

**IN THE SUPREME COURT FOR ZAMBIA**

**SCZ/8/18/2021**

**HOLDEN AT LUSAKA**

**APPEAL No. 11. 2021**

**IN THE MATTER OF:**

**THE PROTECTION OF FUNDAMENTAL RIGHTS AND REGULATIONS**

AND

**IN THE MATTER OF:**

**ARTICLES 11 (a) AND (b), 22 (1) (9) AND 23 (2) OF THE CONSTITUTION OF ZAMBIA**

AND

**IN THE MATTER OF:**

**SECTION 62 OF THE ROAD TRANSPORT AND SAFETY AGENCY ACT NO. 11 OF 2022**

AND

**IN THE MATTER OF:**

**SECTIONS 43 AND 44 OF THE PERSONS WITH DISABILITIES ACT NO. 6 OF 2012**

AND

**IN THE MATTER OF:**

**ARTICLES 4 AND 5 OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES**

**BETWEEN:**

**FRANKSON MUSUKWA**

**1<sup>ST</sup> APPELLANT**

(SUING ON HIS BEHALF AND AS THE EXECUTIVE DIRECTOR OF ZAMBIA DEAF YOUTH AND WOMEN)

**WENCYSLOUV BUUMBA MAKONDO**

**2<sup>ND</sup> APPELLANT**

**ALICK NKHOMA**

**3<sup>RD</sup> APPELLANT**

AND

**ROAD TRANSPORT AND SAFETY AGENCY**

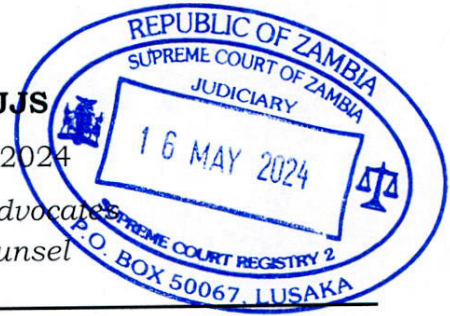
**RESPONDENT**

**CORAM: Kaoma, Kajimanga and Chisanga, JJS**

On 2<sup>nd</sup> November, 2021 and 16<sup>th</sup> May, 2024

For the Appellants: Mr. G. Phiri, Messrs PNP Advocates

For the Respondent: Mr. A. Tembo, In-house Counsel



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## JUDGMENT

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**CHISANGA, JS** delivered the Judgment of the Court.

### Cases referred to:

1. *Paul v. Virginia* 75 U.S. 168 (1869)
2. *O'Neil v. Providence Amusement* 42 R.I. 479 (1920)
3. *Thompson v. Smith* 154 SE 579, 11
4. *Teche Lines Inc. v. Danforth, Miss*, 12 S. 2d 784 (Miss 1943)
5. *Caneisha Mills v. District of Columbia* 571 F. 3d 1304 (D.C. Cir. 2009)
6. *R v. Oakes* (1986) 1 SCR 10
7. *Constitution Rights Project v. Nigeria* (Communication No. 153/96 (1999) ACHPR 9; (15 November, 1999)
8. *Shetton v. Tucker*, 304 US 47, 488 (1960)
9. *Legal Resources Foundation v. Zambia* (Communications No. 211/98) 2001 ACHPR 31
10. *Kalenga and Others v. Richman's Money Lenders Enterprise* (1999) Z.R. 27
11. *Mumba v. Lungu* (2014) Vol 3 Z.R 351
12. *Hamalambo v. Zambia National Building Society* (SCZ Appeal No. 64/2013)
13. *Miyanda v. Handahu* (1993-94) Z.R. 187
14. *Hinds and Others v. The Queen* (1977) AC 195
15. *Olivier v. Buttigieg* (1967) 1 A.C. 115 at 128-129
16. *Maharaj v. Attorney General of Trinidad and Tobago No.2* (1979) A.C. 385
17. *Attorney General of Trinidad and Tobago and another v. Mcleod* (1984) 1 WLR 522
18. *Hichilema and the Attorney General* (Appeal No. 4/2019)
19. *Chikuta v. Chipata Rural Council* (1974) ZR 241
20. *Nivel v. Mwale* SCZ Appeal No. 161 of 2015
21. *B.P. Zambia PLC v. Zambia Competition Commission and Others* SCZ Judgment No. 22 of 2011

### Legislation referred to:

1. *The Constitution Zambia*
2. *Persons with Disabilities Act No. 6 of 2012*
3. *Road Traffic Act No. 11 of 2022*

4. *United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)*
5. *Universal Declaration of Human Rights*
6. *International Covenant on Civil and Political Rights*

**Other Works referred to:**

1. *Oxford Advanced Learners Dictionary New 7<sup>th</sup> Edition, Oxford University Press.*

**INTRODUCTION**

- 1] When we heard this appeal, Judge Kajimanga was part of the panel. He has since retired. This Judgment is therefore by the majority.
- 2] The appellants are deaf. They commenced this matter in the High Court, under Part III of the Constitution of Zambia, by way of petition, as prescribed by Article 28. The 1<sup>st</sup> appellant petitioned as Executive Director on behalf of the Zambia Deaf Youth and Women Association, and on his own behalf, while the 2<sup>nd</sup> and 3<sup>rd</sup> appellants moved the court in their own right. Their grievance was that Sections 62 and 59 of the Road Traffic Act contravened the rights of all deaf persons as guaranteed by Articles 11 (a), (b), (d), 22 (1) (a) and 23 of the Constitution of Zambia, and sections 4 (1) (b), (e) to (i), 5, 6, 35 (2), 40 (1) of the Persons with Disabilities Act.

## **BACKGROUND**

- 3] When the appellants commenced this matter the 1<sup>st</sup> appellant held a valid driving licence, which was to expire on 9<sup>th</sup> August 2023. It has since expired. The 2<sup>nd</sup> appellant applied for a driving licence. His application was rejected because he has a hearing impairment. The 3<sup>rd</sup> appellant had a driving licence, until it expired in 2018. When he attempted to renew it, his application was turned down, and instead, his licence suspended until 2030. Both the 2<sup>nd</sup> and 3<sup>rd</sup> appellants had undergone medical tests at local government hospitals. They were certified medically fit to drive a motor vehicle. In addition to this, they undertook driving courses, which they successfully completed. Before his licence was suspended, the 3<sup>rd</sup> appellant had driven a motor vehicle without difficulty. In fact, despite the hearing impairment, he has not been involved in an accident. The 1<sup>st</sup> appellant is apprehensive that his licence will likewise be suspended on expiry in 2023.
- 4] The foregoing is the background that drove the appellants to petition the court for relief we shall presently state. In furtherance of their claim, the appellants averred as follows:

- i. A deaf person is not incapacitated from driving. This is because driving is largely visual, requiring limited auditory function. The ability of a deaf person to focus and concentrate on the road is far greater than that of a driver who is not deaf. The misconception that a deaf driver is a danger to other road users is not based on any studies or research. It is as a result, discriminatory and arbitrary.
- ii. The denial of licences to deaf persons is anomalous because deaf persons who hold Southern African Development Community (SADC) driving licences can drive in Zambia. A deaf person is not allowed to drive in Zambia, but can obtain an international driver's licence from Namibia or South Africa and drive on Zambian Roads.
- iii. Section 62 of the Road Traffic Act contravenes the Constitution, as well as the Persons with Disabilities Act, in that it prevents a licensing officer from issuing a provisional or driving licence to any person who is not certified medically fit, in terms of the ability to hear as prescribed by the

respondent. It prevents drivers with partial hearing who are certified medically fit from being issued with driving licences. When read with sections 59 and 68, it prevents licensing officers from renewing or extending licences, and permits them to revoke a person's licence on the basis that they are deaf.

- iv. Section 62, as read with Section 59, fails to provide a framework for testing and training deaf persons to drive motor vehicles, thereby depriving them of the right to drive a motor vehicle of their choice on an equal basis with other members of the public.
- v. The Road Traffic Act does not authorize the respondent to suspend a driver's licence.
- vi. As a result, the refusal to issue driving licences to the petitioners is a violation of their constitutional and legal rights to equal protection of the law, freedom of movement and protection from discrimination contrary to Articles 11 (a) and (b), 22 (1) (a) and 23 (2) of the Constitution.
- vii. Sections 62 and 69 of the Road Traffic Act inhibit freedom of movement. The petitioners' ability to

travel within Zambia and participate in gainful economic activities has been inhibited, contrary to the Constitution. These sections violate the petitioners' rights to protection from discrimination contrary to Article 23 (2) of the Constitution.

5] The petitioners asked the High Court for the following redress:

- (i) A declaration that section 62, as read with section 59 of the Road Traffic Act contravenes the right to equal protection of the law and freedom of movement, and are null and void. Furthermore, that the said sections are discriminatory and contravene Article 23 (2) of the Constitution, and that all deaf persons who are medically fit qualify to be issued with provisional and driving licences.
- (ii) The respondent be directed to commence issuing driving licences to deaf persons, and to renew and extend the licences upon satisfaction of the requisite competencies.

(iii) The 2<sup>nd</sup> petitioner be awarded damages for loss of business on account of the illegal suspension of his driving licence.

6] The Petition was supported by three affidavits. Frankson Musukwa, who was the 1<sup>st</sup> petitioner and is the 1<sup>st</sup> appellant, explained that he was the Executive Director of the Zambia Deaf Youth and Women, an organisation of disabled persons registered under section 54 (2) of the Persons With Disabilities Act No. 6 of 2012.

The objectives of the organisation are to promote and protect human rights and the welfare of deaf persons through advocacy. It is mandated to campaign for legislative measures and regulations that would enable and empower deaf persons to participate equally in all aspects of life such as education, health and employment.

7] Musukwa initially obtained his driving licence on 24<sup>th</sup> January, 2014 from the Road Transport and Safety Agency (RTSA). It was renewed on 10<sup>th</sup> August, 2018, for another five years. Alick Nkhoma, the 3<sup>rd</sup> appellant, informed him that RTSA had refused to renew his licence because the Road



Traffic Act allegedly prevented it from issuing driving licences to deaf individuals. Nkhoma's licence was suspended until 2030, without a hearing. RTSA's decision made Musukwa apprehensive, as he fears that all deaf individuals, including himself, will be denied driving licences, and his licence suspended on expiry.

- 8] Musukwa wrote to RTSA concerning amendment of the Road Traffic Act to remove the obstacles that impede deaf individuals from obtaining driving licenses.
- 9] The response he received was that the Bill to amend the Act was scheduled for February 2019 on the parliamentary calendar. However, an enquiry on the status of the proposed amendment with the Clerk of the National Assembly revealed that no such proposal had been presented to the National Assembly. He took the initiative of petitioning the National Assembly, in terms of Article 88 of the Constitution, to initiate amendment of the Road Traffic Act. He was informed that the petition could not be considered because the National Assembly had not yet prescribed how a citizen could petition it. Having failed to secure the rights of the affected individuals through these means, Musukwa resorted to court for redress.

- 10] Wencyslouw Buumba Makondo made an enquiry on 5<sup>th</sup> October, 2017 with RTSA concerning the licencing of deaf individuals. The response he received was that the law did not permit it to issue a driving licence to a deaf person, but that the Road Traffic Act was under review in that respect. It was indicated that RTSA was working with the Zambia Agency for Persons with Disabilities to develop a framework for the training and testing of deaf persons.
- 11] Sometime in 2018, Makondo purchased a motor vehicle to facilitate his movements within Zambia. After being certified as medically fit to drive at a hospital, RTSA issued him with a provisional licence. Upon successfully completing a driving course, he applied for a driving licence. RTSA refused to issue him one on account of deafness.
- 12] Alick Nkhoma was inspired to apply for a driving licence when he learnt that Musukwa had obtained a driving licence without difficulties. Similarly, he obtained a provisional licence, underwent medical tests, and successfully obtained a driving course. He drove for five years without colliding with another vehicle, nor did he have a traffic offence recorded against him.

- 13] He was self-employed, transporting vehicles from borders to homes of purchasers, and earned a decent living from this business. He moved freely throughout Zambia without any inhibitions, and enjoyed driving his family in the privacy of their company. His licence expired after five years. When he applied for its renewal however, the application was rejected. RTSA informed him that the licence that had expired was issued erroneously. The agency suspended it from 14<sup>th</sup> June, 2019 to 27<sup>th</sup> May, 2030.
- 14] He went to the agency's premises to make a follow up on RTSA's refusal to renew his licence. Instead of having his concerns addressed, he was humiliatingly and forcibly ejected from the Agency's premises by police officers in full view of members of the public. He was subjected to indignity despite his inalienable rights as a human being.
- 15] He lamented that the procedures adopted by the respondent are arbitrary and without formal guidelines. In some instances, deaf individuals are given driving licences whilst others are denied. He complained that the suspension of his licence has inhibited his freedom of movement. He cannot earn a livelihood or meet his family's basic needs. His

children's lives are in danger, in that he is unable to transport them to the hospital when they fall ill at night, because transport is not available, or on account of difficulties to access it. He can no longer travel in privacy but has to rely on hired vehicles for transportation.

- 16] RTSA filed an answer to the petition. It averred that the rights enshrined in Articles 11, 22 and 23 of the Constitution of the Republic of Zambia were not for deaf persons only, but for all persons in the Republic. It asserted that it interpreted and applied the Road Traffic Act consistently with the Constitution and the Persons With Disabilities Act.
- 17] To amplify the foregoing, RTSA averred that, sections 67, 59 and 68 of the Road Traffic Act are consistent with the Constitution and the Persons With Disabilities Act. Section 62 of the Road Traffic Act prescribes conditions that require to be met for one to obtain a driving licence, contrary to the assertion that the provision exists to prevent deaf persons from obtaining driving licences. That section 68 of the Act empowers it to revoke a driver's licence if, in its discretion, a driver has a disability that is likely to pose a danger to the public if they are allowed to drive.

- 18] In RTSA's estimation, driving is not only visual but also dependent on a person's physique, hearing, body and mental fitness. Thus, the prohibition of deaf individuals from acquiring driving licences is reasonable and justified, as stipulated in section 62 of the Road Traffic Act. This being the case, the 1<sup>st</sup> and 3<sup>rd</sup> appellants were issued with driving licences erroneously.
- 19] RTSA denied infringing the petitioners' constitutional rights, explaining that licences not issued by it, but in other countries, are not valid in Zambia.
- 20] According to RTSA, Articles 11(a), (c), 22(1) (a) and 23 of the Constitution have not been breached as the petitioners' right to freedom of movement has not been curtailed nor have they been discriminated against. It was finally averred that the High Court did not have jurisdiction to question the decision by the Director to suspend and revoke licences.
- 21] Upon considering the petition, Chawatama J opined that Article 22 of the Constitution was inapplicable, in that it was concerned with the movement of individuals within and outside Zambia, and not with the means by which they did so. She went on to state that even were it to be said Article 22 was concerned with the means of movement, the refusal

to issue licences would be within reason, in that sections 62 and 59 of the Road Traffic Act were intended for public safety. This would be reasonably justifiable in a democratic society in terms of Article 22 (3) and (4) (e) of the Constitution. Moreover, there was nothing wrong for the issuing authority to withdraw a licence erroneously issued in terms of section 68 of the Road Traffic Act.

### **THE APPEAL**

22] Dissatisfied with this decision, the petitioners have appealed on the following grounds:

- i. The court below misdirected itself in law and fact when it held that Article 22 of the Constitution of Zambia had nothing to do with how people moved around, in particular, driving, and that Article 22 of the Constitution could not be called in aid when it came to the respondent's refusal to grant the appellants driving licences.
- ii. The court below erred in both law and fact when it held that the respondent's application of section 62 as read with section 59 of the Road Traffic Act No. 11 2002 of the Laws of Zambia to deny driving licences to persons with disabilities, does not violate

the appellants' rights to protection of the law nor their freedom of movement.

- iii. The court below erred in both law and fact when it held that should section 59 as read with section 62 of the Road Traffic Act No. 11 of 2002 be found to be discriminatory against the appellants within the meaning of Article 23 of the Constitution of Zambia, the said discrimination would be reasonably justifiable in a democracy under Article 22, 99 (3) and 23 (4) (e) of the Constitution of Zambia.
- iv. The court below erred in both law and fact when it did not take into account incontrovertible evidence before it, to the effect that the appellants underwent mandatory medical tests at local Government Hospitals which rendered them medically fit to drive motor vehicles, after taking driving courses and passing mandatory tests.
- v. The court below misdirected itself in both law and fact when it held that section 42 of the Persons With Disabilities Act No. 6 of 2012 and Articles 4 and 5 of the United Nations Convention on the Rights of Persons With Disabilities (UNCRPD) had no bearing

on the respondent's actions which they had complained against.

- vi. The court below misdirected itself both in law and fact when it held as a general fact that deaf people pose a danger to road safety contrary to its findings from the evidence.

23] At the hearing both sides relied on written arguments in support of their respective positions.

#### **APPELLANTS' ARGUMENTS**

24] Grounds one, two and three were argued together as they related to rights enshrined in Part Three of the Constitution of Zambia. These are, protection of the law, freedom of movement and non-discrimination. We summarise the arguments on this limb as follows:

- (i) Article 22 (1) (a) indicates that freedom of movement envisages the right to move freely throughout Zambia. This includes driving by a competent citizen who has been issued with a driving licence. **Paul v. Virginia**<sup>1</sup> and **O'neil v. Providence Amusement Co**<sup>2</sup> are cited as support for this proposition. Article 13 of the Universal



Declaration of Human Rights and Article 12 of the International Covenant on Civil and Political Rights are similarly relied upon.

- (ii) Denying the appellants driving licences pursuant to Sections 59 and 62 of the Road Traffic Act violates their rights and those of other deaf persons contrary to Article 22 (1) (a) of the Constitution.
- (iii) RTSA applied sections 59 and 62 of the Road Traffic Act in a discriminatory manner, in that the appellants who met the conditions prescribed by the Act were denied licences. RTSA's understanding that these provisions did not allow it to issue a driving licence to deaf persons was flawed and in violation of the appellants' right to freedom of movement.
- (iv) Both the 2<sup>nd</sup> and 3<sup>rd</sup> appellants were certified fit to drive with hearing aids. That being the case, the denial, suspension or revocation of driving licences on arbitrary and discretionary grounds was ultra vires, and an infringement of the appellants' right to freedom of movement as enshrined in Article 22.

Three cases were enlisted in support of these arguments: **Thompson v. Smith**,<sup>3</sup> **Teche Lines Inc. v. Danforth**,<sup>4</sup> and **Caneisha Mills v. District Of Columbia**.<sup>5</sup>

- (v) The right to protection of the law as guaranteed by Article 11 (a) of the Constitution assures the appellants of equal treatment in accordance with the law without discrimination on arbitrary grounds. It eliminates the use of unlawful means to deprive a person of their human rights and fundamental freedoms. The Road Traffic Act has been used to deny the appellants' protection of the law by RTSA.
- (vi) The decision to deny the 2<sup>nd</sup> and 3<sup>rd</sup> appellants driving licences despite recommendations from their respective doctors that they were able to hear with hearing aids was discriminatory, and in contravention of Article 22. The court below failed to take the doctor's recommendations that the 2<sup>nd</sup> and 3<sup>rd</sup> appellants could drive with hearing aids into account, holding instead, that denying the

appellants driving licences was reasonably justifiable in a democratic society.

(vii) For a limitation to be necessary or reasonably justifiable in a democratic society, it has to be proportional. The criteria to be met was discussed in **R v. Oakes**<sup>6</sup> by the Supreme Court of Canada.

(viii) As section 62 of the Road Traffic Act only prevents RTSA from issuing a provisional licence to a person who cannot certify that they are fit to drive in the prescribed manner, a satisfactory medical certificate under the hand of a registered medical practitioner qualifies an applicant to be issued a provisional driving licence. These arguments are predicated on **Constitutional Rights Projects v. Nigeria Communication**<sup>7</sup> as well as **Shetton v. Tucker**.<sup>8</sup>

(ix) The Court below failed the proportionality test. The appellants, who could hear with the assistance of hearing aids, were by virtue of this factor on an equal footing with other drivers who were not deaf. By suspending his licence, RTSA deprived the 3<sup>rd</sup> appellant of an opportunity to earn an income for

his family. Article 2 of the African Charter, and **Legal Resources Foundation v. Zambia**<sup>9</sup> were cited for this argument.

25] Turning to the fourth and sixth grounds, learned counsel repeated his arguments in paragraph 24 (vi) and (viii). We will not reproduce them.

26] With respect to ground 5, it was submitted as follows:

(i) Section 43 of the Persons With Disabilities Act No. 6 of 2012 obliges the Ministry responsible for road transport, in part, to take into account the needs of persons with disabilities in the operation of the transport network. This entails that deaf persons with valid medical certificates be issued with licences, to meet the requirements of the law.

(ii) Article 4 of the United Nations Convention on the Right of Persons with Disabilities requires the respondent to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise. This can be actualised by the respondent ensuring that those deaf persons who meet the criteria

prescribed in section 62 of the Act are issued with driving licences.

### **RESPONDENT'S ARGUMENTS**

27] The opposing arguments on grounds 1, 2 and 3 were put in this way:

- (i) While the rights under Part Three of the Constitution are sacrosanct, the Constitution limits enjoyment of the rights if they prejudice the rights and freedoms of others and on public interest considerations. Article 22 entails freedom of movement throughout the Republic except in restricted instances.
- (ii) In as much as sections 59 and 62 of the Road Transport Act enable a person to apply for a driving licence, they will be denied one if their physique, vision, hearing, body and mental faculties do not satisfy the requirements. The rationale is to ensure road safety for the applicant, as well as other road users.
- (iii) The appellants' rights to protection of the law and freedom of movement were not infringed. They were not restrained whatsoever from moving

around. Article 22 is concerned, not with how people move, but their right to move throughout the Republic from one place to another. The right to travel is not concerned with how a person travels, but whether they are restrained from traveling or not. This is the import of **Paul v. Virginia**<sup>1</sup> and **Thompson v. Smith**<sup>3</sup> cited by the appellants. Although the 2<sup>nd</sup> appellant's application for a driver's licence was turned down, and the 3<sup>rd</sup> appellant's licence cancelled for being issued in error, both appellants have continued to enjoy their freedom of movement. So would the 1<sup>st</sup> appellant, with or without a driving licence.

(iv) The 2<sup>nd</sup> and 3<sup>rd</sup> appellants did not appeal to the Road Service Appeals Tribunal, as stipulated by section 68 of the Road Traffic Act, when their respective applications were refused.

(v) The rationale by Chawatama J on the foregoing grounds applies with equal force to grounds 4 and 6.

28] In response to the appellants' arguments on ground 5, it was argued as follows:

- (i) Section 43 of the Persons With Disabilities Act does not apply to RTSA, because it places responsibility on specific ministries and institutions.
- (ii) The issuance of a driving licence is subject to the procedures stipulated under the Road Traffic Act. These procedures also related to public safety and the interests of other road users. The decisions taken by RTSA are not in violation of the provisions of the Persons With Disabilities Act.

#### **ARGUMENTS IN REPLY**

29] In replying to the opposing arguments, it was argued as follows:

- (i) RTSA applied by summons, for an order to set aside the petition for irregularity on the ground that the appellants should have appealed against the decision to the Road Service Appeals Tribunal, and not petitioned the court.
- (ii) By ruling dated 15<sup>th</sup> July, 2020, the Deputy Registrar dealt with the issue. It cannot be raised at this stage, and is res judicata. **Kalenga & Others v. Richman's Money Lenders**

**Enterprise<sup>10</sup>, Mumba v. Lungu<sup>11</sup> And  
Hamalambo v. Zambia National Building  
Society<sup>12</sup>** were cited in support of this proposition.

### **CONSIDERATION BY THE COURT**

30] We have duly considered the submissions of both sides. In our assessment, the issues that arise for determination are:

- (i) Whether the rights of deaf persons as enshrined in Article 11 (a) and (b) and 22(1) (a) of the Constitution are violated by section 62 as read with section 59 of the Road Traffic Act, No. 11 of 2002.
- (ii) Whether section 62 as read with section 59 of the Road Traffic Act is discriminatory in its effect and contravenes the appellants' right to protection from discrimination as guaranteed by Article 23 (2) of the Constitution and, therefore null, and void.
- (iii) Whether the court should have taken into account the fact that the appellants were certified medically fit and had passed all mandatory driving tests.
- (iv) Whether section 3 of the Persons With Disabilities Act and Articles 4 and 5 of the United Nations Convention on the Rights of Persons With



Disabilities have no bearing on the respondent's action.

- (v) Whether the court should have held that deaf persons pose a danger to road safety despite a finding to the contrary.

31] We will start with the first three issues, which are, whether RTSA has infringed the 2<sup>nd</sup> and 3<sup>rd</sup> appellants' right to protection of the law, freedom of movement, and protection from discrimination, in refusing to issue them with driving licences. Resolution of this issue necessitates interpretation of the Articles in question.

32] We are, in this endeavour, enjoined to decipher the intent of the framers as expressed in the Constitution. In **Miyanda v. Handahu**,<sup>20</sup> adopting *Basu's Commentary* on the Constitution of India, we held that the Constitution should be construed according to the intent of the framers, and that the court's duty was to find the expressed intention of the legislature. When the language is plain, and there is nothing to suggest that any words were used in a technical sense, or that the context required a departure from the fundamental rule, there would be no occasion to depart from the ordinary and literal meaning, and it would be inadmissible to read into

the terms something else on account of policy, expediency, justice or political motive of the framers and the like.

- 33] This view accords with that expressed by the Privy Council in **Hinds and Others v. The Queen.**<sup>14</sup> This is what they said:

**“..... A written constitution must be construed like any other written document. It must be construed to give effect to the intentions of those who made and agreed to it and those intentions are expressed in or to be deduced from the terms of the constitution itself and not from any preconceived ideas as to what such constitution should or should not contain. It must not be construed as if it was partly written and partly not. We agree that such constitutions differ from ordinary legislation and this fact should lead to even greater reluctance to imply something not expressed. While we recognize that an inference may be drawn from the express provisions of a constitution (see Attorney General for Australia v R and Boilermaker’s Society of Australia per Viscount Simonds (1957) 2 ALL ER 45 at 51) we do not agree that on the adoption of a constitution a great deal is left to necessary implication. If it were so, a written constitution would largely fail to achieve its object.”**

- 34] In construing the Articles in issue, we will start with Article 11 of the Zambian Constitution. It enacts as follows:

**11. It is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to the limitations contained in this Part, to each and all of the following, namely:**

- (a) **life, liberty, security of the person and the protection of the law;**
- (b) **freedom of conscience, expression, assembly, movement and association;**
- (c) **protection of young persons from exploitation;**
- (d) **protection for the privacy of his home and other property and from deprivation of property without compensation;**

**and the provisions of this Part shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in this Part, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.**

- 35] It will be noticed that Article 11 *recognises*, and *declares* that *before* the Constitution was enacted, every person in Zambia was entitled, and would afterwards continue to be entitled, to the fundamental rights and freedoms enumerated in the Article. These fundamental rights would be enjoyed regardless of race, place of origin, political opinions, colour, creed, sex or marital status. (emphasis added)
- 36] The Articles that follow, from 12 to 27, explain the rights in more detail, and state the limitations to which these rights are subject.

37] The Privy Council had occasion to comment on a similarly worded provision in the Constitution of Malta, in **OLIVIER V. BUTTIGIEG.**<sup>15</sup>

“It is to be noted that the section begins with the word “whereas”. Though the section must be given such declarative force as it independently possesses, it would appear in the main to be of the nature of a preamble. It is an introductory note and in a sense a prefatory or explanatory note in regard to the sections which are to follow. It is a declaration of entitlement – coupled however with a declaration that though “every person in Malta” is entitled to the fundamental rights and freedoms of the individual” as specified, yet such entitlement is “subject to respect for the rights and freedoms of others and for the public interest.” The section appears to proceed by way of explanation of the scheme of the succeeding sections... the succeeding sections show that the promised scheme was followed.”

38] The Zambian Constitution is based on the Westminster Model. The Privy Council has had opportunity to interpret similarly worded provisions in a number of constitutions based on this model. For instance, in **Maharaj v. Attorney General of Trinidad and Tobago,**<sup>16</sup> the Board made this observation:

“...The structure and the presumptions that underlie Chapter I of the Constitution of Trinidad and Tobago and the corresponding chapters in other Constitutions on the Westminster model that provide for the recognition and protection of fundamental human rights and freedoms, have

been referred to in a number of previous cases that have come before the Judicial Committee, notably in *Director of Public Prosecutions v Nasralla*, *Baker v The Queen* and *De Freitas v Benny*. In the first of these authorities Lord Devlin ([1967] 2 All ER 161 at 165, [1967] 2 AC 238 at 237, 248), speaking for the Board, said of the corresponding chapter in the Constitution of Jamaica:

‘This chapter... proceeds on the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law... The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed.’

That the same presumption underlies Chapter I of the Constitution of Trinidad and Tobago was stated by the Judicial Committee in *De Freitas v Benny* ([1976 AC 239 at 244). In s.1 the human rights and fundamental freedoms which it is declared (by the only words in the section that are capable of being enacting words) ‘shall continue to exist’ are those which are expressly recognised by the section to ‘have existed’ in Trinidad and Tobago. So, to understand the legal nature of the various rights and freedoms that are described in the succeeding paragraphs, paras (a) to (k), in broad terms and in language more familiar to politics than to legal draftsmanship, it is necessary to examine the extent to which, in his exercise and enjoyment of rights and freedoms capable of falling within the broad descriptions in the section, the individual was entitled to protection or non-interference under the law as it existed immediately before the Constitution came into effect.”

(Emphasis added)

- 39] What then is the right to protection of the law as contemplated in Article 11 (a) of the Zambian Constitution, and amplified in Article 18? The side note to Article 18 reads “*provisions to secure protection of law.*” Sub-Articles 2 to 8, and 12 to 15 are devoted to matters relating to the trial of criminal offences. They stipulate how a fair trial is to be held, and concluded. The steps that are required to be taken before an accused person is finally tried and convicted are outlined. The protection an accused person enjoyed vis-a-vis the coercive power of the state, before the Zambian Constitution was enacted, is preserved by Article 18. This is the *protection of the law* that is contemplated in Article 11 (a).
- 40] Sub-Articles 9 to 11 of Article 18 protect every person’s right, as was the case before the Zambian Constitution came into being, to have their disputes tried by a court that is established by law, and is independent and impartial. The expectation that a case would be given a fair hearing within a reasonable time is also secured.
- 41] It is indisputable that Article 18 protects persons against contravention of those safeguards that were in place at common law, which ensured that they were subjected to a

fair judicial process whenever they were charged with a criminal offence. The Article also ensures a fair process when disputes are brought before adjudicating authorities for resolution. Therefore, as stated by the Board in the *Maharaj* case, the protection afforded is against contravention of these rights by the State or by some other public authority endowed by law with coercive power. It is in the realm of public law, not private law.

42] In **Attorney General of Trinidad and Tobago and Another v. Mcleod**,<sup>17</sup> the Privy Council dealt with a claim that Mr. Mcleod's right to protection of the law, which was secured by section 54 (3) of the Constitution of Trinidad and Tobago had been infringed. That section prohibited parliament from passing an Amendment Act, except by the majorities specified in the subsection. The Privy Council found Mr Mcleod's contention fallacious. Their view was that when parliament purported to make a law that was void under section 2 of the Constitution for inconsistency, this in itself did not deprive any one of the protection of the law. This was because the judicial system of Trinidad and Tobago afforded a procedure by which any person interested in establishing the invalidity

of the purported law could obtain from the courts of justice, a declaration that the purported law was invalid. The declaration, issued by the courts of justice, in which the plenitude of the judicial power was vested, would be binding on the parliament itself, and on all persons attempting to act under or enforce the purported law. Access to a Court of Justice for that purpose was itself 'protection of the law' to which all individuals were entitled under section 3 (b).

- 43] We respectfully agree with this persuasive authority as there can be no doubt that the right to 'protection of the law' embraces access to a court of justice established by law, whose preserve is to dispense binding decisions in accordance with the prescribed tenets.
- 44] Our considered view is that the intention behind Article 18 of the Zambian Constitution demolishes the contention that RTSA has infringed the appellants' right to protection of the law. This right has no bearing on sections 59, 62 and 68 of the Road Traffic Act. The manner in which RTSA has interpreted these sections has nothing to do with the right to protection of the law.



45] It will be observed that learned counsel for the appellants argues that the right to equal protection of the law has been infringed by the respondent. We get the impression that counsel is conflating or mixing up the right to *protection of the law* and the right to *equal protection of the law*. We must emphasise that Article 11 does not refer to the right to '*equal protection of the law*'. The cases cited on behalf of the appellants, relating as they do to the right to "*equal protection of the law*" in the Constitution of the United States of America do not assist the appellants. For instance, in **O'neil v. Providence Amusement Co,**<sup>2</sup> the defendant O'neil, was charged with failure to pay a fireman employed by him at a theatre the amount stipulated in an applicable statute. The defendant raised constitutional issues, among them, the question whether the provision denied him equal protection of the law. The Court's understanding of this claim was as follows:

**The defendant further claims that the act deprives it of equal protection of the law contrary to Section 1 of the fourteenth amendment of the Constitution of the United States. In other words, that the law which is applicable to all cities in the state impose upon the owners or lessees of theatres in Providence a greater burden than what is imposed upon**

**others carrying on a similar business in other portions of the state and the defendant points out that in the cities of Pawtucket and Crownston, the Act provides that firemen from the city force must be stationed in each theatre to be paid 2 dollars per day for their services and that in Providence, the person employed by the owner or lessee of the theatre shall receive for his services not less than 3 dollars per day while in Woonsocket and Central Falls the Act does not fix any wage to be paid to the person to be employed but leaves owners and lessees in the two cities last named to contract for each service in their discretion”**

The complaint before the court related to the imposition of a greater burden on theater owners or lessees in Providence than that imposed on others who were carrying on a similar business in other parts of the State.

- 46] Reverting to our Constitution, our view is that, the right to *equal protection of the law* appears to align with the prohibition in Article 23, against enactment of a discriminatory law. Arguments relating to *equal protection of the law* are, therefore, inappropriate when discussing the right to *protection of the law* as envisaged in Articles 11 and 18 of our Constitution.
- 47] We turn to consider the ambit of the right to freedom of movement. Article 22 (1) of the Constitution of Zambia reads as follows:

**22. (1) Subject to the other provisions of this Article and except in accordance with any written law, a citizen shall not be deprived of his freedom of movement, and for the purposes of this Article freedom of movement means-**

**(a) the right to move freely throughout Zambia;**

**(b) the right to reside in any part of Zambia; and**

**(c) the right to leave Zambia and to return to Zambia.**

**(2) Any restrictions on a person's freedom of movement that relate to his lawful detention shall not be held to be inconsistent with or in contravention of this Article.**

48] These words are very clear. They intimate that Article 22 is concerned with the liberty of the individual to move freely, without hindrance, except in the stated instances. These are lawful detention, and such other restrictions as may be necessary in the interest of defence, public safety, public order, public morality or public health. The converse of freedom of movement is restriction of the person from moving as they would like from place to place in Zambia to reside anywhere they prefer in Zambia, and to leave and return to Zambia. Article 22 safeguards the liberty to move freely, and not the means by which one does so.

49] Given the scope of Article 22, our conclusion is that RTSA did not prevent the 2<sup>nd</sup> and 3<sup>rd</sup> appellants from moving freely in

the Republic in turning down their applications for driving licences.

50] We were referred to a number of American decisions as persuasive authorities on the right of *freedom of movement*. Our observation is that these cases were concerned with different issues. The **Paul v. Virginia**<sup>1</sup> case was about an Act that prohibited an insurance company not incorporated in Virginia, from carrying on its business within that State without a licence for that purpose. The issue before the court was whether the Act was unconstitutional. The court's response was that it was not.

51] **Teche Lines Inc. v. Danforth**<sup>4</sup> involved interpretation of section 90, chapter 200 Laws 1938, known as the Uniform Highway Traffic Regulation Act. The section addressed the stopping, parking or leaving of a vehicle upon the paved or improved or main travelled part of the highway when it was practical to stop, park or leave the vehicle off that part of the highway. In any event, a clear and unobstructed width of at least 20 feet of that part of the highway opposite such standing vehicle was required to be left for the free passage of other vehicles. The court opined that the right to travel

meant the right to go from one place to another and included the right to start, to go forward on the way and to stop when the traveler's destination had been reached.

52] It was also held that the right of a citizen to travel upon the public highways and to transport his property thereon in the ordinary course of life and business is a common right which he has under his right to enjoy life and liberty to acquire and possess property, and to pursue happiness and safety. It includes the right in doing so to use the ordinary and usual conveyances of the day; and under the existing modes of travel include the right to drive a horse-drawn carriage or wagon thereon, or to operate an automobile thereon for the usual and ordinary purposes of life and business.

53] It will be noticed that the case was not concerned with the licensing of drivers, but with the right of a citizen to travel upon the public highways and to transport his property. It is the use of the highway that was restricted by the Act. We understand this to be the context of the views expressed by the court.

54] In the present case, it is the refusal to issue driving licences to the appellants that is said to abrogate freedom of

movement. We fail to conceive how this prevents the appellants from moving freely in Zambia by means currently available at their disposal.

55] We agree that derogations on the rights of citizens that are reasonably justifiable in a democratic society must be proportional. However, having found that the right to freedom of movement is not abrogated by denial of a driving licence, we find the proposition espoused in the **Oakes** case of little assistance in the instant case.

56] We note that the appellants' grievance relates to personal mobility, a principle enumerated in Article 20 of the Convention on the Rights of Persons with Disabilities and domesticated in Section 5 of the Persons With Disabilities Act.

57] We turn to consider the claim that sections 59 and 62 have infringed the appellants' right not to be discriminated against, contrary to Article 23 of the Constitution of Zambia. The article is in the following terms:

**23. (1) Subject to clauses (4), (5) and (7), a law shall not make any provision that is discriminatory either of itself or in its effect.**

**(2 ) Subject to clauses (6), (7) and (8), a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.**

**(3) In this Article the expression "discriminatory" means affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.**

**(4) .....**

**(5) .....**

**(6) .....**

**(7) .....**

**(8) .....**

58] This Article specifies that a law should not include a provision that is discriminatory either in itself or in its effect, and that no person should be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority. However, the expression '*discriminatory*' is defined as affording different treatment to different persons attributable, wholly or mainly to their respective descriptions

by race, tribe, sex, place of origin, marital status, political opinion, colour and creed. Such persons would be subjected to disabilities or restrictions to which persons of another such description are not subject, or accorded privileges or advantages which are not accorded to persons of another such description.

- 59] The word 'wholly' means 'completely', 'totally', while 'mainly' means 'more than anything else'. See **Oxford Advanced Learners Dictionary New 7<sup>th</sup> Edition, Oxford University Press**. Therefore, the discrimination envisaged in Article 23 should be completely or entirely based on the enumerated factors, or mostly so.
- 60] Having considered the wording of Article 23, we are compelled to conclude that discrimination on the basis of disability is excluded. An attempt to address this omission was made when the proposed amendments to Part III of the Constitution were subjected to a referendum. However, the referendum failed. The result is that Part III remains unaltered. We are aware that the term '*discrimination*' is now broadly defined in Article 266 of the Constitution as amended in these terms:



“Discrimination” means directly or indirectly treating a person differently on the basis of the person’s birth, race, sex, origin, colour, age, disability, religion, conscience, belief, culture, language, tribe, pregnancy, health or marital status, ethic, social or economic status.”

61] Regrettably, this definition is inapplicable to Part III of the Constitution. It cannot be applied, as Part III is unalterable except by amendment as provided by Article 79. We reiterate our views in **Hichilema and The Attorney General**,<sup>18</sup> where we said:

The Bill of Rights is a special enactment. Its provisions pronounce on the rights and fundamental liberties of the people. It must, therefore, be revered. The very existence of a democratic society is anchored on such rights and freedoms and it is for that reason that the framers of the Constitution entrenched its provisions. Unlike other provisions of the Constitution, the provisions of the Bill of Rights cannot be amended willy-nilly but through the consent of the majority of the people through a referendum. This special protection has also been extended to the amendment of the Article providing for the holding of a referendum. Article 79 (3) states, in the relevant parts, that:

‘A bill for alteration of Part III of this Constitution or of this Article shall not be passed unless....it has been put to a National referendum. We find it difficult to accept that the provisions of the Bill of Rights, having been entrenched through a special amendment procedure, can be amended by implication as suggested by the learned Attorney-General. If that were the case, then the protection of rights and

**freedoms in the Bill of Rights would be diluted and left to the whims and caprices of those sitting in judgment. This would render the protection granted in Article 79 of the Constitution, ineffective. In our view, the provisions of Article 267 of the Constitution, if anything, underscore the importance of the values enshrined in the provisions contained in the Bill of Rights in that there is a requirement, when interpreting other provisions of the Constitution, to uphold those values.**

On this view, the argument that the respondent contravened Article 23 of the Constitution is unsustainable. We need not discuss the permitted derogations in the circumstances.

62] That said, we wish to state that despite this omission in Article 23, the appellants are adequately protected by the Persons With Disabilities Act No. 6 of 2012.

63] This matter was brought by petition, pursuant to the Protection of Fundamental Rights and Rules, 1969. These rules stipulate how an application made pursuant to Article 28 of the Constitution can be brought.

Article 28 enacts as follows:

**28 (1) subject to clause (5) if any person alleges that any of the provisions of Article 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, them, without prejudice to any other action with respect to the**

**same matter which is lawfully available, that person may apply for redress to the High Court which shall:**

- (a) hear and determine any such application;**
- (b) .....**

**And which may, make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Articles 11 to 26 inclusive.**

64] We have examined the scope of the rights enshrined in Articles 11, 22 and 23, in the foregoing paragraphs, and concluded, as did the trial judge, that the respondent has not infringed any of these rights in so far as the appellants are concerned.

65] This action was premised on contravention of the stated Articles. Redress would only be available if the Articles had been contravened by the respondent. This is because the mode of commencement deployed does not confer jurisdiction on the courts to grant redress to a Petitioner, where none of the provisions in Part III of the Constitution have been contravened. Whenever a party has a justiciable grievance, they are required to commence an appropriate action in accordance with the rules that prescribe how an action may be brought. We have in a plethora of cases held that where

an action is not properly before a court, it may not grant relief even if so disposed, unless matters are put right. See **Chikuta v. Chipata Rural Council**,<sup>19</sup> **Nivel v. Mwale**,<sup>20</sup> **B.P. Zambia Plc v. Zambia Competition Commission and Others**,<sup>21</sup> to that effect.

66] On the view we have taken, we need not address the rest of the issues, as they are rendered otiose. Nonetheless, we wish to observe that the appellants may, if they are so inclined, issue appropriate proceedings pursuant to the Persons With Disabilities Act No 6 of 2012.

67] Having determined that the right to protection of the law, freedom of movement and non-discrimination were not infringed by the respondent, we dismiss this appeal accordingly. We make no orders for costs.

  
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**R.M.C. KAOMA**  
**SUPREME COURT JUDGE**

  
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**F.M. CHISANGA**  
**SUPREME COURT JUDGE**