

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)**



IN THE MATTER OF:

**The Protection of Fundamental Rights
Regulations, 1969**

IN THE MATTER OF:

Article 28 of the Constitution of Zambia

IN THE MATTER OF:

**Articles 8, 13, 15, 16, 18, 23 and 266 of the
Constitution of Zambia**

IN THE MATTER OF:

**The Mental Disorder Act, Chapter 305 of the
Laws of Zambia**

AND IN THE MATTER OF:

The Persons with Disabilities Act. No. 6 of 2012

B E T W E E N :

GORDON MADDUX MWEWA

1ST PETITIONER

MULIMA SANTA KASOTE

2ND PETITIONER

SYLVESTER KATONTOKA

3RD PETITIONER

(Suing on his own behalf and as Executive
Director of the Mental Health Users Network)

AND

THE ATTORNEY GENERAL

1ST RESPONDENT

ZAMBIA AGENCY FOR PERSONS
WITH DISABILITIES

2ND RESPONDENT

DISABILITY RIGHTS WATCH

AMICUS CURIAE

**Before Honourable Mrs. Justice M. Mapani-Kawimbe in Chambers on the 9th
day of October, 2017**

For the Petitioners : Mrs. C. Mushota- Nkhata, Messrs Mushota Associates

For the 1st Respondent : Mr. E Tembo, Assistant Senior State Advocate

For the 2nd Respondent : Mrs. E. Chanda, Messrs Chanda Chizu & Associates

For the Amicus Curiae : Mr. B.J. Mwanza, Disability Rights Watch

J U D G M E N T

Cases Referred To:

1. *Schater v Canada* (1992) 2 SCR 679
2. *Christine Mulundika and 7 Others v The People* (1995-1997) ZR 20
3. *Resident Doctors Association of Zambia and Others v The Attorney General* (2003) Z.R 33
4. *Attorney General v Roy Clarke* (2008) Z.R 38
5. *Purohit and Moore v The Gambia AHRLR* (2003) 96 (Communication 241/2001)
6. *Centre for Health Human Rights and Development and Another v Attorney General* Petition 64 of 2011
7. *Dawood v Minister of Home Affairs* (2000) (3) SA 936 (CC)
8. *Castel v De Greef* (1994) (4) SA 408 (C)

Legislation Referred To:

1. *Constitution of Zambia, Chapter 1*
2. *Constitution of Zambia (Amendment) Act No. 2 of 2016*
3. *Persons with Disabilities Act, No. 6 of 2012*
4. *Mental Disorders Act, Chapter 305*
5. *Health Professionals Act No. 24 of 2009*

Other Works Referred To:

1. *Halsbury's Laws of England 4th Edition, Volume 44 (1)*
2. *African Charter on Human and People's Rights, 1981*
3. *United Nations Convention on the Rights of Persons with Disabilities, 2006*
4. *United Nations Human Rights Committee General Comments No. 21 and No. 35*
5. *International Covenant on Civil and Political Rights, 1966*

This **Petition** is presented pursuant to Article 28 of the Constitution, wherein the Petitioners allege that the Mental Disorders Act, is unconstitutional and interferes with the implementation of the Persons with Disabilities Act. More specifically, the Petitioners allege

that the Mental Disorders Act unjustifiably violates their rights under the Constitution by impeaching the following rights, namely:

- (i) *Right to dignity under Article 8;*
- (ii) *Right to personal liberty under Article 13;*
- (iii) *Right to protection from torture and inhuman or degrading treatment under Article 15;*
- (iv) *Protection from deprivation of property under Article 16;*
- (v) *Right to constitutional protection of the law under Article 18;*
and
- (vi) *Right to freedom from discrimination under Articles 23 and 26 of the Constitution.*

The Petitioners' prayer to the Court is to set aside the Mental Disorders Act and to declare it unconstitutional. They also pray for declaratory reliefs to secure the protection of persons with mental disabilities from unlawful detention and the violation of their rights. Further, to informed consent to medical treatment and admission to healthcare facilities. The Petitioners also pray for an order to direct the 2nd Respondent to assist the Court in monitoring and reporting the enforcement of its judgment. In the alternative, they pray for a declaration that the Mental Disorders Act has been tacitly repealed by the Persons with Disabilities Act.

The 1st Respondent did not file an **Answer**.

The 2nd Respondent filed an **Answer**, where it states that it is established by an Act of Parliament which prescribes its functions. It also states that it is not empowered to regulate and monitor the implementation of statutes. As a result, the relief sought against it is misconceived.

The Petition is supported by three Affidavits. The 1st Petitioner, **Gordon Maddox Mwewa**, avers that on every occasion he was detained following a relapse of his mental health issues, the conditions at Chainama Hills Hospital were very depressing. That meals were insufficient and unbalanced and the rooms were overcrowded with poor sanitary conditions.

The deponent states that whenever he escaped these conditions, he was arrested by the police and re-admitted against his consent. That he has never appeared before a Magistrate for an order of detention. The deponent avers that his admission to the mental facility is due to the power his family possesses under the Mental Disorders Act. He avers that his involuntary admission into Chainama Hills Hospital arose every time he differed with family members.

The 2nd Petitioner, **Mulima Santa Kasote**, states that he was arrested and involuntarily admitted to Chainama Hills Hospital. That he suffered trauma after a number of people close to him as a child, passed away. Further, that he was arrested by armed police officers, interrogated and detained at Chainama Hills Hospital without the sanction of a Magistrate. The deponent states that he was physically assaulted by attendants and patients at the Hospital, locked up and isolated after the assault. That he was denied medication when in pain.

The 3rd Petitioner, **Sylvester Katontoka**, avers that he has at times been arrested and detained by the police under the Mental Disorders Act on the grounds that he is a mentally disordered danger to society; and incapable of taking care of himself, a fact he denies. He states that the conditions at Chainama Hills Hospital are inconducive with wards that possess jail like structures, seclusion rooms where patients are left to lie on ice-cold concrete floors, sometimes covered with urine and fecal matter.

He also states that the wards are very dirty with overflowing toilets, broken doors and windows. That patients wear torn uniforms

and at times they are left naked. He avers that at times there would be insufficient food in the wards. Further, that the impact of these experiences as a patient was too harsh and turned his life upside down, leading to his social isolation.

The deponent avers that he has engaged the Government on several occasions to lobby for the repeal and replacement of the Mental Disorders Act so that it can conform to the Constitution, the Persons with Disabilities Act and international human right instruments that Zambia has ratified.

The Respondents did not file **Affidavits in Opposition**.

On 15th July, 2017, the parties filed a statement of agreed issues wherein they raised the following questions for the Court's determination:

- a. **Whether the aim and purpose of the Mental Disorders Act is incompatible with the Constitution and the Persons with Disabilities Act, rendering the Act void?**
- b. **Whether the Mental Disorders Act unconstitutionally and unlawfully uses derogatory language against persons with mental disabilities?**
- c. **Whether the Mental Disorders Act unconstitutionally and unlawfully permits disability based detention and**

- Involuntary admission to prisons and medical institutions?
- d. Whether the Mental Disorders Act unconstitutionally and unlawfully denies people with mental disabilities the right to legal capacity?
 - e. Whether the Mental Disorders Act unconstitutionally and unlawfully removes the right to informed consent to medical treatment for persons with mental disabilities?
 - f. Whether the Mental Disorders Act unconstitutionally and unlawfully discriminates against people with mental disabilities in terms of access to healthcare services, rehabilitation and health-related rehabilitation?
 - g. Whether the violations to the rights of persons with disabilities under the Mental Disorders Act are nevertheless constitutionally justifiable?
 - h. In the alternative, whether the Persons with Disabilities Act tacitly repeals the Mental Disorders Act?
 - i. Whether the Petitioners' prayer for this Court to grant a supervisory order directing the 2nd Respondent to monitor enforcement of the judgment is permissible?

Together with the statement of agreed facts and issues, the parties filed written submissions for which I am highly indebted.

On behalf of the Petitioners, Learned Counsel submitted that the Court has broad remedial powers to grant the reliefs sought for under Article 28 of the Constitution. The Article empowers the Court to:

"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."

Counsel further submitted that international human rights law and jurisprudence from foreign Courts, though not binding, are of

interpretive and persuasive value in determining the Petition. She stated that the aim and purpose of the Mental Disorders Act is unconstitutional and therefore invalid in its entirety as gleaned from its title which reads:

"An Act to provide for the care of persons suffering from mental disorder or mental defect; to provide for the custody of their persons and the administration of their estates; and to provide for matters incidental to or connected with the foregoing."

Learned Counsel for the Petitioners contended that the Mental Disorders Act aims at controlling the bodies and assets of persons with mental disabilities in a manner to enforce social exclusion. The extensive use of terminology such as "detention", and "control" in the Act infer a punitive intent, and is based on an archaic understanding that persons with mental disabilities are threatening objects and not persons equal in human dignity as compared to the others. Counsel argued that this is contrary to section 4(a) of the Persons with Disabilities Act, which mirrors Article 3(a) of the Convention of the Rights of Persons with Disabilities (CRPD) and provides as follows:

Section 4(a):

"The following principles shall apply to persons with disabilities: Respect for inherent dignity of persons with disabilities, individual autonomy including the freedom to make one's own choices and independence of persons."

The Persons with Disabilities Act defines "disability" in section 2 as:

"a permanent physical, mental, intellectual or sensory impairment that alone, or in combination with social and environmental barriers, hinders the ability of a person to fully or effectively participate in society on an equal basis with others."

Counsel for the Petitioners submitted that the definitions of disability in those legal instruments affirmed a human-rights based approach to disability that recognizes the inherent human dignity of all persons with disabilities. She added that the Persons with Disabilities Act promotes inclusion and equal participation in all spheres of life for persons with disabilities, respect for human dignity, and equality before the law. On the other hand, she contended that the Mental Disorders Act violates the provisions of the legal instruments cited above and is wholly repugnant.

Counsel submitted that the Mental Disorders Act unlawfully discriminates against persons with mental disabilities by using derogatory language when describing or classifying such persons. More specifically, section 5 of the Mental Disorders Act, refers to

persons with mental disabilities as mentally disordered or defective persons.

It also classifies persons with mental disabilities using the following derogatory terms:

- a. Idiot**
- b. Imbecile**
- c. Feeble-minded; and**
- d. Moral imbecile**

Counsel submitted that Article 23 of the Constitution protects every person from discrimination, while Article 266 of the Constitution (Amendment) Act defines "discrimination" as follows:

"...directly treating a person differently on the basis of that person's birth, race, sex, origin, colour, age, disability, religion, conscience, belief, culture, language, tribe, pregnancy, health, or marital, ethnic, social or economic status."

Counsel stated that section 4(g) of the Persons with Disabilities Act contains similar provision, which states that persons with disabilities are entitled to:

"respect for difference and acceptance of persons with disabilities as part of human diversity and humanity."

She further stated that section 4(g) is reinforced by section 6(3), of the Persons with Disabilities Act, which reads:

"a person shall not call a person with disability by any derogatory name because of the disability of the person."

Counsel prayed to the Court to declare that the provisions of the Mental Disorders Act which brand persons with disabilities as disordered, defective, imbecile, feeble minded and moral imbecile as dehumanizing and unconstitutional.

On the legal regime, Counsel took issue with the following provisions in the Mental Disorders Act:

- (i) Section 6, which provides for the detention of a person in an institution or other place subject to a warrant or order of the Minister, Judge or Magistrate.
- (ii) Section 8, which empowers any officer to apprehend a person presumed to be mentally disordered or defective without a warrant and to convey them to a hospital, prison, or other place, for observation. A person's detention is sustained under section 9 which makes provision for re-authorisation by a Magistrate and section 10, which does not require the affected person to be present at an inquiry or to make representations, even if the Magistrate is empowered to interrogate such person.
- (iii) Under section 11, a Magistrate is empowered to make an adjudication order for the detention of a person who the

Magistrate believes to be mentally disordered or defective, in addition to various other factors. The factors relate to a person who is not under proper care, treatment, or control, has acted in a manner offensive to public decency or if any person having care, treatment or control of the person consents.

(iv)

Counsel argued that there is no provision for mandatory regular review of control orders nor any explicit procedures to initiate a review of the control. Further, that the detention of persons with mental disabilities under the Mental Disorders Act violates their constitutional rights to dignity, personal liberty, the prohibition of torture and cruel or inhuman and degrading treatment, to constitutional protection of the law and freedom from discrimination.

She went on to state that the Mental Disorders Act does not fall within the lawful limitation of the right to liberty of a person under Article 13(1) (h), of the Constitution which permits a deviation from the right to personal liberty as authorized by law. Counsel submitted that the Mental Disorders Act is not a valid law upon which a

person's liberty could be restricted because it is manifestly unjust and was impliedly repealed by the Persons with Disabilities Act.

Counsel further submitted that the Mental Disorders Act lacks necessary legal certainty as there is no accepted definition, criteria or methodology for determining whether someone is of unsound mind. Counsel also submitted that the conditions in detention facilities as described and experienced by the Petitioners amounted to a violation of their freedom from torture, inhuman and degrading treatment, especially that their detention was unlawful.

Under Article 18 of the Constitution, Counsel submitted that the detention regime established by the Mental Disorders Act interfered with their legal capacity as persons contrary to section 8 of the Persons with Disabilities Act, by not offering equal and effective protection of the law. Counsel broadly stated that the regime in the Mental Disorders Act had subjected many persons with mental disabilities in the country to discrimination and social exclusion.

Counsel averred that the denial of the right to informed consent to treatment for persons with mental disabilities sustained under the

Mental Disorders Act is unconstitutional and contrary to the Persons with Disabilities Act. As shown in the Petitioners' Affidavits, their consent to treatment was never sought and the Mental Disorders Act presumes that persons with mental disabilities are always unable to consent to treatment.

On protection from deprivation of property, Counsel stated that the Mental Disorders Act deprived persons with mental disabilities their property under sections 17-19. On access to mental healthcare services, Counsel submitted that the Mental Disorders Act created a situation whereby there are no mental healthcare services at primary level. As a result, persons with mental disabilities are compelled to access health services in facilities that are often distant and inadequate to meet their health needs.

In the alternative, Counsel argued that the Persons with Disabilities Act, which is later piece of legislation enacted in 2012 repealed the Mental Disorders Act, for being grossly inconsistent and unconstitutional.

Counsel averred that under the Persons with Disabilities Act, the Zambia Agency for Persons with Disabilities has a number of broad functions and powers. The Agency is empowered to gather information under section 17 on persons with disabilities, services rendered and to distribute information relating to disability to any institution, person, organization or the public at large. It was Counsel's submission that the Agency should monitor the enforcement of the Court's judgment and to report on the measures taken to implement it viz the declaratory reliefs sought in casu. Counsel concluded with a prayer beseeching the Court to grant the Petitioners the reliefs sought.

In rejoinder, the 1st Respondent submitted that it is a well-established principle of interpretation that a general law yields to a specific law, where the law operates in the same field on the same subject. The principle of law is founded on a latin maxim *generalia specialibus non derogant*, contained in **Halsbury's Laws of England 4th Edition, Volume 44(1), at para 2300** where the Learned Authors state:

"It is difficult to imply a repeal where the earlier enactment is particular, and the latter is general. In such a case the maxim *generalia specialibus non derogant* (general things do not derogate from special things) applies. If parliament considered all the

circumstances of, and made special provisions for, a particular case, the presumption is that a subsequent enactment of a purely general character would not have been intended to interfere with that provision; and therefore, if such enactment, although inconsistent in substance is capable of reasonable and sensible application without extending to the case in question, it is *prima facie* to be construed as not so extending, the special provisions stand as an exceptional proviso upon the general."

Counsel submitted that there is no dispute that the Persons with Disabilities Act encompasses persons with mental disabilities in section 2 of the Act, which reads:

"Persons with disability" means a person with a permanent physical, mental, intellectual or sensory impairment which in interaction with various barriers, may hinder that person to fully and effectively participate in society on an equal basis with others."

Counsel however, asserted that the Persons with Disabilities Act is of general application and it would be flawed for the Petitioners to argue or allege that the Persons with Disabilities Act, has repealed the Mental Disorders Act. Counsel did not dispute the derogatory terms cited by the Petitioners in the Mental Disorders Act. He stated that the terms might have been acceptable at the time of enactment, however, at present, the language had changed in the later pieces of legislation.

Counsel challenged the various provisions of the Constitution cited by the Petitioners as the basis for the repeal of the Mental

Disorders Act, contending that Article 6(2) of the Constitution empowers Parliament at its own time to amend a law. It reads:

“Parliament shall within such period as it shall determine, make amendments to any existing law to bring that law into conformity with or to give effect, to this Act and the Constitution as amended.”

Counsel added that the Ministry of Justice was currently finalizing the draft Mental Health Bill for presentation to Parliament. Any decision to curtail the process would amount to usurping and undermining the function and power of Parliament.

Counsel stated that contrary to the allegation that the police or a member of the public possesses arbitrary power to detain a person with mental disorders, sections 6 - 12 of the Mental Disorders Act require a warrant of arrest to be issued before detention. Further, the provisions require an inquiry to be instituted to determine the mental condition of a person. Counsel contended that generally, there was no breach of human rights instanced by the Mental Disorders Act because it covered a specific disability. Counsel prayed to the Court to dismiss the Petition because the reliefs sought were already under consideration in the Mental Health Bill.

Learned Counsel for the 2nd Respondent submitted that its functions are limited to advice and recommendations. Its monitoring mandate attends to the provision of services to persons with disabilities. The 2nd Respondent is also mandated to implement the Persons with Disabilities Act, the Policy and National Strategy. More specifically, some of its functions and policies were listed as follows:

- (i) **Developing and implementing measures to “achieve equal opportunities” including “full access to community and social services” (section 14(1)(b), and coordinating and facilitating habilitation, rehabilitation and welfare services for persons with disabilities (section 14(1)(c), and to cooperate with State institutions and other organisations in doing so (section 14(1)(g).**
- (ii) **Promoting research and public awareness into all aspects of disability (section 14(1)(d-e).**
- (iii) **Making recommendations to “any State organ or institution any measure to prevent discrimination against persons with disabilities” (section 14(1)(h) and to take “appropriate measures to eliminate discrimination (section 14(1)(i).**
- (iv) **Making “representations on behalf of any person with disability before any State organ or institution and provide or procure legal assistance for any person with disability, if any matter relates to the rights of, or the interaction of, persons with disabilities” (section 14(1)(j).**
- (v) **Monitoring and evaluating the provision of services to persons with disabilities and the implementation of the Persons with Disabilities Act (section 14(1)(n).**
- (vi) **Identifying provisions in any law that hinder the implementation of the Act (section 14(1)(o).**
- (vii) **Conducting inquiries into “any matter relating to the welfare, habitation and rehabilitation of persons with disabilities (section 14(3) and**
- (viii) **Doing “all things as are incidental to, or conclusive to, the attainment of the functions of the Agency.” (section 14(1)(q).**

On that basis, Counsel contended that the 2nd Respondent had no mandate to monitor the enforcement of this judgment and that the relief sought against it was misconceived.

The submissions of Learned Counsel of the Amicus Curiae were substantially the same as those of the Petitioners. He placed emphasis on the following:

1. *That the paradigm shift introduced by the Convention on the Rights of Persons with Disabilities (CRPD) is inclined towards a social and human rights model of disability.*
2. *The Mental Disorders Act violates the human rights of affected persons since the approach to mental health is now centered on psychosocial and rights based approaches. Any departure is harmful to the health of the affected persons.*
3. *The CRPD requires a concept of community-based care.*
4. *The relationship between the right to legal capacity and the right to informed consent to medical treatment and medical admission is the accepted standard.*
5. *There is an absence of legal and empirical justification for the human right violations caused by the Mental Disorders Act.*

I will now move to address the claims in the manner that they were presented in the statement of agreed facts and issues.

- (a) Whether the aim and purpose of the Mental Disorders Act is incompatible with the Constitution and the Persons with Disabilities Act, rendering the Act void?**

The Petitioners contended that the Mental Disorders Act aims to control the bodies and assets of persons with mental disabilities in a

manner that enforces social exclusion. The extensive use of terminology such as detention and control in the Act infers a punitive intent, and is based on an archaic understanding of persons with mental disabilities as threatening objects and not persons equal in human dignity.

The response of the 1st Respondent was that the Persons with Disabilities Act, which is a general law yields to a specific law, in this case the Mental Disorders Act, which according to the Ministry of Justice is under review. The 1st Respondent also argued that it would be flawed for the Petitioners to allege that the Persons with Disabilities Act, repealed the Mental Disorders Act.

It is a judicial fact that Courts play an important role in constitutional interpretation and the laws made under it. By this token, this Court has jurisdiction to rule on the validity of constitutional references under Article 28 of the Constitution, which provides that:

"28.(1) Subject to clause (5), if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, 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) determine any question arising in the case of any person which is referred to it in pursuance of clause (2); 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."

The issue canvassed by the Petitioners under this claim is that the Mental Health Disorders Act in its entirety violates internationally accepted human rights principles on the treatment of persons with mental disabilities. These principles are equally enshrined in the Republican Constitution as well as the Persons with Disabilities Act.

On the other hand, the Respondent contends that it is legally flawed to advocate that the entire Mental Disorders Act violates the Constitution. It is also legally flawed to presume that the general law of the Persons with Disabilities Act invalidates the Mental Disorders Act, which is a more specific piece of legislation dealing with a particular type of disability. The Respondent states that the Mental Disorders Act is under review and the concerns of the affected persons have been addressed in the Mental Health Bill.

Learned Counsel for the Petitioner relied on a number of legal authorities from foreign jurisdictions. Among those, Counsel cited the case of **Schacter v Canada**¹, where the Supreme Court of Canada held that:

"Where the purpose of the legislation is itself unconstitutional, the legislation should almost always be struck down in its entirety....Where the purpose of the legislation or legislative provision is deemed to be pressing and substantial, but the means used to achieve this objective are found not to be rationally connected to it, the inconsistency to be struck down will generally be the whole of the portion of the legislation which fails the rational connection test."

Counsel argued that the other ground for impeaching the entire Mental Disorders Act was based on the fact that it is discriminatory. It differs with the intention of Article 23(1) of the Constitution, which states that a law cannot create any provision that is discriminatory either in itself or its effect.

Counsel also called in aid Article 266 of the Constitution (Amendment Act), which defines disability and affirms the prohibition of discrimination on the ground of mental disability. Counsel relied on the national values and principles stated in Article 8 and 9 of the Constitution (Amendment Act) as a reference to be applied in the interpretation and application of the Constitution and other legislation. She added that the values and principles affirmed the

recognition of human dignity, equity, social justice, equality and non-discrimination.

After considering the contested arguments, I find the Petitioners' claim that the Mental Disorders Act is wholly incompatible with the Constitution is rather legally flawed. In my view, disposing an entire piece of legislation in the absence of a critical review would be irrational because it should be subject to a legislative process rather than a Court process.

In a constitutional democracy such as ours, all laws flow from the Constitution and all other subordinate laws rank *pari pasu*. A subordinate piece of legislation such as the Persons with Disabilities Act cannot therefore void or repeal the Mental Disorders Act. In other words, the provisions of the Persons with Disabilities Act cannot be the basis for impeaching the Mental Disorders Act. The validity of the Mental Disorders Act can only be examined against the Republican Constitution.

It is granted that national values and principles are not only symbolic but also influence the aspirations of society in the

interpretation and application of the law. However, they cannot be taken as a forceful embodiment in measuring the compliance of Mental Disorders Act to the Constitution because as aspirations, they do not attach any immediate obligation on the Government to implement them.

I have considered the Zambian landmark cases on constitutional interpretation and in particular the case of **Christine Mulundika and 7 others v The People²**, **Resident Doctors Association of Zambia and Others v The Attorney General³** and **Attorney General v Roy Clarke⁴**. I observe that the trend employed by the Petitioners in these cases challenged specific provisions in subsidiary legislation, which they claimed violated the Constitution. They did not seek to impeach whole pieces of legislation. The difficulty, I suppose with such an approach is that it places an extraordinary burden of proof on a Petitioner to prove their claims on each provision of a challenged law, which is undesirable in a process where Parliament is vested with legislative authority. On that basis, I decline to hold that the Mental Disorders Act is unconstitutional in its entirety. I will nevertheless consider *ad seriatim* the sections of the Mental Disorders Act that are alleged to be unconstitutional. My holding on this claim affects

alternative claim that the Persons with Disabilities Act tacitly repealed the Mental Disorders Act, which in my considered view, has no merit.

(b) Whether the Mental Disorders Act unconstitutionally and unlawfully uses derogatory language against persons with mental disabilities?

The Petitioners contend that the Mental Disorders Act unlawfully uses derogatory language when describing or classifying persons with mental disability. In particular, section 5 of the Mental Disorders Act, refers to persons with mental disabilities as mentally disordered or defective persons. It also classifies persons with mental disabilities using the terms, idiot, imbecile, feeble-minded and moral imbecile.

The Petitioners argue that Article 23 of the Constitution protects every person from discrimination, which is defined in Article 266 of the Constitution (Amendment) Act. In addition, section 6(3) of the Persons with Disabilities Act, restrains the uses of derogatory language by providing that:

“a person shall not call a person with disability by any derogatory name because of the disability of the person.”

To buttress their position, Counsel for the Petitioners cited the case of **Purohit and Moore v The Gambia**⁵, where the African Court on Human and Peoples' Rights held that:

"Legislation that branded persons with mental disabilities as "lunatics" and "idiots" was undoubtedly dehumanizing and violated their dignity contrary to Article 5 of the African Charter on Human and Peoples' Rights, which guarantees that every individual shall have the right to the respect of dignity inherent in a human being and to the recognition of his legal status."

Counsel for the Petitioners referred me to the jurisprudence of other national Courts that found the use of language such as idiots and imbeciles derogatory. In the case of **Centre for Health Human Rights and Development and Another v Attorney General**⁶, the Ugandan Constitutional Court found that the use of idiots and imbeciles in Article 130 of the Ugandan Penal Code were dehumanizing and detracted from the dignity of persons with mental disabilities. The Court went on to hold that the language was discriminatory and unconstitutional. The Ugandan Court in that case relied on the principles enunciated in Article 3 of the African Charter, Article 2 of the International Convention on Civil and Political Rights, the Convention on the Rights of Persons with Disabilities and the country's Constitution.

The 1st Respondent conceded that the Mental Disorders Act contains derogatory language and that the language might have been acceptable in 1949 but has no place in modern legislation.

Section 5 of the Mental Disorders Act reads as follows:

"5. For the purposes of this Act and all proceedings thereunder, mentally disordered or defective persons may be divided into the following classes:

Class I.-A person suffering from mental disorder, that is to say, a person who owing to some form of mental disorder is incapable of managing himself or his affairs.

Class II.-A person mentally infirm, that is to say, a person who through mental infirmity arising from age or from its common disorders is incapable of managing himself or his affairs.

Class III.-An idiot, that is to say, a person in whose case there exists mental defectiveness of such a degree that he is unable to guard himself against common physical dangers.

Class IV.-An imbecile, that is to say, a person in whose case there exists mental defectiveness which, though not amounting to idiocy, is yet so pronounced that he is incapable of managing himself or his affairs, or, if he is a child, of being taught to do so.

Class V.-A feeble-minded person, that is to say, a person in whose case there exists mental defectiveness which, though not amounting to imbecility, is yet so pronounced that he requires care, supervision and control for his own protection or for the protection of others, or, if he is a child, appears by reason of such defectiveness to be permanently incapable of receiving proper benefit from the instruction in ordinary schools.

Class VI.-A moral imbecile, that is to say, a person who displays mental defectiveness coupled with strongly vicious or criminal propensities and who requires care, supervision and control for his own protection or for the protection of others."

In their natural and ordinary meaning, I find that the definitions and classifications used in section 5 of the Mental Disorders Act are highly offensive, derogatory and discriminatory. They have no place in a modern society and it is obvious that in 1949, that the authorities

did not have anything in mind as far as the protection of human rights and fundamental freedoms is concerned. I totally agree with the Petitioners that the Mental Health Disorders Act contains derogatory language which is unconstitutional and I have no hesitation in holding that section 5 of the Mental Disorders Act, which contravenes Article 23 (1) of the Constitution is null and void.

(c) Whether the Mental Disorders Act unconstitutionally and unlawfully permits disability based detention and involuntary admission to prisons and medical institutions?

The Petitioners contend that by permitting arrest, detention, and forced treatment of persons with mental disabilities, under the Mental Disorders Act is unconstitutional and unlawful both as a matter of domestic legislation and under international human rights law. The Petitioners also contend that the legal regime on the detention of a person with a mental disability is such that the decisions are made by others and not themselves. Pursuant to the powers given by the Mental Disorders Act, persons with mental disabilities are often subjected to involuntary admission and detention at prescribed institutions. This detention takes place on the basis of their

disability, in conditions that are degrading and inhumane, and without procedural protections.

Apart from the unlawful and discriminatory nature of the Mental Disorders Act, the Petitioners allege that the minimal procedural protections afforded by the Act are seldomly upheld. The Petitioners described how they were detained and subjected to involuntary admission in their Affidavits. Counsel for the Petitioners cited Article 4 of the African Charter on Human and Peoples' Rights, which states:

"Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

She also cited Article 5, of the African Charter on Human and Peoples' Rights, which provides that:

"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation, and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

Counsel called in aid the case of **Purohit and Another v The Gambia**⁴, where the African Commission on Human and Peoples' Rights held that:

"Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination. It is therefore an inherent right which every human being is obliged to respect by all means

possible and on the other hand it confers a duty on every human being to respect this right."

Counsel further cited the case of **Dawood v Minister of Home Affairs**⁷, where the South African Constitutional Court held that:

"Human dignity informs constitutional adjudication in many ways: it is a value that informs the interpretation of other rights and is central in analyzing justifiable limitations on rights. It is in addition a justiciable and enforceable right that must be protected and respected."

The Petitioners contend that the Mental Disorders Act is not covered by the exception to Article 13(1)(h) on the right to personal liberty which reads:

"(1) No person shall be deprived of his personal liberty except as may be authorized by law in any of the following cases:

(h) In the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment, or the protection of the community."

The Petitioners submit that the legal regime established under the Mental Disorders Act does not fall within the lawful limitation of the right to liberty of a person under Article 13(1)(h) of the Constitution. By this token, the Mental Disorders Act is invalid because it operates contrary and unjustly compared to the Constitution.

Further, the Mental Disorders Act lacks necessary legal certainty as there is no accepted definition, criteria or methodology for determining whether someone is of unsound mind. Such certainty it is argued, is a necessary precondition whenever a law seeks to impose a liability or derogate a person's right to liberty.

Article 13 of the Constitution provides that:

"13. 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 or sex, but subject to the limitations contained in Article 4 and this Part, to each and off of the following, namely:

- (a) Life, liberty, security of the person and protection of the law;**
- (b) Freedom of conscience, expression, assembly and association, and**
- (c) Protection for the liberty of home and other property and from deprivation of property without compensation.....**
- (d) In the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his case or treatment, or the protection of the community.**
- (h) In the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment, or the protection of the community."**

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 Article 4 and in these provisions, 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."

Article 13 of the Constitution is formulated on the basis of Article 9 of the International Covenant on Civil and Political Rights,

which guarantees every individual the right to liberty and security of person. It goes on to state that a person should not be subjected to arbitrary arrest or detention except on such grounds that are in accordance with such procedure and established by law.

In **Christine Mulundika**², the Supreme Court stated that:

"Fundamental constitutional rights should not be denied to a citizen by any law which permits arbitrariness and is couched in wide and broad terms. In The State of Bihar v K.K Misra and others AIR 1971 1667 at 1675, the Supreme Court of India expressed the view on laws imposing restrictions on fundamental rights that:.....

".....in order to be a reasonable restriction, the same must not be arbitrary or excessive and the procedure and the manner of imposition of the restriction must also be fair and just. Any restriction which is opposed to the fundamental principles of liberty and justice cannot be considered reasonable."

Further, in **Christine Mulundika**², the Supreme Court pointed out that:

"One of the important tests to find out whether a restriction is reasonable is to see whether the aggrieved party has a right of representation against the restriction imposed or proposed to be imposed. We find the foregoing to be a round exposition of the attitude to be adopted in these matters. The principles of fairness, let it be said, are principles in their own right and ought to be allowed to pervade all open and just societies."

A Court has a duty to test whether a restriction is reasonable by exposing it to the principles of fairness. Sections 6, 8, 9, 30 and 31 of the Mental Health Disorders Act are regulatory in that they state the procedure on detention of persons suffering from mental disabilities.

They also regulate the admission of mental patients into mental health institutions. It appears that in certain circumstances the admission can be quite involuntary because affected persons are detained either at the behest of family members, members of the public or law enforcement agencies. While it is rightfully contended by the Petitioners that there could be an infringement of the affected persons rights, I take the view that there is need to consider the principle of proportionality.

By this, I mean to say that there needs to be a balance between the competing considerations on detention and admission to mental health institutions, which appear to be involuntary on one hand and the affected persons rights. In my view, there may be instances, where it is necessary for the family, community or law enforcement agencies to have a mental patient admitted without their consent especially where they suffer from severe disabilities or where it is obvious that an affected person is not capable of making an appropriate decision for their care and treatment. The decision to determine the detention or admission of mental patients to prisons or medical institutions is a medical question, and cannot be determined by this Court.

I would be reluctant to rely on the Petitioners Affidavits as the only authoritative source of evidence. The Petitioners themselves submit that there is no accepted definition, criteria or methodology for determining whether a person is of unsound mind or not. This fortifies my reluctance to make a finding. However, in cases where an affected person is able to make a sound decision, then the authorities should be able to allow such a person to give their consent. The prescription cannot be a blanket one given that there are different types of mental health issues that call for different intervention. Detention in a prison facility on the other hand, occurs at the instance of the Court and has not been adequately canvassed in the Petition. As a result, I cannot make a determination on the issue.

The United Nations Human Rights Committee **General Comment No. 35 of 16th December, 2014** on Article 9 of the International Covenant on Civil and Political Rights (ICCPR) states that:

"..liberty and security of person are precious for their own sake, and also because deprivation of liberty and security of person have historically been principal means for impairing the enjoyment of other rights. Liberty of person concerns freedom from confinement of the body, not a general freedom of action. Security of person concerns freedom from injury to the body and the mind, or bodily and mental integrity, ... Article 9 guarantees these rights to everyone...in particular the important guarantee laid down in paragraph 4, is the right to review by a court of the legality of detention, which applies to

all persons deprived of liberty. Examples of deprivations of liberty include police custody, "arraigo," remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional custody of children, and confinement to a restricted area of an airport, and also include being involuntarily transported."

The United Nations Human Rights Committee acknowledges that the right to liberty is not without exception. However the deprivations of liberty must not be done arbitrarily and must be subject to periodic reviews. It is worth stating that the International Covenant on Civil and Political Rights (1966) which Zambia has ratified does not impose an immediate obligation to implement the exceptions to deprivation of liberty including deprivation on account of mental disability. The Human Rights Committee calls on States parties, to make available adequate community-based or alternative social care services for persons with psychosocial disabilities, in order to provide less restrictive alternatives to confinement.

The Human Rights Committee also calls for the deprivation of liberty on mental disability to be re-evaluated at appropriate intervals with regard to its continuing necessity. Individuals must be assisted in obtaining access to effective remedies for the vindication of their rights, including initial and periodic judicial review of the lawfulness

of the detention, and to prevent conditions of detention which are incompatible with the Covenant.

In my view the provisions attacked by this Petition on detention and involuntary admission do create a progressive obligation on the Government to implement alternative care to mental health issues. In doing so, there is need to consider the economic-socio impacts, which remove the issue into a larger discourse, than one of a legal type. Thus, I find that the Mental Disorders Act does not contravene the constitutional provisions on the right to liberty and security of persons but rather provides a platform under which the issues of control, review, admission or detention can be addressed by a thorough review of the Mental Disorders Act. Accordingly, this claim fails.

The Petitioners raised issue with the conditions of detention at Chainama Hills Hospital in their Affidavits. The allegations were not gainsaid by the 1st Respondent and attest to a degeneration of human rights protection at that hospital ranging from claims of torture, poor health provision and administration, poor diet and inhumane treatment. The Human Rights Committee **General Comment No. 21**

of 10th April, 1992 on Article 10 of the ICCPR places an obligation on State parties to ensure that persons deprived of their liberty under the laws and authority of the State particularly in prisons, psychiatric hospitals or correctional institutions are treated in a humane way.

From the Petitioners Affidavits, it is quite clear that Chainama Hills Hospital is not conducive for mental health treatment. The Petitioners have been admitted at that hospital and have real experience of the facility. The Petitioners allege that they were subjected to inhumane treatment during their admission to Chainama Hills Hospital and this was not gainsaid by the 1st Respondent. If the inhumane treatment did occur, then the Hospital authorities contravened Article 15 of the Constitution. In order to prevent such recurrences, I hold that the authorities at mental health institutions must ensure that patients at the facilities are treated in the most humane way.

- (d) Whether the Mental Disorders Act unconstitutionally and unlawfully removes the right to informed consent to medical treatment for persons with mental disabilities?**

The Petitioners submit that they are denied the right to informed consent to treatment under the Mental Disorders Act and this is unconstitutional and contrary to the Persons with Disabilities Act. They ground their contention on the following constitutional provisions:

- (i) The right to dignity under Article 8.
- (ii) The right to personal liberty under Article 13 of the Constitution.
- (iii) The prohibition on torture, inhuman and degrading treatment under Article 15 of the Constitution.
- (iv) The right to equality and freedom from discrimination under Articles 23 and 266.

The Petitioners also argue that the exception to the universal right to informed consent for persons with mental disabilities contravenes the Code of Ethics established by the Health Professionals under Act No. 24 of 2009, which does not provide exceptions. They state that health professionals are required to take into account the patient or client's needs preference and confidentiality. They rely on section 5.1 (c), which states, quoting relevance as follows:

"A health practitioner shall not;

- (1) Intervene in a patient's/client's treatment or treating a patient/client without obtaining adequate informed consent from the patient/client except in an emergency;**

...

- (ix) **Discriminate in the management of patients/clients based on the patient's/client's lifestyle, culture, beliefs, race, sex, sexuality, disability, age, ethnicity, social or economic status."**

Counsel for the Petitioners cited the South African case of **Castel v De Greef⁶**, where the Court stated the following on informed consent:

- (a) The consenting party must have had knowledge and been aware of the nature and extent of the harm or risk;**
- (b) The consenting party must have appreciated and understood the nature and extent of the harm or risk;**
- (c) The consenting party must have consented to the harm or assumed the risk;**
- (d) The consent must be comprehensive, that is extended to the entire transaction, inclusive of its consequences."**

The Petitioners submitted that the Mental Disorders Act removes the right to informed consent for affected persons and this renders the Act unconstitutional and contrary to the Persons with Disabilities Act. The Petitioners also contended that their Affidavits disclosed that in most cases their consent to treatment was not sought because the Mental Disorders Act presumes that affected persons are always unable to consent to treatment.

I find that the issue raised in this claim is novel. It seeks to allow persons suffering from mental disabilities the right to informed consent to medical treatment. I take judicial notice that are different

types of mental disabilities and some might be more severe than others. It is not in every case that an affected person might be able to appreciate the severity of their illness so as to voluntarily give consent to medical treatment. However, in cases where patients have minor conditions, such persons should be allowed to consent to medical treatment.

By saying so, I do not hold that the Mental Disorders Act is unconstitutional because it removes the right to informed consent to medical treatment. I can only hold to contrary if there was medical evidence adduced to assist me in making an informed finding. In my view, this issue is more complex than it appears and I cannot on the basis of the Petition as the only source of evidence make a finding. The claim accordingly fails.

(e) Whether the Mental Disorders Act unconstitutionally and unlawfully denies people with mental disabilities the right to legal capacity?

The Petitioners contend that the Mental Disorders Act deprives persons with mental disabilities their legal capacity with respect to their property through sections 17-19 of the Act. The Petitioners

argue that the Mental Disorders Act does not accord persons with mental disabilities, the prospect of making representations on the administration of their estates. Further, that in terms of section 35(2) of the Act, the cost of their unlawful or unconstitutional detention may be recovered from their estates.

The Petitioners submit that the provisions of the Mental Disorders Act do not fall within the permissible limitations set out in Article 16 of the Constitution but represent an unlawful and discriminatory deprivation of the affected persons' legal capacity.

Article 16 of the Constitution provides that:

"16. (1) Except as provided in this Article, property of any description shall not be compulsorily taken possession of, and interest in or right over property of any description shall not be compulsorily acquired, unless by or under the authority of an Act of Parliament, which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of clause (1) to the extent that it is shown that such law provides for the taking possession or acquisition of any property or interest therein or right thereover-

- (f) for the purpose of its administration, care or custody on behalf of and for the benefit of the person entitled to the beneficial interest therein...**
- (h) for the purpose of-**
- (i) the administration of the property of a deceased person, a person of unsound mind or a person who has not attained the**

age of eighteen years, for the benefit of the persons entitled to the beneficial interest therein;..."

The provisions complained of legal capacity and deprivation of property in the Mental Disorders Act are as follows:

Section 17:

17. (1) There shall be vested in the High Court jurisdiction to administer and control the estates and property of patients, including the power to appoint committees and receivers, in substantial conformity with the law and practice for the time being in force in the High Court of Justice in England.

(2) The Chief Justice may, by statutory instrument, make rules for the due administration and efficient working of this Part.

Section 18:

"18. After making an adjudication order, the Magistrate shall make an investigation into the estate of the patient and shall report to the Registrar in the prescribed form.

Provided that where it appears to the magistrate that, owing to circumstances to be entered on the record, it is expedient that such investigation be continued by another magistrate, he shall adjourn the investigation and refer the record to such other magistrate, and such other magistrate shall thereupon, subject to any directions in that behalf which may be issued by the High Court, and which the High Court is hereby empowered to give, continue the investigation and conclude the same."

Section 19:

"19. (1) For the purposes of this Act, in default of any prescribed rules, the Registrar shall exercise all the powers and duties of the Master in Lunacy or of the Court of Protection in England, and the Administrator-General shall exercise all the powers and duties of the

Official Solicitor, with regard to the estates and property of patients."

In my view, sections 17 - 19 of the Mental Disorders Act are procedural provisions which vest the High Court with jurisdiction to administer or control the estates and property of mental patients. They do not seek to administer or control every estate but rather apply to estates of persons who probably suffer from severe mental disabilities. It is a well-known fact that there are different types of mental disability and a generic prescription cannot be applied to all patients. Certain disorders might be slight while others more severe.

I would dare to say that the patients envisaged in the cited sections of the Act might be those who have serious mental health disabilities but of course this is subject to different interpretation. My point however, is that the cited sections of the Mental Disorders Act have more to do with procedure and less with deprivation of property. I therefore find that the Mental Disorders Act does not deprive mental patients of their legal capacity or their property as argued by the Petitioners. This claim also fails.

- (f) **Whether the Mental Disorders Act unconstitutionally and unlawfully discriminates against people with mental disabilities in terms of access to healthcare services, rehabilitation and health-related rehabilitation?**

The Petitioners submit that the Mental Disorders Act has created a situation whereby there are no mental healthcare services at the primary healthcare level. As a result, persons with mental disabilities are compelled to access health services in facilities that are often distant and inadequate to meet their health needs.

The Mental Disorders Act provides for prescribed institutions for the treatment and care of persons with mental disabilities. Section 2 of the Act defines 'institution' as:

"Any mental hospital or other place which has been or may hereafter be prescribed by the Minister as an institution or place for the reception, treatment, or detention of two or more persons suffering from any mental disorder or defect."

By virtue of the above provisions, the Petitioners contend that persons with mental disabilities are almost always treated at the prescribed institutions. There are very few prescribed institutions listed under regulation 2 of the Mental Disorders Regulations as follows:

- (a) Livingstone General Hospital;**
- (b) The Government Prison, Livingstone;**

- (c) Lewanika District Hospital, Mongu;
- (d) Lusaka Mental Hospital;
- (e) Ndola General Hospital;
- (f) Matero Rehabilitation Hostel, Lusaka.

The Petitioners contend that the existence of the Mental Disorders Act creates and perpetuates a two tier healthcare system at the secondary and tertiary healthcare level whereby persons with mental disabilities are subjected to healthcare services that are of unequal range, quality and standard compared to those provided in other secondary healthcare facilities.

I find that it is incontrovertible that every person is supposed to be provided health care services without discrimination. That is to say, persons with disabilities must enjoy the same health range, quality and standard of services and treatment as provided to others. There should be no discrimination whatsoever.

It is a notorious fact that the number of mental health facilities in the country is limited and there is need for the authorities to address this concern so that wherever possible, mental health patients should be able to access treatment at the primary health care level wherever possible. In so doing, the authorities must pay

attention to the principles of equality, equal access and non-discrimination.

In its current form, I find that the Mental Disorders Act does not discriminate on access to healthcare services because it is an old Act, which lists the facilities that were available at the time. Circumstances have changed together with the needs of mental health. Thus, a review of the Act is desirable.

For the avoidance of doubt, I do not find that the Mental Disorders Act discriminates against access to healthcare services and rehabilitation, but rather needs to be adapted to suit the present times and the issues of health care access. There is definitely more need for a socio-economic approach in the implementing the identified need rather than a preference for a legal declaration. The claim fails.

- (g) **Whether the violations of the rights of persons with disabilities under the Mental Disorders Act are nevertheless constitutionally justifiable?**

I find that this claim is unclear and does not establish a clear right to relief. It further entices me to make a general conclusion on whether the Mental Disorders Act in its entirety is unconstitutional. This claim is basically a repeat of what I have opined under the first claim and hence, I will adopt my earlier views. Suffice to state that the claim fails just like the first one.

(i) Whether the Petitioners' prayer for this Court to grant a supervisory order directing the 2nd Respondent to monitor enforcement of the judgment is permissible?

I take judicial notice of the 2nd Respondent's mandate and functions as stated in the Persons with Disabilities Act. It is trite that an entity can only exercise the authority that it possesses, failure to which it may be considered to be acting *ultra vires*. This claim is therefore, misconceived given that the rules of the Court prescribe ways in which its judgments can be enforced and do not depend on external assistance. Thus, I have no hesitation in disposing this claim for lack of merit.

In the result, I declare that section 5 of the Mental Health Disorders Act contravenes Article 23 of the Constitution and is null and void. I further, declare that all persons with mental disabilities

should be treated humanely at all health institutions. Any cruel or inhumane treatment inflicted at mental health facilities contravenes Article 15 of the Constitution. I also hold that mental patients should be allowed treatment at the primary health care level wherever possible.

In concluding, I wish to state that the Petition has raised a number of important issues regarding the plight of persons with mental disabilities. These issues are very valid however, they cannot be addressed by this judgment. They rather ignite the need for a thorough review of the Mental Disorders Act, which the authorities should seriously consider. I have considered that the issues raised in the Petition are of public interest and make no order as to costs.

Leave to appeal is granted.

Dated this 9th day of October, 2017


M. Mapani-Kawimbe
HIGH COURT JUDGE