

Zimbabwe Rule of Law Journal

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FOREWORD

I am delighted to welcome the inaugural issue of the Zimbabwe Rule of Law Journal. The idea of establishing this Rule of Law Journal has largely been influenced by existing demand in the legal fraternity for a peer reviewed law journal with a national scope.

The aim of this Zimbabwe Rule of Law Journal is to make a significant contribution towards knowledge creation, raising general awareness on aspects of the law and instill informed scholarly debates. The journal is a joint endeavor between the International Commission of Jurists Africa Regional Programme and the Centre for Applied Legal Research (CALR). This journal is composed of articles and papers written by academics, legal practitioners and law students.

The rule of law is a foundational value and principle of our Constitution as set out in section 3. The Preamble of the Constitution recognises the need to entrench the rule of law because it underpins democratic governance. The rule of law is the means by which fundamental human rights are protected. It is therefore absolutely necessary that there be a way in which the legal profession is enabled to play its role in ensuring that the rule of law is maintained and promoted. This first issue contains articles on house demolitions in violation of s 74 of the Constitution, the right of access to the voters' roll, fair labour standards, the justice delivery mandate of the Judicial Service Commission, the right to life and applicable criminal defences, employment of persons with disabilities, accountability of persons in high offices and public statements prejudicial to the State.

It is my hope that this journal will play an important role in nation building. It will offer information on rule of law issues and disseminate the jurisprudence of our courts and international and regional courts on this very vital subject. It will hopefully introduce, through the contributions by lawyers and other practitioners of their professional expertise, to the comparative and international dimensions of the rule of law principle and the comprehensive developments in this area. In this way this journal will seek to protect and promote the rule of law through critical analysis of judgments of the courts.

The current Constitution of Zimbabwe was adopted in 2013. Many of its provisions require interpretation by the courts in order to build a body of jurisprudence for the future. It can be said that with the coming into force of the 2013 Constitution and establishment of the Constitutional Court, the process of balancing the Court's functional and institutional establishment has just begun. There is a need to strike a proper balance between constitutional functions and the concrete power of the Court and between the objects and subjects of constitutional control. This journal can, with the contribution of many professionals, become a permanent, continual and systemic source of assessment of the work of our courts and provide invaluable insights into the working of our system of governance.

I wish to thank the many individuals who have made it possible for this Journal to be produced and congratulate those who have prepared the articles that make up this first issue. I wish to apologize in advance for any inadequacies that may be picked up in this issue. It is the first and all efforts will not be spared to improve subsequent issues in all respects.

Harare, February 2017

Justice MH Chingengo, Chief Editor

THE PROTECTION OF THE RIGHT TO EMPLOYMENT OF PERSONS WITH DISABILITIES IN AFRICA: LESSONS FROM ZIMBABWE

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Introduction

Over the past few years, Zimbabwe has been portrayed as a lawless country, a place “characterised by institutional failures” where the rule of law simply does not exist² and therefore a hopeless country especially for the most vulnerable such as persons with disabilities (PWDs). However, on 1 March 2016, the High Court of Bulawayo rendered an important judgement in the *Zimbabwe National League of the Blind v Zimbabwe National Statistics Agency (ZIMSTAT) and Ors*³ case. This judgement dealt with the right of employment of persons who are visually impaired and is important for it sets a direction on the protection of the right to employment for PWDs.

The aim of this paper is to unpack this decision and examine how the right to employment of PWDs should be protected under international human rights law. To this end, the article will deconstruct the concept of equality, non-discrimination, and reasonable accommodation, which are keys in securing the inclusion of PWDs in society in general and at the work place in particular. In understanding the implications of this decision, the article relies on local and foreign jurisprudence on equality, non-discrimination and reasonable accommodation and their significance in securing the right to employment for PWDs.

The article is divided into five parts including this introduction. The second part will present the international and African regional regimes of the right to employment of PWDs. The third part

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² Arthur Gwagwa “Zimbabwe, Human Rights, Rule of Law & Democracy 2013”, Report of the Zimbabwe Human Rights Forum, 2013, page omitted.

³ *Zimbabwe National League of the Blind v Zimbabwe National Statistics Agency (ZIMSTAT) and Others*, High Court of Zimbabwe, Case no 1326/15.

presents the facts and decision of the Court; the fourth part of the article will analyse this decision in line with international human rights standards related to the rights of persons with disabilities and the final part will provide concluding remarks.

The international regime of the right to employment of persons with disabilities: An Overview

This section will be divided into three parts: the first will discuss the normative standards of the right to employment of PWDS under general international law; the second will focus on this same right under the Convention on the Rights of Persons with Disabilities⁴ (CRPD) and the third part will focus on this right in the African human rights system.

2.1 The normative standards of the right to employment of PWDS under general international law

Under the Universal Declaration of Human Rights (UDHR), "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment".⁵ In this provision, 'everyone' comprises everybody including PWDS, even though it is advisable to mention the ground of exclusion as to ensure its visibility.

Similarly, the International Covenant on Economic Social and Cultural Rights (ICESCR) guarantees the right to work in article 6 and the right to favourable working conditions in Article 7. These rights are guaranteed to all persons, including those with disabilities. Importantly, Article 7 (c) is unequivocal in providing for "Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence". This means that everyone has the right to take up the job that he or she accepts and no one should be discriminated against on the ground of disability.

⁴ Adopted in 2006 and entered into force on and ratified by Zimbabwe under CRPD on 23 September 2013.

⁵ Adopted on 10 December 1948, Art 23.

The right to work for PWDs is also highlighted by the Committee on Economic, Social and Cultural Rights⁶ which promotes the employment of PWDs in mainstream employment and not “reserved” shelter.⁷

In addition, numerous ILO Conventions⁸ provide for the right to employment and fair labour practice for persons with disabilities. In essence, these conventions aim to ensure that state parties adopt national policies for the promotion of the rights of PWDs to access employment; and to be afforded equal opportunity and treatment as far as occupation and employment are concerned. Put differently, at the centre of these Conventions is the need to ensure that PWDs are provided with equal opportunities in the work place; provided with adequate adjustment and reasonable accommodation. This entails the adaptation of the job content, working time and work organization, and the adjustment of the work environment to ensure the recruitment of PWDs. It may also include the modifications in work schedules, sequences of work and in breaking down work tasks to accommodate PWDs.⁹

2.2 The right to employment for persons with disabilities under the CRPD

Article 5(2) and (3) of the CRPD provides that:

“States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.”

Besides the general prohibition of discrimination against PWDs, the substantive provision on the right to employment of PWDs is contained in Article 27 of the CRPD. Accordingly, member states commit to secure the right of PWDs

“to work, on an equal basis with others; this includes the right to the opportunity to gain a living

⁶ General Comments, N05 of 1994, paragraphs 20 to 27.

⁷ Ibid, para 21.

⁸ ILO Vocational Rehabilitation (Disabled) Recommendation (No 99, 1955); ILO Convention No 111 concerning Discrimination in Respect of Employment and Occupation; ILO Convention (No 159, 1983) on the promotion of equal opportunities and equal treatment for men and women with disabilities; ILO Recommendation No 168 Vocational Rehabilitation and Employment (Disabled Persons) Recommendation, 1983 (No 168).

⁹ Leticia De Campos ‘Reasonable accommodation: The new concept from an inclusive Constitutional perspective’ *Sur International Journal on Human Rights*, vol 8, no14, Jun 2011, p 85-112.

*by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities*¹⁰

In addition, state parties are obliged to forbid all disability-based discriminations related to employment, especially in matters concerning “conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions”.¹¹ It could be argued that Article 27 of the CRPD provides the guideline of what should be done by the state to ensure equality for PWDs at the work place.

The significance of the right to work for PWDs was further highlighted by the Committee on the Rights of Persons with Disabilities (CRPD Committee) through various Concluding Observations on state reports. For instance, in its Concluding Observations on Hungary (2012),¹² the CRPD Committee expressed its concern at the low level of employment of PWDs and called for the development of “programmes to integrate persons with disabilities into the open labour market and the education and professional training systems”.¹³ Similarly, in the case of Argentina, while the CRPD Committee was happy for the adoption of the labour law which allocates a minimum quota of 4 per cent for the employment of PWDs in the public sector,¹⁴ and numerous programmes adopted for the inclusion of PWDs at the work place, it expressed concern on the cultural barriers and prejudices that close access to the labour market to PWDs.

Moreover, in a CRPD Committee decision – *Gröninger v Germany*,¹⁵ the Committee observed that the CRPD in Article 27 enshrines the rights of PWDs to benefit from appropriate measures of promotion of employment opportunities such as real access to general placement services as well as support or help in finding and obtaining employment. This is to say that the CRPD Committee is useful in providing

¹⁰ CRPD, Art 27, para 1.

¹¹ CRPD, Art 27 1(a)

¹² Concluding Observations on Hungary (2012), para 43.

¹³ *Ibid*, para 44

¹⁴ Public Sector [Act 25].689.

¹⁵ *Liliane Gröninger v. Germany* (Communication No. 2/2010)

guidance on how states should ensure the inclusion of PWDs at the work place.

2.3 Normative standards under the African regional Human rights system

It is important to note that the African human rights system includes all human rights instruments which aim to promote and protect human rights in Africa.¹⁶ It comprises: The African Charter on Human and People's Rights (ACHPR); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; the African Youth Charter; and the 2014 Draft African Disability Protocol.

In line with Article 2 of the ACHPR, all these instruments prohibit discrimination on numerous grounds, including disabilities. This also suggests a prohibition of discrimination in the employment sector. In addition, the ACHPR provides for the right to work for everyone. Accordingly, "Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work".¹⁷ Furthermore, in its Article 18(4), the ACHPR, also protects the rights of PWDs and stresses the need to ensure "the right to special measures of protection in keeping with their physical or moral needs". This provision urges the states to ensure the inclusion of PWDs with consideration of their needs.

As for the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, it protects women with disabilities and obliges states to "take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making".¹⁸ This provision is unequivocal in ensuring the right to employment and fair labour practice to women with disabilities.

As far as the African Youth Charter is concerned, it prohibits discrimination under the theme "every young person, young people [including those with disabilities]" have the right to employment.¹⁹

¹⁶ See generally, Frans Viljoen *International Human Rights Law in Africa*, Oxford University Press, 2012.

¹⁷ Art 15.

¹⁸ Art 23(a)

¹⁹ Art 5.

Although this approach in which PWDs are not expressly mentioned shall not be encouraged, it could be argued that it is quite inclusive of PWDs, under Article 24 of the Youth Charter which specifically compels states to recognise

"... the right of mentally and physically challenged youth to special care and shall ensure that they have equal and effective access to education, training, health care services, employment, sport, physical education and cultural and recreational activities".

In sum, the African human rights system is unequivocal in its protection of the right to PWDs for employment. The next session of this paper will examine how the global and regional framework for the PWDs' right to employment was given effect by the Zimbabwean court.

The right to employment of visually impaired persons in Zimbabwe

The Zimbabwe National League of the Blind v Zimbabwe National Statistics Agency (ZIMSTAT) and others.

3.1 Facts and decisions

The applicant was the Zimbabwe National League of the Blind, a registered Non- Governmental Organization whose membership includes visually impaired persons and the respondents were ZIMSTAT, the Minister of Finance cited in his capacity as the Minister responsible for the administration of the Census and Statistics Act, and the Minister of Public Service, Labour and Social welfare cited in her official capacity as the Minister responsible for fair labour standards, disability and social issues. The applicant brought an application before the High Court of Bulawayo challenging the systemic discrimination of visually impaired persons in the process of recruiting extra personnel by ZIMSTAT.

Mandated by the Minister of Finance to conduct the 2012 population censuses, ZIMSTAT had embarked on a recruitment of extra personal to discharge its mandate. In doing so, it decided to recruit personnel from amongst the ranks of civil servants. To give effect to this decision, ZIMSTAT issued a circular titled

'Recruitment of Level I- IV personnel for the 2012 Population Census (reference number POPC/2/3/A) which provided for four levels of the officers as follows:

- (i) Level 1 – Provincial Supervisors
- (ii) Level 2 - District Level supervisors
- (iii) Level 3 – Enumeration Area Level Supervisors
- (iv) Level 4 – Enumerators

Nevertheless, the circular also set conditions to select the appointees who should be:

- (i) *Physically and mentally fit*. The work is field based and involves a lot of
- (ii) Able to work under pressure in a highly technical environment
- (iii) In possession of, at least, a tertiary level qualification
(degree/diploma/certificate from a tertiary institution)
- (iv) Senior enough to be able to supervise and discipline personnel in levels below theirs
- (v) Able to work in a team²⁰

As a result of the first condition above, which is, legally, a disability-based discrimination or imposed by law, Thulani Tavashavira, Simangele Ndlovu and Msoni Mlilo, all blind civil servants at the time and members of the applicant, were simply dismissed or not recruited for being "*physically unfit*" to the job. In fact, they faced barriers erected by the Directive on the assumption that their visual impairment could be equated with inability to work. This was a case of discrimination on the ground of a disability and was in violation of Article 56 of the Constitution which expressly outlaws discrimination on the ground of disabilities.

The applicant sought a declaratory order to the effect that the exclusion of the members of the National League of the Blind and other visually impaired civil servants from being enlisted as personnel in the 2012 population census was discriminatory.

²⁰ *National League of the Blind case*, op cit note 3 p 3.

It also sought an order compelling ZIMSTAT and the Minister of Finance to “immediately facilitate the full participation of persons with disabilities on an equal basis with others in future population censuses or any other such exercise”. In addition to ensuring compliance with the order, the applicants also requested that the order be provided in the form of a “structural interdict that allows the Applicant to monitor the steps taken by the Respondents and allow the applicants to approach court for a decision whether the steps taken are adequate”.

The court found that

“the exclusion of visually impaired persons from recruitment as enumerators and supervisors to which other persons were recruited for the purpose of conducting population census exercises was discriminatory and was a violation of the Constitution” and made an order to that effect.²¹

The High Court ordered ZIMSTAT and the Minister of Finance

“to put in place mechanism and facilities within a reasonable time that will enable the full participation of persons with disabilities, particularly those with visual impairment, as enumerators and supervisors in the conduct of population censuses or any other such exercise”.²²

4. An Evaluation of the Decision

This section evaluates the significance of the decision. In doing so, first, it shows how the declaratory order by the court fosters substantive equality and secondly, that ordering reasonable accommodation measures is also important in strengthening substantive equality.

4.1 Fostering Substantive Equality through the Declaratory Order

The Zimbabwe Constitution²³ recognizes the inherent dignity and worth of each human being as one of its founding principles.²⁴ In other words, this is the affirmation of the right to equality to all.

²¹ Para 1 of the order.

²² Para 2 of the order.

²³ Act No. 20 of 2013

²⁴ Section 3 (1)(e) of the Constitution

Importantly, the Constitution is also explicit in providing for the right of PWDs to treatment with respect and dignity.²⁵ To secure this equality, the Constitution prohibits discrimination on various grounds including on the basis of disabilities.²⁶ It reads:

A person is treated in a discriminatory manner for the purpose of subsection (3) if

a. they are subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected; or

b. other people are accorded directly or indirectly a privilege or advantage which they are not accorded.”²⁷

Although this provision is significant in guaranteeing the dignity and equality of PWDs, it is weakened by s 83 which submits the achievement of disability rights to the availability of resource test. As correctly argued by Manatsa, this is problematic as the government can rely on this provision to refrain from investing in disability rights.²⁸ In fact, this is how formal or textual equality works. Formal equality is linked with Aristotelian equal treatment idea, which posits that likes must be treated alike.²⁹ Accordingly, there is no need to adopt special measures for the benefit of the marginalized to address systemic inequality. As correctly underlined by Ngwena, formal equality “requires that all persons be evaluated by neutral rules regardless of any disparities on certain individuals or groups.³⁰

In a formal equality context, the law provides equality and prohibits discrimination but there are various legal loopholes that hinder substantial or real equality. In this perspective, the application of equality does not consider structural elements which hinder substantial equality, but reflects the apparent similarity between persons. In this vein, while Zimbabwe has been credited for the adoption of The Disabled Persons Act (DPA)³¹ which, amongst other provisions, prohibits discrimination against

²⁵ Section 3 (1)(e) of the Constitution

²⁶ Sec 56(3).

²⁷ Section 56(4)

²⁸ Proceed Manatsa ‘Are disability laws in Zimbabwe compatible with the provisions of the United Nations Convention on the Rights of Persons with Disabilities (CRPD)?’ in *International Journal of Humanities and Social Science Invention* pp. 25-34 at 32.

²⁹ Aristotle *The Nicomachean ethics*. Oxford: Oxford University Press. (Translated by D Ross)1980 pp. 113a-113b.

³⁰ Charles Ngwena ‘Equality for people with disabilities in the workplace: An overview of the emergence of disability as a human rights issue’ 2004 in *Journal for Juridical Science*, Volume 29(2): pp 167-197 at 171.

³¹ Adopted in 1992 and amended in 2001

PWDs on access to public premises, services and amenities and employment,³² this legislation has two serious shortcomings which hamper its objectives.

First, the name of the Act "Disabled Persons" is depreciatory and is likely to do more harm to PWDs. This is a clear representation of the medical model of disability which considers PWDs as being sick and in need of medical assistance. Unlike the social model of disability, the medical model does not recognise societal and environmental barriers as disabling factors. Mandipa writes that the DPA "reflects a medical and diagnostic approach to disability which ignores the imperfections and deficiencies of the surrounding society".³³

Secondly, unlike Article 27 of the CRPD which unambiguously provides for the right to work for PWDs, the DPA does not expressly provide for the right to work of a person with disabilities, but simply prohibits discrimination in employment³⁴ and, as result, as noted by Tsitsi Choruma, "most people with disabilities in Zimbabwe are not accorded the same access to job opportunities as their able-bodied counterparts".³⁵

However, the court through the declaratory Order recognized that the discriminative nature of the recruitment process by ZIMSTAT unfairly excluded visually impaired persons and bridged the gap between formal and substantive equality.

The South Africa jurisprudence is informative in achieving substantive equality and securing human dignity for all. In *Harksen v. Lane NO and Others*,³⁶ the Court articulated the test for unfair discrimination. According to the decision, three questions are essential: Whether there is a rational and legitimate ground for the policy, law or practice that differentiates between people or groups of people such as the

³² [Chapter 17: 01]

³³ Esau Mandipa "Disabled Persons Act defective", *The Standard*, January 22, 2012.

³⁴ Proceed Manatsa op cit note 27 pp. 25-34 at 28.

³⁵ Tsitsi Choruma 'The Forgotten tribe' persons with disabilities in Zimbabwe 2007, Progression Report, p 17.

³⁶ *Harksen v. Lane NO and Others* 1998 (1) SA 300 (Constitutional Court) para 53.

differentiation that was included in the circular; whether the differentiation is an unfair discrimination; and in case the differentiation is an unfair discrimination, whether it can be justified under section 36 of the Constitution.³⁷

At the centre of the second question is the need to secure dignity for all. In this question the court investigates the impact of the discrimination on the plaintiff and the social group(s) to which the plaintiff belongs. In assessing the impact, the following factors are paramount: (a) What is the position of the complainant in society and the extent to which the complainant belongs to a group that has been the victim of disadvantage or exclusion in the past; the nature of the provision or power and the purpose it seeks to achieve, including consideration whether the provision or power is intended to achieve a worthy and important social goal; and (c) the extent to which the provision or power has affected the rights or interests of the complainant and whether it has caused an impairment of the fundamental human dignity of the complainant in a comparably serious manner.³⁸

In the case under investigation, the second stage enquiry reveals that visually impaired persons are victims of unfair discrimination for they are in a weak position; belong to a group that is generally the victim of exclusion and disadvantage; and the provision or power had affected their rights or interests and violated their fundamental human dignity. Consequently, the court in Zimbabwe was correct in pronouncing the declaratory order condemning the action of ZIMSTATS as discriminatory. This decision was also in line with the Hugo judgment in which the court held:

"The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.

³⁷ For more on this case see Charles Ngwenya 'Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa: A case study of contradictions in inclusive education' in African Disability Rights Yearbook 2013, pp.139-164.

³⁸ *Harksen v Lane NO and Others* paras. 51-53.

*The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked”.*³⁹

In other words, the prevention of discrimination seeks to efficiently secure the right to equality and dignity for all as echoed by both the South African and Zimbabwean Constitutions. Therefore, the Bulawayo High Court was correct in issuing the declaratory order which protected substantive equality and demonstrates that Zimbabwe is not a lawless country.

4.2 Fostering substantial equality through reasonable accommodation measures

According to the CRPD, ‘reasonable accommodation’ means

*“necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”*⁴⁰

In other words, adopting reasonable accommodation measures suggests the adoption of reasonable adjustment measures to secure the inclusion of PWDs. In this context, for the measure to be reasonable, it should not cause undue or disproportionate burden or hardship or unjustified costs.

Reasonable accommodation is essential to advance substantial equality because as noted by Marumoagae,

*“equality for persons with disabilities cannot stop with injunctions to refrain from invidious discrimination, but there must be a practical acknowledgment that persons with disabilities are not fully catered for by existing societal structures and that they have a right to participate fully in society and the labour market in particular”.*⁴¹

³⁹ *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC)

⁴⁰ CRPD, Article 2.

⁴¹ MC Marumoagae ‘Disability discrimination and the right of disabled persons to access the labour market’ in PER Volume 15 (1), 2012 pp.345-428 at 347; also Day, Shelagh, and Gwen Brodsky. ‘The Duty to Accommodate: Who Will

Thus the CRPD provision compels the employer to adjust the work environment to ensure the inclusion of PWDs,⁴² at the work place for example. Nevertheless, the duty bearer of the right can show that the requested modifications cause undue burden, and will not be bound to provide such accommodation. In the Canadian case of *Central Alberta Dairy Pool v Alberta*⁴³ the Supreme Court listed criteria for consideration in identifying whether the provision of accommodation would create undue burden.

These criteria include:

- (a) Financial costs;
- (b) Impact on collective bargaining agreements;
- (c) Disruption of service to the public;
- (d) Effects on employee morale;
- (e) Interchangeability of workforce and facilities;
- (f) Size of the employer's operations;
- (g) Safety;
- (h) Overall economic climate; and
- (i) Financial resources required for the accommodation

The inviolability of reasonable accommodation was further strengthened through another Canadian case, *Eldridge v British Columbia*⁴⁴ where the Supreme Court held that the right to disability non-discrimination (under the Canadian Charter of Fundamental Rights) is not only a negative right but also a positive right that compels the state to take positive measures to ensure that PWDs enjoy rights as all other members of the society. In clarifying its position, the court held as follows:

"The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field. It is also a cornerstone of human rights jurisprudence that the duty to

Benefit?' Canadian Bar Review Volume 75:433-473.

⁴² CRPD, Article 2.

⁴³ *The Central Alberta Dairy Pool v Alberta* [1990] 2 SCR 489.

⁴⁴ *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624.

take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation".⁴⁵

On the employment terrain, reasonable accommodation boils down to "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities".⁴⁶ According to the Americans with Disabilities Act of 1990, there are three types of "reasonable accommodations" at the work place:

"(i) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities".⁴⁷

However, as indicated earlier, 'reasonable accommodation' should not cause "undue hardship" to the employer. This was clarified through the US case of *Norcross v Sneed*⁴⁸ where the complainant, who was blind, had his application to work as school librarian rejected on the ground that once a year the librarian would have to take learners on a field trip. The court was of the view that possessing a driving license for the position was neither reasonable nor essential. Driving ability was necessary for the job for it was required only once a year. Alternative transport could be arranged by the employer without suffering undue hardship or burden.

⁴⁵ As above, para 79.

⁴⁶ Title I of the Americans with Disabilities Act of 1990 (the 'ADA').

⁴⁷ Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act available at <http://www.eeoc.gov/policy/docs/accommodation.html> (accessed on 21 September 2016).

⁴⁸ *Norcross v Sneed* 755 F2d 113 (8th Cir 1983)

In Europe, the European Council Directive aiming to provide a general framework for equal treatment in employment and occupation calls for the reasonable accommodation for PWDs in these terms:

"In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided.

This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."⁴⁹

The requirement of reasonable accommodation is also part of the South African law under the Promotion of Equality and Prevention of Unfair Discrimination Act,⁵⁰ which directs all persons and entities to reasonably accommodate PWDs. In addition, the South African Employment Equity Act 55 of 1998 defines 'reasonable accommodation' to be "any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access or to participate or advance in employment".⁵¹ In addition, the recently adopted White Paper on Disability Rights⁵² also relies on reasonable accommodation to secure the dignity of PWDs. Accordingly, in removing barriers to ensure access and participation for PWDs, amongst others, the White Paper's Strategy includes the need to focus on reasonable accommodation measures,⁵³ which include adjustments to:

- Make the physical environment accessible;
- Provide persons with disabilities with access to information and communication;
- Redress stress factors in the environment;
- Accommodate specific sensory requirements such as those relating to light, noise and spatial stimuli;

⁴⁹ Council Directive 2000/78/EC, art 5.

⁵⁰ Act 4 of 2000.

⁵¹ Employment Equity Act section 1.

⁵² The White Paper on The Rights of Persons with Disabilities adopted on 9 December 2015, Government Gazette, No 39792 of 9 March 2016.

⁵³ Ibid, para 6.1.1.6.

- Improve independence and mobility of persons with disabilities;
- Guarantee participation and supported decision-making by persons with disabilities; •

Provide access and participation to quality education and work.

In sum, under international law employers are compelled to adopt reasonable accommodation measures to ensure the substantial equality of PWDs. In Zimbabwe, the National Disability Board is mandated to issue adjustment orders needed for the full inclusion of PWDs in the public services; and to formulate and develop measures and policies to secure equal opportunities for PWDs in the education and employment sector.⁵⁴ Nevertheless, a person served with an adjustment order has thirty days of the service of the order to appeal to the Administrative Court if the order is unreasonable or imposes undue burden on the appellant.⁵⁵ This is the formulation of reasonable accommodation in Zimbabwe, where failure to comply with the adjustment order is penalised by a fine.⁵⁶ Manatsa observes that the criminalisation of non-compliance with an adjustment order is “a bold step” in an attempt to ensure full accessibility and services to PWDs.⁵⁷

However, the Zimbabwe National League of the Blind case showed how a recruitment Directive was discriminatory of visually impaired persons and the National Disability Board had not intervened. Nonetheless, the court was firm in ordering the respondents to

*“put in place mechanisms and facilities within a reasonable time that will enable the full participation of persons with disabilities, particularly those with visual impairments, and enumerators and supervisors in the conduct of future population censuses or any other such exercise”.*⁵⁸

This was indeed a call for the adoption of reasonable accommodation measures by the respondents in future recruitments processes. Moreover, the court did not consider whether the adjustment to

⁵⁴ Disabled Persons Act, of 2001, section 5.

⁵⁵ Disabled people Act of 2001, section 6 (5).

⁵⁶ As above, section 6(8).

⁵⁷ Proceed Manatsa “Are disability laws in Zimbabwe compatible with the provisions of the United Nations Convention on the Rights of Persons with Disabilities (CRPD)?” International Journal of Humanities and Social Science Invention Volume 4 Issue 4 (2015) 28.

⁵⁸ Ibid, para 2.

be effected will create undue burden or not, but simply urged the respondents to take action within reasonable time. This is a positive development which indicates that discrimination against PWDs and those who are visually impaired in particular cannot be tolerated, and that reasonable accommodation measures should be adopted to secure their substantial equality. This decision was in line, with the CRPD Committee's Concluding Observations on China (2011) in which the Committee expressed its concerns on the practice of reserved employment, which discriminated against PWDs in their vocational training and career. It went on to recommend that China adopt all necessary measures to ensure that PWDs have freedom to choose their careers and vocational training.⁵⁹

Although the verdict of the *Zimbabwe National League of the Blind* calls for celebration, its rationale was not clarified by the court which, besides refusing to grant a structural interdict, simply agreed with plaintiff without indicating reliance on foreign and international law as empowered by the Constitution,⁶⁰ or any other rationale. In fact under s 326 of the Constitution, not only is customary international law part of the law of Zimbabwe, when it is consistent with the Constitution, or an Act of Parliament,⁶¹

*'When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe, in preference to an alternative interpretation inconsistent with that law.'*⁶²

This provision clearly empowers the court to rely on customary international law in providing reasoning for the judgment. Similarly, under section 327(20) of the Constitution, (2)

'An international treaty which has been concluded or executed by the President or under the President's authority—

(a) does not bind Zimbabwe until it has been approved by Parliament; and

(b) does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament.'

⁵⁹ Concluding Observations on China (2011), paras 41 and 42.

⁶⁰ See section 46 (c) and (e) of the 2013 Zimbabwean Constitution.

⁶¹ Section 326(1)

⁶² Section 326(2).

Put differently, Zimbabwe subscribes to the monist theory of international law which requests parliamentary approval for a ratified treaty and its incorporation into national law by an Act of parliament. It is only when these conditions are met that the international treaty has force of law at the domestic level.

In Zimbabwe, the court could have relied on the force of law provided by the CRPD through the Disability Act to motivate its decision. This could have been done by the court to clarify its position. Left with no clarity, the reader of the judgment has to guess, read and interpret the decision in line with international law and foreign jurisprudence. Notwithstanding this shortcoming, the Bulawayo High Court has demonstrated that the judiciary in Zimbabwe is inclined to protect disability rights.

5. Concluding Remarks

The aim of this article was to unpack the implications of the decision of the Bulawayo High Court in the matter between *Zimbabwe National League of the Blind v Zimbabwe National Statistics Agency (ZIMSTAT)* and Ors on the protection of disability rights in Zimbabwe in particular, and in Africa broadly. The paper began with an exploration of the global and regional standards for protection of the right to employment of PWDs before focusing on the case under discussion. It was found that at all these levels; PWDs enjoy a normative protection of their right to employment and should not be discriminated against on the job market on the ground of disabilities.

As for the implication of the *National League of the Blind* decision on the disability rights discourse, it echoed the fact that the social model of disability has gained dominance over the medical model on the imperative of realising significant or substantial equality. This positive development was illustrated by the declaratory order affirming that "*the exclusion of visually impaired persons from recruitment*" for positions afforded to other was discriminatory and was unconstitutional,⁶³ and subsequently ordered the adoption of mechanisms or reasonable accommodation measures within

⁶³ Para 1 of the Order

reasonable time to ensure the inclusion of visually impaired persons in such future recruitments. Notwithstanding the insufficiency of this decision, namely the lack of substantive reasoning of the Court that could have relied on ss 326 and 327 of the Constitution to clarify its decision, the latter itself is a testimony that disability rights are now taken seriously and this positive lesson from Zimbabwe should be emulated by other courts across the African Continent.

