

1 June 2018



Government wins Online Content Regulations case

- A concluding paragraph or subparagraph in an affidavit does not render an entire affidavit defective
- Applications for orders to remove a subsidiary legislation from the statute books can only be filed before the High Court
- To establish locus standi in applications for judicial review, an Applicant must be a person whose interests have been or believes will be adversely affected by any act or omission, proceeding or matter
- Courts rules that Applicants have no locus standi to file an application for judicial review because there is no proof that the Applicants carry out business in the areas affected by the Regulations

Background

On 4 May 2018, Judge Fauz Twaib of the High Court of Tanzania at Mtwara, issued interim orders preventing the Government from enforcing the Online Content Regulations against the Applicants. The Applicants in this case are 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. The Respondents are the Minister for Information, Culture, Arts and Sports, Tanzania Communications Regulatory Authority and the Attorney General.

Apart from issuing interim orders, the Court had made a ruling that an application for leave to apply for judicial review be heard inter partes. The Attorney General, through a written notice, raised three points of preliminary objection against the application. First, the application was incompetent and unmaintainable as the Applicants have not exhausted available alternative remedies. Second, the affidavit in support of the chamber summons was incurably defective for contravening the provisions of Order XIX rule 3 of the Civil Procedure Code [Cap. 33 R.E 2002]. And lastly, the Applicants had no locus standi or interests as required under rule 4 of the Judicial Review Rules.

Summary of the Ruling and Orders

In its decision, the Court overruled the first objection on grounds that there are no other alternative remedies because it is only the High Court, exercising its powers of judicial review, that can order removal of a subsidiary legislation from the statute books. Similarly the Court dismissed the second objection on grounds that a concluding paragraph or subparagraph in an affidavit would not, per se, render an entire affidavit defective. However, the Court agreed with the Government's point of preliminary objection that the Applicants in this case have not been able to show, by their pleadings, that they have locus standi to file an application for the prerogative orders of certiorari, mandamus and prohibition against the challenged Online Content Regulations.

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The Judge summarized the Ruling and Orders as follows:

1. The complaints advanced by the Applicants in this matter, seeking to impugn a subsidiary legislation i.e the Electronic and Postal Communications (Online Content) Regulations 2018 enacted by the Minister for Information, Culture, Arts and Sports, cannot be pursued by way of the procedure provided for in section 11(5) of the Electronic and Postal Communications Act through the Fair Competition Tribunal. It is only this Court that can avail the Applicants with the reliefs they are seeking, provided the Court finds the meritorious.
2. A concluding paragraph or subparagraph in an affidavit would not, per se, render an entire affidavit defective. Neither would such a conclusion be considered an attempt at taking over the functions of the Court. It would be, at most, unless reasons exist to hold otherwise, simply a closing statement, aimed at wrapping up the preceding averments, with no harm done to the affidavit.
3. The words "every person" in Article 26(2) of the Constitution have been interpreted by case law as recognizing the right to sue that is wide enough to go beyond the "personal interest" principle, and encompass the notion of public interest in constitutional litigation: *Rev. Christopher Mtikila v Attorney General* [1995] TLR 31. However, the same cannot be said of judicial review proceedings. Perhaps because of the prerogative nature of remedies of certiorari and mandamus, not everybody has the right to move the Court for redress. Under rule 4 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Procedure and Fees) Rules, the limits of locus standi are that the Applicant has to be "a person whose interests have been or believes will be adversely affected by any act or omission, proceeding or matter."
4. To qualify for the legal test that the body has an actionable interest in a matter for judicial review, evidence that the body actually carries out business in that area must be given in the affidavit in support of the application. The Applicants' affidavits do not even suggest facts that connect the Applicants (or any of them) with the impugned Regulations so as to constitute an interest actionable by way of judicial review.
5. As the decision is not based on the merits of the application, an order striking out the application is more appropriate in the circumstances.

What this means

The ruling implies that the order issued by the Court suspending implementation of Online Content Regulations to the Applicants has lapsed and the suspension automatically lifted. Since the application has been struck out, the Applicants have a chance of refiling the application with proper pleadings.

The Ruling also elaborates more on the issue of *locus standi*. It emphasizes that only persons affected by the decision of an authority may approach the Court for the remedies under judicial review. Thus, not everyone may apply for judicial review.

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