

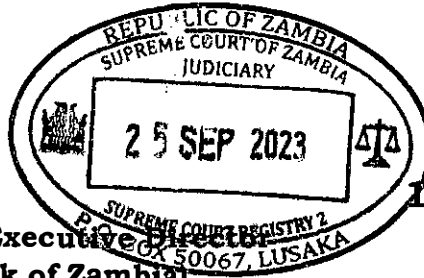
IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Appellant Jurisdiction)

Appeal No. 01 of 2023

BETWEEN:

SYLVESTER KATONTOKA

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



1ST APPELLANT

WAMUNDILA FRED WALIUYA

(Suing on his own behalf and the Executive Director
of Disability Rights Watch)

2ND APPELLANT

AND

ATTORNEY GENERAL

RESPONDENT

CORAM : Musonda DCJ, Hamaundu and Mutuna JJS

On the 9th day of May, 2023 and 25th September 2023

For the Appellant : Mr. K. Mwale of Messrs K. Mwale and Co.

For the Respondent : Mr. P. Phiri, Attorney General's Chambers

J U D G M E N T

Mutuna JS delivered the judgment of the Court.

Cases referred to:

1. Sara Longwe v. Intercontinental Hotels (1993) LRC 221
2. Purohit and Another v The Gambia (2003) AHRLR 96
3. Finance Bank Zambia Limited v. Weluzani Banda & 162 Others
Selected Judgment No. 31 of 2019
4. Attorney General v Roy Clarke (2008) Z.R. 38 Vol. 1

Legislation referred to:

1. **The Constitution, Cap 1 of the Laws of Zambia**
2. **The Mental Health Act No. 6 of 2019**
3. **The Persons with Disabilities Act No. 6 of 2012**
4. **The Mental Disorders Act, 1949**
5. **The Companies Act, Cap 388 of the Laws of Zambia**
6. **The Ratification of International Agreements Act No. 34 of 2016**
7. **The Investment Disputes Convention Act, Cap 42 of the Laws of Zambia**

Other authorities referred to:

1. **B. A. Garner and H.C. Black, 'Black's Law Dictionary' (9th Edition) West Group, USA.**
2. **S.H. Gifis, 'Barron's Dictionary of Legal Terms' Barron's Educational Services, USA.**
3. **United Nations General Assembly Resolution 46/119**
4. **Convention on the Rights of Persons With Disabilities**
5. **International Convention on Civil and Political Rights**
6. **African Charter on Human and People's Rights**
7. **Robert Diverstein 'Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The difficult period through Guardianship to supported decision making' *Human Rights Brief* (2012) Volume 18, Issue 2**
8. **Vulnerable Persons Living With Disability Act (MANITOBA CCSM CV90)**

Introduction

1. In the recent past, our courts have been inundated with actions by various groups asserting their constitutional and other rights. They contend an infringement of such rights and seek redress from the courts.
2. This appeal is one such action, in which the Appellants challenge the constitutionality of Section 4 of the ***Mental***

Health Act (the Act). They alleged that its enactment is likely to and does, in fact, infringe upon their constitutional rights as enshrined in the Bill of Rights, Chapter 3 of the **Constitution**, in particular Articles 11(a), 13(1), 19(1), 20(1), 23(1) and 28(2)(b).

3. It is an appeal against the decision by Lombe - Phiri J, in which she dismissed the Petition by the Appellants which sought to strike down Section 4 of the Act on the grounds set out in the preceding paragraph.

Background

4. The facts leading up to this appeal are fairly undisputed. The Appellants are both persons living with disabilities and champion their and the rights of other persons who are similarly circumstanced.
5. The First Appellant has psychological disability and was diagnosed with depression in 1996 and has been receiving treatment for the condition since then. He is also the Executive Director and co-founder of the Mental Health Users Network of Zambia (MHUNZA) which advances the rights of persons with

psychosocial disabilities in Zambia, on whose behalf he also took out the action in the High Court and this appeal. In addition, he participated and contributed to the debate on the enactment of the Act which repealed and replaced the ***Mental Disorders Act, 1949***.

6. The Second Appellant is visually impaired and is the Executive Director of the Disability Rights Watch (DRW), a non-profit making company incorporated under the provisions of the ***Companies Act, Chapter 388*** of the Laws of Zambia. The DRW is also registered under ***Article 54(2)*** of the ***Persons With Disabilities Act, No. 6 of 2012*** as an organization which advances the rights of persons living with disabilities associated with the Zambia Agency for Persons with Disabilities.

The Petition in the High Court and decision by the learned High Court Judge

7. The Appellants contended that Section 4 of the Act violated their rights, as persons with mental and psychosocial disabilities guaranteed under Articles 11(a), 13(1), 19(1), 20(1) and 23(1) of

the **Constitution**. The particulars of their claim were crafted as follows:

- 7.1. Section 4(1) of the Act circumscribes the universal right to enjoy one's legal capacity and deprives persons with mental and psychosocial disabilities of legal capacity on an equal basis with others;
- 7.2. Section 4(2) of the Act conflates mental capacity with legal capacity instead of protecting and enabling the inherent right to legal capacity;
- 7.3. Section 4(2) permits a person deprived of their legal capacity to be denied the right to perform any function that requires legal capacity;
- 7.4. Section 4(3) of the Act establishes substituted instead of supported decision making thereby failing to respect the will and preferences of the individual concerned;
- 7.5. Section 4(4) of the Act precludes persons deemed to lack legal capacity from determining who their supporter should be through advance directives; and,
- 7.6. Section 4(5) of the Act empowers courts to legally disqualify persons with mental and psychosocial

disabilities from enjoying their legal capacity under all laws in the Republic of Zambia.

8. As a consequence of the matters stated in paragraph 7, the Appellants concluded as follows:

8.1. Section 4 of the Act disqualifies and precludes persons with mental and psychosocial disabilities from exercising the rights and duties of legal persons and from making legally binding decisions and entering into legal relationships with others;

8.2. Since Section 4 of the Act deprives persons with mental and psychosocial disabilities legal personhood, such persons are likely to be subjected to forced treatment and involuntary detention in psychiatric detention facilities prescribed under the Act in contravention of the rights enshrined in the **Constitution**; and,

8.3. Section 4 of the Act is the basis upon which persons with mental and psychosocial disabilities are denied the right to enjoy privileges arising from legal capacity such as the right to own property, participate in economic, political

and community life, entering into contracts and exercising their right to marry, among other things.

9. The evidence the Appellants and Respondent relied upon at the hearing of the Petition was both in affidavit form and *viva voce*, with the latter mirroring the former. The Appellants also complained generally about the poor medical services provided by public mental health institutions. At the close of the hearing, the parties also filed final submissions.
10. The learned High Court Judge considered the evidence and arguments and began by reminding herself that the burden of proof lay with the Appellants. She then summarized the contentions by the Appellants as set out in paragraph 7 of this judgment.
11. The Judge also summarized the Respondent's position which was that the Appellants had misapprehended the provisions of Section 4 of the Act which acknowledges the vulnerable position mental patients are in and provides safeguards in the event that they become incapacitated and are unable to make decisions on their own.

12. After stating the two competing positions, the learned High Court Judge began her analysis of the matter by defining the phrases “*capacity*” and “*legal capacity*” with reference to ***Black’s Laws Dictionary*** by Bryan A. Garner and ***Barron’s Dictionary of Legal Terms***. Her finding was that all persons of full age, including persons with disabilities (who are not otherwise legally disqualified), are possessed of legal capacity and that to hold otherwise would be discriminatory.
13. The Judge went on to qualify her finding by holding that the law recognizes that arising from the fragility of the mind, in certain instances, mental patients may not be capable of making decisions on their own. To anticipate such situations, the Judge said, there are international best practices which prescribe the provision of support to mental patients. The support varies depending on the degree of need. She went on to quote at length from the ***United Nations General Assembly Resolution 46/119*** the (***Resolution***) which sets out principles for protection of mental patients and the improvement of mental health care.

14. The Judge focused on Principle Number 1(6) of the **Resolution** which she said acknowledges the fact that legal capacity may be affected by an individual's compromised mental health and sets out the recommended procedure to be followed to mitigate such circumstances. She drew a parallel with legislation in some Commonwealth countries which she said has provisions similar to those in the **Resolution**. The Judge noted a common thread running through the laws in the Commonwealth countries she examined as being the provision for the appointment of a supporter or personal representative through the court system or through the individual where it is done prior to the episode of mental illness resulting in the incapacity.
15. Having set out the international best practices and law prevailing in other Commonwealth countries, the learned High Court Judge then analysed the provisions of the Act and found as follows:
 - 15.1. Section 3 of the Act clearly sets out the test to be considered in determining the condition of a mental patient. The test conforms to international best practices and mirrors the **Resolution** which attests to the fact that

the Legislature was alive to the need to align the Act to these international best practices;

15.2. Section 4(1) affirms the fact that a mental patient shall have legal capacity, while subsection (4) provides an opportunity for mental patients to appoint a supporter of their choice unless a court of competent jurisdiction finds that the patient is lacking in mental capacity, in which case it would be the duty of the court to appoint the supporter; and,

15.3. By definition and according to Section 2 of the Act, a supporter is *“a person who represents a mental health service user or a mental patient’s rights or interests”*.

16. The learned High Court Judge proceeded to accept the contention by the Respondent that the Appellants had misapprehended the effect of the provisions of Section 4 (1) of the Act which, according to her, should be read in conjunction with the other provisions of the Act which recognize and affirm the fundamental rights and freedoms of mental patients. She made specific reference to Parts (v) to (xi) of the Act which she found to be specific in this regard.

17. As a consequence of her findings, the learned High Court Judge concluded that there was no basis upon which she could make a declaration that Section 4 of the Act contravenes the **Constitution**. However, by way of obiter, she noted the other issues raised by the Appellants which were on the quality of health care provided by the public mental health institutions. While she considered the Appellants' concerns as valid, she still dismissed them because they did not fall within the scope of the action before her. The Judge, nonetheless, observed that Part III of the Act provides for the constitution of a National Mental Health Council, whose role is to oversee the formulation of policies for provisions of the law and international best practices in the care of mental patients. She recommended that the Council should consider the issues raised by the Appellants regarding the quality of mental health services provided by the public mental health institutions.
18. The Judge accordingly, dismissed the petition and made no order as to costs.

Appeal to this Court and arguments by counsel

19. The Appellants are aggrieved by the decision of the learned High Court Judge and have appealed to this Court advancing six grounds of appeal which question the finding by the Judge that Section 4 of the Act, as read with the other provisions of the Act, is not discriminatory and conforms to international best practices. The grounds also fault the learned High Court Judge for failing to consider the provisions of the **Persons With Disabilities Act** and the **Convention on the Rights of Persons with Disabilities** (CRPD) in arriving at her decision.
20. Prior to the hearing, counsel filed heads of argument. With leave of Court, the Appellants filed arguments in reply as well.
21. In opening the arguments in support of the appeal, counsel for the Appellant, Mr. K. Mwale, referred to the various articles of the **Constitution** which he contended are violated by Section 4 of the Act. He began with Article 11(A) which he argued confers the right to all persons in Zambia to security of person and protection of the law. Counsel explained that this right provides that the law must treat all people equally and “..... *requires a systematic rule of law that observes due process, provides equal*

justice, and requires equal protection ensuring that no individual nor group of individuals is privileged over others by the laws”.

22. Counsel went on to say that the right under Article 11(a) was explained by Musumali J, (now deceased) in the case of **Sara Longwe v. Intercontinental Hotels¹** to mean that it guarantees every individual resident in this country a right to be protected by the law. According to counsel, the right which this law espouses is not restricted to the domestic scene but extends to the international scene as well. In support of this argument, he referred to the **International Convention on Civil and Political Rights** (ICCPR) and **African Charter on Human and People’s Rights** (ACHPR). In relation to the latter, counsel argued that the Charter has interpreted Article 3 of the ACHPRP in the case of **Purohit and Another v The Gambia²** as guaranteeing fair and free treatment of individuals within the legal system of any given country.
23. In addition, the provision is non-derogable and, therefore, must be adhered to in all circumstances in order for all persons to enjoy all the other rights provided for under the Charter. Concluding arguments in respect to Article 11(a), counsel

submitted that all people, notwithstanding their nationality, marital status, race or religion are entitled to equal protection of the law as demonstrated by the **Constitution** and various international and regional human rights instruments.

24. Counsel then advanced his arguments in relation to Articles 18(1) and 23(1) and explained them with reference to decisions of this Court and Article 266 of the **Constitution**. We have not listed and summarized the cases counsel referred to because he did not explain their relevance to the matters we have to consider. He argued that the provisions of Article 266 specifically prohibit the discrimination of persons living with disabilities.

25. Having set out the provisions of the **Constitution** and international instruments, which the Appellants contended were violated by the provisions of Section 4 of the Act, counsel went on to attack the findings by the learned High Court Judge as follows:

25.1. The Judge erred when she relied on the **Resolution** in arriving at the findings that Section 4 does not violate the Appellants' rights. He attacked the findings by the learned

High Court Judge that Parts (v) and (xi), as read with the provisions of Sections 3 and 4 of the Act recognize, affirm and provide for recognition of the fundamental rights and freedoms of mental patients;

25.2. The primary piece of legislation which the Judge ought to have considered is the **Persons With Disabilities Act** through which the CRPD has been domesticated following its ratification by Zambia. Counsel justified the foregoing arguments by contending that the provisions of the **Persons With Disabilities Act** prevail over other Acts of Parliament when there is inconsistency. He went on to explain the extent of domestication of the CRPD into the **Persons With Disabilities Act** which he said is the minimum international standard prescribed which the Judge ought to have considered in determining the constitutionality of Section 4 of the Act;

25.3. There is a need to shift from viewing persons with disabilities as objects of charity needing medical treatment and institutional rehabilitation to subjects with rights that need to be protected and allow them to make meaningful

decisions concerning their lives as active members of society. This principle is espoused by the CRPD;

25.4. Since Zambia has ratified the CRPD and enacted the **Persons With Disabilities Act**, we are compelled to shift our mindset in dealing with psychosocial disabilities towards a human rights approach. In addition, there is need to review legislation in Zambia which deals with education, health and accessibility to employment to bring it in line with the principles of non-discrimination espoused by the CRPD; and,

25.5. Section 8(2) of the **Persons With Disabilities Act** compels the judiciary to take necessary measures to ensure that persons living with disabilities have equal and effective protection and benefit of the law without discrimination. Since Section 4 of the Act is based on a medical and not social model of dealing with the rights of mental patients, there is need for the judiciary to exercise its duty under Section 8 of the **Persons With Disabilities Act**.

26. The thrust of Mr. Mwale's second argument contends that the learned High Court Judge failed to distinguish mental

incapacity from legal incapacity arising from her misinterpretation of Section 4 (2), (3) (4) and (5) of the Act. He argued that the Section deprives all mental patients of legal capacity regardless of the duration, nature, cause, effect and severity of the condition. This, counsel argued further, is in sharp contrast with Section 8 of the **Persons With Disabilities Act** which places persons with disabilities on an equal footing with others in terms of enjoyment of legal capacity.

27. According to counsel, where a person lacks mental capacity, he is, by virtue of Section 4, lacking also in legal capacity. Further, there is no legal process by which a person lacking mental capacity can be determined. Section 4(5) of the Act extends the deprivation of legal capacity to denying persons with mental and psycho-social disabilities of their rights to enjoy social and economic benefits of life. This includes the opportunity of engaging in gainful employment. It, therefore, discriminates against persons with mental disabilities contrary to Article 23, as read with Article 266, of the **Constitution**. In addition, counsel contended that once a court declares a person with

psycho-social disabilities as lacking in legal capacity, they lack the protection of the law.

28. In concluding arguments on the issue, Mr. Mwale drew our attention to the Second Appellant's evidence in the High Court which he contended established his claim that the effect of Section 4 of the Act is that it:

28.1.denies persons living with disabilities the right to enjoy legal capacity on equal footing with others;

28.2.deprives them of various liberties once found to be lacking in legal capacity;

28.3.denies them of the right to education and skills training due to the definition of legal capacity;

28.4.denies them the right to marry and own property; and,

28.5.does not afford them protection from confinement in mental institutions.

29. In the third limb of Mr. Mwale's arguments, he contended that Section 4 of the Act deprives mental patients of their right to participate in the decision of the appointment of a supporter. As a result of this, he argued, the will and preference of the persons with mental and psychosocial disabilities are not

considered. Counsel argued further that this extends to the detention of such persons because the conditions under which they are detained are not tailored to the individual circumstances of such persons.

30. To support his arguments, counsel referred us to an Article by Robert Diverstein, titled ***Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities. The difficult period through Guardianship to supported decision making, Human Rights Brief volume 18, issue 2, 2012*** which states that the effect of Article 12 of the CRPD is that all people with disabilities retain their legal capacity including those who may need significant and intensive support to achieve it. He argued that this approach has been adopted by most States including Canada which, by Section 6(1) of the ***Vulnerable Persons Living With Disability Act*** (MANITOBA CCSM CV90), has specifically defined the phrase “*supported decision making*” as follows:

“...the process whereby a vulnerable person is enabled to make and communicate decisions with respect to personal care or

his or her property and or assistance is provided to the vulnerable person by members of his or her support network.”

32. Counsel concluded his arguments as follows:

32.1. there are no safeguards which promote supported decision making through informed consent of persons with disabilities under the Act;

32.2. the procedure for court appointed supporters under Section 4(5) is deficient because it completely disregards the wishes of the “*supported*” person;

32.3. the reference in the Act to a “*court appointed supporter*” suggests that those who are not appointed by the court are not recognized;

32.4. there are no legislated safeguards to regulate the court appointed supporter and prevent conflict of interest, ill treatment and other possible abuses; and,

32.5. section 4 (4) which provides for advance instructions to a supporter is deficient because it does not allow for such advance instructions following the loss of mental capacity.

33. Counsel also set out a number of decisions in other jurisdictions on the right to legal capacity and supported decision making. We were urged to allow the appeal.
34. In his response, counsel for the Respondent, Mr. P. Phiri, began by arguing that the learned High Court Judge was on firm ground when she interpreted Section 4 of the Act with reference to the **Resolution** because the Preamble to the Act compels the Judge to do so. He went on to say that the enactment of the Act and **Persons With Disabilities Act** was a reaction to Article 4 (1) (a) and (b) of the CRPD pursuant to which State Parties undertook to enforce the rights of the disabled as enshrined in the CRPD and abolish legislation which discriminates against such persons.
35. Counsel concluded his initial arguments as follows:
- 35.1. the relevant law in determining the issues in the appeal is not only the **Persons With Disabilities Act** as read with the CRPD but also the Act;
- 35.2. both the Act and the **Persons With Disabilities Act** state their intention as being to give effect to the principles set

out in the CRPD. This is not restricted to the **Persons With Disabilities Act** only; and,

- 35.3. although the **Persons with Disabilities Act** provides for protection of the rights of persons with disabilities in formal terms, the Act deals specifically with mental health issues.
36. The second limb of Mr. Phiri's arguments addressed the general contention by the Appellants that Section 4 of the Act is unconstitutional. He began by pointing out that although the Appellants bear the burden of proving the contention, they did not lead sufficient evidence to prove them. Counsel drew our attention to the record of appeal which he said attests to this fact. He also argued that even in this appeal the Appellants have not proved the contentions of unconstitutionality of Section 4.
37. Mr. Phiri then addressed the contentions by the Appellants in more specific terms as follows:

37.1. Section 4 of the Act as read with Section 3 and Parts (v) and (xi) is not vague. To the contrary, the section provides sufficient guidelines for the determination of the condition of a mental patient. The learned High Court Judge was,

therefore, on firm ground when she held that Section 4(1) succinctly affirms the fact that mental patients have legal capacity.

37.2. Section 4 of the Act does not deprive mental patients of their inherent right to legal capacity but merely ousts legal capacity where there is absence of mental capacity. The provisions of the section relating to the appointment of a supporter are to enable a mental patient to continue enjoying legal capacity through a representative, in keeping with Article 12 of the CRPD;

37.3. A careful perusal of Section 4 of the Act as read with Parts (v) and (xi) reveals that the Act has listed: several inalienable rights of mental patients; standards of care and treatment; and, matters to do with consent regarding administration, care, treatment and other matters for the care of mental patients; and,

37.4. The Appellants did not lead sufficient evidence to prove that persons with psychosocial disabilities are deprived of their personal liberties and chained in order to constrain them thereby denying them access to education and skills

development as a consequence of their lack of legal capacity.

38. We were urged to dismiss the appeal.

39. The Appellants arguments in reply mirrored their initial arguments.

Consideration and decision by this Court

40. We would like to begin our consideration of this appeal by thanking counsel for the industry displayed in the preparation and presentation of their arguments. We also applaud the two Appellants for the role they continue to play in championing the rights of persons with mental health issues and other disabilities.

41. Mental health issues have taken center stage in the recent past in most jurisdictions with the focus being on the need for all of us to address any underlying mental issues and putting in place incentives to cater for our well-being in general. This arises from the stressful working environments and recognition of the fragility of the mind. These efforts, unfortunately, have not been

embraced or adequately addressed in our jurisdiction except by a few institutions.

42. The main focus in Zambia has been stigmatization of persons with mental health and other disability issues and shy away from addressing mental wellbeing of citizens in general. The few exceptions where the wellbeing of individuals has been addressed is mainly through “*well-ness*” programmes put in place by some major conglomerates like banks. The Judiciary through the Zambia Association of Women Judges also held a “*wellness*” meeting just a few months ago. These shining efforts must be commended.
43. There is, therefore, need to change the mindset of the public in general to bring it in line with what is trending in other jurisdictions.
44. Notwithstanding what we have said in the preceding paragraph, it is important that we acknowledge, without necessarily commenting on the merits or demerits of the appeal at this point, that there has been significant movement in legislative reform on the issue of mental health in the country. We have moved from the ***Mental Disorders Act*** to the ***Mental Health***

Act. The significance of this is apparent later. Several international agreements on mental health and other disabilities have been introduced in the local legislation. These are what are at the heart of the dispute in this appeal and are discussed in detail later.

45. The observations in the preceding paragraphs are by way of obiter. We would now like to address the main issue namely, is Section 4 of the Act unconstitutional? A consideration will also be made of the plight of the Appellants and determine whether the provisions of the Act have impeded their exercise of legal capacity as contended. The determination of the main issue will be through three sub issues as follows:

45.1. Whether the learned High Court Judge erred when she relied upon the United Nations General Assembly Resolution 46/119 in finding that Section 4 of the Act is not discriminatory;

45.2. Whether Section 4 of the Act impedes mental patients from exercising their legal capacity; and,

45.3. Whether the Act provides sufficient safeguards to protect the interests of persons with mental illness.

These sub issues are drawn from the six grounds of appeal advanced by the Appellants.

46. In dealing with the plight of the Appellants the question we have asked is, in so far as Section 4 of the Act relates to them as persons living with mental illness, did they prove the contentions they advanced in the Petition? In other words, did the learned High Court Judge err when she dismissed their Petition?
47. The Appellants contended in the High Court that Section 4 denies them the right to engage in economic and social activities. The evidence led was as follows:
- 47.1. section 4 of the Act in its current form is the basis upon which persons with mental and psychosocial disabilities are denied enjoyment of a range of rights and relationships which are dependent upon legal capacity;
- 47.2. section 4 precluded them from being recognized as legal persons and they cannot freely participate in activities in society and acquire or dispose of assets; and,

47.3. denial of legal capacity disempowers them from performing economic activities, engaging in employment and entering into legal relationships with others.

The Appellants' contentions aforestated were in general terms as they were essentially saying that all mental patients have been impeded in carrying out most activities which they would like to engage in such as business enterprises, social engagements, like marriages and gainful employment.

48. This evidence is contained in the two affidavits filed by the two Appellants in the High Court in support of the Petition. Counsel for the Respondent argued that the Appellants bore the burden of proving the allegations and that they failed to discharge the burden.

49. We must agree with the Respondent's argument because during our engagement with Mr. Mwale at the hearing, he confirmed the following:

49.1. The Appellants had competently interacted with him in the client lawyer relationship and the interaction had resulted in legally binding contracts by which he undertook to provide legal services and they undertook to remunerate

him for such legal services. They were in no way impeded in their interaction with him by their conditions or section 4 of the Act; and,

49.2. The Appellants have not in any way been impeded in asserting their rights before the High Court or this court as a consequence of their conditions and the provisions of Section 4 of the Act.

There is also evidence that the Appellants are in employment and manage two very important institutions for the benefit of persons with disabilities and competently champion their cause. Their status has in no way impeded the advancement of their careers.

50. Counsel for the Appellants concluded our engagement with him by confirming that from a practical point of view, the two Appellants are not impeded in any way in the exercise of their social and economic rights and activities as a consequence of their conditions and Section 4 of the Act. He also conceded that the evidence they tendered in the High Court which alleged that by virtue of Section 4 they have difficulty asserting their social and economic rights was not truthful.

51. The inescapable conclusion we have come to, as a consequence of the concessions made by Mr. Mwale, on behalf of Appellants is that, in so far as the two are concerned, they failed, on a balance of probabilities, to prove their case. Their actions in relating to their counsel of choice and presentation of their case before the courts reveals an unhindered exercise of their constitutional rights and legal capacity notwithstanding their conditions.
52. After the concessions, Mr. Mwale made an alternative argument that while the Appellants' rights have not been affected by the provisions of Section 4 of the Act, they have affected the other persons living with mental health issues on whose behalf the Appellants have also brought the action. We have considered and dismissed the argument because, in so far as the action purports to be a class action, it was ill conceived. In the case of **Finance Bank Zambia Limited v. Weluzani Banda & 162 Others**³ we explained how a class action should be presented and that the averments by each claimant should be set out in the originating process.

53. The originating process presented by the Appellants falls far short of this because, not only does it omit to specifically name the other Petitioners and persons on whose behalf they were taking out the action, but it merely made general averments in relation to the claims by the others.
54. Moving on to the first sub issue which is whether or not the learned High Court Judge erred when she relied upon the **Resolution** in finding that Section 4 of the Act is not discriminatory, the argument by the Appellants is that the Judge ought to have considered the CRPD and the **Persons With Disabilities Act** because these two instruments are representative of the best international practices.
55. The learned High Court Judge quoted at length Principle 1 of the **Resolution** and explained its effect. She also set out various legislation in other jurisdictions on the issue, then compared the provisions of the Act to the **Resolution** and legislation in other jurisdictions. The Judge concluded that a logical reading of the Act reveals that careful consideration was made when enacting it to ensure that the international best

practices were included. This is the consideration which has aggrieved the Appellants.

56. The starting point is the Preamble to the Act which states in the relevant portion that its purpose is to, among other things, “...give effect to certain provisions of the United Nations Convention on the Rights of Persons with Disabilities, Principles for the protection of persons with mental illness and the improvement of mental care General Assembly Resolution 46/119 of 17th December 1991 and other international human rights instruments to which Zambia is a state party...”
57. Our understanding of the portion of the Preamble to the Act we have quoted is that in enacting the Act the intention of the Legislature was to bring into domestic legislation certain international principles on the care and treatment of mental patients as enshrined in the **Resolution**. That is to say, domestication of the **Resolution**.
58. Section 2 of the **Ratification of International Agreements Act** defines the word “domestication” by stating that the process of domesticating an international agreement can take two forms. The first is through actual incorporation of the provisions

or part thereof of the international agreement into local legislation. An example of such method is the **Investment Disputes Convention Act** which gives effect to the Convention on Settlement of Investment Disputes between States and Nationals of other States of 1965, popularly known as the 'Washington Convention of 1965'.

59. The second method is through the use of any other enforceable means. This can be through the courts considering an international agreement ratified by the country, such as the **Resolution** and rendering an enforceable decision in accordance with the provisions of that agreement.
60. In rendering her decision, the learned High Court Judge, by implication acknowledged this fact and made a comparison between the provisions of the Act and those of the **Resolution**, identifying as she did, the similarities in the two. She concluded that Zambia has indeed adopted the international best practice in its legislation not only from the **Resolution** but other jurisdictions because the provisions of the Act mirror the provisions of the **Resolution**.

61. The Appellants are aggrieved by the approach taken by the learned High Court Judge contending that she should, instead, have considered the **Persons With Disabilities Act** which has embraced the CRPD and is thus more progressive than the Act. The Respondent has countered this argument by submitting that the Act and **Resolution** speak specifically to the issue with which the learned High Court Judge was engaged, being the rights of mental patients, while the **Persons With Disabilities Act** and CRPD are general as they speak to all disabilities.
62. The matters which the Appellants presented before the High Court and with which we are engaged concern the rights of mental patients. It is very specific in this regard and all the contentions set out in the Petition related to these issues. At the heart of the dispute is a section in the Act. The learned High Court Judge was, therefore, obliged, in dealing with the matter, to refer to the primary legislation on the issue which is the Act especially that it was the provisions of this legislation which were under attack.
63. The learned High Court Judge was also on firm ground in referring to, considering and giving effect to the **Resolution**

which, as we have said earlier, is in itself the domestication of an international agreement ratified by the country. This is in line with Section 12(1) of the **Ratification of International Agreements Act** which states, *inter alia*, that an international agreement may be domesticated through the use of enforceable means. The ‘*enforceable means*’ referred to include a court rendering a decision on an international agreement. The learned High Court Judge was thus on firm ground when she relied on the Act and referred to the **Resolution**.

64. We must distinguish the approach we have taken on domestication in this appeal from the one we took in the case of **Attorney General v Roy Clarke**⁴. In that case, while we confirmed that in construing *Zambian* statutes, courts can take into account international instruments to which *Zambia* is a signatory, we said that the instruments are only of persuasive value unless they are domesticated in the local laws. The domestication anticipated in the **Roy Clarke**⁴ case was the actual incorporation of international instruments into local legislation. This decision was rendered in 2008 long before the enactment of the **Ratification of International Agreements**

Act which has broadened the definition of domestication to the consideration of an international agreement ratified by Zambia and rendering an enforceable order on it.

65. The second sub issue is whether or not Section 4 of the Act impedes mental patients from exercising their legal capacity. We shall consider this sub issue along with the third one which is whether or not the Act provides sufficient safeguards to protect the interests of mental patients. The thrust of the arguments by the Appellants was that the Section aligns legal capacity to mental capacity such that when one is found to have lost the latter it is assumed the former is also lost. Secondly, the section does not provide for participation by mental patients in appointing supporters. Therefore, their will and preference is not reflected in the person so appointed. Lastly, the section does not have sufficient provision for assessing the mental capacity of a person.
66. As a consequence of the matters set out in the preceding paragraph, Mr. Mwale contended that section 4 of the **Mental Health Act** contravenes provisions of the **Constitution** we have referred to earlier.

67. In advancing the first argument under these sub issues Mr. Mwale's main grievance was the contention that legal capacity ought not to be aligned to mental capacity. That a person must at all material times, regardless of the mental state, be endowed with legal capacity. The Respondent's argument was that Section 4 of the Act guarantees legal capacity to mental patients except in a situation where the mental illness is such that it results in the absence of mental capacity. Mr. Phiri argued further that even where one is deprived of legal capacity, there are sufficient provisions under the Act for appointment of a supporter.
68. We begin our consideration of these sub issues with Section 4(1) of the Act which states as follows:

“subject to the other provisions of this Act, a mental patient shall enjoy legal capacity”

Our interpretation of this section is that it guarantees the right to legal capacity to all mental patients. This is in accordance with the finding by the Judge. Mr. Mwale's argument suggests that there is no such guarantee and that, the fact that a person is a mental patient disqualifies him from legal capacity. We do

not agree with this interpretation because the wording of the section expresses a contrary intention, which is that it guarantees legal capacity to all mental patients.

69. In the earlier part of this judgment, we traced the history of the Act and alluded to the fact that we have moved from the ***Mental Disorder Act*** to the ***Mental Health Act***. The significance of this is that the repeal of the ***Mental Disorders Act*** introduced legal capacity for mental patients in our legislation for the first time. This is a positive move as there was no such provision in the old Act which, to a large extent, discriminated against the rights of mental patients.
70. The ***Mental Disorders Act*** was not only by definition discriminatory but also stigmatized mental patients. In its preamble, the intention was “...*to provide for care of persons suffering from mental disorder or mental defect; to provide for the custody of their persons and administration of their estates...*”. This suggests a total lack of legal capacity on the part of mental patients and the ill perceived need for society to care for them regardless of the level of their mental state. The old Act treated

mental patients as “*objects of charity*” to borrow a phrase from Mr. Mwale’s lexicon.

71. On the other hand, the ***Mental Health Act*** defines its intention as being “...*to provide for the promotion and protection of the rights of persons with mental illness, mental disorder, mental impairment or mental disability...*” while giving effect to certain provisions of the United Nations Convention on the Rights of Persons with Disabilities, Principles for the protection of persons with mental illness and the improvement of mental care General Assembly Resolution 46/119 of 17th December, 1991 and other international human rights instruments to which Zambia is a State Party.
72. Mr. Mwale’s argument that the learned High Court Judge should have considered Section 8 of the ***Persons With Disabilities Act*** rather than Section 4 of the Act was inspired by his conviction that the former secures the interests of the disabled because it is a domestication of the CRPD. In so doing, he argued, the Judge below should have found section 4 to be discriminatory. For completeness, it is important that we quote the relevant portions of Section 8 of the ***Persons With***

Disabilities Act and compare them with Section 4(1) of the Act.

It states as follows:

“8 (1) A person with disabilities 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.”

We are of the firm view that Section 8(1) does not in any way provide a better prescription of legal capacity than Section 4(1) of the Act. This is the case with Section 8(2) in terms of its prescription of access to the courts as our discussions of the other subsections of Section 4 will show.

73. Section 4 qualifies the right to legal capacity in subsection (2) which states as follows:

“where the nature of the mental illness, mental disorder or mental disability results in the absence of mental capacity of that mental patient, the mental patient shall not enjoy legal capacity and is legally disqualified from performing a function that require legal capacity.”

Section 4(3) goes further to state that where a mental patient lacks legal capacity a court may appoint a supporter.

74. The Appellants' contention suggests that a mental patient should be considered to be possessed of legal capacity whatsoever the state of their mental illness. This argument fails to recognize not only the fact that mental illness is of varying degrees, but also the fact that the provisions of Section 4(2) are not meant to discriminate against mental patients but rather protect them. The rationale for the provision is that it provides protection to mental patients when the degree of their illness is such that they are wanting in mental capacity. In such a case, the law will shield such mental patients from contractual and other obligations they may have committed themselves to while labouring under the incapacity.
75. The learned High Court Judge dealt with this issue when she said that instances may arise due to fragility of the mind, when persons living with mental health issues may not be able to make certain decisions on their own stead. Legal capacity will, therefore, always be aligned to a person's state of mind because this is what determines competence of such, if not, all persons to make decisions which affect them.

76. The second argument by Mr. Mwale suggests that there is no participation by the mental patient in the appointment of a supporter. As the learned High Court Judge quite rightly observed, subsection 4 of Section 4 allows a mental patient while possessing legal capacity to give advance instructions regarding the preference of a supporter. Further, where the court exercises its jurisdiction under Section 4(3) to appoint a supporter, it does so in consultation with members of the family of the affected mental patient. Mr. Mwale confirmed during our engagement with him that this is the practice adopted by the courts in Zambia. These members of the family will no doubt inform the court who the mental patient's preferred supporter is, resulting from prior conversation had with the patient.
77. In addition, in exercising the power under Section 4(3) of the Act, courts are enjoined, by virtue of the Preamble to the Act, to follow the comprehensive recommended procedure set out in Principle 1(6) of the **Resolution** which states as follows:

“Any decision that, by reason of his or her mental illness, a person lacks legal capacity, and any decision that, in consequence of such incapacity, a personal representative shall be appointed, shall be made only after a fair hearing by an

independent and impartial tribunal established by domestic law. The person whose capacity is at issue shall be entitled to be represented by a counsel. If the person whose capacity is at issue does not himself or herself secure such representation, it shall be made available without payment by that person to the extent that he or she does not have sufficient means to pay for it. The counsel shall not in the same proceedings represent a mental health facility or its personnel and shall not also represent a member of the family of the person whose capacity is at issue unless the tribunal is satisfied that there is no conflict of interest. Decisions regarding capacity and the need for a personal representative shall be reviewed at reasonable intervals prescribed by domestic law. The person whose capacity is at issue, his or her personal representative, if any, and any other interested person shall have the right to appeal to a higher court against any such decision.”

This principle complements the provisions of Section 4(3) of the Act and reveals, contrary to the contention by the Appellants, an active participation by mental patients in the decision on the appointment of a supporter. Their will and preference are, therefore, respected. It also ensures that the likelihood of conflict of interest is eliminated whose primary objective is to ensure the advancement of the interests of the mental patient. In addition, it is broader than Article 12(4) of the CRPD in its

quest to protect or advance the interests of persons with disabilities.

78. Article 12 of the CRPD is titled "*Equal recognition before the Law*" and states in part as follows:

- "1. State Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.**
- 2. State Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.**
- 3. State Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.**
- 4. State Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to exercise of legal capacity respect the rights, will and preferences of the person are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body..."**

The Article affirms the rights of persons with disabilities: to recognition before the law; to possess and enjoy legal capacity;

to be supported in their quest to enjoy legal capacity; and protection of their rights.

79. The features which we have ascribed to section 4 which grant legal capacity to mental patients in express terms and make provision for supporters all speak in broader terms to the principles set out in Article 12 of the CRPD. As for the competent, independent and impartial authority or judicial body to conduct regular reviews to ensure that the rights are guaranteed, section 8 of the Act provides such body in the National Mental Health Council which is mandated to, among other things, promote and protect the rights of a mental patient. The duty of our courts, as demonstrated in this appeal, is to provide a forum for addressing grievances.
80. Mr. Mwale also argued that there are no systems put in place by the court for assessing the lack of legal capacity nor are there systems for the regulation of court appointed supporters. In her judgment, the learned High Court Judge said that Section 3 of the Act sets out the general principles for determining the condition of a mental patient. The section sets out the criteria which will be used in assessing the mental capacity of a mental

patient and who may be consulted. The section is actually a replication of Principle 4 of the **Resolution** and thus represents international best practices.

81. Lastly, Mr. Mwale has asserted that Section 4 contravenes Articles 11(a), 13(1), 19(1), 20(1) and 23(1) of the **Constitution**.

We must begin by stating that counsel did not specify how the section actually contravenes these articles. Neither did the Appellants lead any evidence explaining the alleged contravention. Be that as it may, we have still felt compelled to look at the articles and see if indeed the rights they are intended to protect are stifled by the provisions of section 4 of the Act.

82. Article 11 guarantees fundamental rights and freedoms of individuals. Sub article (a) is specific to the right to life, liberty, security of the person and protection of the law. The Appellants' grievance was specific to protection of the law. This right guarantees access to the courts, due process and a fair trial. The Appellants have not, in any, way demonstrated how this right has been affected or stifled by Section 4 in their quest to prosecute this and other cases and assert their rights before the courts. What we have seen is to the contrary. The Appellants

have enjoyed the right under the Article without impediment before this and the High Court.

83. Article 13(1) prohibits the deprivation of an individual's personal liberties except as may be authorised by law. The Second Appellant led evidence to the effect that he has witnessed the arbitrary detention and chaining of mental patients when he visited Sanzu Rehabilitation Center. These are serious allegations which required the Second Appellant to lay before the learned High Court Judge convincing evidence in support of his contentions such as subpoena authorities or inmates at the center. He is, as we said earlier, visually impaired.

84. The next is Article 19 which guarantees the freedom of conscience which includes freedom of thought and religion, freedom to change religion or belief and freedom to manifest and propagate religion. The Appellants led no evidence in the court below to prove the contention that these rights are affected by section 4 nor were any arguments advanced before us which prove this contention. This is the same with Article 20(1) which guarantees the right to freedom of expression. No evidence or

arguments were presented to prove the contention in relation to this article. To the contrary, evidence abound that the two Appellants exercised these freedoms without any hindrance as is demonstrated by their activities in championing their rights and those of other similarly circumstanced individuals.

85. The last Article in dispute is 23 which prohibits discriminatory provisions in the law and acts of discrimination by individuals through the use of the Law. From our analysis of the provisions of the Act, we concluded that it is progressive and represents international best practices. We also spoke to how the repeal of the ***Mental Disorder Act*** has endeavored to remove stigmatization and discrimination of mental patients. We must conclude that there is no basis whatsoever to uphold Mr. Mwale's contention that section 4 impedes the Appellants in the enjoyment of their rights under Article 23.

Conclusion

86. The nature of this case is that there can be no winner or loser. While the Appellants have not been successful in their attempt to upset the decision of the learned High Court Judge, they have

brought to the fore the need to address the plight of mental patients further. The learned High Court Judge agreed with the Appellants' contention that the services provided to mental patients by public mental health institutions are of poor quality. This mainly arises from poor funding by the Treasury. She placed the fate of these institutions in the hands of the National Mental Health Council.

87. We take it a step further and urge Government, through the Respondent, to make mental health care one of the priority areas so that it is adequately funded. Principle 8 of the **Resolution**, compels State Parties to provide the same care and treatment to mental patients as they do to other victims of ill health. The situation on the ground, which the learned High Court Judge accepted, is that public mental health institutions provide very poor medical services. This must change. We would also urge Government to put in place a deliberate policy of "*wellness*" programs in the work place. The Government must prioritize the general wellness of the citizens. Investing in the health and wellness of its citizens is the best investment that any country can make. In many countries, then as close as

neighboring Botswana, the Governments have a whole ministry dedicated to health and wellness (Ministry of Health and Wellness).

88. By way of closure of these proceedings, we must regrettably dismiss the Appellants' appeal and uphold the judgment of the learned High Court Judge. Costs are in our discretion. The nature of this case, and its genesis which is the Appellants' quest to champion the cause of mental patients, leaves us to conclude that we must depart from the general principle that costs shall follow the event. We order that the parties will bear their respective costs, in this and the court below.

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M.C. MUSONDA
DEPUTY CHIEF JUSTICE

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E.M. HAMAUNDU
SUPREME COURT JUDGE

.....
N.K. MUTUNA
SUPREME COURT JUDGE