LINAH PFUNGWA
and
JUSTICE FOR CHILDREN TRUST
versus
HEADMISTRESS BELVEDERE JUNIOR PRIMARY SCHOOL
and
MINISTER OF EDUCATION, SPORT AND CULTURE
and
MINISTER OF JUSTICE, LEGAL AND PARLIAMANETARY AFFAIRS

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 28 February and 3 March, 2017

Opposed application

T Biti, for the applicants
Ms *V Munyoro*, for the respondents

MANGOTA J: The applicants applied for a constitutional declaratory order. They moved the court to declare that corporal punishment in school and in the home violates the rights of children as set out in sections 51, 53 and 81 of the Constitution of Zimbabwe. They filed their application in terms of s 85 (1) (d) of the country's Constitution ("the Constitution").

Section 85 (1) (d) of the Constitution falls under the general head which relates to enforcement of fundamental human rights and freedoms. It reads:

> "(1) Any of the following persons, namely
>
> (a)……..
> (b) ……..
> (c) ……..
> (d) any person acting in the public interest;
> (e)……
>
> is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been or is being or is likely to be infringed and the court may grant appropriate relief, including a declaration of rights and….."

It was in the letter and spirit of the above cited section that the applicants urged the court to accept that the new Constitution is a transformative document which must be used creatively and wisely. They submitted that the court should, through it, develop the law.

The background of the application centred on a teacher who is at the first respondent's school. On 11 March, 2016 the teacher, a Ms Chemhere, assaulted the first applicant's daughter one Makanaka.. She used a thick rubber pipe to assault the child. Makanaka was assaulted for the simple reason that her mother, the first applicant, failed to sign Makanaka's reading book to confirm that Makanaka had done her homework.

Makanaka, it was submitted, suffered red deep bruises on her back. She could hardly sleep. She was so traumatised that she refused to go to school on the following day.

Makanaka's unfortunate circumstances came into the public domain through what is known in social media as a "*whatsapp group*". The first applicant published the pictures of Makanaka's condition on the "*whatsapp group*" as a result of which it was discovered that other children had also been assaulted.

The first applicant approached and sought corrective action from the first respondent. The first respondent investigated the complainant which had been lodged with her and she took corrective action.

The second applicant, a corporate body registered according to the laws of Zimbabwe, enlisted its support to the first applicant's application. Its function, it said, was to fight for the protection of children. Its main objective, according to it, was to ensure that international standards which protect children were realised and actualised in Zimbabwe.

It was the case of the applicants that no one, whether a school, a teacher or a parent at home should inflict corporal punishment on children. They submitted that corporal punishment was physical abuse of children. They averred that the punishment more often than not resulted in physical trauma or injury to children. They insisted that corporal punishment in school was dangerous in that it was administered indiscriminately without any measure or control over the teachers.

The applicants' case was sustained and it had a lot of substance. They produced empirical evidence which supported the application. They referred the court to:

(a) relevant sections of the Constitution;

(b) case law authorities from this jurisdiction and from the region;

(c) expert evidence – as well as

(d) regional and international instruments to which Zimbabwe is a party.

So convincing was their argument that the court was left with no option but to lean in their favour.

The respondents did not oppose the application. They stated that they would abide by the decision of the court.

The application should have been heard on 16 February, 2017. On the mentioned date, the Attorney-General appeared at court. He, through his representative, applied that he be allowed to appear as a friend of the court. He relied on s 114 (5) (c) of the Constitution in the mentioned regard.

The hearing was postponed to 28 February, 2017 to accommodate the Attorney-General's application. The court directed him to file his opposing papers and his heads of argument as well as to serve the same on the applicants within the stipulated period of time.

For some unknown and unexplained reasons, the Attorney-General did not file his opposing affidavit(s). He filed heads of argument only. He remained contended with the position which he had taken of the matter.

At the hearing of the application, it was evident that the Attorney-General was not opposing the application. His heads of argument stood on nothing. His representative who appeared at court conceded as much. The concession was, in the court's view, properly made as the heads which he filed were premised on nothing. Essentially, therefore, the application remained unopposed. The Attorney General's attempt to oppose it was not sustainable.

The court was, in the premise, satisfied that the application was not without merit. It was, accordingly, granted with no order as to costs.

The court exercised its powers in terms of s 171 (1) (c) of the Constitution. The application is, in the court's view, not frivolous or vexatious. It is, accordingly, referred to the Constitutional Court in terms of s 175 (1) and (5) of the Constitution of Zimbabwe.

Tendai Biti Law, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners