

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

2017/ HP/ 204

**IN THE MATTER OF: THE PROTECTION OF FUNDAMENTAL RIGHTS
REGULATIONS, 1969**
AND

IN THE MATTER OF: ARTICLE 28 OF THE CONSTITUTION OF ZAMBIA
AND

**IN THE MATTER OF: ARTICLES 8, 13, 15, 16, 18, 23, AND 266 OF THE
CONSTITUTION OF ZAMBIA**
AND

**IN THE MATTER OF: THE MENTAL DISORDERS ACT, CHAPTER 305 OF THE LAWS
OF ZAMBIA**
AND

IN THE MATTER OF: THE PERSONS WITH DISABILITIES ACT, NO. 6 OF 2012
AND

IN THE MATTER BETWEEN:

**GORDON MADDOX MWEWA
MULIMA SANTA KASOTE
SYLVESTER KATONTOKA**
(Suing on his own behalf and as Executive Director of the
Mental Health Users Network)

**1ST PETITIONER
2ND PETITIONER**

3RD PETITIONER

AND

**ATTORNEY GENERAL
ZAMBIA AGENCY FOR PERSONS WITH DISABILITIES
DISABILITY RIGHTS WATCH**

**1ST RESPONDENT
2ND RESPONDENT
AMICUS CURIE**

PETITIONERS' SUBMISSIONS

Statutes

1. Constitution of Zambia, as amended by Constitution of Zambia (Amendment) Act No. 2 of 2016.
2. Persons with Disabilities Act, No. 6 of 2012.
3. Health Professions Act, No. 24 of 2009.
4. Mental Disorders Act, Chapter 305 of the Laws of Zambia.

International Instruments

1. African Charter on Human and Peoples' Rights.
2. International Covenant on Civil and Political Rights
3. United Nations Convention on the Rights of Persons with Disabilities.

Domestic Case law

1. *Attorney General v Roy Clarke* (2008) Z.R 38.
2. *Esan v Attorney General* (Appeal No. 96/2014) [2016] ZMSC 225 (9 December 2016).
3. *Feliya Kachasu v The Attorney-General* (1967) ZR 145
4. *Getrude Munyonsi and Another v Ngalabeka* [1999] ZMSC 24.
5. *Godfrey Miyanda v Attorney-General* (1983) Z.R. 78 (SC).
6. *In Re: Implied Amendment of the Constitution; In Re: Corrupt Practices Act* (1984) Z.R. 38 (H.C.).
7. *Kingaibe and Another v Attorney General* 2009/HL/86.
8. *Michael Sata v Post Newspapers Limited and Another* (HC) (1995) ZLR.
9. *Nkaka Chisanga Puta v Attorney General* (1983) Z.R. 114.
10. *Patel v The Attorney-General* (1968) ZR 99.
11. *Resident Doctors Association of Zambia and Others v Attorney-General* (2003) Z.R. 33
12. *Sara Longwe v Inter-Continental Hotels* 1992/HP765; (1993) 4 LRC 221.
13. *Zambia National Holdings Limited and Another v Attorney-General* (S.C.Z. Judgment No. 3 of 1994) [1994] ZMSC 30 (1 December 1994); (1994) S.J. 22 (S.C.)

Foreign Case Law

1. *Attorney General and Others v Tapela and Others* Civil Case No, CACGB-096-14 (26 August 015).
2. *Castel v De Greef* 1994 (4) SA 408 (C).
3. *David Sajjaaka Nalima v Rebecca Musoke* (Civil Appeal No. 12 of 1985) [1986] UGCA 3 (9 November 1986).
4. *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC).
5. *Ellen Street Estates Limited v Minister for Health* [1934] 1 KB 590, [1934] All ER Rep 385.
6. *Georgi Cenov* (unreported) found at <http://www.mdac.info/en/bulgaria>
7. *HL v the United Kingdom* No 45508/99 ECHR 2004.
8. *Huri-Laws v Nigeria*, African Commission on Human and Peoples' Rights, Comm No 225/98 (2000).

9. *In the Matter of Dameris L (NYS 2d-2012 WL)*
10. *Monim Elgak, Osman Hummeida and Amir Suliman v. the Federal Republic of Ethiopia, communication 379/09*
11. *Mukong v Cameroon Communication* No. 458/1991, UN Human Rights Committee (HRC), 21 July 1994.
12. *NIMR and Chapman (Pvt) Ltd and Others v Zimbabwe Electricity Supply Authority* (Case No. HC 31/05) [2005] ZWBHC 8 (27 January 2005).
13. *Olmstead v L.C.*, 527 U.S. 581 (1999).
14. *Purohit and Moore v the Gambia* (2003) AHRLR 96 (Communication 241/2001).
15. *R. v. Oakes [1986] 1 S.C.R. 103.*
16. *Schacter v Canada* [1992] 2 SCR 679
17. *Spilg and Mack & DITSHWANELO (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana, Communication 277/03*
18. *Stanev v Bulgaria* (Grand Chamber) Judgment of 17 January 2012, Application No. 36760/06.
19. *Victor Rosario Congo v Ecuador*, Case Report 63/99, Case 11.427, 13 April 1999.
20. *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 SCA.

Decisions of International Bodies

1. *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Human Rights Council, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013) (by Juan E. Méndez).
2. UN Committee on the Rights of Persons with Disabilities (CRPD), *General Comment No. 1 (2014), Article 12: Equal recognition before the law*, 19 May 2014, CRPD/C/GC/1.
3. UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2.
4. United Nations General Assembly. *Torture and other cruel, inhuman or degrading treatment or punishment: Note by the Secretary General*, 28 July 2008, A/63/175.
5. UN Convention on the Rights of Persons with Disabilities, Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities: General Comment on Article 12 (2009) available at <http://www.un.org/disabilities/convention/conventionfull.shtml>

Authored Books and Publications

1. Arlene S. Kanter. (2015) "*The Development of Disability Rights Under International Law: From Charity to Human Rights*".
2. Likando Kalaluka. (2013) "Towards an Effective Litigation Strategy of Disability Rights: The Zambian Experience." *African Disability Rights year Book*. Vol. 1.
3. Mental Health Users Network of Zambia and the Mental Disability Advocacy Centre (2014) "*Human Rights and Mental Health in Zambia*."

ARGUMENTS

IF IT MAY PLEASE this Honorable Court, these are the submissions on behalf of the Petitioners:

1. INTRODUCTION

- 1.1. On 8 February 2017, a Petition was filed in terms of article 28 of the Constitution of the Republic of Zambia, accompanied by supporting affidavits from the 1st, 2nd, and 3rd Petitioners.
- 1.2. The Petitioners allege that the **Mental Disorders Act, Chapter 305 of the Laws of Zambia** (Mental Disorders Act) is unconstitutional and contrary to the **Persons with Disabilities Act, No 6 of 2012** (Persons with Disabilities Act).
- 1.3. In particular, the Petitioners allege that the Mental Disorders Act unjustifiably violates their rights under the **Constitution of Zambia**, as amended by **Constitution of Zambia (Amendment) Act No .2 of 2016** (the Constitution), including:
 - a. the right to dignity under article 8;
 - b. the right to personal liberty under Article 13;

- c. the right to protection from torture and inhuman or degrading treatment under article 15;
- d. the protection from deprivation of property under article 16,
- e. the right to constitutional protection of the law under article 18; and
- f. the right to freedom from discrimination under articles 23 and 266.

1.4. The Petitioners pray for the Mental Disorders Act to be set aside and declared unconstitutional and invalid. They pray further for declaratory relief to secure the protection of persons with mental disabilities from unlawful detention and violations of their rights to informed consent to medical treatment and admission to healthcare facilities. The Petitioners pray for a further order to direct the 2nd Respondent (the Zambia Agency for Persons with Disabilities) to assist the Court in monitoring and reporting on the enforcement of the judgment.

1.5. In the alternative, the Petitioners pray for a declaration that the Mental Disorders Act has been tacitly repealed by the Persons with Disabilities Act.

3.1 The 1st Respondent does not oppose this application. The Petitioners have also demonstrated in their evidence, in paragraphs 30 to 33 of the 3rd Petitioner's Affidavit, that they have engaged the Government on several occasions to lobby for repeal and replacement of the mental Disorders Act with a law that conforms to the Constitution and the Persons with Disabilities Act and international human rights standards that Zambia has ratified.

1.6. The 2nd Respondent opposes only the relief sought in relation to it.

2. STATEMENT OF ISSUES

- 2.1. The Petitioners submit that the main questions for determination are as follows, as will be addressed in turn below:
- 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, habitation 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 to the above, 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 Second Respondent to monitor enforcement of the judgment is permissible.

3. INTERPRETIVE APPROACH

The Court's jurisdiction

- 3.2 The Petitioners submit that this Honourable Court has broad remedial powers to grant the reliefs prayed for, in accordance with the Constitution.
- 3.3 In terms of article 1 of the **Constitution of Zambia** as amended by the **Constitution of Zambia (Amendment) Act, No. 2 of 2016** (the Constitution), the Constitution is supreme and any other written law that is inconsistent with its provisions is void to the extent of the inconsistency.
- 3.4 Article 118 of the Constitution guides the courts in the exercise of its judicial authority, mandating that "justice shall be done to all, without discrimination" and that "the values and principles of this Constitution shall be promoted."
- 3.5 Article 28 of the Constitution, in terms of which this Petition is made, empowers the High 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."
- 3.6 The Supreme Court has interpreted article 28 of the Constitution to empower the High Court "to make any order" and that "an aggrieved party is also at liberty to seek remedies for tortuous injuries arising from such breach" of constitutional rights. This interpretation was given in the case of ***Resident Doctors Association of Zambia and Others v Attorney-General (2003) Z.R. 33.***

Interpretation of human rights

3.7 The Supreme Court has affirmed that a “generous and purposive approach” must be adopted when interpreting rights in the Bill of Rights, “so as to confer on a person the full measure in the enjoyment of the rights”.

Resident Doctors Association of Zambia and Others v Attorney-General (2003) Z.R. 33.

3.8 The Petitioners submit that international human rights law and jurisprudence from foreign courts, though not binding, is of interpretive and persuasive value in this Court’s determination of the Petition.

3.9 Of particular importance is the **Convention on the Rights of Persons with Disabilities (CRPD)**, which Zambia ratified in February 2010. The Persons with Disabilities Act was enacted with the intent of domesticating the normative standards, principles and provisions of the CRPD into Zambian national law. As such, it is submitted that the provisions and authoritative interpretations of the CRPD by the Committee on the Rights of Persons with Disabilities (CRPD Committee) and courts of other jurisdictions have particular persuasive value for the rights at issue.

3.10 Another important international instrument is the African Charter on Human and Peoples’ Rights (the African Charter). Zambia ratified the African Charter on 10 January 1984.

3.11 Zambian courts have affirmed that international and regional instruments to which Zambia is a party may be used to interpret domestic law, particularly in interpreting constitutional and statutory human rights obligations. This position has been stated and affirmed by the courts in the following decisions: ***Attorney General v Roy Clarke (2008) Z.R. 38, Sara Longwe v Intercontinental Hotels (1993) 4 LRC 221; Miyanda v Attorney-***

***General*, Supreme Court judgment 22 of 1983; *Nkaka Chisanga Puta v Attorney General* (1983) Z.R. 114; *Patel v The Attorney-General* (1968) ZR 99; and *Feliya Kachasu v The Attorney-General* (1967) ZR 145.**

- 3.12 Foreign jurisprudence may also be considered by the courts, particularly when determining novel issues. The High Court has further affirmed that “the opinions of other senior courts in the various jurisdictions dealing with a similar problem tend to have a persuasive value”.

***Michael Sata v Post Newspapers Limited and Another* (HC) (1995) ZLR.**

4. THE AIM AND PURPOSE OF THE MENTAL DISORDERS ACT

- 4.1 The Petitioners submit that the aim and purpose of the Mental Disorders Act is unconstitutional and therefore invalid in its entirety.

- 4.2 In ***Schacter v Canada* [1992] 2 SCR 679**, the Supreme Court of Canada held:

“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.”

- 4.3 The purpose of the Mental Disorders Act is evident in its long title which provides:

“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.”

- 4.4 Read with the impact of the provisions elaborated below, the Petitioners submit that the Mental Disorders Act aims to control the bodies and assets of persons with disabilities in a manner to enforce social exclusion. The extensive use of terminology such as “detention”, and “control” in the Act infers a punitive intent, based on an archaic understanding of persons with mental disabilities as threatening and as objects, not persons equal in human dignity.
- 4.5 In the affidavit of the 3rd Petitioner, Mr. Sylvester Katontoka, he describes the Mental Disorders Act as creating “an outdated and oppressive system of treatment and care for persons with psychosocial disabilities.”
- 4.6 The Petitioners submit further that the Constitution, the Persons with Disabilities Act 2012 and the CRPD, which the Persons with Disabilities Act seeks to domesticate, are in stark contrast to this approach.
- 4.6.1 **Article 23(1)** of the Constitution states that “no law shall make any provision that is discriminatory either in itself or its effect”.
- 4.6.2 **Article 266** of the Constitution expressly includes “disability” as a prohibited ground of discrimination. “Disability” is defined in the same section as a–

“permanent physical, mental, intellectual or sensory impairment that alone, or in combination with social or environmental barriers, hinders the ability of a person to fully or effectively participate in an

activity or perform a function as specified in this Constitution or as prescribed”.

4.6.3 The national values and principles in **article 8** of the Constitution, which are to be applied in the interpretation and application of the Constitution and other legislation in terms of **article 9**, further affirm the recognition of human dignity, equity, social justice, equality and non-discrimination.

4.6.4 The right to dignity for persons with disabilities is provided under **section 4(a) of the Persons with Disabilities Act** which mirrors article 3(a) of the CRPD and provides:

“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.”

4.6.5 The long title of the Persons with Disabilities Act provides:

“An Act to ... promote the participation of persons with disabilities with equal opportunities in the civil, political, economic social and cultural spheres; provide for mainstreaming disability issues as an integral part of national policies and strategies of sustainable development; incorporate a gender perspective in the promotion of the full enjoyment of human rights and fundamental freedoms by persons with disabilities; ensure accessibility by persons with disabilities to the physical, social economic and cultural environment and to health, education information, communication and technology; ... provide for the domestication of the Convention on the Rights of Persons with Disabilities and its Optional Protocol and

other international instruments on persons with disabilities to which Zambia is a party in order to promote protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities and to promote respect for their inherent dignity”.

- 4.7 The Persons with Disabilities Act defines “disability” in section 2 to include “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.”
- 4.8 The Petitioners submit that the definition of disability in article 266 of the Constitution, read with the above constitutional and legislative provisions, affirms a human-rights-based approach to disability that recognizes the inherent human dignity of all persons with disabilities. The Persons with Disabilities Act seeks to promote inclusion and equal participation in all spheres of life for persons with disabilities, respect for human dignity, and equality before the law. The Mental Disorders Act, as applied in the provisions highlighted below, is wholly repugnant to these constitutional and legislative provisions in aim, purpose and application.

5. DEROGATORY LANGUAGE

- 5.1 The Petitioners submit that the Mental Disorders Act unlawfully discriminates against persons with mental disabilities by using derogatory language when describing and classifying persons with mental disabilities in its provisions.

- 5.2 Section 5 of the Mental Disorders Act refers to persons with mental disabilities as mentally “disordered” or “defective” persons. It proceeds to classify persons with mental disabilities using the following derogatory terms:
- a. Idiot;
 - b. Imbecile;
 - c. Feeble-minded; and
 - d. Moral imbecile.
- 5.3 **Article 23** of the Constitution of Zambia protects every person from discrimination, as stated above. **Article 266** of the Constitution 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.
- 5.4 **Section 4(g) of the Persons with Disabilities Act** provides that persons with disabilities are entitled to “respect for difference and acceptance of persons with disabilities as part of human diversity and humanity.” The provision is further augmented by **section 6(3)**, which states that “a person shall not call a person with a disability any derogatory name because of the disability of that person.”
- 5.5 Discrimination against persons with disabilities is explicitly prohibited by the Article 5(2) of the CRPD and according to article 4(1) (b) of CRPD, States Parties to the Convention are required to modify and abolish existing laws that discriminate against persons with disabilities.

- 5.6 In ***Purohit and Moore v the Gambia (2003) AHRLR 96 (Communication 241/2001)*** at para 59, 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."
- 5.7 Applying the interpretation approach adopted by the Zambian Courts, decisions of the African Court on Human and Peoples' Rights have persuasive force in Zambian Courts as demonstrated by case authorities cited above.
- 5.8 Other national courts have found the use of language such as "idiots" and "imbeciles" to be derogatory. In ***Centre for Health Human Rights and Development and Another. v. Attorney General, Petition 64 of 2011***, the Uganda Constitutional Court found the use of such language in article 130 of the Ugandan Penal Code to be dehumanizing and to detract from the dignity that should be accorded to people with disabilities. It held that this language is discriminatory and unconstitutional. In so doing, the court relied on the principles enshrined 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 Constitution of Uganda.
- 5.9 Further, the derogatory and stigmatizing language is contrary to the standards of human dignity required by the CRPD (Article 3(1) (and recitals (a), (h) and (y))).
- 5.10 The above terms used in the Mental Disorders Act, including the short title of the Act that infers people with mental disabilities are "disordered", are derogatory in meaning and have the effect of lowering the status of persons

with mental disabilities contrary to constitutional protections of dignity, equality and non-discrimination, the provisions of the Persons with Disabilities Act and the spirit and purport of the Constitution and the Persons with Disabilities Act.

- 5.11 The petitioner therefore submit that this Honourable Court should find provisions of the Mental Disorders Act which brand persons with disabilities as “disordered”, “defective”, “imbecile”, “feeble minded” and “moral imbecile is dehumanising and a violation of their right to human dignity and non-discrimination contrary to provisions of article 8, 23 and 266 of the Constitution of Zambia.

6. DETENTION AND INVOLUNTARY ADMISSION

- 6.1 By permitting arrest, detention, and forced treatment of persons with mental disabilities, on the ground of their disability, the Petitioners submit that the Mental Disorders Act is unconstitutional and unlawful both as a matter of domestic law and international human rights law.
- 6.2 **Arlene S. Kanter** in her book “*The Development of Disability Rights Under International Law: From Charity to Human Rights*” on **pages 239-241**, states, with regards to the history of guardianship laws such as the Mental Disorders Act and consequential actions of indiscriminate arrest, detention and other actions taken in the “best interest” of the person with a mental disability that:

Guardianship laws were developed to protect people who are deemed by their societies as unable to protect themselves. In English law, guardianship first appeared in the statute *De Praerogativa Regis*, which recognized guardianship as a duty of the sovereign to protect and care for the person and property of “idiots” and “lunatics”... Whereas a state may act pursuant to its *parens patriae* power to protect the welfare and

safety of its citizens, a State's police power may be used only to punish those who act to the harm or detriment of others....Because the exercise of the police powers entails restrictions on physical liberty, various procedural protections are required to ensure against the mistaken punishment of "innocent" people in democratic countries today. Such protections include the right to counsel, the right to cross examination, the right to a trial by jury [or judge], the right against self-incrimination. However, such procedural protections have not been guaranteed to persons subject to guardianships. Although under international law, even before the CRPD, some sort of a judicial hearing would be required prior to the issuance of an order of civil commitment in some countries, such procedural due process safeguards have not been required in the context of guardianship proceedings. Even today in some countries, a person with an intellectual or psychosocial disability may find himself in front of a judge trying to explain why he or she is capable of making certain decisions or engaging in certain transactions. If the court determines that the person lacks the ability to make such decisions in his or her own best interest, the court will order the appointment of a guardian to make some or all decisions for the person. In that way the person is denied not only the right to make decisions about his or her own life, but also the right to ask for help in making such decisions. Once a person is declared "incompetent" or lacking in legal capacity, the person is prohibited from acting as the agent of his or her own life.

Such a system is not desirable in a society that seeks to uphold democratic principles and recognises the right to human dignity.

The Legal Regime

- 6.3 Section 6 of the Mental Disorders Act 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.
- 6.4 Section 8 of the Act empowers any officer to apprehend persons presumed to be “mentally disordered or defective” without a warrant and to convey them to a hospital, prison, or other place for observation. The objective of this provision is to place the apprehended person under “care and control”.

Such a person’s ongoing detention is required to be sustained in terms of section 9 through re-authorisation by a magistrate.

This process is subject to a section 10 inquiry which does not require the person subject to detention to be present, or give that person any right to make representations, even if the magistrate is empowered to “interrogate” the person should the magistrate elect to do so.

- 6.5 Section 31 empowers members of the public to petition a court to enquire into a person’s mental condition and empowers the court to “make such order as it deems fit”. The person subject to the order is not required to be present or permitted the right to make representations.
- 6.6 In terms of section 11, a magistrate is obliged and 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. These factors include if the person is “not under proper, care, treatment or control”, if the person has “acted in a manner offensive to public decency” or if “any person having care, treatment or control of the person consents.”

Persons subject to adjudication orders are, through section 13 of the Act, subjected to “control orders” for their “control, care or detention”.

The person subject to adjudication and control orders is not required to be present or permitted the right to make representations.

There is no provision for mandatory regular review of control orders nor any explicit procedures to initiate a review of the control order by a person subject to the order, but for the limited right of appeal to the High Court in terms of section 30.

- 6.7 Persons subject to control and adjudication orders can be removed from the Country on issue of a warrant by the Minister in terms of section 14. Restrictions on the person’s return to Zambia are stipulated in sections 16, and 22, which include a requirement to be subjected to detention and a fresh inquiry process if re-entering the country at any time. Failure to report to the relevant authorities on re-entering the Country is an offence under section 27.
- 6.8 In order to be released from detention and nullify any adjudication and control orders, section 20 requires two medical practitioners to issue a “certificate of sanity”, following which a magistrate shall grant the person’s discharge.
- 6.9 Persons subject to control and adjudication orders may be released “at large on trial” for a maximum of 12 months at a time and subject to conditions at the magistrate’s discretion under section 21 of the Act. Such an order may only be made if the magistrate is satisfied that it is “in the best interests of the patient” and “there is no likelihood of danger to the public”. Deemed discharge occurs if a person is at large for a continuous period of 12 months.

6.10 Section 26 establishes an offence for assisting or permitting a patient to escape from a place of detention. Section 28 creates an offence for failure to comply with any conditions contained in orders under the Act.

Evidence of the Application of the Mental Disorders Act

6.11 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 above provisions, the evidence before this Court further illustrates that even the minimal procedural protections afforded by the Act are seldom upheld:

6.11.1 The 1st Petitioner, Gordon Maddox Mwewa, attests that on every occasion he was detained during a relapse of his mental health issue. He avers that the conditions at Chainama Hills Hospital were “very depressing”, the meals were “insufficient and unbalanced”, and the rooms overcrowded and unsanitary.

When seeking to escape these conditions, he was arrested by police and re-admitted against his consent. Mr. Mwewa states that he has never “been made to appear before a magistrate to make an order” for his detention.

Mr. Mwewa attests to his alienation from his family due to their power under the Act to report him to the police for involuntary admission into Chainama every time they differ.

Mr. Mwewa describes that as a result of these periods of detention from an early age, the “depressing and dehumansing” conditions, and the “lack of

educational and rehabilitation facilities at the institutions” he has lost his motivation to write and sing as he did before.

6.11.2 The 2nd Petitioner, Mulima Santa Kasote, describes how he was arrested and involuntarily admitted to Chainama Hills Hospital following the loss of a number of people close to him as a child. He describes being arrested by armed police officers and interrogated.

Mr. Kasote further attests that he was detained at Chainama Hills Hospital without sanction of a magistrate.

He describes the conditions at Chainama Hills Hospital as including being physically assaulted by attendants and patients, being “locked up and isolated” after this assault, and being denied medication when in pain.

6.11.3 The 3rd Petitioner, Sylvester Katontoka, sues on his own behalf and on behalf of the Mental Health Users Network of Zambia (MHUNZA).

Mr. Katontoka avers that he has at times been arrested and detained by police under the Mental Disorders Act on the grounds that he is “a mentally disordered person who is a danger to society and incapable of taking care of [himself]” when this is not in fact the case. He attests to conditions he observed during his treatment at Chainama Hills Hospital. He describes witnessing “wards possessed like jail-structures”, “seclusion rooms where patients were left to lie on the ice-cold concrete floor, sometimes covered with urine and feces and without anything to use as a covering.”

Mr. Katontoka describes “very dirty wards with overflowing toilets, broken doors and windows, torn uniforms and at times patients were left naked.” He attests that at times there would be insufficient food in the wards.

Mr. Katontoka states that the impact of these experiences as a patient was “too harsh” and turned his life upside down, leading to his social isolation.

6.11.4 Mr. Katontoka exhibits a document to his affidavit, a publication from July 2014, published by MHUNZA and the Mental Disability Advocacy Centre that shows systemic violations of persons with mental disabilities’ human rights under the precepts of the Mental Disorders Act: **Mental Health Users Network of Zambia and the Mental Disability Advocacy Centre (2014) *Human Rights and Mental Health in Zambia*** (MHUNZA Report).

The MHUNZA Report is based on monitoring missions that included visits to five psychiatric hospitals in Zambia and the taking of testimonies of key persons, including persons with mental disabilities. **(MHUNZA Report: Page 9, 13).**

The MHUNZA Report documents the effect of the legal system established by the Mental Disorders Act, focusing on the control and detention of persons with mental disabilities. **(MHUNZA Report: Page 9).**

The MHUNZA Report documents the systemic use of arbitrary detention. Where detention is on the basis of an order under the Mental Disorders Act, it is granted on the basis that the person is “apparently mentally disordered or defective”. During the first 14 days of detention, medical practitioners are required to report back to the court on whether the person is “mentally normal” or “a mentally disordered or defective person”. One interviewee stated, “I live with this all the time. If I annoy my brother he could go to the magistrates. Then I’m back in hospital”. Judicial detention orders are exceedingly easy to obtain. Continuation of detention is exclusively based

on the staff's assessment of the person's disability and whether they are "well enough". (**MHUNZA Report: Page 43 - 44**).

The Report also documents extensive use of forced sedation, and conditions of overcrowding, endemic violence and abuse, inadequate food and unsanitary conditions in psychiatric units. Detained persons are subjected to the use of chemical restraints (the forced administration of psychiatric drugs to sedate and restrain) as well as the use of physical restraints, including the use of handcuffs, chains and rope. (**MUNZA Report: Page 36-46**).

Enforced seclusion is implemented in unsanitary conditions with no ventilation, drainage or facilities for bathing, urination or defecation. Persons in seclusion are described as relying on other patients to access food and water. (**MHUNZA Report: Page 45-46**).

There is no review or appeal process for those subjected to seclusion and restraints, no policies or operational guidance on their use, no recording or documentation, and no independent scrutiny. (**MHUNZA Report: Page 45-46**).

As similarly attested to by the 1st and 2nd Petitioners, it is important to note that the MHUNZA Report states that in closed wards, "most patients were detained without any legal authority, but expressed their desire to leave". (**MHUNZA Report: Page 42**). Despite the minimal procedural guarantees afforded in the Mental Disorders Act, the MHUNZA Report states that the process is systemically not implemented:

“A magistrate officer told monitors that she had never seen any such assessment from doctors about persons subject to judicial detention orders. Staff at the hospitals confirmed this.”

(MHUNZA Report: Page 44).

The MHUNZA Report states that “Zambia’s psychiatric hospitals are breeding grounds for abuse.” **(MHUNZA Report: Page 11).**

Unconstitutionality

6.12 The Petitioners submit that the detention of persons with mental disabilities in terms of the Mental Disorders Act violates the constitutional rights to dignity, personal liberty, the prohibition of torture and cruel or inhuman and degrading treatment, to constitutional protection of the law, and the freedom from discrimination.

Article 8: Dignity

6.13 The Petitioners’ submissions on the content of the right to dignity are elaborated above, with respect to article 8 of the Constitution and section 4 of the Persons with Disabilities Act, read compatibly with African and international human rights standards.

6.14 The **African Charter** provides under **article 4**:

“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.”

6.15 Under **article 5 the African Charter** further provides:

“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.”

6.16 In ***Purohit and Another v The Gambia (2003) AHRLR 96 (Communication 241/2001)***, 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.”

The African Commission noted that “personal suffering and indignity can take many forms, and will depend on the particular circumstances” of each case.

6.17 In ***Kingaibe and Another v Attorney General 2009/HL/86***, Justice Muyovwe referred to the right to dignity in the African Charter and stated: “Human dignity and personal privacy belong to every person whether living or dying”.

6.18 In ***Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC)***, 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 analysing justifiable limitations on rights. It is in addition a justiciable and enforceable right that must be protected and respected.

6.19 The detention of people with mental disabilities on the basis of their disability under the Mental Disorders Act fundamentally violates their right to dignity as human beings. In addition, detention in conditions such as those described and experienced by the petitioners also strips them and others so detained of their human dignity.

Article 13: Personal liberty

6.20 Article 13 of the Constitution provides for the protection of the right to personal liberty. It is noted that subsection 1(h) provides for an exception to the right not to be deprived of one's liberty:

“(1) No person shall be deprived of his personal liberty except as may be authorised 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 this care or treatment or the protection of the community”.

6.21 The Petitioners submit that the legal regime established under the Mental Disorders Act, and its application as described in the uncontested evidence, does not fall within the lawful limitation of the right to liberty of the person under article 13(1)(h) for the following reasons:

6.21.1 Article 13(1) permits deviation from the right to personal liberty “as may be authorised by law”. The Petitioners submit that the Mental Disorders Act is not

valid “law” in terms of which the exception may operate due to its being manifestly unjust, contrary to other provisions of the Constitution and in any case impliedly repealed by the Persons with Disabilities Act.

6.21.2 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 legal certainty is a necessary precondition whenever a law seeks to impose a liability or derogate a person’s right to liberty.

6.21.3 The article 13 (1) (h) exception must be read, since 2016, together with the inclusion of disability as an express ground of discrimination in the constitutional amendment as well as the definition of “disability”.

The petitioners submit that these provisions require an interpretation providing for deprivation of liberty of the persons mentioned only when the law authorising the deprivation is in full compliance with the protection against discrimination and upholds human dignity, amongst other constitutional provisions. A law which therefore provides for the deprivation of liberty of persons with mental disabilities in a manner that denies equality before the law, lacks legal certainty, is arbitrary, irrational or overbroad, or fails to adhere to basic procedural rights (such as the Mental Disorders Act) is therefore no valid exception to Article 13.

6.22 The European Court of Human Rights has held that involuntary hospitalization or institutionalization constitutes detention because “the health care professionals treating and managing the applicant exercised complete and effective control over his care and movements”.

HL v the United Kingdom No 45508/99 ECHR 2004 at para 91.

6.23 While the Mental Disorders Act includes references to “care”, there can be no doubt that the Act employs a system of “detention”, making explicit use of the term, and including providing for detention of persons with mental disabilities in prisons. This system of detention is justified explicitly on the basis that a person is “mentally disordered or defective”.

6.24 In contrast, the Persons with Disabilities Act envisions independent living, community-based care, and social integration for persons with disabilities as well as treatment based on informed consent, without exception. See for example **sections 20-21, 27, 33, 34** as well as **section 8** recognising legal capacity. Amongst others, the following provisions are notable:

6.24.1 **Section 7 of the Persons with Disabilities Act** guarantees the right to family life, the right not to be deprived of the right to choose a place of residence, and to participate in social, political, economic, creative or recreational activities.

6.24.2 **Section 4 of the Persons with Disabilities Act** further establishes “independent living” and “full and effective participation and inclusion in society” as principles to apply to persons with disabilities.

6.24.3 **Section 34** states that the “Ministry shall ensure that persons with disabilities are rehabilitated in their communities to foster their integration”.

6.25 The United Nations Committee on the Rights of Persons with Disabilities has stated that the detention of persons with disabilities violates article 12 of the CRPD (equal recognition before the law) and article 14 (liberty and security of the person):

“The denial of the legal capacity of persons with disabilities and their detention in institutions against their will, either without their consent or with the consent of a substitute decision-maker, is an ongoing problem. This practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention.”

UN Committee on the Rights of Persons with Disabilities (CRPD), *General comment No. 1 (2014), Article 12: Equal recognition before the law, 19 May 2014, CRPD/C/GC/1 at para 1 and 11.*

6.26 **Paragraph 6 of the CRPD Committee’s Guidelines on article 14** clearly states that there is no exception whereby persons may be detained on the grounds of their actual or perceived impairment. Where disability is a factor taken into account in permitting detention it is incompatible with article 14, discriminatory and amounts to arbitrary deprivation of liberty, even where there are also other reasons for detention, including that the person is deemed dangerous to themselves or to others.

UN Committee on the Rights of Persons with Disabilities (CRPD), *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: the right to liberty and security of persons with disabilities, September 2015.*

6.27 Further, **article 6 of the African Charter on Human and Peoples Rights** guarantees to every person the right to liberty and security of his person and that no person may be arbitrarily arrested or detained.

6.28 The South African Constitutional Court in ***De Vos N.O and Others v Minister of Justice and Constitutional Development and Others (CCT 150/14) [2015] ZACC 21; 2015 (2) SACR 217 (CC); 2015 (9) BCLR 1026 (CC)*** found section 77 (6) (a) (ii) of the Criminal Procedure Act to be inconsistent

with the Constitution and invalid as it allowed for arbitrary arrest and detention. Section 77 states as follows:

“(ii) where the court finds that the accused has committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence—

(aa) be admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act 17 of 2002;

The court held that the second provision is constitutionally invalid as it prescribes that an accused person who has committed no act or a minor offence be institutionalized.

- 6.26 Deprivation of liberty on the basis of disability has been strongly linked to violations of **Article 19 of the CRPD** which recognises the right of all persons with disabilities to live in the community with choices equal to others. **The UN Guidelines on Article 14 in paragraph 9** states that:

Enjoyment of the right to liberty and security of the person is central to the implementation of article 19 on the right to live independently and be included in the community. This Committee has stressed this relationship with article 19. It has expressed its concern about the institutionalization of persons with disabilities and the lack of support services in the community,¹ and it has recommended implementing support services and effective deinstitutionalization strategies in consultation with organizations of persons with disabilities

Article 19 of CRPD has been enshrined in the African Context through Article 18 of the African Charter. **Article 18 of the African Charter** provides that the family shall be natural unit of society which must be protected by the state. By arbitrarily depriving persons with mental disability their liberty, the state also denies them the right to family and protection of the same.

- 6.27 Deprivation of liberty under the provisions of the Mental Disorders Act should be considered to amount to detention under the law. Such detention is unconstitutional and an unlawful deprivation of personal liberty because the relevant provisions of the Mental Disorders Act do not constitute valid “law” in terms of Article 13 of the Constitution, *inter alia*, because they permit detention on the basis of disability. Further, it conflicts with the aim and purpose of the Persons with Disabilities Act and the CRPD where the emphasis is on the protection of the right to independent living, community-based care and social integration. Pursuant to provisions of the Persons with Disabilities Act, the Ministry is required to ensure that persons with disabilities are rehabilitated in their communities.

Article 15: Torture and inhuman and degrading or other like treatment

- 6.28 **Article 15 of the Constitution** provides: “No person shall be subjected to torture, or to inhuman or degrading punishment or other like treatment.”
- 6.29 The provision is universal in its application to all persons and contains no internal justifications for permissible exceptions to the prohibition. The Petitioners submit that the language of the provision is in congruence with the understanding of the prohibition under international law and as interpreted in other jurisdictions as a right that is subject to no permissible limitations or justifications, regardless of economic conditions.

See, for example, **UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties, 24***

January 2008, CAT/C/GC/2, at para 5; *Huri-Laws v Nigeria*, African Commission on Human and Peoples' Rights, Comm No 225/98 (2000); *Mukong v Cameroon Communication No. 458/1991*, UN Human Rights Committee (HRC), 21 July 1994, at para 9.3.

6.30 The United Nations Special Rapporteur on Torture (**United Nations General Assembly. *Torture and other cruel, inhuman or degrading treatment or punishment: Note by the Secretary General, 28 July 2008, A/63/175, para 48-50***) has provided useful guidance on the prohibition against torture, inhuman and degrading treatment as applied to persons with disabilities:

“The definition of torture in the Convention against Torture expressly proscribes acts of physical and mental suffering committed against persons for reasons of discrimination of any kind. ...

Furthermore, the requirement of intent in article 1 of the Convention against Torture can be effectively implied where a person has been discriminated against on the basis of disability. This is particularly relevant in the context of medical treatment of persons with disabilities, where serious violations and discrimination against persons with disabilities may be masked as “good intentions” on the part of health professionals. Purely negligent conduct lacks the intent required under article 1, and may constitute ill-treatment if it leads to severe pain and suffering.

Torture, as the most serious violation of the human right to personal integrity and dignity, presupposes a situation of powerlessness, whereby the victim is under the total control of another person. Persons with disabilities often find themselves in such situations, for instance when they are deprived of their liberty in prisons or other places, or when they are

under the control of their caregivers or legal guardians. In a given context, the particular disability of an individual may render him or her more likely to be in a dependent situation and make him or her an easier target of abuse. However, it is often circumstances external to the individual that render them “powerless”, such as when one’s exercise of decision-making and legal capacity is taken away by discriminatory laws or practices and given to others.”

The Special Rapporteur has repeatedly affirmed an “absolute ban” on the use of restraints and seclusion on persons with mental disabilities, stating that the imposition of solitary confinement, of any duration, on persons with mental disabilities may constitute torture, cruel, inhuman or degrading treatment.

Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Human Rights Council, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013) (by Juan E. Méndez) at para 63.

- 6.31 **Article 16 of the African Charter on Human and Peoples Rights** obligates states to provide the highest attainable standards of physical and mental health. Failure to provide the same can amount to acts of torture as observed by the Commission in ***Monim Elgak, Osman Hummeida and Amir Suliman v. the Federal Republic of Ethiopia, communication 379/09:***

The Commission observes that according to its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, the right to health includes the right to control one’s health and body and the right to be free from interferences, such as the right to be free from torture and other forms of ill-treatment. ... The Commission notes, as established above, that the Complainants were subjected to torture and other forms of ill-treatment while in NISS detention which resulted to physical and psychological harm. The Commission

considers that this was an unjustified interference with the Complainants' right to health...

6.32 Article 15 of the CRPD states:

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.

6.33 In ***Getrude Munyonsi and Another v Ngalabeka* [1999] ZMSC 24**, the Supreme Court held that a plaintiff who had endured conditions of short detention which included being detained in a filthy cell with a blocked toilet with urine and human excrement on the floor and being denied food was subjected to cruel and inhuman treatment.

6.34 In ***Victor Rosario Congo v Ecuador, Case Report 63/99, Case 11.427, 13 April 1999***, the Inter-American Commission on Human Rights held that leaving a man with mental disabilities in isolation and unable to satisfy his basic needs violated the right to dignity and the prohibition against inhuman and degrading treatment. The Commission held that with regards to people with mental disabilities, "isolation in itself can constitute inhuman treatment."

6.35 The Mental Disorders Act violates the above standards and rights by permitting such treatment. Rather than prohibiting these types of torture and inhuman and degrading treatment, such as seclusion, forced and over-medication, physical restraint and detention in inhuman and degrading conditions, as experienced and witnessed by the petitioners and averred to in their affidavits, the Mental Disorders Act both facilitates and endorses such treatment.

6.36 Detention in conditions such as those described and experienced by the petitioners thus amounts to a violation of the right to freedom from torture, and inhuman and degrading treatment, especially when that detention is unlawful for the reasons set out above. The work of the UN Special Rapporteur makes clear that the use of seclusion and restraint of people with mental disabilities is not a form of medical treatment, but rather a form of torture and inhuman and degrading treatment. Rather than prohibiting these types of torture and inhuman and degrading treatment, the Mental Disorders Act through its legal resume of “detention” and “control” both facilitates and endorses the use of physical restraints such as handcuffs, chains and rope, of forced sedation and chemical restraint (forced administration of psychiatric drugs to sedate and restrain), of seclusion and solitary confinement, and of detention in unsanitary, dangerous and degrading conditions.

Article 18: Constitutional protection of the law

6.37 The Petitioners submit that the Mental Disorders Act in principle and practice denies persons with mental disabilities Constitutional protection of the law and denies persons with mental disabilities their legal capacity contrary to the Constitution and the Persons with Disabilities Act.

6.38 **Article 18 of the Constitution** guarantees every person the right to secure protection of the law. In particular, **article 18(9) of the Constitution** states:

“Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.”

- 6.39 Based on the provisions of Article 18(9) of the Constitution, it is evident that any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation must:
- a. be established by law;
 - b. Be independent and impartial; and
 - c. Accord the case a fair hearing within a reasonable time.

6.40 Section 8 of the Persons with Disabilities Act contains provisions that interpret the right to equal protection of the law and safeguards for a fair hearing in relation to persons with disabilities. **Section 8 of the Persons with Disabilities Act** reads:

- (1) A person with disability shall enjoy legal capacity on an equal basis with others in all aspects of life.
- (2) The judicature shall take necessary measures to ensure that persons with disabilities have equal and effective protection and equal benefit of the law without discrimination.
- (3) Where a person with disability is a party in any legal proceedings, the adjudicating body shall take into account the condition of the person with disability and provide procedural and other appropriate facilities to enable the person to access and participate effectively in the proceedings.

Section 8 of the Persons with Disabilities Act imposes an obligation on all adjudicators to take necessary steps to ensure that persons with disabilities effectively participate in legal proceedings that affect them. The above section provides for the right to legal capacity and equal recognition before the law. In so doing, the Act has domesticated **article 12 of the CRPD**.

6.33 **Article 12 CRPD** (equal recognition before the law) provides:

1. States Parties reaffirm that persons with disabilities have the right to

recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

6.29 Article 12 of the CRPD affirms that all persons with disabilities have full legal capacity on an equal basis with other persons. The right to legal capacity is understood under the CRPD as part of the right to equality before the law and reaffirms the right of persons with disabilities to be recognized as persons before the law.

**UN Committee on the Rights of Persons with Disabilities (CRPD),
General comment No. 1 (2014), Article 12: Equal recognition
before the law, 19 May 2014, CRPD/C/GC/1 at para 1 and 11.**

6.34 In order for one to enjoy equal protection of the law they must be able to exercise their legal capacity. Article 12 thus sets a standard that empowers persons with mental disabilities to enjoy their legal capacity on an equal basis with others.

6.35 Legal Capacity differs from Mental Capacity. Legal Capacity is often confused with Mental Capacity and yet the two are not the same. In a publication by **Amnesty International** entitled "**A Citizens' Jury on Legal Capacity Law**" the two concepts are distinguished as follows:

"Mental capacity assesses people's ability to make decisions based on their ability to understand and retain information and to use it in reaching a decision...Legal Capacity is the law's recognition of the validity of a person's choices."

.....

“So the CRPD makes a clear distinction, separating this idea of mental capacity’ and instead focusses on the fact that everyone has ‘legal capacity’ that is, an ability to exercise their rights. Article 12 in particular focusses on the idea of respecting a person’s choices and the need to restore decision-making autonomy to them. It affirms that no one ever losses their legal capacity even if their mental capacity is impaired. It ensures people can access the right support to allow them to make their own decisions. [page 18]

6.36 The Petitioners submit that under the Mental Disorders Act, a lack of legal capacity is deemed to flow automatically from a finding that a person is “mentally disordered or defective”. There is, therefore, a conflation of mental capacity and legal capacity contrary to the terms of Article 12 CRPD and Section 8 of the Persons with Disabilities Act. Legal capacity must be retained irrespective of disability or mental capacity.

6.37 **Arlene S. Kanter** in her book “*The Development of Disability Rights Under International Law: From Charity to Human Rights*” writes, in respect of Article 12 as follows:

“Article 12 [of CRPD]...offers a new mode of support to replace the more traditional substitute decision-making process that has been enshrined within guardianship laws for decades in many countries throughout the world. Although some people argue that Article 12 does not specifically require the abolition of guardianship laws, there is now a broad consensus that Article 12 contemplates the end of guardianship laws as we know them. Article 12 changes the focus of legal capacity decisions from a medical model of disability that addresses the deficit of the individual to a social model that seeks to offer support to a person in exercising his or her capacity on an equal basis with others. [Pages 235-236]

6.38 **The United Nations CRPD Ad hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities** also commented on Article 12. It stated in its **General Comment** on Article 12 that:

“The Convention’s human rights-based model of disability implies the shift from a substitute decision-making paradigm to the one that is based in supported decision-making...Historically, persons with disabilities have been discriminatorily denied their right to legal capacity in many areas via substitute decision-making regimes such as guardianship and others. These practices need to be abolished to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.”

6.39 Laws that seek to limit legal capacity of person have their origins in prejudices that certain minority groups have historically been subject to. To this effect, **Arlene S. Kanter argues at pages 238-239** that:

“...Countries have enacted laws or policies that deprive a group of people of their right to equality and participation by labelling them as incompetent or lacking the ability to protect their own best interests. Slaves were routinely denied legal capacity in Ancient Roman times and, as recently as the 19th C, in the US and elsewhere. Women, too, until relatively recently, were denied the right to vote, own property, inherit or have sole custody of their own children in many countries. This denial of legal capacity was based on the view, that women were inherently unequal to men and that such inequality warranted a different and inferior legal position. In addition, women were considered to be in need of protection from harm; Subjugating them to their fathers or husband’s will was considered a way to protect them from harm...For similar reasons related to prejudice and parentalism,

many legal systems throughout history have denied legal capacity to people based on their disability.”

6.40 A number of cases in different jurisdictions have determined that involuntary placement of persons with disabilities in institutions violates the liberties and legal capacity of persons with disabilities.

6.41 In ***Stanev v Bulgaria (Grand Chamber) Judgment of 17 January 2012, Application No. 36760/06*** the European Court of Human Rights held that the involuntary placement of a person with a disability in an institution, on the authority of a guardian, and without access to an effective remedy, constitutes a deprivation of the right to respect for one’s private and family life and the right to a court. The Court held further that the need for housing and social services could not be used to justify a deprivation of a person’s liberty.

See also the cases of ***In the Matter of Dameris L (N.Y.S 2d-2012 WL) and Georgi Cenov*** found at <http://www.mdac.info/en/bulgaria>.

6.42 The African Charter does not expressly mention legal capacity but it does envision principles of equality before the law. **Article 2 as read with Article 3** expressly provides for non-discrimination and equality before the law on an equal basis with others. The Mental Disorders Act violates the rights enshrined in the Charter through discriminatory application of the law. It treats persons with mental disabilities as objects of the law rather than persons before the law.

6.43 In ***Spilg and Mack & DITSHWANELO (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana, Communication 277/03***, The African Commission stated that:

“...the right to equal protection of the law envisaged under Article 3 of the African Charter consists of the right of all persons to have the same access to the law and Courts, and to be treated equally by the law and Courts, both in procedures and in the substance of the law. While it is akin to the right to due process of law, it applies particularly to equal treatment as an element of fundamental fairness. It is a guarantee that no person or class of persons shall be denied the same protection of the laws that is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property.”

- 6.44 The High Court of Kenya in ***Wilson Morara Siringi v. Republic, Criminal Appeal No 17 of 2014***, made the following observations on Article 12 of the CRPD:

“In conclusion, I would be remiss if I did not mention that the approach taken by the prosecution and the learned magistrate is that the complainant is an object of social protection rather than a subject capable of having rights including the right to make the decision whether to have sexual intercourse. This approach is inconsistent with the provisions of **Article 12** of the ***Convention on the Rights of Persons with Disabilities*** which requires State parties to recognize persons with disabilities as individuals before the law, possessing legal capacity to act, on an equal basis with others. Kenya ratified this Convention in 2008 and by dint of **Article 2(6)** of the Constitution it forms part of the law of Kenya. It is therefore improper and inconsistent with the Convention and an affront to the right of dignity of a person protected by **Article 28** to label any person as mentally retarded and proceed on the basis that the person is incapable of making a free choice.”

- 6.45 The Petitioners submit that the detention regime established by the Mental Disorders Act in purpose and in practice takes away the legal capacity of persons with mental disabilities contrary to section 8 of the Persons with Disabilities Act without offering equal and effective protection of the law as required by article 18 of the Constitution. Further, based on the aforementioned interpretation of personal liberty and legal capacity, it is evident that the criminal offence of escaping from a medical facility popularly referred to as Leaving Against Medical Advice attested to by the 1st petitioner violates section 8 of Persons With Disabilities Act and Articles 13 as read together with Article 18 of the Constitution
- 6.46 The Mental Disorders Act not only removes a person's legal capacity by detaining them against their will, but also fails to provide necessary procedural guarantees to people so detained allowing them to access the protection of the law to challenge their detention on an equal basis with others. Section 6 of the Mental Disorders Act provides minimal protection in the process of obtaining a detention order and, in practice, it has been shown that even this minimal protection is often not applied. The Act deprives those detained of their rights to be represented or heard in detention proceedings affecting them, provides insufficient control of detention through review processes, permits re-detention for people entering the state (sections 14, 16 and 22), and includes a process for obtaining a "certificate of sanity" in order to re-gain the right to liberty which is more onerous than the process for placing someone in detention (requiring the intervention of two medical practitioners an order by a magistrate (s.20), whereas detention can be ordered based only on the warrant or order of the Minister, a judge or a magistrate (s.6 and s.11)).
- 6.47 The Mental Disorders Act provides the possibility for individuals detained under its provisions to challenge that detention by appeal under section 30. However, in practice, it is impossible for people with mental disabilities in detention to actually appeal to the courts or access an effective remedy if their rights are violated in the

detention process or during their detention. There are no effective complaints procedures available to those detained under the Act and no accessibility measures or reasonable accommodations to enable them to access courts. No information is provided to them on their rights in detention and they can be specifically excluded from proceedings affecting them.

Articles 23 and 266: Non-discrimination

6.48 Constitutional, legislative and international provisions and norms on the prohibition on discrimination are described above and will not be repeated here for brevity.

6.49 The Petitioners submit that the regime in the Mental Disorders Act has subjected many persons with disabilities in Zambia face discrimination and social exclusion at the hands of society. To this effect, **Likando Kalaluka** in his article “ **Towards an Effective Litigation Strategy of Disability Rights: The Zambian Experience**” states:

“In Zambia, as in most African Countries, persons with disabilities often suffer social exclusion and marginalization arising from cultural prejudices and stigma that attach to their disabilities. Consequently, they are often denied the basic human rights that are available to non-disabled persons.”

6.50 The Petitioners submit that the Mental Disorders Act provides for the detention of persons with mental disabilities on the basis of their disability. The Act is discriminatory against persons with mental disabilities as it permits situations where persons with mental disabilities are institutionalized in designated health institutions on apprehension by community members and/or police officers. The discrimination lies not only in the fact that persons with mental disabilities are institutionalized without their informed consent or supported decision making, but also in the lack of availability of services at primary care level, fostered by the Mental Disorders Act. By failing to mainstream mental health services to all or

Government Clinics and Hospitals and providing such services only in designated Government Institutions, mental health users are discriminated against. This further perpetuates discrimination in the communities where persons with mental disabilities comes from as the designated institutions become stigmatized as well. The petitioners thus submit that if persons with mental disabilities were able to access mental health services at any Clinic nearest to them and to which other health services are offered, this would reduce their exposure to ridicule and discrimination. This would also enhance their access to health services and empower them to live independently, enjoying their liberties as guaranteed by Article 13 of the Constitution and the Persons with Disabilities Act.

- 6.51 In the United States case of ***Olmstead v L.C*, 527 U.S. 581 (1999)**, the Supreme Court held that segregation of persons with mental disabilities from community-based services was discriminatory because it meant that people with mental disabilities were forced to give up their liberty to obtain services.
- 6.52 By permitting detention of people with mental disabilities because they have a disability, the Mental Disorders Act directly discriminates against the petitioners and other people with mental disabilities – it permits “directly treating a person differently on the basis of that person’s... disability” in contravention of article 266 of the Constitution. The Act applies only to people with mental disabilities and has severe negative consequences on their lives, as averred to by the petitioners. The Act envisages deprivation of liberty as the only way in which to provide “care” to people with mental disabilities. It includes no provisions to provide medical or other services on a voluntary basis or otherwise on a basis of equality with people without disabilities. By contrast, as set out above, sections 27, 33 and 34 of the Persons with Disabilities Act, in conjunction with the prohibition of discrimination in section 6, recognize that it is possible, and indeed require, that people with mental disabilities are provided with care in the community in the same manner as people without disabilities and without exception

7 INFORMED CONSENT TO TREATMENT

- 7.1 The Petitioners submit 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.
- 7.2 The aims to control and detain persons with mental disabilities under the Act are described above as are the Petitioners' attestation to receiving coercive psychiatric treatment. The MHUNZA Report further details the systemic practice of coercive, non-consensual in-patient and out-patient treatment for persons with mental disabilities.
- 7.3 The Mental Disorders Act conflates detention of people with mental disabilities and forced treatment – the latter flows automatically from the former without any further safeguards to prevent such forcible treatment on the basis of disability. The Act contains provisions regulating detention but does not have any provisions guaranteeing the right of persons who are detained to informed consent to treatment. Once a person is detained, the absence of further provisions allows medical personnel to force treatment on them without any respect for their legal capacity and right to informed consent.
- 7.4 Informed consent to all medical treatment and interventions is a human right, grounded in the following constitutional provisions:
- 7.4.1 The right to dignity under article 8;
 - 7.4.2 The right to personal liberty under article 13 of the Constitution.
 - 7.4.3 The prohibition on torture, inhuman and degrading treatment under article 15 of the Constitution.

7.4.4 The right to equality and freedom from discrimination under articles 23 and 266.

7.5 The Persons with Disabilities Act envisions treatment for people with mental disabilities based on informed consent without exception. For example, section 27(d) of the Persons with Disabilities Act draws its wording directly from article 25 of the CRPD and states:

“The Minister shall, in collaboration with the Minister responsible for health, take appropriate measures to ensure access for persons with disabilities to health services that are gender sensitive and to health-related rehabilitation and shall, in particular, prescribe measures to—
(d) require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, among others, raising awareness of human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care”.

7.6 The exception to the universal right to informed consent for persons with mental disabilities contravenes medical ethics. For example, the **Code of Ethics** established by the **Health Professionals Act 24 of 2009** provides for no exceptions. Professionals are required to take into account “the patient’s/client’s needs, preference and confidentiality”. Informed consent is also more explicitly found in Section 5.1(c), which states, in relevant part:

“A health practitioner shall not;

(i) 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;

...

(x) 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."

The anti-discrimination principle is repeated in section 5.1(a) of the Code, which states that treatment may not be discriminatory "on grounds of age, gender, marital status, education, medical condition, national or ethnic origin, physical or mental disability, political affiliation, tribe, race, religion or social status".

7.7 The Special Rapporteur on Torture has stated:

"Millions of people with disabilities are stripped of their legal capacity worldwide, due to stigma and discrimination, through judicial declaration of incompetency or merely by a doctor's decision that the person 'lacks capacity' to make a decision. Deprived of legal capacity, people are assigned a guardian or other substitute decision maker, whose consent will be deemed sufficient to justify forced treatment. As earlier stated by the mandate, criteria that determine the grounds upon which treatment can be administered in the absence of free and informed consent should be clarified in the law, and no distinction between persons with or without disabilities should be made. Only in a life-threatening emergency in which there is no disagreement regarding absence of legal capacity may a health-care provider proceed without informed consent to perform a life-saving procedure."

Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Human Rights

**Council, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013) (by Juan E. Méndez)
at para 65.**

- 7.8 The mandate has also recognized that, in certain circumstances, forced treatment can amount to torture and inhuman and degrading treatment. He states that:

“Medical treatments of an intrusive and irreversible nature, where lacking a therapeutic purpose or when aimed at correcting or alleviating a disability, may constitute torture or ill-treatment when enforced or administered without the free and informed consent of the person concerned. Forced interventions, often wrongly justified by theories of incapacity and therapeutic necessity inconsistent with the CRPD, are legitimised under national laws and may enjoy wide public support as being in the alleged best interests of the person concerned. Nevertheless, to the extent that they inflict severe pain and suffering, they violate the absolute prohibition of torture and cruel, inhuman and degrading treatment. Concern for the autonomy and dignity of persons with disabilities leads me to urge revision of domestic legislation allowing for forced interventions.”

Interim report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, 28 July 2008, A/63/175)

- 7.9 In *Government of the Republic of Namibia v LM and Others (SA 49/2012) [2014] NASC 19*, the Government was tasked to prove that the women who were sterilized were in no position to give informed consent. In the dicta, the court stated that:

It is therefore my considered opinion that the doctors should not have sterilised the respondents because of the circumstances in

which the consent was obtained. I am not persuaded that the appellant has discharged its onus of demonstrating on the balance of probabilities that informed consent was given by any of the respondents. The respondents should have been given an opportunity to return to hospital at a later stage to undergo the BTL procedure, after having had the opportunity to make an informed decision in a sound state of mind and without being influenced by circumstances such as the labour pains they were experiencing at the time they signed the consent forms.

7.10 In the South African case of ***Castel v De Greef (1994 (4) SA 408 (C)***, the court outlined the following as relevant factors that should be satisfied in order to fulfill the requirement of 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 extend to the entire transaction, inclusive of its consequences."

7.11 The Persons with Disabilities Act seeks to secure the right to informed consent to persons with disabilities. For example, section 27(d) of the Persons with Disabilities Act states:

"The Minister shall, in collaboration with the Minister responsible for health, take appropriate measures to ensure access for persons with

disabilities to health services that are gender sensitive and to health-related rehabilitation and shall, in particular, prescribe measures to—
(d) require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, among others, raising awareness of human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care”.

7.12 The exception to the universal right to informed consent for persons with mental disabilities contravenes medical ethics. For example, the **Code of Ethics** established by the **Health Professions Act, No. 24 of 2009** provides for no exceptions. Professionals are required to take into account “the patient’s/client’s needs, preference and confidentiality”. Informed consent is also more explicitly found in Section 5.1(c), which states, in relevant part:

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(x) 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.”

7.13 The anti-discrimination principle is repeated in section 5.1(a) of the Code, which states that treatment may not be discriminatory “on grounds of age, gender, marital status, education, medical condition, national or ethnic

origin, physical or mental disability, political affiliation, tribe, race, religion or social status”.

7.14 The Petitioners submit that the Mental Disorders Act’s removal of the right to informed consent for person with mental disabilities renders the Act unconstitutional and contrary to the Persons with Disabilities Act. As the Petitioners’ have shown in their affidavits, their consent to treatment was not sought in most cases. Consent to treatment cannot be negated in any circumstance especially where the person has the capacity to consent to the same. The Mental Disorders Act presumes that people with mental disabilities are always unable to consent to treatment. Equal treatment of patients/clients demands that persons with mental disabilities must be provided with information and ensured their right to give or withhold their consent. Hospitals, families and the community need to give persons with disabilities sufficient information and opportunity to make their choice irrespective of the circumstances.

7.15 The Petitioners submit that the Mental Disorders Act’s removal of the right to informed consent for person with mental disabilities renders the Act unconstitutional and contrary to the Persons with Disabilities Act. As the Petitioners’ have shown in their affidavits, in most cases, their consent to treatment was not sought. Consent to treatment cannot be negated in any circumstance. The Mental Disorders Act presumes that people with mental disabilities are always unable to consent to treatment. It therefore removes their legal capacity in this context. Persons with mental disabilities must be provided with information and ensured their right to give or withhold their consent. Hospitals, families and the community need to give person with disabilities sufficient information and opportunity to make their choice irrespective of the circumstances.

- 7.16 Denial of the right to informed consent to treatment in circumstances described by the petitioners and set out in the MHUNZA Report also violates the right to human dignity of people with mental disabilities. Further, in some instances witnessed and experienced by the petitioners, it can amount to a form of torture and inhuman and degrading treatment, especially where treatment includes, for example, the use of forced medication, electro-shock therapy or other invasive procedures, or where use of restraints, seclusion or solitary confinement is considered to be treatment.
- 7.17 In addition, because the Mental Disorders Act conflates detention and treatment, it suffers from the same lack of the procedural safeguards necessary to enable victims of forced treatment to challenge decisions to treat or obtain effective redress for violations of the right to informed consent, as set out in section 6 above.
- 7.18 Finally, because the Mental Disorders Act fails to protect the right to informed consent to treatment for people with mental disabilities on a basis of equality with people without disabilities, it is discriminatory. It also fails to ensure necessary accessibility measures and access to reasonable accommodations that are necessary for people with mental disabilities to effectively exercise their right to informed consent. For example, it fails to ensure that information is provided in an accessible manner, and that support is provided where necessary for the individual to appreciate the information provided and to reach a decision

8 PROTECTION FROM DEPRIVATION OF PROPERTY

To the extent that the Mental Disorder's Act deprives persons with disabilities of legal capacity with respect to their property (see sections 17-19), these provisions of the

Act may be argued to infringe on protection from deprivation of property in article 16 of the Constitution.

8.1 Article 16 of the Constitution of Zambia provides:

(1) Except as provided in this Article, no property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall 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”.

8.2 The right to property is contained in article 14 of the ACHPR and permits very limited exceptions:

“The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”

It should be read in conjunction with the rights to non-discrimination, equal protection of the law and equality before the law in articles 2 and 3 of the ACHPR.

8.3 Article 12 of the CRPD also expressly protects the property rights of people with disabilities:

5. States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

8.4 To the extent that the Mental Disorders Act does not provide for persons with mental disabilities the prospect of making representations as to the administration of their estates, and that in terms of section 35(2) the cost of their unlawful, unconstitutional detention may be recovered from that estate, the Petitioners submit that the provisions of the Act do not fall within the permissible limitations in article 16 of the Constitution and represent an unlawful and discriminatory deprivation of legal capacity on the basis of disability.

9 ACCESS TO MENTAL HEALTHCARE SERVICES

9.1 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 of which persons with mental disabilities are compelled to access health services in facilities that are often distant and inadequate to meet their health needs.

9.2 In its care and treatment regulation, the Mental Disorders Act provides for prescribed institutions for treatment and care of persons with mental disabilities. Section 2 of the Mental Disorders 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.”

9.3 By virtue of the above provisions, 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.

9.4 Section 2 of the Mental Disorders Act and regulation 2 of the said Act cited above provide for separate prescribed institutions at which persons with mental disabilities should be received and treated. The existence of the Mental Disorders Act creates and perpetuates a two tier healthcare system at 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.

9.5 The Affidavits in support of the petition sworn by the 1st and 2nd Petitioners both attest to the problems of lack of mental health services at the primary healthcare level which has proved expensive and caused practical challenges in terms of access by persons with mental disabilities:

- 9.5.1 Mr. Mwewa, the 1st Petitioner, states that he faces “great challenges in accessing medication and mental services because they are not available at the nearest health centres”, causing him “great expense”. (Paragraph 22 of the 1st Petitioner’s Affidavit in Support of the Petition).
- 9.5.2 Mr. Kasote, the 2nd Petitioner, states that “due to lack of Mental Health Services at primary healthcare level, I have difficulties in accessing medicines and going for reviews as I have to travel long distances to access the same.” (Paragraph 16 of the 2nd Petitioner’s Affidavit in Support of Petition).
- 9.6 Another disturbing fact which results from the creation of a two tier healthcare system is the denial of healthcare for persons with mental disabilities that is ordinarily available to other members of the community.
- 9.6.1 Mr. Kasote attests to being denied pain medication while in detention. (Paragraph 12 of the 2nd Petitioner’s Affidavit in Support of Petition).
- 9.6.2 In addition, a disturbing narrative is recorded on pages 46 to 47 of the MHUNZA Report, which, the Petitioners submit, illustrates the impact of the legal regime in sustaining the lack of access to appropriate healthcare services:

“During a visit in October 2012, monitors saw a woman in the female ward at Kabwe who had suffered serious burns all over her neck and a large portion of her chest. The nurse said that she had been brought to the psychiatric unit the previous night by community volunteers who claimed to have found her in that state. She was taken to the psychiatric ward because she had a mental health consultation card. The day after, a consultation request was sent to the general hospital section to attend. Monitors called the psychiatric nurse a month later to find out what happened. She explained that

no doctor had shown up to examine the woman, who was discharged after three weeks in the hospital.”

9.7 The Petitioners submit that the above described conditions are not only discriminatory but are also inhumane and deprive persons with disabilities in those wards of their human dignity and respect for the person.

9.8 Further, denial of healthcare may amount to torture and cruel, inhuman and degrading treatment.

Special Rapporteur on Torture, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Human Rights Council, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013) (by Juan E. Méndez).

9.9 Article 19 of the CRPD obliges States to ensure that people with mental disabilities have access to specialized services in the community as well as equal access to mainstream community-based services.

9.10 Section 27(a) of the Persons with Disabilities Act mandates the Minister, in collaboration with the Minister responsible for health to ensure persons with disabilities enjoy the “same range, quality and standard of free or affordable health care and programmes as provided to other persons”. This is identical to the wording in article 25(a) of the CRPD.

9.11 Section 27(b)-(c), which has domesticated article 25 (c) of the CRPD obliges the Minister to ensure in addition access to healthcare services needed by persons with disabilities and to provide these “as close as possible to people’s own communities, including rural areas.”

9.12 Article 25 of the CRPD recognizes the right of people with disabilities to the highest attainable standard of health without discrimination on the basis of disability.

Article 19 of the CRPD obliges States to ensure that people with mental disabilities have access to specialized services in the community as well as equal access to mainstream community-based services.

9.13 The right to the best attainable state of physical and mental health on a basis of equality is contained in article 16 of the African Charter in conjunction with articles 2 and 3.

9.14 Further, denial of healthcare may amount to torture and cruel, inhuman and degrading treatment.

Special Rapporteur on Torture, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Human Rights Council, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013) (by Juan E. Méndez).

9.15 The Petitioners submit that the above described conditions are not only discriminatory but also violate the right to the highest attainable standard of physical and mental health, and amount to torture, inhuman and degrading treatment. They deprive persons with disabilities in those wards of their human dignity and respect for the person

10 JUSTIFIABLE LIMITATION OF RIGHTS

10.1 The Petitioners submit that in the light of the facts and legal arguments submitted above, the Mental Disorders Act violates the constitutional rights of persons with mental disabilities guaranteed in articles 8, 13, 15, 16, 18, 23 and 266 of the Constitution.

10.2 The Petitioners submit that where human rights are held to be limited, the onus falls on the State (or respondent) to provide concrete evidence to prove that the limitation is constitutionally justifiable.

See, for example, ***Attorney General and Others v Tapela and Others Civil Case No, CACGB-096-14 (26 August 015) at paras 74-75. See also Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 SCA at 375.***

10.3 As the 1st Respondent does not oppose this Petition, and as such has tendered no evidence to prove that the violations of the rights of persons with mental disabilities fall within the permissible limitations stipulated in article 11 of the Constitution, the Petitioners respectfully submit that there can be no legal or evidential basis to justify the rights' violations.

10.4 The Petitioners nevertheless submit that the violations are not justifiable and make the following arguments in this respect:

10.4.1 As advanced above, there can be no justifiable limitation to the rights under article 15 of the Constitution.

10.4.2 With respect to the other rights violations alleged, the Supreme Court has pronounced itself on the importance of judicial scrutiny where public officials are granted absolute discretion in exercising power of individuals and where such power is exercised arbitrarily and perversely, contrary to emerging trends in human rights protections.

Esan v Attorney General (Appeal No. 96/2014) [2016] ZMSC 225 (9 December 2016).

10.4.3 In considering justifiable limits to rights, the Supreme Court has held that the courts should adopt interpretations that do not negate the fundamental content of human rights protections.

Resident Doctors Association of Zambia and Others v Attorney-General (SCZ Judgment No. 12 of 2003) [2003] ZMSC 31 (27 October 2003).

10.4.4 Zambia's democratic ambitions to advance its approach to the rights of persons with disabilities has been meaningfully expressed in the Persons with Disabilities Act and in its ratification of the CRPD, which instruments do not offer any basis for limiting the rights of persons with mental disabilities in the manner set out in the Mental Disorders Act.

To the extent that limitations to rights require the Court to assess whether the limit is reasonably justifiable, the Petitioners submit that as per the proportionality test developed by the Canadian Supreme Court in ***R v Oakes [1986] 1 S.C.R. 103***, the infringements to rights of persons with mental disabilities do not meet this test.

Assuming that there exists a "pressing and substantial" objective under the Mental Disorders Act to provide "care" for persons with mental disabilities the Petitioners submit that the **means** employed to achieve this objective (the detention, coerced treatment, isolation and removal of legal capacity of persons with mental disabilities) are neither proportionate nor rationally connected to that objective. The means do not minimally impair rights, nor is there proportionality between the infringement and the objective.

10.4.5 The Petitioners' affidavits and the MHUNZA Report indeed document the adverse effects on mental health that the Mental Disorders Act perpetuates, negating any claim that could be made to the necessity of these provisions,

whether in the public interest, or in the interest of persons with mental disabilities.

- 10.4.6 The Petitioners therefore submit that the rights violated are not in the interests of others nor in the public interest and are not reasonably justifiable.

11 ARGUMENT IN THE ALTERNATIVE: INCONSISTENCY WITH PERSONS WITH DISABILITIES ACT

11.1 The Petitioners have sought to illustrate that the Mental Disorders Act is unconstitutional and violates the human rights of persons with mental disabilities, as interpreted through subsequent legislation that domesticates Zambia's binding obligations under the CRPD, the Persons with Disabilities Act.

11.2 The Petitioners advance an argument in the alternative: that the Persons with Disabilities Act, which is later legislation (2012), by implication repeals the earlier (1949) Mental Disorders Act, which is so inconsistent with its provisions that the Acts cannot be read together.

11.3 The Petitioners submit that the Persons with Disabilities Act anticipates its enactment will contradict previous laws and explicitly establishes its precedence. Section 3 provides:

"Subject to the Constitution, where there is any inconsistency between the provisions of any other written law impacting on the rights of persons with disabilities as provided under this Act or any other matter specified or prescribed under this Act with respect to persons with disabilities, the provisions of this Act shall prevail to the extent of the inconsistency."
(Underlined for emphasis).

11.4 The High Court has recognised that “under ordinary interpretation of statutes” a later Act may impliedly repeal or amend a prior Act.

In Re: Implied Amendment of the Constitution; In Re: Corrupt Practices Act (1984) Z.R. 38 (H.C.)

11.5 The repeal of an earlier Act may be express or may be implied if the Acts cannot be read together where the later Act’s provisions are so inconsistent with or repugnant to those of the earlier Act.

In Re: Implied Amendment of the Constitution; In Re: Corrupt Practices Act (1984) Z.R. 38 (H.C.); Ellen Street Estates Limited v Minister for Health [1934] 1 KB 590, [1934] All ER Rep 385; David Sajjaaka Nalima v Rebecca Musoke (Civil Appeal No. 12 of 1985) [1986] UGCA 3 (9 November 1986); NIMR And Chapman (Pvt) Ltd and Others v Zimbabwe Electricity Supply Authority (Case No. HC 31/05) [2005] ZWBHC 8 (27 January 2005); (Zimbabwe).

12 THE SUPERVISORY ORDER: THE MANDATE OF THE ZAMBIA AGENCY FOR PERSONS WITH DISABILITIES

12.1 The Petitioners have sought this Court’s refuge through declaring the Mental Disorders Act unconstitutional and invalid, together with further declaratory relief to ensure legal clarity in prohibiting practices of non-consensual and forced detention, and healthcare treatment and admission of persons with mental disabilities, on the basis of their disability.

12.2 Premised on an understanding of the impact of this relief on all persons with mental disabilities, and the social isolation, and vulnerability that the existing regime has enacted on persons with disabilities, the Petitioners pray for a

supervisory order to assist the Court and the Petitioners to ensure that the Court order is respected.

12.3 Under the Persons with Disabilities Act, the Zambia Agency for Persons with Disabilities has a number of broad functions and powers that include:

- 12.3.1 planning, promoting and administering services for people with disabilities (section 14(1)(a));
- 12.3.2 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));
- 12.3.3 promoting research and public awareness into all aspects of disability (section 14(1)(d-e));
- 12.3.4 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));
- 12.3.5 making “representations on behalf of any person with disability before any State organ or institution an 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));
- 12.3.6 monitoring and evaluating the provision of services to persons with disabilities and the implementation of the Persons with Disabilities Act (section 14(1)(n));
- 12.3.7 identifying provisions in any law that hinder the implementation of the Act (section 14(1)(o));
- 12.3.8 conducting inquiries into “any matter relating to the welfare, habilitation and rehabilitation of persons with disabilities (section 14(3)); and
- 12.3.9 doing “all things as are incidental to, or conducive to, the attainment of the functions of the Agency.” (Section 14(1) (q)).

- 12.4 The Agency is further obligated to gather information regarding persons with disabilities and services rendered (section 16) and to distribute information relating to disability to “any institution, a person, organisation or the public at large” which is obtained from the Government”. (Section 17.)
- 12.5 The Petitioners humbly submit that the Agency is therefore empowered to monitor the enforcement of the Court’s judgment and to report to the Court on its implementation as specified in the Petitioners’ prayers. Such reporting will be of particular import in application to the declaratory relief sought regarding the right to informed consent and the prohibition on detention on the basis of disability. This prayer is in line with the broad powers of the Agency outlined above.
- 12.6 In the South African Case of *Western Cape Forum for Intellectual Disability v. Government of the Republic of South Africa and Another* 2011 5 SA 87 (WCC), the Court made a structural order compelling a statutory entity such as ZAPD to carry out its functions under the enabling law and report on its process to the Court.

13 COSTS

- 13.1 The Petitioners have not sought costs in this matter.
- 13.2 In the event that the Petitioners do not succeed in their submissions, the Petitioners pray that the precedent is upheld that, being a case concerning constitutional issues and of general public importance, no cost order be made.

***Zambia National Holdings Limited and Another v Attorney-General*
(S.C.Z. Judgment No. 3 of 1994) [1994] ZMSC 30 (1 December 1994);
(1994) S.J. 22 (S.C.)**

14 PRAYERS

14.1 In the light of the above submissions, the Petitioners therefore pray for the following relief:

- a) For a declaration that the Mental Disorders Act is unconstitutional and is therefore null and void.
- b) For a declaration that the Mental Disorders Act is incompatible with the Persons with Disabilities Act and is therefore invalid.
- c) For a declaration that persons with mental disabilities enjoy the same right to informed consent to treatment and admission to healthcare facilities as all other persons.
- d) A declaration that the detention of persons with mental disabilities on grounds of their disability is unlawful.
- e) An order directed at the 2nd Respondent to monitor the enforcement of the judgment of the court to ensure that persons with mental disabilities realise their rights as mandated by the Persons with Disabilities Act and report to the court on the implementation of the judgment within a period of 6 months of making the order.
- f) In the alternative, a declaration that the Mental Disorders Act has been tacitly repealed by the Persons with Disabilities Act.
- g) Further and other relief the court may deem fit.

Dated the _____ day of _____ 2017.

Per: _____

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

2017/HP/204

**IN THE MATTER OF: THE PROTECTION OF FUNDAMENTAL RIGHTS
REGULATIONS, 1969**
AND

IN THE MATTER OF: ARTICLE 28 OF THE CONSTITUTION OF ZAMBIA
AND

**IN THE MATTER OF: ARTICLES 8, 13, 15, 16, 18, 23, AND 266 OF THE
CONSTITUTION OF ZAMBIA**
AND

**IN THE MATTER OF: THE MENTAL DISORDERS ACT, CHAPTER 305 OF THE
LAWS OF ZAMBIA**
AND

**IN THE MATTER OF: THE PERSONS WITH DISABILITIES ACT, NO. 6 OF
2012**
AND

IN THE MATTER BETWEEN:

GORDON MADDOX MWEWA	1ST PETITIONER
MULIMA SANTA KASOTE	2ND PETITIONER
MENTAL HEALTH USERS NETWORK OF ZAMBIA	3RD PETITIONER

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

AND

ATTORNEY GENERAL	1ST RESPONDENT
ZAMBIA AGENCY FOR PERSONS WITH DISABILITIES	2ND RESPONDENT

PETITION CHALLENGING VIOLATION OF HUMAN RIGHTS

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