

4 May 2018



High Court stops implementation of Online Content Regulations

- **Reinforces the independence of Judiciary**
- **Reiterates the legal position that subsidiary legislation are amenable to a challenge by way of judicial review**
- **The order is applicable only to the Applicants**
- **Regulations continue to apply to citizens and corporate bodies who are not the Applicants**

Background

On 16 March 2016, the Minister for Information, Culture, Arts and Sports gazetted the Electronic and Postal Communications (Online Content) Regulations 2018 which inter alia required bloggers, online forums, online radio and online television to register with the Tanzania Communications Regulatory Authority (TCRA). The Regulations also impose regulatory and licensing fees to any person who wishes to provide online content services.

Aggrieved by the above Regulations, the Legal and Human Rights Centre, Tanzania Human Rights Defenders Coalition, Registered Trustees of Media Council of Tanzania, Tanzania Media Women's Association, Tanzania Editors Forum and Jamii Media Limited (collectively Applicants) proceeded to challenge these Regulations in the High Court of Tanzania at Mtwara. In this application, the respondents are the Minister for Information, Culture, Arts and Sports, Tanzania Communications Regulatory Authority and the Attorney General.

The Ruling

In a classic ruling showing the Judiciary's independence, Judge Fauz Twaib of the High Court of Tanzania at Mtwara, has today Friday 4 May 2018, issued interim orders against the Government from enforcing the Online Content Regulations against the Applicants. The order is an interim order pending hearing and determination of the Applicant's application for leave to apply for Judicial Review.

The Judge ordered the following:

1. *That the Electronic and Postal Communication (Online Content) Regulations 2018, promulgated by the first respondent through General Notice No 133 of 16th March 2018 ("the Regulations"), being subsidiary legislation, are amenable to a challenge by way of judicial review through the prerogative orders of certiorari, mandamus and prohibition under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act [Cap 310 R.E. 2002], and not necessarily, in the circumstances of this case, by way of a constitutional petition under the Basic Rights and Duties Enforcement Act [Cap 3 R.E. 2002], which deals with matters falling under Part III of the Constitution of the United Republic of Tanzania;*
2. *That it is neither necessary nor judicious, at this stage, for this Court to issue an omnibus interim injunction prohibiting the first and second respondents from enforcing the provisions of the entire Regulations pending final determination of the intended application for judicial review;*

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3. *That it is necessary and judicious, for present purposes, for this Court to issue an interim order, as I hereby do, to the following effect:*

That the first and second respondents, their agents or representatives, are hereby restrained, in as far as the applicants herein are concerned, from enforcing the deadline of 5th May 2018 prescribed in the notice titled "MAENDELEO YA USAJILI WA WATOA HUDUMA ZA MAUDHUI KWA NJIA YA MTANDAO" dated 2nd May 2018, issued by the second respondent, in respect of the registration of bloggers, online forums, radios and televisions, pending hearing and determination of the applicants' application for leave to apply for orders of certiorari, mandamus and prohibition.

4. *The reasons for the above holdings and orders shall be given on 10th May 2018 (underlined emphasis ours).*

What this means

The ruling implies that in as far as the Applicants are concerned, the Regulations are not implementable. However, for all other citizens and corporate bodies who are not the Applicants, the Regulations will continue to apply with the deadline to comply being tomorrow 5 May 2018.

The ruling also creates a precedent for citizens aggrieved by the enactment of subsidiary legislation to challenge them before Courts of law.

In principle, the ruling reiterates a legal position that all subsidiary legislation are not only subject to challenge by way of a constitutional petition but are also amenable to a challenge by way of judicial.

Judicial review entails Court proceedings in which the Courts exercise their supervisory jurisdiction over inferior Courts, tribunals or other public bodies. The grounds for judicial review are generally based on illegality, irrationality and procedural impropriety. Through judicial review, the High Court may quash the decision of the executive (certiorari), compel the executive to make a decision or issue restrictive orders (prohibition which is akin to an injunction in civil cases).

In the upshot, judicial review reminds the Executive to follow due process of law when enacting principal or subsidiary legislation else their validity and legitimacy be challenged in Courts of law.

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