

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

2019/HP/1832



IN THE MATTER OF:

THE PROTECTION OF FUNDAMENTAL
RIGHTS AND REGULATIONS

IN THE MATTER OF:

ARTICLES 11 (a) and (b), 22(1)(a), and 23(2)
OF THE CONSTITUTION OF ZAMBIA

AND

IN THE MATTER OF:

SECTION 62 OF THE ROAD TRANSPORT
AND SAFETY AGENCY ACT NO. 11 OF 2002

FRANKSON MUSUKWA

1ST PETITIONER

(suing on his own behalf and as the Executive
Director of Zambia Deaf Youth and women)

WENCYSLOUV BUUMBA MAKONDO

2ND PETITIONER

ALICK NKHOMA

3RD PETITIONER

AND

ROAD TRANSPORT AND SAFETY AGENCY

RESPONDENT

BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 4TH JUNE, 2021 - IN CHAMBERS

For the Petitioners : K. Mwale- K. Mwale & Company
For the Respondent : Mr. D. Kalima- In House Counsel

JUDGMENT

CASES REFERRED TO:

1. Resident Doctors Association v Attorney (Supreme Court Judgment No. 2 of 2003)
2. Dan Pule & Others v The Attorney General & Others (2018) ZMCC 224
3. Lt. General Wilford Joseph Funjika Vs The Attorney General (2005) Z.R. 97 (S.C.)
4. Attorney-General and Another v Lewanika and Others (1993-1994) Z.R. 164

5. *Minister of Land Affairs and Another v Slamdien and Others* (LCC107/98) [1999] ZALCC 6
6. *Huntley v Attorney-General for Jamaica* (1995) 1 ALL ER 308
7. *Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & Others* (2005) ZR 138 (SC)

AUTHORITIES REFERRED TO:

1. Section 59, 62, 69 of the Road Traffic Act No. 11 of 2002
2. Article 1(1) and (2), Article 11(a) and (b), 22(1), 22(3) Article 23 (1) and (2), 23(4)(e) 28, 128(3) of the Constitution of Zambia

This is a matter in which it is petitioned, in the amended petition (by consent of the parties) filed into court on 27th October, 2020, that:

1. This court determines and declares that section 62 as read with section 59 of the Road Traffic Act contravenes the petitioner's rights and the rights of all deaf persons as guaranteed by Articles 11(a) and (b), 22(1)(a) and is therefore null and void to that extent;
2. That it may be determined and declared that section 62 as read with section 59 of the Road Traffic Act is discriminatory in its effect and contravenes the petitioners right from discrimination as guaranteed by Article 23 (2) of the Constitution and therefore is null and void;
3. That it may be determined and declared that all deaf persons who are medically fit quality to be issued with provisional and driver's licences;
4. That the respondent be directed to commence the issuance, renewal and extension of provisional and driver's licences to deaf persons upon satisfying the requisite tests to assess their driving competence;
5. Damages for loss occasioned to the 3rd petitioner's business as a result of the suspension of his driver's licence;
6. Declaration that the suspension of the 3rd petitioner's drivers' licence is illegal, null and void;
7. Costs; and
8. Any other relief the court may deem fit.

The petitioners are suing in their own behalf whilst the 1st petitioner is also suing on behalf of the Zambia Deaf Youth and Women, which is a registered Disabled People's Organization whose principal objective in its constitution is to advocate and campaign for legislative measures and regulations that would enable and empower deaf person to realize the rights enshrined in the Constitution of the Republic of Zambia, Persons with Disabilities Act No. 6 of 2012, the United Nations Convention of the Rights of Persons with Disabilities to achieve equality of opportunities and full participation in all aspects of life specifically in the areas of education, health and employment. It was averred that the rights of the petitioners and the rights of all deaf persons as enshrined and protected by **Articles 11(b), 22(1)(a) and 23(2) of the Constitution of Zambia ("the Constitution")** are violated by **section 62 of the Road Traffic Act, No. 11 of 2002 ("Road Traffic Act")**.

Alternatively, the petitioners challenged the constitutionality and compliance with the Disabilities Act of the Road Traffic Act in the extent to which:

- a) Section 62 of the Act precludes the issuance of provisional and consequently driver's licences to any person who is unable to be certified as medically fit in terms of their ability to hear as prescribed by the respondent;*

- b) Section 62 prohibits drivers with partial hearing but are certified to be medically fit from being issued with a provisional driver's licence and consequently a driver's licence; and*
- c) Section 62 read with sections 59 and 68 of the Act permits a licensing officer to arbitrarily preclude deaf people from renewing or extending their driver's licenses or to revoke a person's licence on the basis that the person is deaf.*

It was furthered averred that **section 62 as read with section 59** fails to provide for a framework for testing and training of deaf persons to drive motor vehicles thereby depriving your petitioners the right to drive a motor vehicle of their choice on equal basis with other members of the public.

The petitioners averred that the suspension of the 3rd petitioner's driver's licence by licensing officer of the respondent is not in terms of law and not provided for in the Road Traffic Act, in terms of which only a court is empowered to suspend a driver's license.

Furthermore, it was averred that the anomalies in the law have been created by the prohibition of issuing driver's licences to deaf persons who are holders of Southern African Development Community ("SADC") driving licences can drive in Zambia even though they are deaf whereas a Zambian who is deaf is prohibited from driving in Zambia.

Further that a Zambian deaf person can obtain an international driver's licence from abroad (for example, in Namibia or South Africa) thus rendering them eligible to drive in Zambia whereas the Road Traffic Act would still prohibit the issuance of a provisional and driving licence to a Zambian who is deaf thereby creating an anomaly at law with the result that the petitioner's rights protected by the constitution are infringed by the respondent.

The petitioners further averred that a deaf person has no incapability in terms of their ability to drive a motor vehicle and in fact driving is largely a visual activity requiring limited auditory function. That due to their inability to hear, their ability to focus and concentrate on the road is far greater than a driver without a hearing impairment.

That there is no reasonable justification or rationale in prohibiting deaf persons from being issued with a provisional or driver's licence other than the misconception that deaf persons who drive are a danger to other road users and which perception is not based on studies or research inquiry in that regard. To that extent the denial is discriminatory, irrational and arbitrary and is not based on any verifiable evidence.

It was further averred that the petitioners all underwent mandatory medical tests in terms of the Road Traffic Act at local government hospitals which certified them medically fit to drive a motor vehicle.

The petitioners went to driving schools and passed both the written and oral tests, which tests are mandatory prior to the issuance of a driver's licence. The 1st and 2nd petitioners were both issued with driver's licences and have been driving since 2014 without any collision or difficulty on the road by virtue of their deafness. The 2nd petitioner's drivers licence has since been suspended until 2030 whereas the 1st petitioner's drivers' licence will expire in 2023 and he is confronted with an imminent threat of suspension by the respondent. The 3rd petitioner has been applying to obtain a driver's licence from the respondent which application has been declined allegedly owing to **section 62 of the Act as read with section 59** which is interpreted and applied to preclude deaf persons from being issued with a driver's licence.

It was averred that **section 62 as read with section 59 of the Road Traffic Act** violates the petitioners' constitutional and legal rights to equal protection of the law, freed of movement and protection from discrimination contrary to **Articles 11(a)(b)(d), 22(1)(a) and 23 of the Constitution**. The section inhibits the freedom of movement in terms of the petitioner's ability to travel within Zambia and participate in gainful economic activities contrary to **Article 11(a) and 22(1)(a) of the Constitution**, as well as violates the petitioners' rights to protection from discrimination contrary to **Article 23(2) of the Constitution**.

In the amended answer filed into court on 5th November, 2020 to the foregoing petition, the respondent's response is that the

interpretation by the petitioners that the application of **section 62 of the Road Traffic Act, No. 11 of 2002** is unconstitutional is highly irregular and unfounded as no rights of the petitioners as envisaged in the Constitution have been violated by the respondent in the application of the Road Traffic Act No. 11 of 2002. **The Road Traffic Act No. 11 of 2002** is being applied in accordance with the Constitution of the Republic of Zambia and the Persons with Disabilities Act, and there is no inconsistency. Further **sections 57, 59, 62 and 68 of the Road Traffic Act No. 11 of 2002** are consistent with the Constitution and the Persons with Disabilities Act. **Section 62 of the Road Traffic Act No. 11 of 2002** stipulates pre-conditions in the process of obtaining a driver's licence contrary to the challenge by the petitioners that it aims to preclude deaf people from obtaining driver's licences.

The respondent further avers that **section 68 of the Road Traffic Act No. 11 of 2002** empowers the respondent to revoke a driver's licence if in the discretion of the respondent a driver has a disability that is likely to cause the driving by that driver a source of danger to the public. Further that, a person whose driving licence has been revoked has a right to challenge such revocation by appealing to the Road Service Appeal Tribunal as required by **section 68(4) of the Road Traffic Act No. 11 of 2002**.

It was further averred that this court has no jurisdiction to hear and determine any reliefs that arose from the decision of the Director of the Respondent in refusing to issue and revoking the petitioner's

driving licences as the challenge should have been lodged with the Road Service Appeal Tribunal as required by **section 68(4) and 69 of the Road Traffic Act No. 11 of 2002.**

Further that the respondent's application of the Road Traffic Act No. 11 of 2002 has not affected the petitioners' freedom of movement, right to privacy and right to earn a living. No constitutional and legal rights of the petitioners have been infringed upon by the respondent's interpretation and application of the Road Traffic Act No. 11 of 2002.

It was further averred that the licences issued in other countries are not issued by the respondent hence rendering them not to be valid. The Road Traffic Act No. 11 of 2002 has not created any anomaly by proscribing the issuance of driving licences to persons that do not meet the prescribed requirements under such Act. That driving is not only visual but also depends a person's physique, hearing, body and mental fitness. The prohibition of deaf people from acquiring driver's licences is reasonable and justified as enshrined under **section 62 of the Road Traffic Act No. 11 of 2002.**

The respondent admits that the driver's licences of the 1st and 2nd petitioners were issued by the respondent albeit, erroneously. Further that the respondent's interpretation and application of the Road Traffic Act No. 11 of 2002 is not inconsistent with the Constitution of the Republic of Zambia as alleged by the petitioners.

In conclusion, it was averred that the petitioners are not entitled to the reliefs claimed in the petition. The respondent has not breached **Articles 11(a)(b)(c), 2(1)(a) and 23 of the Constitution** have not been breached, are not about to be breached and will certainly not be breached, as the petitioner's right to freedom of movement has not been curtailed or discriminated against. **The Road Traffic Act No. 11 of 2002**, whether in whole or in part is not inconsistent with the Constitution of the Republic of Zambia. The claim challenging the decision by the Director to suspend and revoke the petitioners is one that this court does not have jurisdiction to hear and determine.

When the matter came up for hearing, the parties agreed that they would file written submissions on which I would make my determination. I am indebted to both Counsel for their spirited submissions.

Counsel for the petitioner contended citing **Article 11(A) of the Constitution** that the right to protection of the law entails the right to be treated in accordance with the law without discrimination founded on arbitrary grounds or the use of unlawful means to deprive a person of their human rights and fundamental freedoms. It was argued that the right to protection of the law together with the right to freedom of movement and protection from discrimination simultaneously as the three rights are inextricably linked in terms of their recognition and protection in the case at the bar.

Counsel invited this court to adopt a generous and purposive interpretation of the Constitution in order to give full effect to the rights enshrined therein as espoused in the case of the **Resident Doctors Association v Attorney (Supreme Court Judgment No. 2 of 2003)**¹ where the court affirmed that fundamental rights and freedoms ought to be given when the court held that:

“A generous and purposive construction....So as to confer on a person the full measure in the enjoyment of that right.”

Counsel further contended that this court has wide discretion with respect to the remedies it may grant in the determination of a violation of the bill of rights pursuant to **Article 28 of the Constitution**. Counsel quoted Article 28(2)(b), as well as **Article 8 of the Universal Declaration of Human Rights**.

It was submitted that the 3rd petitioner has demonstrated his income and earnings (“AN2”) whilst plying his trade as an agent, ferrying motor vehicles from abroad and bringing them to Zambia. I was urged to declare the various prohibitions by the respondent as null and void and grant the 3rd petitioner damages to be assessed.

The respondent submitted in reference to **Article 11** of the **Constitution** that the literal meaning of the provision is that every person in the Republic is entitled to the protection of the fundamental rights and freedoms, hence making the rights under the Bill of rights

sacrosanct. That, however, the Constitution further states that the fundamental rights and freedoms will not be enjoyed if they prejudice the rights and freedoms of others or the public interest. In reference to **Article 22 of the Constitution**, it was submitted that the legal meaning entails that a person has a freedom to move throughout in the Republic unless restrictions imposed under the Article or any written law have been applied on such person. The legal disqualification of not issuing drivers licences to deaf people does not infringe on their freedom of movement as espoused under **Article 22 of the Republican Constitution**. The arguments premised on the fact that, a deaf person without a driver's licence is not constrained from moving freely in the Republic as that person can get on any vehicle to move from one point to another.

Concerning the case cited by the petitioner of the **Resident Doctors Association v Attorney General SCJ No. 2 of 2003**, it was submitted that the court is barred from using the generous and purposive interpretation when the literal and legal interpretation is applied and no absurdity arises when the literal interpretation is used.

I was referred to the case of **Dan Pule & Others v The Attorney General & Others (2018) ZMCC 224** (citing **Katuka and Another v Attorney General and Others CCZ Judgment No. 29 of 2016**)² held that:

"We explained that this is premised on the principle that words or provisions in the constitution or statute must not be read in isolation. We

then went on to state that it is only when the ordinary meaning leads to absurdity that the purposive approach should be resorted to....

The sum total of what we have stated in the two cited cases is the purposive rule of interpretation is resorted to where the literal rule of interpretation results in absurdity or where it is not possible to decipher what the Legislature intended from the words used in the statute itself."

I was urged not to entertain the specific submissions made by the petitioners as the appropriate forum for challenging the decisions of the Director of the respondent is the Road Service Appeals Tribunal established under **section 111 of the Road Traffic Act**. My attention was drawn to **section 69 of the Road Traffic Act**.

It was submitted that **section 62 of the Road Traffic Act** infringes their right to freedom of movement as envisaged by **Article 22 of the Constitution**. I was urged to dismiss the petition for lack of merit as deaf people continue to enjoy their right to freedom of movement. Counsel also asked for an order for costs. Further that the legislative process is a preserve of Parliament and cannot be controlled by the respondent.

From the onset, I would like to tackle the issue of the jurisdiction of this court over this petition. This is important because that is the determinant as to whether this court will delve into substance of the petition.

The respondent argues that this court has no jurisdiction to determine this matter as the appropriate forum for challenging the decisions of the Director of the respondent is the Road Service Appeals Tribunal established under **section 111 of the Road Traffic Act**. That the relief claimed is against the decision or anticipated decision of the Director which should not be entertained by this court. My attention was drawn to **section 69 of the Road Traffic Act** which provides as follows:

- (1) Any person aggrieved by the refusal of a licencing officer or of the Director to issue a driving licence under this Part may, within thirty days of such refusal, appeal to the Tribunal or, where the appeal is from a refusal of the Tribunal to the High Court.*
- (2) An appeal against the refusal to issue a driving licence or duplicate driving licence shall be in such form and manner as the Minister may, by regulations prescribe.*

I have carefully analysed the petition. Clearly, the respondent has misconstrued the petition. The petition shows that the petitioners are not contesting the decision of the licensing officer or the Director in terms of **section 69 of the Road Traffic Act** quoted above. The petitioners' contest is the constitutionality of the sections of the **Road Traffic Act** which they find discriminatory against deaf people in terms of issuance of provisional and drivers' licences. Specifically, it has been argued that **section 62** as read with **section 59** of the Act, violates the petitioner's constitutional and legal rights to equal protection of the law, freedom of movement and protection from discrimination contrary to **Articles 11(a) and (b) and 22(1)(a)** of the

Constitution. The petitioners therefore seek a declaration to that effect.

This court has jurisdiction to entertain this petition. In the case of **Fred M'membe v Sunday Bwalya Nkonde, SC & Others 2018/CCZ/001**, where the court had occasion to analyse **Article 128(3) of the Constitution of Zambia**, stated the following:

The interpretation of the above provisions particularly Article 128(3) is that this court indeed does have jurisdiction to hear a matter challenging an action, omission, measure or decision by a person or an authority that contravenes the Constitution. We, however, note from the wording of the said provision that it is clear that the jurisdiction of this court is limited to the extent that by Article 28 of the Constitution, this court is excluded from adjudicating on matters falling under Part III of the Constitution that deals with the Bill of Rights.

Article 28 of the Constitution was quoted as follows:

Subject to clause (5), if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall:

- (a) Hear and determine any such application;*
- (b) Determine any question arising in the case of any person which is referred to it in pursuance of clause (2); and which may, make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of Articles 11 to 26 inclusive.*

The court went on to state that:

...On the other hand, where a matter seeks to challenge an action or decision of an authority on the basis that it violates any of the fundamental rights and freedoms guaranteed under Part III of the Constitution, the appropriate remedy would be to apply for redress before the High Court as per Article 28 of the Constitution.

Concerning the substance of the case, a person whose rights are directly affected by a law can raise the question of the constitutionality of that law. As stated in the case of ***Attorney General v The Law Association of Zambia, Appeal No. 199 of 2006; SCZ No. 3 of 2008***, this is based on the doctrine of the Supremacy of the Constitution as stated in **Article 1(1) and (2)**, which states:

- (1) This Constitution is the supreme law of the Republic of Zambia and any other written law...that is inconsistent with its provisions is void to the extent of the inconsistency.*
- (2) An act or omission that contravenes this Constitution is illegal.*

This is what was held in the case of ***Lt. General Wilford Joseph Funjika Vs The Attorney General (2005) Z.R. 97 (S.C.)***³ where the court held that:

“The Constitution is the supreme law of Zambia and if any other law is inconsistent with the Constitution, that other law is to the extent of the inconsistency void.”

Having stated that what remains to be determined is whether **section 62** as read with **section 59 of the Road Traffic Act** as applied by the respondent does, in fact, violate the petitioners right to protection of

the law, freedom of movement and the petitioners right to be protected from discriminatory treatment.

It has not been disputed that the 2nd petitioner applied for but was denied a driver's licence and that the 3rd petitioner's licence which was granted in 2014 was subsequently suspended by the respondent until 2030. The petitioners' contention is that section 62 as read with **section 59** violates **Articles 11(a) and (b), 22 (1)(a) and 23 of the Constitution.**

The respondent argues that it rightly applied **sections 59 and 62** which provide for the physical fitness of the applicant, which includes physique, vision, hearing, body and mental fitness. That the rationale was to ensure road safety not only for the driver concerned, but also other people using the road. It was further submitted that it was common knowledge that a deaf person cannot hear a siren nor hooting sounds from other vehicles hence posing a risk to other road users. Further that there may be associated challenges of deaf drivers failing to communicate with other road users and traffic law enforcement officers where they are stopped at a road checkpoint.

The respondent denied that the legal disqualification not to issue drivers licences to deaf people infringes on their right to freedom of movement as espoused in **Article 22 of the Republican Constitution.**

Section 59 of the Road and Traffic Act provides as follows:

- (1) An application for a driving licence or for a duplicate driving licence or for the renewal of such licence or for the extension by endorsement, of a driving licence, shall, subject to the provisions of subsection (2), be made to a licensing officer and shall be in such form as may be prescribed.*
- (2) An application under the provisions of subsection (1) shall be made to the Agency.*
- (3) Any person making an application under this section shall comply with such conditions and make such declaration as may be prescribed:*

Provided that where conditions are so prescribed the Director may dispense with compliance with such conditions in such circumstances as may be prescribed.

- (4) Subject to the provisions of this Act and to any regulation made under it and on payment of the prescribed fee, a licensing officer or the Director shall issue, renew or extend a driving licence or a duplicate driving licence.*
- (5) Driving licences shall be renewed or extended in such manner as may be prescribed.*

Section 62 of the same Act provides as follows:

A licensing officer shall not issue a provisional driving licence to any person who is unable to certify in the prescribed manner that the person's physique, vision, hearing, body and mental fitness are such as to warrant the issue to that person of a licence, and before issuing a provisional driving licence the licensing officer shall require the applicant to produce a satisfactory medical certificate in such form as may be prescribed, signed by a registered medical practitioner.

A reading of the above sections does indeed reveal that the petitioners are not allowed to be issued with a provisional and consequent drivers licences. This is the treatment that they find

discriminatory against themselves and hinges on their right of movement.

The Articles said to be violated provide as follows:

Article 11(a) and (b):

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

- (a) Life, liberty, security of the person and the protection of the law;*
- (b) Freedom of conscience, expression, assembly, movement and association;*

Article 22(1):

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

- (a) The right to move freely throughout Zambia;*
- (b) The right to reside in any part of Zambia; and*
- (c) The right to leave Zambia and to return to Zambia.*

Article 23 (1) and (2):

- (1) Subject to clauses (4), (5) and (7), a law shall not make any provision that is discriminatory either of itself or in its effect.*
- (2) Subject to clauses (6), (7) and (8), a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.*

The petitioner's Counsel has urged me to adopt a generous and purposive interpretation of the Constitution in order to give full effect to the rights enshrined therein. I was referred to the case of the *Resident Doctors Association v Attorney General* (supra). The respondent's Counsel, on the other hand, argued that this court is barred from using the generous and purposive interpretation as the cited provisions of the Constitution and Acts of Parliament are clear, and when the literal interpretation is applied no absurdity arises.

In the case of *Faustine Mwenya Kabwe Aaron Chungu John Sangwa V Judicial Complaints Authority Attorney-General (2009/HP/0966)*, *Kajimanga J*, (as he then was) discussed a number of authorities in which the courts dealt with the application of the purposive rule in the interpretation of the Constitutional provisions. For instance, the case of *Attorney-General and Another v Lewanika and Others (1993-1994) Z.R. 164*,⁴ where our Supreme Court stated as follows:

"In the instant case, we have studied the judgment of the Court below, and we find it sound and correct by applying the literal interpretation. However, it is clear from the Shartz and Northman cases that the present trend is to move away from the rule of literal interpretation to 'purposive approach' in order to promote the general legislative purpose underlying the provisions. Had the learned trial judge adopted the purposive approach, she should undoubtedly have come to a different conclusion.

It follows, therefore, that whenever the strict interpretation of a statute gives rise to unreasonable, and an unjust situation, it is our view that judges can and should use their good common sense to remedy it- that it is by reading words in if necessary, so as to do what parliament would

have done had they had the situation in mind. We, therefore, propose to remedy the situation in this case by reading in the necessary words so as to make the constitutional provision fair and indiscriminatory..."

In that case, there was also reference to a South African case of ***Minister of Land Affairs and Another v Slamdien and Others (LCC107/98) [1999] ZALCC 6 (10 February 1999)***⁵ which I find persuasive. In that case the court stated the following:

"What method should be used in interpreting section 2(1) (a) (of the Restitution of Land Rights Act 22 of 1994)? The approach to the interpretation of constitutional and statutory provisions in our law is not harmonious. The Constitutional Court has made it clear that the approach to be adopted in interpreting the Constitutions is a purposive one. This was the approach adopted in the first judgment of the Court, namely S v Zuma and Others. It was confirmed by the President of the Court in S v Makwanyane and Another. It was applied in relation to subsequent judgments under the 1993 Constitution, and had continued to be applied in relation to the 1996 Constitution. That it must be accepted as binding all other Courts to the purposive method in constitutional cases is clear. This Court signaled its acceptance of a purposive approach early in its life in the judgment of Meer J (Gildenhuys J concurring) in Dulabh and Another v Department of Land Affairs. In that case, the purposive method was used in order to determine the 'ambit of restitution' under the 1993 Constitution."

The Court further went on to explain the purposive interpretation saying:

"The purposive approach as elucidated in the decisions of the Constitutional Court and this Court requires that one must:

- (i) In general terms, ascertain the meaning of the provision to be interpreted by an analysis of its purpose and, in doing so;*
- (ii) Have regard to the context of the provision in the sense of its historical origins;*
- (iii) Have regard to its context in the sense of the statute as a whole, the subject matter and broad objects of the statute and the value which underlie it;*
- (iv) Have regard to its immediate context in the sense of the particular part of the statute in which the provision appears or those provisions with which it is interrelated;*
- (v) Have regard to the precise wording of the provision; and*
- (vi) Where a constitutional right is concerned, as is the case here, adopt a generous rather than a legalistic perspective aimed at securing for individuals the full benefit of the protection which the right confers."*

The court further stated that:

"With reference to the last of these guidelines, the observation needs to be made that the adoption of a purposive approach will not always mean the adoption of a wide or literal interpretation of the words concerned. It may well be that, upon a proper analysis of the purpose of the provisions, a meaning which is narrower than the ordinary, literal meaning of the provision is arrived at. The goal is to ascertain the proper ambit of the provision. This point is made in the judgment of Chaskalson P in Soobramoney v Minister of Health, KwaZulu-Natal where he says: "The purposive approach will often be one which calls for a generous interpretation to be given to a right to ensure that individuals secure the full protection of the bill of rights, but this is not always the case, and the context may indicate that in order to give effect to the purpose of a particular provision 'a narrower or specific meaning' should be given to it."

In my opinion, the choice of what rule of interpretation the court adopts will depend on the nature of the statutory provision, in relation to the rights that are sought to be protected in the Bill of Rights. The above cases reveal that there is no absolute rule to be adopted. The court will adopt the rule which serves the occasion.

The position was also affirmed in the **Resident Doctors Association** case cited above. In that case the court held the following:

It is accepted the world over that the enjoyment of these rights is not absolute. They have to be balanced against the public interest in the laws and regulations restricting these rights. Courts, as final arbiters, when interpreting the constitution and the laws made thereunder which confer the freedoms, determine the content and parameters of these rights. While it cannot be denied that not all manner of speech and assembly are acceptable, there is need for the court, when interpreting provisions conferring fundamental rights, to adopt an interpretation which does not negate the rights. Most jurisdictions have adopted a generous and purposive construction of human rights instruments, so as to confer on a person the full measure in the enjoyment of the rights.

The court quoted Lord Woolf in the case of **Huntley v Attorney-General for Jamaica (1995) 1 ALL ER 308**,⁶ when he said that:

“The court should “look at the substance and reality of what was involved and should not be over concerned with what are no more than technicalities.”

However, the starting point should always be to give the words the literal meaning unless that leads to absurdity. This is was held by

the court in the case *Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & Others (2005) ZR 138 (SC)*⁷ where the court held the following:

"It is trite law that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning. It is only if there is ambiguity in the natural meaning of the words and the intention cannot be ascertained from the words used by the legislature, that recourse can be had to the other principles of interpretation."

I have carefully analysed the statutory provisions cited in this regard.

Article 22 of the Constitution which provides that:

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

- (a) The right to move freely throughout Zambia;*
- (b) The right to reside in any part of Zambia; and*
- (c) The right to leave Zambia and to return to Zambia.*

This Article cannot be called in aid when it comes to the respondent's refusal to grant the petitioners drivers licences. Subclauses (a)(b)(c), clearly spell out the purpose of the provision. It is for movement within and outside Zambia. It has nothing to do with how people move around, in particular driving, which is the subject matter of this petition.

If we were to stretch the provision so as to cover the issue at hand, I think it will be necessary then not to end on clause 2 but to also look at clause (3) which provides that:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision-

- (a) for the imposition of restrictions that are reasonably required in the interests of defence, public safety, public order, public morality or public health or..., and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society; (underlining is mine for emphasis).

Furthermore, **Article 23(4)(e)** provides that:

Clause (1) shall not apply to any law so far as that law makes provision-

Whereby persons of any such description as is mentioned in clause (3) may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description is reasonably justifiable in a democratic society. (underlining is mine for emphasis).

In view of the foregoing, I am of the firm view that **section 62** as read with **section 59 of the Road Traffic Act**, in its application by the respondent does not violate the petitioners' rights to the protection of the law nor their freedom of movement.

In this case, the purposive rule might as well be adopted in resolving why Parliament decided that deaf people may be excluded from being issued with driver's licences and ultimately not allowed to drive on Zambian roads.

Using the purposive rule on interpretation, I can only come to one conclusion that the purpose of **section 62** as read with **section 59 of the Road Traffic Act** is for public safety. It protects the petitioners and other road users. I totally agree with the respondent's Counsel's submission that it is common knowledge that a deaf person cannot hear a siren nor hooting sounds from other vehicles hence posing a risk to other road users. I also agree that there are other associated challenges of deaf drivers failing to communicate with other road users and traffic law enforcement officers.

Should **section 62** as read with **section 59**, be found to be discriminatory against the petitioners in the meaning of **Article 23**, then I am of the view that the discrimination is reasonably justifiable in a democracy in terms of **Articles 22(3) and 23(4)(e)**.

Other statutory provisions cited by Counsel for the petitioners such as, **section 43 of the Persons with Disabilities Act, No. 6 of 2012**; the Article 4 of the United Nations Convention on the Rights of Persons with Disabilities; and Article 5 of the UNCRPD have no bearing on the respondent's actions complained about.

Furthermore, there is nothing wrong with the issuing authority withdrawing a licence which was erroneously issued in terms of section 68. In this case the issuance would have been contrary to the cited **sections 62** as read with **section 59 of the Road Traffic Act**.

Although this action fails and is dismissed, I wish to state here that our country needs to comply with various instruments of human rights it is party to, in order for all its citizens to fully enjoy their human rights without distinction particularly on the basis of disability.

I sympathize with the plaintiff and quite agree with Counsel that it is important for the court to consider international best practices. However, in this country our facilities have not developed to the extent that the deaf can safely drive our roads. The law in its current form as stated above is for the protection of persons living with this disability.

The World Federation of the Deaf stresses that having a hearing impairment does not in any way limit the use of a car or other vehicles. Consequently, a driver with a hearing impairment does not constitute a risk for safe traffic. Globally, there are no known reports that drivers with hearing impairment are a threat to other road users, in countries where persons with hearing impairments are allowed to obtain driver's licences. The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)

which has been domesticated under the Persons with Disabilities Act No. 6 of 2012 provides for equality and non-discrimination for all persons with disabilities (Article 5). It further requires that State Parties ensure that persons with disabilities enjoy legal capacity on an equal basis with others in all areas of life.

It is said that denying persons with hearing impairments driving licence deprives them on the mobility that gives them access to essential services, social opportunities and life in general. That it also restricts the already limited employment prospects. There is no doubt that this is a reality.

Driving has been described as part of the human rights discourse as a means through which the enjoyment of rights such as movement and an adequate standard of living can be enhanced.

Having made a decision in accordance with the law there is nothing stopping my recommending that our facilities should be improved in order for us to extend our motor vehicle laws to cater for persons with hearing impairments.


Having ratified the United Convention on the rights of persons with disabilities it follows that our country should do everything to ensure that all perceived discriminations on the ground of disability do not arise through the provision of facilities that will make it

possible for persons living with disabilities to safely and fully express their rights without any limitations.

I will not make any orders to costs due to the nature of the matter.

Leave to appeal is hereby granted.

DELIVERED AT LUSAKA THIS 4TH DAY OF JUNE, 2021



**G.C. CHAWATAMA
HIGH COURT JUDGE**