IN THE HIGH COURT FOR ZAMBIA 2021/HP/0025

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(CONSTITUTIONAL JURISDICTION)

IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA, THE CONSTITUTION OF ZAMBIA ACT, CHAPTER 1, VOLUME 1 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: AN APPLICATION UNDER ARTICLE 28(1) OF THE CONSTITUTION OF ZAMBIA, THE CONSTITUTION OF ZAMBIA ACT, CHAPTER 1, VOLUME 1, OF THE LAWS OF ZAMBIA

IN THE MATTER OF: STATUTORY INSTRUMENT NO. 156 OF 1969, THE PROTECTION OF FUNDAMENTAL RIGHTS RULES

IN THE MATTER OF: ARTICLE 23(2) & (3) OF THE CONSTITUTION OF ZAMBIA, THE CONSTITUTION OF ZAMBIA ACT, CHAPTER 1, VOLUME 1 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: SECTION 6(1); 8(2); 22; 25 OF THE PERSONS WITH DISABILITIES ACT NO.6 OF 2012

IN THE MATTER OF: THE CONVENTION OF THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD)

IN THE MATTER OF: THE DECISION OF THE RESPONDENT, ZCAS UNIVERSITY TO DENY THE PETITIONER A CHANCE TO APPLY FOR ENROLMENT FOR DEGREE PROGRAMME IN COMPUTER NETWORKS ENGINEERING ON GROUND OF DISABILITY

IN THE MATTER OF: FAILURE BY THE 2ND RESPONDENT TO PRESCRIBE RULES, ISSUE GUIDELINES AND PUT IN PLACE MEASURES TO ENSURE NON-DISCRIMINATION OF PERSONS WITH DISABILITIES IN THE ENROLMENT IN HIGHER EDUCATION COURSES AS ENJOINED BY THE PERSONS WITH DISABILITIES ACT NO. 6 OF 2012

BETWEEN:

KASONGO WILSON KAFWEMBE **PETITIONER**

AND

ZCAS UNIVERSITY LIMITED **1ST RESPONDENT**

THE ATTORNEY GENERAL **2ND RESPONDENT**

BEFORE HON. JUSTICE ELITA PHIRI MWIKISA

FOR THE PETITIONER: MR. G. PHIRI WITH MRS M. PHIRI OF MESSRS PNP ADVOCATES

FOR THE 1ST RESPONDENT: MR. G. HAAKAINSI WITH MR. M. SHAMALEKE OF MESSRS LM CHAMBERS

JUDGMENT

Cases Referred To:

1. *Frankson Musukwa, Wencyslouv Buumba Makondo and Alick Nkhoma v Road Transport and Safety Agency Appeal No. 11. 2021, SCZ/8/18/2021*
2. *Godfrey Miyanda v the Attorney General 2016/CC/0006*

Legislation referred to:

1. Section 22 of the Persons with Disabilities Act No. 6 of 2012

1. INTRODUCTION

1.1. The Petitioner commenced this matter by way of petition on 14th January, 2021, seeking the following reliefs:

1.1.1. Interim Relief

(a) This honourable Court be pleased to issue an Order compelling the 1st respondent to avail the Petitioner application forms for the computer network Repair degree programme and not to hinder him from lodging in the completed application form.

1.1.2. Substantive Reliefs

(a) A declaration that the 1st respondent's refusal to issue the Petitioner with application forms for enrolment into the degree programme was discriminatory and in breach of Article 23(2) & (3) of the Constitution of Zambia

(b) A declaration that the 2nd respondent's failure to promulgate rules, issue guidelines and put in place measures to ensure non-discrimination of the Petitioner in enrolment in higher education courses as mandatorily enjoined by Section 22 of the Persons with Disabilities Act No. 6 of 2012 is not only violative of the said Act but is also ultra vires Article 23(2) and (3) of the Constitution;

(c) An order that the Petitioner be availed application forms and that the said application be fairly processed for consideration for admission into the Computer Network Repair degree programme;

(d) An order that the 2nd respondent does promulgate rules, issue guidelines and put in place measures to ensure non-discrimination of the Petitioner, as a deaf person, in enrolment in higher education courses as mandatorily enjoined by Section 22 of the Persons with Disabilities Act No. 6 of 2012;

(e) Damages;

(f) Interest;

(g) Costs of, or incidental to this Petition;

(h) Such declarations, orders and directions as this Honourable Court may deem fit and just.

2. PETITIONER'S CASE

2.1. The facts relied upon in the petition are that on or about 9th November, 2020, the Petitioner attended the 1st respondent's

institution with a view to collecting application forms in order to apply for enrolment in the Computer Network Repair Degree Programme. The Petitioner stated that the 1st respondent's servants and/or agents tasked with issuing out application forms refused to issue one out to the Petitioner on account that he was deaf. Consequently, the Petitioner sought the intervention of the Vice Chancellor of the 1st respondent where he was attended to by the latter's Executive Assistant who undertook to secure an appointment for the Petitioner with the Vice Chancellor in order to resolve the matter.

2.2. The Petitioner went on to testify that on or about 11th November, 2020, the aforesaid Executive Assistant, acting for and on behalf of the Vice Chancellor of the 1st respondent sent an electronic mail to the Petitioner indicating that he could not be enrolled in the 1st respondent's institution because it did not have the facilities to cater for deaf students. The Petitioner was also advised to instead enrol with the University of Zambia or the Copperbelt University. The Petitioner stated that upon inquiry, it was established

that neither the University of Zambia, nor the Copperbelt University offered the Computer Network Repair course and that to the best of his knowledge, only the 1st respondent offers the said degree programme. It was also pointed out that the Petitioner already obtained a Diploma in Computer studies from ZIBSIP College. That the Petitioner also has industrial work experience as he is in current employment with the National Pension Scheme Authority (NAPSA) where he is employed as a Web Chat Agent in its call centre.

2.3. The Petitioner also pointed out that Zambia is a signatory to the Convention on the Rights of Persons with Disabilities ("UNCRPD") whose State Parties recognize the right of persons with disabilities to education which right is to be realised without discrimination and on the basis of equal opportunity. It was stated that the 2nd respondent has not filled its obligations as a State Party to the UNCRPD and Section 22 of the Persons with Disabilities Act No. 6 of 2012 of the Laws of Zambia. That in view of the foregoing, the Petitioner is rightfully exercising his right to petition the High Court for redress of grievances regarding the protection of his

fundamental rights and individual freedoms of protection from discrimination on the ground of disability.

2.4. The Petitioner stated that his rights to protection from discrimination on the ground of disability have been, are being, and are likely to continue to be contravened by the 1st and 2nd respondent.

2.5. In the affidavit verifying facts also dated 14th January, 2021, the Petitioner herein exhibited copy of the electronic mail from the 1st respondent's Vice Chancellor's office which was marked "KWK1." The Petitioner also exhibited copies of his educational certificates marked "KWK2."

3. RESPONDENTS' CASE

3.1. The 1st respondent, on the other hand, filed an answer to the Petition on 29th January, 2021. The 1st respondent disputed the assertions that its employees tasked with issuing out application forms refused to issue out forms to the Petitioner on account of his disability. The 1st respondent stated that the correct position was that the Petitioner was advised, by way of electronic mail dated 11th November, 2020, that he could not be enrolled in the 1st respondent institution

because the institution did not have facilities at the time to cater for persons with disabilities in the Petitioner's situation. That in no way does the advice given to the Petitioner amount to discrimination on account of disability as alleged by the Petitioner. The 1st respondent averred that the unavailability of facilities to enable the 1st respondent enrol the Petitioner or indeed any other differently abled person must never be construed to amount to discrimination on account of disability but instead to mean inability by the institution to provide such a service due to lack of necessary facilities.

3.2. The 1st respondent averred that although it is every citizen's right to seek and exercise their right to petition the High Court for redress regarding the protection of fundamental rights and individual freedoms and liberties, that such petitions must be based on evidence of eminent likelihood or a fragrant violation of the fundamental rights and freedoms of individuals. That the Petitioner is not entitled to any interim or substantive reliefs claimed as the 1st respondent has in no way discriminated against the Petitioner.

3.3. I have taken note of the 1st respondent's affidavit in opposition to affidavit verifying facts in petition which I will not re-produce as the contents are substantively similar to the answer filed herein.

3.4. The 2nd respondent filed its answer on 28th May, 2021. It averred therein that although the Petitioner attained a diploma in computer studies from ZIBSIP College, the said training was conducted with challenges owing to his disability. Consequently, that computers as well as lip-reading were used as methods of learning. The 2nd respondent stated that as a State Party to the UNCRPD the demonstration by the Petitioner that he enrolled, studied and graduated from a Higher Institution of learning where the facilities and the human resources were provided is proof that the State have fulfilled its obligations as a State Party to the UNCRPD. That the 2nd respondent will aver that the Petitioner was never discriminated against.

3.5. I have noted the Petitioner's reply to the 1st respondent's answer to petition.

4. PETITIONER'S AFFIDAVIT IN REPLY

4.1. In the affidavit in reply to the 1st respondent's affidavit in opposition to affidavit verifying facts in petition dated 15th February, 2021, the Petitioner deposed that the 1st respondent lamentably failed to indicate what facilities it did not possess to justify its discriminatory stance. The Petitioner added that the key facilitation he needed was the presence of an interpreter and that the 1st respondent did not even get to discuss the said aspect with him.

5. EVIDENCE AT TRIAL

5.1. When the matter came up for trial on 9th June, 2021, PW1, the Petitioner herein told the Court that he works as a call centre personnel at NAPSA. He gave testimony that on 9th November, 2020, the 1st respondent, through its officers from the registration office, refused to register him for a course in Computer Network Repairs on grounds that he was deaf. PW1 told the Court that he escalated the matter to the office of the Vice-Chancellor where he eventually got feedback that he could not be admitted to the 1st respondent's university as it did not have facilities for differently abled persons like him. PW1 testified that he was however re-directed to the

University of Zambia or the Copperbelt University as the two universities had such facilities in place.

5.2. PW1 gave evidence that he is in possession of a full grade 12 Certificate and Diploma in Computer Studies from ZIBSIP College. He told the Court that he then got employed by NAPSA at the call centre but that he has been trying to move to the IT department as that is his area of interest. PW1 told the Court that the Human Resources department advised him to get a degree in Computer Network Repair before he can be transferred to the IT department and that it was on that basis that he desired to study with the 1st respondent University as it is the only university that offers the said course. PW1 prayed that the Court orders the 1st respondent to accept the Petitioners application as well as damages for discrimination.

5.3. Under cross-examination, PW1 testified that he did not have any evidence to show that the 1st respondent did not admit him because of his disability but that he has evidence that he was discriminated against on the basis of being deaf and dumb as shown by the email produced before Court. PW1

testified that the contents of the email stated that the 1st respondent could not admit him because it did not have the facilities to accommodate him and according to PW1, that is discrimination. That although they did not specifically state that they could not admit him because he was deaf and dumb it went without saying when the 1st respondent stated that it did not have facilities to accommodate him.

5.4. PW1 also told the Court that he went to Munali Secondary School because it has a deaf unit but that he was still learning with able bodied pupils. PW1 further told the Court that there has never been a deaf person study at the 1st respondent university and that he was aware that the 1st respondent is a private university.

5.5. It was PW1's further testimony that he has a constitutional right to study at any university even in his condition. The witness stated that the 2nd respondent is negligent in the circumstances as he has failed to prescribe rules, issue guidelines and put in place measures to oblige educational institutions not to discriminate against the Petitioner and other persons with disabilities in enrolment for higher

education courses as mandatorily enjoined by Section 22 of the Person's with disabilities Act No. 6 of 2012 of the Laws of Zambia. That the 1st respondent has also breached and not complied with the Person's with Disabilities Act.

5.6. PW2, Monday Mulenga, a lecturer at Zambia Institute of Business Studies and Mukuba University, told the Court that he has been a lecturer since 2008 to date at ZIBS. PW2 testified that the Petitioner enrolled at ZIBSC in 2011, and was a student of his in all courses except Accounting. That the Petitioner attained an advanced diploma when he completed his tertiary education.

5.7. PW2 testified that at the time the Petitioner enrolled to study at ZIBSC, there were no facilities in place to carter for differently abled persons like him. That the Principal, at the time, however, approached PW2 and asked him whether it was possible to enrol the Petitioner in the circumstances. PW2 stated that before the Petitioner could be enrolled, he (PW2) gave the Petitioner notes and text books that were required in those courses. Further, that PW2 would also write on the white board and would use power point to help

enhance the Petitioner's learning. PW2 also testified that in the Petitioner's final year, there was a soft ware development project which he (the Petitioner) needed to do. PW2 told the Court that the Petitioner finalised the project and that when presenting it, the Petitioner hired a sign language interpreter to help him answer all questions put to him by the audience.

5.8. PW2 testified that there was no single facility that the Government provided to help the Petitioner pursue his studies. That the Petitioner was learning with other able-bodied students and had no challenges in his learning.

5.9. Under cross examination, PW2 testified that discrimination is denying someone that which they are entitled to. He told the Court that he was not aware that Zambia is attaining the goal of inclusiveness for differently abled persons. PW2 did not accept the argument that for the right education to be fully realised, there must be resources. The witness also conceded that the State did not violate the Convention on the Rights of Persons with Disabilities as the Petitioner successfully attended school at a Government Institution of learning.

5.10. The respondents on the other hand opened their case and RW1, Jacqeline C.M. Chikwama, the Board Secretary at the 1st respondent University stated that an affidavit in opposition was filed into Court on 29th January, 2021, and that she would rely on it entirely. Under cross-examination, RW1 conceded that the Petitioner did attempt to enrol at the 1st respondent University and that the Petitioner could not be given an enrolment form because the 1st respondent did not have facilities for persons with disabilities. RW1 admitted that the Petitioner was advised to either enrol with the University of Zambia or the Copperbelt University as the two universities have facilities for persons with disabilities.

5.11. RW1 testified that she was not aware that the degree programme in Computer Networks Repairs was only offered at the 1st respondent's University. The witness told the Court that it did not deny the Petitioner his constitutional right to education by denying him enrolment although she confirmed that he was not enrolled at the 1st respondent University. RW1 gave evidence that the enrolment form was not availed to the Petitioner because of his disability as he was deaf and

that the 1st respondent does not have facilities to provide him with the required tools for his education as a person with disabilities. RW1 stated that funds and resources allowing, the 1st respondent would enrol persons with disabilities.

5.12. RW1 went on to testify that the 1st respondent cannot be held liable for failing to provide such facilities. That the 1st respondent still does not have the facilities to carter for differently abled persons to date.

5.13. RW1 testified that the Petitioner was not assessed for the said degree programme but that by virtue of his disability, he was not assessed. RW1 testified that she was not aware that the Petitioner obtained a diploma from ZIBSC without any special tools because of his disability. The witness stated that the 1st respondent had a right to deny the Petitioner's admission because of the nature of the disability of the Petitioner but that the University does admit other persons with mobility challenges such as those with paralysis who move on wheelchairs. That the 1st respondent ensures that rumps are built around the university and that all lecture rooms are down stairs so as to accommodate the students

with the said challenge. She went on to testify that the 1st respondent has not gone ahead to carter for the deaf as there are no financial resources to employ sign language interpreters and provide other such facilities. RW1 stated that the 1st respondent does not get funding from the Government as it falls under the Ministry of Finance.

6. FINAL SUBMISSIONS

6.1. I have taken note of the Petitioner's and 1st respondents final submissions dated 10th May, 2023, and 1st June, 2023, respectively.

7. ANALYSIS AND DECISION

7.1. I have carefully considered the Petition, the affidavit evidence as well as the evidence before Court. It is uncontested that the Petitioner sought to apply for admission as a student at the 1st Respondent University and he was denied enrolment by the 1st Respondent on the basis that it did not have facilities that would accommodate the Petitioner, a deaf person. Instead, the 1st Respondent University advised the Petitioner to apply to the University of Zambia or Copperbelt University which have facilities that would accommodate

him. It is on this basis that the Petitioner alleges breach of his fundamental right of protection against discrimination and failure of the 2nd Respondent to promulgate rules, issue guidelines and put in place measures to ensure non-discrimination of the Petitioner in enrolment in higher education courses as mandatorily enjoined by Section 22 of the Persons with Disabilities Act No. 6 of 2012. The core issue, as I perceive it, is whether or not the Petitioner was discriminated against when he was denied enrolment at the 1st Respondent's University.

7.2. The Petitioner's claim for discrimination is anchored on Article 23 (2) and (3) of the Constitution of Zambia, Cap 1 of the Laws of Zambia, which provides as follows:

> **(2) Subject to clause (6), (7) and (8), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.**
>
> **(3)in this Article, the expression "discriminatory" mean, affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons of one such description are**

subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

7.3. It is clear from the evidence before me that the Petitioner was treated differently by the 1st Respondent on the basis of his disability. However, the question I have to resolve is whether the treatment received by the Petitioner amounts to discrimination as envisaged in Article 23 (2) and (3) of the Constitution of Zambia, above.

7.4. The Supreme Court of Zambia in the case of **Frankson Musukwa, Wencyslouv Buumba Makondo and Alick Nkhoma v Road Transport and Safety Agency Appeal No. 11. 2021, SCZ/8/18/2021**[1] had occasion to guide in a matter similar to the one in casu. In that case, the Petitioners who were all deaf commenced a Petition under Part III of the Constitution alleging breach of Article 23 (2) of the Constitution by the refusal of the Respondent to issue them with drivers' licences. The Supreme Court at page J40, made the following observation:

"Having considered the wording of Article 23, we are compelled to conclude that discrimination on the basis of disability is excluded. An attempt to address this omission was made when the proposed amendments to part III of the Constitution were subjected to a referendum. However, the referendum failed. The result is that Part III of the Constitution remains unaltered."

7.5. The Supreme Court went on to state as follows:

"We are aware that the term '*discrimination*' is now broadly defined in Article 266 of the Constitution as amended in these terms...regrettably, this definition is inapplicable to Part III of the Constitution. It cannot be applied, as Part III is unaltered except by amendment as provided by Article 79."

7.6. The Constitutional Court of Zambia shared similar sentiments in the case of **Godfrey Miyanda v the Attorney General 2016/CC/0006**[2], where it held that the definition of the word 'discrimination' in Article 266 of the Constitution as amended is in conflict with Article 23 (3) in Part III of the Constitution. This is because the definition given in Article 266 has the effect of amending Article 23 (3) which, being part of Part III of the Constitution, cannot be altered minus referral to a referendum as required in Article 79 (3).

7.7. In view of the foregoing, it is clear that the Petitioner's claims for discrimination is on the basis of disability. As ably guided

by the Supreme Court, discrimination on the basis of disability is not included in Article 23 of the Constitution. While I sympathise with the Petitioner, Article 23 of the Constitution in its current state does not envisage discrimination on the basis of disability, which the Petitioner is seeking to enforce. It follows that the claim that the Respondents contravened Article 23 of the Constitution is untenable.

7.8. I have observed, as did the Supreme Court in the **Frankson Musukwa** *case* above, that despite the above omission, the Petitioner is adequately protected by the Persons with Disabilities Act No. 6 of 2012. This matter was brought by way of Petition pursuant to the Protection of fundamental Rights and Rules, 1969. These Rules stipulate how an application made pursuant to Article 28 of the Constitution can be commenced. The relevant portion of Article 28 of the Constitution of Zambia reads:

> **28 (1) "Subject to clause (5) if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, without prejudice to any other action with respect to the same matter which is lawfully available,**

that person may apply for redress to the High Court which shall:
(a) hear and determine any such application;
(b) .....

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

7.9. In the **Frankson Musukwa** case above, the Supreme Court on page J43 and 44, in dismissing the appeal, observed as follows;

"We have examined the scope of the rights enshrined in Articles 11, 22 and 23....
This action was premised on contravention of the stated Articles. Redress would only be available if the Articles had been contravened by the Respondent. This is because the mode of commencement deployed does not confer jurisdiction on the courts to grant redress to a Petitioner, where none of the provisions of Part III of the Constitution have been contravened. Wherever a party has a justifiable grievance, they are required to commence an appropriate action in accordance with the rules that prescribe how an action may be brought. We have in a plethora of cases held that where an action is not properly before a court, it may not grant relief even if so disposed, unless matters are put right...on the view we have taken, we need not address the rest of the issues, as they are rendered otiose. Nonetheless, we wish to observed that the appellants may, if they so inclined, issue appropriate proceedings pursuant to the Persons with Disabilities Act No. 6 of 2012.

7.10. In light of the above authority, having found that the 1st Respondent University did not breach Article 23 (2) and (3) of

the Constitution, it follows that the Petitioner's claim that the 2nd Respondent failed to promulgate rules, issue guidelines and put in place measures to ensure non-discrimination of the Petitioner in enrolment in higher education courses as mandatorily enjoined by Section 22 of the Persons with Disabilities Act No. 6 of 2012, fails. This is because there is no discrimination on the basis of disability as found above. There being no breach of fundamental rights, other claims cannot be considered under the mode of commencement that the Petitioner employed as per the **Frankson Musukwa** case.

7.11. The Petitioner may, if they so wish, commence an action under the Persons with Disabilities Act No. 6 of 2012. The Petitioner's claims having failed due to the reasons advanced above, I accordingly dismiss the Petition. I make no orders for costs.

Leave to appeal is granted.

Dated at Lusaka this.....5th.....day of.....September,...2024

.....

ELITA P. MWIKISA
HIGH COURT JUDGE