



Brotherton N.O. v Electoral Commission of Zambia (HP 818 of 2011) [2011] ZMHC 32 (18 September 2011)	
COUNTRY	Zambia
COURT	<u>High Court Of Zambia,</u>
PARTIES	<u>Brotherton N.o.</u> v <u>Electoral Commission Of Zambia</u>
DATE DELIVERED	18 Sep 2011

CASE JUDGEMENT

IN THE HIGH COURT FOR ZAMBIA 2011/HP/0818

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

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

AND

**IN THE MATTER OF: ARTICLES 23, 28 AND 75 OF THE CONSTITUTION OF
ZAMBIA**

AND

**IN THE MATTER OF: SECTION 19 OF THE PERSONS WITH DISABILITIES
ACT, CAP 65 OF THE LAWS OF ZAMBIA**

AND

**IN THE MATTER OF: SECTIONS 18, 24, 28, 40, 41, 42, 45 AND 60 OF THE
ELECTORAL ACT, NO. 12 OF 2006**

AND

**IN THE MATTER OF: REGULATION 7 OF THE ELECTORAL (CODE OF
CONDUCT) REGULATIONS NO. 52 OF 2011**

B E T W E E N:

**SELA BROTHERTON (suing as secretary PETITIONER
of the Zambia Federation of Disability Organisations)**

AND

BEFORE THE HON. JUSTICE NIGEL K. MUTUNA, ON 19th DAY OF SEPTEMBER, 2011.

For the Petitioner : Mr. B.C. Mutale SC, Mr. L. Kalaluka & Ms. F. Kalunga of
Messrs Ellis & Company

For the Respondent : Mrs. T. Lungu, In ? house Counsel for the Respondent

JUDGMENT

Legislation referred to:

1. *The Constitution of Zambia, chapter 1.*

2. *Electoral Act, No. 12 of 2006.*

3. *The Electoral (Code of Conduct) Regulations, 2011, Statutory Instrument No. 52 of 2011.*

4. *The Persons with Disabilities Act, No. 33 of 1996.*

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

The Petitioner, Sela Brotherton, brings this petition in her capacity as secretary of the Zambia Federation of Disability Organizations, hereinafter, referred to as the organization. The said organization comprises eleven member organisations comprising a total number of 20,267 individual members, the majority of whom are persons with disabilities and are eligible and registered voters for the forth coming elections.

The Respondent, [Electoral Commission Of Zambia](#) is an autonomous body constituted under the provisions of Article 76 of the **Constitution**. Its functions are, *inter alia*, to supervise the registration of voters and to conduct Presidential and Parliamentary elections. It is also mandated to ensure that all stake holders in the electoral process adhere to the prescribed code conduct before, during and after elections. This is by virtue of regulation 7 of the **Electoral (Code of Conduct) Regulations, 2011**.

The dispute arises from the Respondent's alleged failure to initiate legislative reform to ensure equitable participation by persons with disabilities in the electoral process of Zambia. It is also alleged that the services offered by the Respondent at the registration and polling stations (the stations) in selected constituencies in Zambia are not accessible to persons with disabilities. Neither do the services cater adequately for their needs. Arising from this, the Petitioner alleges as follows;

"(1) The Respondent has unlawfully discriminated against the

Petitioner and persons with disabilities, in general, in the electoral process contrary to Article 23 of the Constitution as read with Section 19 of The Persons With Disabilities Act.

(2) The Respondent has reneged its statutory duty to ensure equitable

participation of all stakeholders, in the electoral process contrary to Regulation 7 of the Electoral (Code of Conduct) Regulations.

(3) The Respondent has unlawfully limited the rights of the Petitioner

and persons with disabilities in general, to exercise their franchise freely, fairly, in secret and with dignity contrary to Article 75 of

the Constitution as read with Sections 18 and 60 of the Electoral Act.

(4) The Respondent has reneged on its statutory obligation to make

provision for a special vote for persons who are unable to vote at the designated polling stations by reason of disability contrary to the provisions of Section 24 of the Electoral Act.

(5) The Respondent has reneged its statutory duty to relocate

inaccessible polling stations to ensure that all citizens, including persons with disabilities, so as to ensure all persons and would be voters are able to access the stations contrary to Section 28, 40 and 41 of the Electoral Act."

Arising from the foregoing, the Petitioner claims the following remedies;

"(i) An order declaring that the Respondent has unlawfully

discriminated against the Petitioner and other persons with Disabilities contrary to Article 23 of the Constitution of Zambia as read together with Section 19 of the Persons with Disabilities Act, Cap 65 of the Laws of Zambia.

(ii) An order declaring that the Respondent has unlawfully limited the

right of the Petitioner and other persons with disabilities in exercising a free franchise by not providing premises and services that are accessible to persons with disabilities contrary to Article 75 of the Constitution.

(iii) An order directed at the Respondent to invoke its statutory powers

to provide the following facilities and services:

(a) Temporal ramps for use by persons with disabilities in all

polling stations or polling stations where there are wheel chair users.

(b) Ensure that all polling booths are located at the ground

floors and in places accessible to persons with disabilities.

(c) Provide a tactile ballot guide for voters who are blind or are

partially sighted but do not wish to be assisted in casting their secret vote.

(iv) An order directed at the Respondent to invoke its statutory powers

under section 41 of the Electoral Act No. 12 of 2006 to relocate polling stations that are not accessible to persons with disabilities to accessible premises.

(v) An order directed at the Respondent to make provision for exercise

of a special vote pursuant to section 24 of the Electoral Act No. 12 of 2006 for persons with disabilities who are unable to vote at their respective polling stations by reason of their disability.

(vi) A mandatory injunction directed at the Respondent to formulate

and issue a detailed plan and budget aimed at providing services and amenities aimed at ensuring equal participation by person with disabilities in the electoral process.

(vii) Any other order the Court deems fit.

(viii) Costs."

The Petitioner has moved this petition by way of petition and affidavit verifying fact. The same were filed on 24th August, 2011, and are made pursuant to the following provisions of the law; ***The Protection of Fundamental Rights Regulations*** 1969; Articles 23, 28, and 75 of the ***Constitution***; Section 19 of ***The Persons With Disabilities Act***; Sections 18, 24, 40, 41, 42 45 and 60 of The ***Electoral Act***; and Regulation 7 of the ***Electoral (Code of Conduct) Regulations***. The Respondent did not file an answer to the Petition. It did however, apply for leave to file an answer out of time, which leave was denied, because the application was made after the close of the hearing and whilst the matter was pending judgment.

The facts as revealed by the petition and affidavit verifying facts are as follows; The organisation as the entity charged with the responsibility of advancement and protection of the rights of persons with disabilities, formulated an accessibility audit check list based on the United Nations disability manual. Following from this, in the year 2008, it trained its employees and agents in the field of ascertaining accessibility to buildings, services and amenities in general in Zambia, to persons with disabilities. It also undertook research into the extent to which the services provided by the Respondent enhanced the equitable, free and fair participation of persons with disabilities in the electoral process. Arising from the said research the organisation has discovered the provision for use of tactile ballot guides, formulated by the International Federation of Electoral Systems, to enable voters who are blind or partially sighted to cast their vote in secret and with dignity. This is in cases where they do not wish to be assisted in casting their vote.

Prior to the foregoing, in 2006, the organisation engaged the Respondent with a view to having the latter initiate legislative and policy reform which would result in equitable participation by persons with disabilities in the electoral process. The Respondent has however, not been willing to seriously dialogue with the organization in that respect.

Subsequently, on 29th and 30th August, 2010, during the registration of voters exercise, the organisation through its agents and employees conducted an audit at several stations in Lusaka, to ascertain the accessibility to the said centres and services offered by the Respondent to persons with disabilities. The stations visited included Kabwata Constituency, Kanyama Constituency, Lusaka Central Constituency, Munali Constituency, Matero Constituency and Madevu Constituency. The audit of these stations revealed that they were not accessible to persons with disabilities, especially those on wheel chairs and the blind. Further, that the registration officers interviewed at the stations did not possess knowledge on sign language nor were they qualified to handle issues related to people with disabilities. As a result, persons with disabilities were made to stand in long queues with no access to toilets or suitable toilet facilities. This had the effect of discouraging most of them from registering

as voters.

Based on the finding of the audit, the organisation and indeed its advocates, engaged the Respondent which expressed willingness to dialogue for purposes of making the electoral process accessible to person with disabilities. It also undertook to consider introducing the Braille template used in some SADC countries to enable blind persons vote unaided during elections.

The evidence ended by highlighting the correspondence passing between the Respondent and Petitioner's advocates and the meetings held by the two.

The Petition came up for hearing on the 13th and 14th September, 2011. The parties presented a witness, each, that is PW and DW, respectively.

PW was Wamundila Waliubuya, the Human Rights Manager for the organisation. His evidence-in-chief began by highlighting his functions in the organisation. These he stated included; planning human rights activities for the disabled; receiving complaints on human rights violations against the disabled and resolving disputes connected thereto; defending rights of person with disabilities; and managing financial and other resources on behalf of the disabled.

The witness proceeded to state what entity the organisation is, its functions and who its members are. He went on to highlight how the organisation had engaged the Respondent for purposes of conducting audits at various stations. Following receipt of the Respondent's consent, audits were conducted at various stations and a report compiled and forwarded to the Respondent. The report he stated, highlighted flaws in the facilities offered at the stations which formed the basis of the Petitioner's claim. These he stated were as follows; the tables used by the registration officers were high so they were not accessible by persons with disabilities; registration tables were placed in positions which were inaccessible as they were either on stages, platforms or the first floor of the buildings used; some stations were located in class rooms, churches, and rooms which had very narrow door ways which are not accessible by persons on wheelchairs; the toilets in the buildings were not appropriate because of the size of the entrance. In certain instances there were stairs leading to the toilets, while in others, toilet pans were not accessible, and in other instances the toilets were pit latrines; the registration officers were not able to use sign language so there was no direct communication with persons with hearing disabilities; some offices were located far from the entrance to the centre, which entailed long walks to get to the office, in paths that had either ditches or portholes and could therefore not be easily accessed by the disabled; and there were no facilities for the blind to conduct a secret ballot by use of a tactile ballot guide.

The witness went on to testify that the report on these findings was submitted to the Respondent and it is produced in the affidavit verifying facts as exhibit SB6. Further that it contains recommendations on how the Respondent can remedy the situation. These recommendations, he stated were made with the full knowledge that the Respondent does not own the buildings and premises that the registration of voters was conducted from. He ended his testimony by stating that he is a registered voter, but is discouraged from voting as he will not be able to exercise a secret ballot because he will be assisted by another person in casting his vote.

Under cross examination, PW stated that the premises used as stations are not owned by the Respondent but various entities such as churches, government and private schools. He went on to state that the said premises were constructed as such, without facilities for the disabled, but that the Respondent had an obligation to select and gazette premises that were accessible to the disabled. He stated further, in this respect, that all schools constructed in and after the year 2008, had facilities which catered for persons with disabilities.

PW went on to testify that he and other members of the organisation who went to register as voters were not turned away by the Respondent's offices but they were all assisted in registering as voters. He stated further that

the Petitioner had not alleged any infringement of the rights of the disabled by the Respondent, but merely demanded that it make provision for a secret ballot and dignified manner of voting for persons with disabilities.

As regard the Respondent's alleged introduction of a tactile ballot guide, PW stated that this was only provided for in respect of the Presidential elections. The Petitioner therefore demanded that the tactile ballot guide be provide for elections in respect of Parliamentary and Local Government seats as well. The failure by the Respondent to provide tactile ballot guides for Parliamentary and Local Government elections amounts to discrimination resulting in the denial of the members of the organisation of their right to a secret ballot. Further that, there is need for the Respondent to mount a public awareness campaign on the use of the tactile ballot guide. He ended by stating that the Respondent should have progressively implemented the demands by the Petitioner from 2006, when the organisation first engaged the Respondent.

In re-examination, PW stated that when the Petitioner engaged the Respondent on the issue of the tactile ballot guide, the Respondent confirmed that it had information on the SADC tactile guide which it obtained from Malawi but that it would not implement that system of voting in the forth coming elections. As regards the fact that the Respondent does not own the polling station, he stated that the Respondent could remedy the lack of amenities by providing temporary ramps and choosing positions within the buildings which are on the ground floor and are not on plat forms, or whose entrance is via a very narrow door way. With respect to temporary ramps, he stated that they were movable and as such had no physical effect on the buildings. He also stated that the stations that are not accessible could be relocated to other premises and in doing so regazetted, as it is the Respondent's responsibility to gazette the locations of the stations.

The Respondent's witness, RW, was Jocelyn Mubita, the Deputy Director Voter Education. Prior to assuming that position she was Manager Elections and Voter Education.

In her evidence-in-chief, RW began by highlight her role as Deputy Director Voter Education. She went on to testify thus in relation to issues raised in the Petition; the Respondent has regulations which guide it in the conduct of elections which do not discriminate against persons with disabilities; issues regarding allegation of discrimination in relation to the exercise of ones right to vote can only be addressed by the laws of the country if provision is made for them in such laws; measures have been put in place by the Respondent to ensure that persons with disabilities can exercise their right to vote which include, the following. Firstly, provisions for assistance to be rendered by election agents at the stations. Secondly, introduction of a blind termplete to enable the blind vote on their own. Thirdly, provision for assistance to be rendered by relatives and friends to persons with disabilities in casting their vote. Fourthly, provision for communication with the deaf by election agents during registration exercise. Lastly, provision for buildings used as stations to be accessible to all citizens. She stated in this respect that the buildings used as stations were identified by Town Clerks and other Local Authority officials on behalf of the Respondent, because it was not decentralized and therefore it could not undertake the task itself. Further that the building were mainly government schools and other buildings and churches.

The directive to the Town Clerks and local authority officers, RW testified further, was that the buildings should be accessible to all. RW also clarified that no one had complained that they could not properly access facilities at the stations and that no one had been turned away.

As regards the furniture used in the stations, RW testified that the Respondent used the desks and chairs found in the schools and the other buildings used as stations. She also stated that, where temporary shelters had been used as stations, the Respondent used card board tables and chairs.

Under cross examination, RW conceded that there were no special desks used in the stations designed for the disabled. She also conceded that no ramps have been put in place in buildings with steps as there was no budget

allocation for the same. To this extent she stated the Respondent had discriminated against persons with disabilities although it had not done so intentionally. She testified further that most of buildings used as stations belonged to governments school and churches as such the Respondent could only use them in their existing state. She reiterated that the agents whom the Respondent had engaged to identify these buildings had been instructed to find accessible buildings but that no instructions were given that only ground floor buildings should be identified for this purpose. The Respondent, she stated to this extent overlooked the needs of persons with disabilities. This fact notwithstanding she testified, persons with disabilities would be assisted to get to any levels of the buildings above ground floor where the need arose. RW also confirmed that the report on the findings by the organisation, "SB6? to the affidavit in support, had been given to the Respondent but that the recommendations could not be implemented because the elections budget had already been prepared.

As regards, the concerns raised in respect of the blind, RW stated that a Braille template had been acquired which would be used to facilitate the blind voting in the Presidential elections, unaided. However, there had been no voter sensitization on same and neither would the template be used in the Parliamentary and Local Government elections. The template she stated further, was acquired after the elections budget was prepared.

RW went on to conceded that non of the elections agents were experts in sign language and as such, the Respondent overlook the aspect of effective communication between the agents and the deaf. This situation she stated would be remedied by use of assistants who would vote on behalf of the blind in the Parliamentary and Local Government elections.

As regards representation of the disabled on the Respondent's National Voter Education Committee, RW testified that, there was a representative from Zambia Agency for Persons with Disabilities, (ZAPD).

RW ended by stating that the Respondent can only relocate stations prior to gazetting them to avoid confusing voters who had already been informed of the location of the stations. She also stated that she does not know if the Respondent has power to postpone elections.

In re-examination, RW testified thus; it is the policy of the Respondent that stations should be accessible to all citizens although it did not specify to the Town Clerks and Local Authority officers that the rooms used for the stations should be on the ground floors; the Respondent was not able to implement the recommendations contained in the report from the organization because the budget for elections had already been prepared; in a situation where persons with disability can not vote independently, the Respondent had put measures in place for the said persons to be assisted; and the tactile voting guide would only be used in the Presidential elections because the elections budget could not accommodate its use in the other elections.

At the close of the proceedings I directed the parties to file submissions on Thursday, the 15th of September, 2011, by 12:00 hours. They both complied with the directive.

In the Petitioner's submissions, counsel for the Petitioner began by stating that Article 23 of the **Constitution** prohibits discrimination against all citizens. Further that, although the Article does not specifically mention persons with disabilities, when it is read with Section 19 of **The Persons With Disabilities Act**, discrimination on grounds of disability is specifically prohibited. He also drew my attention, in this respect, to the provisions of Regulation 21 (m) of the **Electoral (Code of Conduct) Regulations**, which, it was argued, also prohibits discrimination on grounds of disability.

Counsel went on to highlight the provision of the **Constitution** pursuant to which the Respondent is established and its functions. He argued, in this respect, that it is incumbent upon the Respondent not to discriminate against persons with disabilities in the exercise of its functions. He went on to highlight the provisions of the **Electoral Act** on the need for a secret ballot and the rationale for same; the need for stations to be accessible to persons

with disabilities and need for amenities to be put in place to enhance free elections; and the need for a special vote. It was also argued that where the stations are found not to be suitable for purposes of elections, the Respondent had power to relocate the station to other premises.

On the issue of assisted voting, counsel argued that in terms of Section 60 (2)(ii) of The **Electoral Act**, it was not mandatory to insist that persons with disabilities be assisted. The facility was only available where a voter so requested. It was argued that, the insistence by the Respondent to provide assistance to persons with disabilities in the exercise of their franchise, amounts to the Respondent taking away their right to vote with dignity. In his concluding arguments counsel stated that discrimination had been established and that liability was not denied by the Respondent.

In the Respondent's submissions, counsel for the Respondent began by restating the Petitioner's claim as endorsed in the petition. She went on to argue that in terms of Article 23 of the **Constitution**, it is the responsibility of the State to fulfill the obligations concerning the rights of citizens. It was argued that the Respondent had not in any way treated persons with disabilities differently from other persons. The Respondent had, in this respect, stretched its constitutional mandate by meeting the needs of the organization's members. She went on to justify this by highlighting amendments to the law initiated by the Respondent to address the needs of the Petitioner and the organization's members.

On the issue of inaccessibility to the stations, counsel argued that the Respondent could not make adjustments to the properties to cater for ramps because they did not belong to it. Further, that relocating polling stations located in inaccessible premises would lead to disenfranchising citizens.

On the issue of provision for a tactile ballot guide, counsel argued that the same had been provided and therefore, the Respondent has met its obligations in this respect. She went on to discredit the evidence contained in exhibit "SB6? to the affidavit in support on the ground that the audits were done only in twenty stations out of six thousand four hundred and fifty-six stations in the country.

In concluding her submissions, counsel argued that if this Court makes an order to compel the Respondent to formulate a budget to incorporate the needs of the Petitioner, it would amount to the Court usurping the constitutional powers of the Respondent. This she argued, is on account of Respondent's autonomy as enshrined in the constitution.

I have considered the Petition, affidavit evidence and the arguments by counsel. It is clear from the evidence presented before this Court that it is not in dispute that the Petitioner and indeed the other members of the organization have a right to vote as stipulated by Article 75 of the **Constitution**. What is in dispute is whether or not the Petitioner and members of the organization have been discriminated against by the Respondent in pursuit of the exercise of the right to vote. This is the issue that I have to determine in this matter.

In articulating the petition the Petitioner has made a number of allegations in respect of the alleged discrimination. Before I consider these allegations and determine whether or not they have been established it is important that I initially review the evidence tender before this Court.

The Petitioner relied upon exhibits "SB1? to "SB12? in the affidavit in support. Emphasis being made on exhibit "SB6? which is a report the organisation submitted to the Respondent after it conducted an audit at various stations. The report is titled, *Disability Access Audit: Findings and Recommendations our suggestion for Action to Improve Accessibility Building/Premises*. A perusal of the report reveals that it lends credence to the allegations made by PW in his evidence because it highlights the short comings in the facilities offered at the stations by the Respondent as they related to persons with disabilities. This is, with respect, to lack of proper access to amenities in some of the stations to enable the organisation's members exercise their right to vote

unhindered. Further by exhibit "SB9? to the affidavit in support (being a letter from the Respondent to the Petitioner's Advocates), the Respondent does indirectly concede that some of the premises are not accessible to the organisation's members. This is stated in paragraph 3, *inter alia*, as follows;

"The premises are government institutions such as schools and clinics and some premises are rented from churches, private individuals or institutions. This, therefore, puts the commission in a difficult position to be able to make alterations or adjustments to such premises."

(The underlining is the Court's for emphasis only.)

The evidence of RW under cross examination also revealed that the Respondent conceded that it had overlooked the interests of the Petitioner, members of the organization and persons with disabilities in general. This is on issues such as acquiring special desks, ramps and officers with knowledge in sign language at the stations. Further, the argument by counsel for the Respondent discrediting the evidence in "SB6? on the ground that the Petitioner only visited twenty stations out of six thousand four hundred and fifty-six stations and that it is not a technical report is untenable. It is a matter of public notoriety that Lusaka town and province has some of the best facilities in the country. This is where the twenty stations audited are situated and as such since the said stations had flaws it must logically follow that the other stations based in towns outside Lusaka must have similar if not more flaws.

As regards the argument that the report is unreliable on the basis that it is not technical, this is answered in paragraph 7 of the Petition, where the Petitioner highlights the basis upon which the audit checklist was made. This, she stated was the United Nations Disability Manual. She also stated that in the year 2008, the organization trained its employees and agents on how to conduct such audits. The reports finding's are therefore credible.

I now turn to determine the allegations made by the Petitioner in the light of the facts highlighted above. The first allegation made is that the Respondent has discriminated against the organization's members and persons with disabilities in general contrary to Article 23 of the **Constitution** as read with Section 19 of **The Persons With Disabilities Act**. The Article basically provides that a person shall not be discriminated in any manner by any person acting by virtue of any written law or performance of a function of any public office. On the other hand Section 19 of **The Persons With Disabilities Act** defines discrimination, thus;

"(1) for the purpose of this part,

"discrimination' means

(a) treating a person with a disability less favourably from a person without a disability;

(b) treating a person with a disability less favourably from another person with a disability

(c) requiring a person with a disability to comply with a requirement or condition which persons without a disability may have an advantage over; or

(d) not providing different services or conditions required for that disability."

In carrying out its functions as mandated by the Article 76 of the **Constitution**, the Respondent is performing functions of a public office. It is therefore bound by the provisions of Article 23 not to treat those seeking to derive its services in a discriminatory manner. The evidence of PW, revealed that the services offered at the

stations by the Respondent were flawed to the extent that the organisation's members could not easily access them, on the other hand they were easily accessible to persons without disabilities. To this extent the organisation's members were treated less favourably than those without disabilities as per the provisions of Section 19 of ***The Persons With Disabilities Act***. My finding is fortified by the admission to this effect by RW under cross examination that the Respondent failed to make adequate provision for persons with disabilities at the stations as I have highlighted above. Her words were that the Respondent discriminated against persons with disabilities, albeit, unintentionally. The first allegation is therefore established.

The second allegation relates to the Respondent reneging on its statutory duty to ensure equitable participation by all stakeholders in the electoral process. This, it is alleged, is contrary to Regulation 7 of the ***Electoral (Code of Conduct) Regulations***. This Regulation states as follows;

"(1) The Commission shall where reasonable and practicable to do

so ?

(a) meet political party representatives on a regular basis

to discuss all matters of concern related to the election campaign and election itself;

(b) ensure that political parties do not use State resources to campaign for the benefit of any political party or candidate;

(c) avail political parties with the election timetable and election notices in accordance with the Act;

(d) censure all acts done by leaders of political parties, candidates, supporters, Government and its organs, which are aimed at jeopardizing elections or done in contravention of this Code;

(e) declare election results expeditiously from the close of the election day;

(f) ensure that a campaign rally or meeting which is legally organised by any political party is not disrupted or arbitrarily prohibited;

(g) ensure that no election officer, police officer, monitor, observer or media person is victimised in the course of their election duties;

(h) ensure that police officers act professionally and

impartially during the discharge of electoral duties

(i) ensure that traditional leaders, do not exert undue influence on their subjects to support a particular political party or candidate;

(j) ensure that equal opportunity is given to all

stakeholders, particularly political parties and independent candidates to participate in and conduct their political activities in accordance with the law; and

(k) condemn acts of media organizations and personnel

aimed at victimization, punishment or intimidation of media practitioners implementing any of the provisions of this Code. "

There was no evidence led by PW in relation to the foregoing regulation, and neither have counsel for the Petitioner alluded to it in their submissions. My assumption is that in advancing her claim under this allegation, the Petitioner relied upon subsection 1 (j) to the Section. This Section spells out the duties of the Respondent as they relate to regulation of the players and stakeholders in electoral process to ensure that they abide by the code of conduct. To that extent it does not, *per se*, grant rights or privileges to any of the players or stakeholders in the electoral process. Further the provisions of subsection 1(j) of the section are not in any way intended to create a privilege for a voter such as the Petitioner. I therefore, find that there is no right or privilege accorded to the Petitioner by the said subsection and as such, the Respondent has not reneged on its obligations under the said section. This allegation is therefore not established.

The third allegation relates to the Respondent unlawfully limiting the rights of the Petitioner and persons with disabilities, generally, from exercising their franchise freely, fairly, by secret ballot and with dignity. This is contrary to Article 75 of the **Constitution** as read with Sections 18 and 60 of the **Electoral Act**.

The provisions of Article 75 are the ones that grant citizens an opportunity to vote. Put simply, the Article makes provisions for the franchise, that is, the right to vote. On the other hand Section 18 of the **Electoral Act** states as follows;

"(1) No person shall be entitled to vote more than once in the same election in accordance with this Act and as may be prescribed.

(2) Every poll shall be taken by means of a secret ballot in accordance with this Act and as may be prescribed."

While section 60 states inter alia as follows;

"(1) The presiding officer or another election officer, at the request of a voter who is unable to read, shall assist that

voter in voting in the presence of ?

(a) a person appointed by or as an accredited observer or monitor, if available; or

(b) two election agents of different candidates, if available;

or

(2) A person may assist a voter in voting if ?

(a) the voter requires assistance due to a physical disability;

(b) the voter has requested to be assisted by that person; and

(c) the presiding officer is satisfied that, that person has attained the age of 18 years.

(3) The secrecy of voting as stipulated in the Constitution shall be preserved in the application of this section."

The relevant portion of Section 18 as it relates to this allegation is subsection 2 which in effect makes it mandatory for all votes cast to be by way of secret ballot. On the other hand Section 60 provides, *inter alia*, for persons with disabilities to be assisted in casting their vote where they so request. Notwithstanding the said assistance, the Section under subsection 3 emphasizes the need to preserve the secrecy of the vote.

This allegation relates to the need to preserve the secret ballot and the need for persons with disabilities to vote in dignity with out assistance. The evidence presented on this issue clearly indicated that in the absence of Braille templates in respect of all elections, blind persons' votes will not be secret in those elections where the template will not be used, because the voting will be done on their behalf. This is evident from the testimonies of both PW and RW. PW went further to state that, for this reason he is discouraged from voting. It was also evident from the evidence of RW that if the persons with disabilities are unable to cast their vote by reason of their disability, they will have to submit to being assisted. She stated, in this respect, that they would be lifted up the stairs and appeared unconcerned with the consequences of such act. Her evidence therefore, was that it is mandatory to submit to assistance.

As counsel for the Petitioner has argued, the provisions of Section 60(2)(b) do not make it mandatory for assistance to be given but rather, it is the choice of the person seeking assistance. To this extent by insisting that persons with disabilities cast an assisted vote, the Respondent is limiting their rights to exercise their franchise in accordance with the provisions of the law I have highlighted above. Further, although the Braille template has been introduced in respect of the elections for the Presidency, the evidence on record shows that there has been no public awareness campaign carried out for purposes of sensitizing the users of such templates and the electorate in general. As RW stated this innovation is new in Zambia as such there was need for sensitizing the

user on its operations otherwise it will be rendered redundant as the persons for whom it is intended may not avail themselves to it.

Arising from the foregoing, I find that the Respondent has limited the Petitioner's rights and those of other disabled persons to exercise their franchise by way of secret ballot. The third allegation is therefore established.

The fourth allegation is that the Respondent has reneged on its statutory obligation to make provision for a special vote for persons who are unable to vote at the designated stations by reason of disability. This is contrary to Section 24 of the ***Electoral Act*** which states as follows;

"(1) The Commission shall allow a person to apply for a special vote if that person cannot vote at a polling station in the polling district in which the person is registered as a voter, due to that person's ?

(a) physical infirmity or disability or pregnancy; or

(b) absence from that polling district while serving as an

officer or monitor in the election concerned, or while on duty as a member of the security services in connection with the election.

(2) The Commission may declare and prescribe circumstances in,

and conditions under, which a person who is unavoidably and unforeseeably unable to vote in the polling district in which that person is registered as a voter may apply to vote elsewhere.

(3) The Commission shall prescribe ?

(a) the procedure for applying for special voters; and

(b) the procedure, consistent in principle with Part VI, for

the casting and counting of special votes."

The relevant provision of this section as it relates to this allegation is subsection 3. By the said subsection the Respondent is required to prescribe the procedure for applying for a special vote and for casting and counting such special vote. The evidence presented indicates that no such arrangements have been made by the Respondent. However, I am not satisfied that the Petitioner or indeed the organization did request the Respondent to provide such special vote. It is a requirement under subsection 1 of section 24 for a person requiring such a vote, to apply to the Respondent to make such provision. The evidence of PW and indeed the contents of both the petition and affidavit in support do not reveal that such a request was made either by the Petitioner or the organization. The argument by counsel for the Petitioner is that the Respondent has power to make provision for such a vote. This may be so, but as I have stated earlier, there must be a request made by the person affected before the Respondent can invoke its power. I therefore find that the Petitioner has failed to establish the fourth allegation and accordingly dismiss it.

The fifth allegation relates to the Respondent reneging its statutory duty to relocate the inaccessible stations. Reliance is made on Sections 28, 40 and 41 of the ***Electoral Act*** which state as follows;

Section 28;

"The Commission may postpone the polling day for an election, provided the Commission is satisfied that ?

(a) the postponement is necessary for ensuring a free and fair election;

and

(b) the polling day for the election shall still fall within the period as required by the Constitution."

While Section 40 states;

?(1) The Commission shall establish, for an election, a polling station in each polling district, as it may prescribe.

(2) When determining the location of a polling station, the

Commission may take into account any factor that could affect the free, fair and orderly conduct of elections, including ?

(a) the number and distribution of eligible voters in those polling districts;

(b) the availability of suitable venues for polling stations;

(c) the distance to be travelled to reach those venues;

(d) access routes to those venues;

(e) the availability of transport to those venues;

(f) traffic density at or near those venues;

(g) parking facilities at or near those venues;

(h) telecommunications facilities at those venues;

(i) general facilities at those venues;

(j) the safety and convenience of voters;

(k) any geographical or physical feature that may impede access to or at those venues; and

(l) the ease with which those venues can be secured.

(3) Before determining the location of a polling station, the

Commission may consult on the proposed location of that voting station with the local authority for the area within which that polling station shall fall."

(The underlining is the Court's for emphasis only).

And Section 41 states;

"(1) Notwithstanding section forty; the Commission may relocate a polling station if it is of the view that it is necessary to do so for the conduct of a free and fair election.

(2) The election officer shall take all reasonable steps to publicise the relocation of a polling station among voters in the voting district concerned."

It is clear from the foregoing quotations that Section 28 makes provision for postponement of the polling day for an election by the Respondent. It is therefore in the Respondent's discretion to decide whether or not the polling day for elections should be postponed. The criteria to be used in exercising this discretion is that it shall be exercised where it, and quoting from the Section, ***" is necessary for ensuring a free and fair election "***". On the other hand, Section 40 provides for the Respondent establishing polling stations and the criteria to be used in determining the suitability of such stations. Such criteria to include and quoting from the Section, ***"? (the) access routes to those venues (and) general facilities at those venues "***" (see subsection 2(d) and (i) of the Section). Whilst Section 40 makes provision for the relocation of a polling station by the Respondent where it is of the opinion that it is necessary to do for the conduct of free and fair elections. This denotes that the Respondent has the discretion to take such action in pursuit of free and fair elections. The use of the word ***free*** in this section, in my considered view denotes that all eligible citizens must be ***free*** to cast their vote. They must thus, not be hindered in any way.

The evidence of PW reveals that there is lack of facilities at the stations audited to enable some members of the organization to cast their vote. PW himself did state that he is discourage to exercise his franchise because his vote will not be secret. He also highlighted the uneven terrain leading to some of the stations and the long distances between the entrance to the stations and the offices. These he stated will prove a challenge to persons on wheel chairs and crutches. The Respondent witness, RW, did also concede that on account of some of the stations being inaccessible to the members of the organization and lack of certain facilities, the organization's members had been discriminated against.

The inaccessibility of the stations and lack of certain provisions implies that the elections will not be free in accordance with the provisions of Section 41. Further, since RW did not deny this, the Respondent is taken to have formed the said opinion in accordance with Section 41, requiring it to relocate the affected stations. By failing to do so, it reneged on its duty under Section 41 and accordingly the fifth allegation succeeds.

In view of what I have stated in the preceding paragraphs, I find that the Petitioner has proved her claim in the petition to the required standard and satisfaction of the Court and is entitled to remedies in paragraph 28(i) and (ii) as endorsed in the Petition. I accordingly declare as follows;

(1) That the Respondent has unlawfully discriminated against the

Petitioner and other persons with disabilities represented by the organisation on whose behalf this action is brought contrary to Article 23 of the ***Constitution*** as read with Section 19 of ***The***

Persons With Disabilities Act.

(2) That the Respondent has unlawfully limited the rights of the

Petitioner and other persons with disabilities represented by the organization on whose behalf this action is brought, to exercise their franchise by not providing premises and services that are accessible to persons with disabilities contrary to Article 75 of the ***Constitution***.

The foregoing declarations are in line with the endorsement in the Petition and should be remedied by the Respondent in accordance with the direction I shall give in the paragraphs that will follow.

As regards remedies in paragraphs 28(iii) and (iv) of the petition, although the Petitioner has proved the allegations entitling her to the grant of the remedies, I decline to grant the remedies as claimed because it would lead to the postponement of the elections scheduled for the 20th September, 2011. The rights of the Petitioner and members of the organization have clearly been violated requiring immediate remedial action, but the said action as I have stated, if taken will lead to postponement of the election because the remedial action cannot be taken in the short period of time remaining before the polls open. I am therefore reluctant to take an action which would put the nation on that course for the following reasons. Firstly and most importantly, the Petitioner and members of the organization are not the only participants and intending participants in the elections. Their individual and group rights and interests must be weighed against the rights and interests of the larger majority of the other participants and intending participants. From a purely common sense position, the interest of this larger majority must prevail. There are also other interests which in my considered view are paramount as against those of the Petitioner and the organization's members. These are the interests of other stakeholders in the electoral process such as the tax payers who have partially funded the elections, the general electorate, the co-operating partners, various election observers and indeed political parties who are geared, at great costs to participate in the elections. Secondly, by the very fact that the remedies are couched in such a manner that they require me to grant them immediately, which would require the postponement of the elections, there is an indirect attempt by the Petitioner to invoke the provisions of Section 28 of the ***Electoral Act***. This as I have stated in the earlier part of the judgment is in the exclusive discretion of the Respondent, and although there is sufficient evidence that the Respondent should have invoked this power, this Petition is not a method by which it can be compelled to do so. Thirdly, although the Petitioner and members of the organization will not be able to cast their vote freely, they have not been totally disenfranchised which would require immediate remedial action. As has been indicated in paragraph 3 of the Petition, the majority of the organization's members have registered as voters despite the challenges alluded to in the earlier part of this judgment. They will therefore be able to cast their vote, albeit, under unfavourable circumstances.

Lastly and by way of a comment only, the timing of this Petition can not pass without comment. These proceedings were instituted on 24th August, 2011, which is less than a month before the polling day. This is notwithstanding the fact that, most if not all, of the Petitioner's grievances arose in the year 2006, when the organization started engaging the Respondent. Although there is no law that requires an aggrieved person to institute proceedings immediately upon the cause of action arising, in matters such as this one, it is prudent that the aggrieved party institutes proceedings promptly to avoid the pitfalls that I have alluded to in the last two paragraphs.

Arising from my decisions in the preceding paragraphs I order that the Respondent should by the next elections that is, not the forthcoming elections, but the ones to follow, put in place measures to ensure that the Petitioner and the organization's members, are not disadvantaged in their pursuit of the exercise of their franchise. These measures should be in line with the remedy endorsed in paragraph 28 (iii) of the Petition, that is to say;

(a) Erect temporary ramps for use by persons with disabilities in

all stations.

(b) Ensure that all polling booths are located on the ground

floors of premises used as stations and in places accessible to

persons with disabilities.

(c) Provide a tactile ballot guide for voters who are blind or are

partially sighted but do not wish to be assisted in casting their secret vote in respect of all elections and not just the Presidential elections.

In arriving at the said directive as it relates to (a) and (b) above, I am alive to the fact that the buildings used by the Respondent to house the stations do not belong to it. But I am of the considered view that the measures are realistic because, firstly the ramps that the Petitioner has insisted on are temporary ramps which will have no effect on the structure of the buildings. Secondly as relates to location of the polling booths, the Respondent should specifically direct its agents to identify buildings located on the ground floor, which directive it has hitherto omitted to give to such agents.

In relation to remedy 28(vi) I order that by the next elections, that is, not the forth coming elections but the next, the Respondent should formulate and issue a detailed plan and budget aimed at providing services and amenities aimed at ensuring equal participation by persons with disabilities in the electoral process.

As regards remedy 28(v) for the special vote, the same fails for the reasons I have stated in the earlier part of this judgment.

The foregoing orders are made pursuant to the power vested in this Court by Article 28(i) of the Constitution to **" " make such order, issue such writs and give such directions as it may consider appropriate for purpose of enforcing, or securing the enforcement of, any of the provisions of Articles 11 to 26 inclusive. "** The fact that the Respondent is an autonomous body does not make it immune to such orders and neither do such orders have the effect of usurping the Respondent's powers. The argument by counsel for Respondent to this effect is therefore untenable and I accordingly dismiss it. Further, the fact that the Respondent is autonomus simply confirms the fact that it is within its means to implement the directions I have given above.

As regards the costs, in view of the constitutional nature of the issues raised and the eventual outcome of the matter, I am inclined to order that the parties will bear their respective cost. I accordingly so order.

Leave to appeal is granted.

Delivered on the 19th day of September, 2011.

Nigel K. Mutuna

HIGH COURT JUDGE