IN THE HIGH COURT OF TANZANIA

MTWARA DISTRICT REGISTRY

AT MTWARA

MISCELLANEOUS CIVIL CAUSE NO. 25 OF 2018

IN THE MATTER OF AN APPLICATION FOR ORDERS OF *CERTIORARI*

AND IN THE MATTER OF THE LAW REFORM (FATAL ACCIDENTS

AND MISCELLANEOUS PROVISIONS) ACT, CAP 310

AND

IN THE MATTER OF AN APPLICATION TO CHALLENGE THE

PROVISIONS OF THE ELECTRONIC AND POSTAL COMMUNICATIONS

(ON LINE CONTENT) REGULATIONS, 2018

BETWEEN

LEGAL AND HUMAN RIGHTS CENTRE.....1ST APPLICANT

THE REGISTERED TRUSTEES OF

MEDIA COUNCIL OF TANZANIA.....2ND APPLICANT

TANZANIA HUMAN RIGHTS DEFENDERS.....3RD APPLICANT

AND

THE MINISTER FOR INFORMATIION,

CULTURE AND SPORTS.....1ST RESPONDENT

TANZANIA COMMUNICATIONS

REGULATORY AUTHORITY.....3RD RESPONDENT

HON. THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

22 November, 2018 & 9 January, 2019

DYANSOBERA, J.:

This is an application for judicial review by way of *certiorari* to quash and declare the provisions of the Electronic and Postal Communications (Online Content) Regulations adopted on 16th day of March, 2018 in Government Notice No. 133 of 2018 to have been promulgated in excess of powers, illegally, against the principles of natural justice, unreasonably, arbitrarily and ambiguous.

The application has been filed by the three applicants. The first applicant is Legal and Human Rights Centre which is a voluntary and human rights interested civil society organization duly registered as a charitable entity under the Companies Act [Cap. 212 R.E.2002]. It has on line platforms including website, Facebook gape, Twitter, YouTube for education and information to the general public. The second applicant is the Registered Trustees of Media Council of Tanzania, an independent voluntary, non-statutory self-regulatory body established under the Societies Act [Cap. 337 R.E.2002] and runs online platforms including website, Facebook page, twitter, YouTube for education and information to the general public. The third applicant is the Tanzania Human Rights Defenders Coalition, a not for profit. organization registered under the Non-Governmental Organization Act, 2002 as

amended in 2005 which works towards ensuring protection of human rights defenders in Tanzania and runs online platforms including website, Facebook page, twitter, YouTube and Instagram for education and information to the general public. The application is, as usual, filed by way of a chamber summons and supported by the affidavits of Ms. Anna Aloyce Henga, Mr. Kajubi Mukajanga and Mr. Onesmo Olengurumwa, the Principal Officers of the respective Applicants' organizations and accompanied by the statement of facts.

The respondents against whom this application has been preferred are the Minister for Information, Culture, Arts and Sports, an establishment which derives its mandate under the Constitution of the United Republic of Tanzania,1977 as amended charged with the duties of overseeing matters of information, culture, arts and sports (1st respondent), the Tanzania Communications Regulatory Authority, a government agency established under the laws of Tanzania charged with the duties of regulating communication matters in the country (2nd respondent) and the Hon. Attorney General of the United Republic of Tanzania appointed under Article 59 of the Constitution as the principal legal advisor to the Government of the United Republic of Tanzania who has been joined in these proceedings by virtue of section 18 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act [Cap. 310 R.E.2002] (3rd respondent). In resisting the application, these three respondents, have filed a joint counter affidavit and a statement in reply.

The brief background to the application may be stated as follows. The Electronic and Postal Communications Act, Cap. 306 (Act No. 3 of 2010) hereinafter referred to as the Parent or Enabling Act enacted by the National Assembly was assented to by the President on 20th day of March, 2010 and came into force on 7th day of May, 2010. It repealed the Broadcasting Services Act, 1993 and the Tanzania Communications Act, 1993 with the aim of putting the communications sector abreast with developments in the electronic communications industry by providing for a comprehensive regulatory framework for electronic and postal communications service providers. The 1st respondent promulgated the Regulations under the said Act. These Regulations known as the Electronic and Postal Communications (Online Content) Regulations, 2018 specify the obligations of service providers and users of online platforms including social media, discussion forums as well as online broadcasts such as radio and television. The same Regulations confer powers on Tanzania Communications Regulatory Authority, known by its acronym TCRA, to regulate online content including through registration of users and platforms, and taking action against non-compliance with the obligations such as ordering removal of prohibited content. Besides, these regulations contain some important provisions and set minimum standard requirement with regards to the

protection of children online, fighting hate speech and extremism online, and promoting user responsibility and digital security practices.

The applicants are greatly perturbed by this exercise of ministerial power, and in particular, are aggrieved by a number of provisions contained in the said Regulations, hence this application.

According to the statement of facts of the applicants, the grounds upon which the said relief is sought are stated to be the following.

One, *Ultra vires*: According to the applicants, the 1st respondent has acted in excess of his jurisdiction in that Section 103 (1) of the Electronic and Postal Communication Act gives the Minister for Information, Culture, Arts and Sports power to make regulations on content related matters. The complaint against the 1st respondent, according to them, is that by making regulations 4, 5 (d), (e), (f) and (g), 6, 7, 8,9,10 and 14 which provisions deal purely with compliance and regulatory matters, the 1st respondent has acted *ultra vires*.

Two, unreasonable, arbitrary and ambiguous: it is contended by the applicants that the regulations 16 and 17 which are on complaints handling are unreasonable and prone to arbitrary use as they do not provide for the right to be heard and that regulation16 has been drafted in a vague and ambiguous manner, thus impairing the right to be heard

Three, interference with privacy, hence illegal and unreasonable. On this ground, the attack has been made against regulations 5 (1) (e) and 9 (d) which require on line content providers to have in place

mechanism to identify source of content and compels internet cafés to install surveillance cameras to record and archive activities inside the internet café, respectively.

Four, interference with the right to freedom of information which leads to illegality. The applicants are greatly disturbed by regulation 14 which establishes a mandatory registration scheme.

Five, arbitrariness. It is argued on part of the applicants that regulation 4 (b), which allows the Authority to take action against the non-compliance but does not provide for the type of the action being taken, is open-ended and gives room for subjective interpretations which attracts arbitrary use of it.

Six, prohibition of overly-broad and ambiguous categories of content. The attack is on regulation 12. According to the applicants, the type of speech prohibited by regulations 12 (f) and (g) is wide ranging and poorly defined, making it impossible for the public to know in advance what conduct or speech is criminalized and that this may lead to prohibition of broadcasting news regarding violent crimes or campaigns highlighting the dangers of domestic violence or sexual trafficking. Furthermore, it is equally contended that prohibited images or content may also expose abuses at the hands of the police or other authorities such as unnecessary violence against the public and or marginalized groups information that is clearly in the public right thus contravening the Constitution of the United Republic of Tanzania.

Seven, conditions for registration are very stringent and arbitrary to the extent that most on line content service providers would not afford hence impeding them the right to access to information and freedom of expression. Such conditions were mentioned to include registration fees, type and number of members of staff, documentations, requirement of time and resources. It was suggested that a transition period of at least one year or so would suffice.

Lastly, it is the applicants' complaint that the regulations contravene the rules of natural justice because they do not provide for the procedure to be followed before imposing sanctions.

In the supporting affidavits of the Principal Officers of the respective organizations, it is averred that the 1st respondent has regulated among other things some matters which are not in his portfolio, imposing criminal sanctions to those in breach of the regulations without adhering to the rules of natural justice. Further, that he has acted *ultra vires* as his powers are limited to content and not licensing, surveillance, radio and television broadcasting. It is further contended that the Regulations are illegal as they interfere with personal privacy by instructing internet cafés to install surveillance cameras. Furthermore, it complained that the Regulations contravene rules of natural justice by not providing for the procedure to be followed before imposing sanctions and without affording and opportunity of being heard and also by giving authorities powers to be prosecutors and

judges in their own causes. The said Regulations are also being attacked for imposing criminal penalties without room of appeal.

In the respondents' joint statement in reply, all the grounds advanced by the applicants in their statement are denied.

On ground No. 1, learned senior state attorney for the respondents contended that the 1st respondent in promulgating the said Regulations acted intra vires and in accordance with principle of legality and natural justice. It is further contended on part of the respondents that Regulation 4 was made to elaborate the regulatory powers of the 2nd respondent in respect of section 4 of the EPOCA and the 2nd Schedule to the EPOCA. As regards regulation 5 (d), (e), (f) and (g) and regulations 6, 7, 8, 9, 10 and 14 of the Regulations, learned senior state attorney told this court that the regulations are aimed at elaborating the function of the 2nd respondent as provided for in the 2nd Schedule to the EPOCA and that the regulations were therefore, enacted to give effect to the provisions of the parent Act.

On ground No. 2, it is was averred on part of the respondents that regulations 16 and 17 of the Regulations in question are in accordance with paragraph 18 of the 2nd Schedule to the EPOCA.

As regards ground No. 3, learned senior state attorney argued that regulations 5 (1) (e) and 9 (d) elaborate the functions of the 2nd respondent in relation to the regulation of online content providers and

users with the view to establish the source of prohibited content as provided under regulation 12 of the Regulations.

As far as ground No. 4 is concerned, it was pointed out for the respondents that the requirement under regulation 14 of the Regulations are provided as a regulatory measure for on line content providers and users under power conferred to the 1st respondent in pursuant to sections 15 and 103 (1) of EPOCA.

On ground No. 5 it was learned senior state attorney's contention that regulation 4 (b) of the Regulations is part of the regulatory measures entrusted to the 2nd respondent by the Principal Act and further that any person aggrieved with the decision of the 2nd respondent, there is a well-established mechanism to challenge that decision.

Disputing ground No. 6, learned senior state attorney for the respondents told the court that regulations 12 (f) and 12 (g) of the Regulations is clear and complemented by other laws. Further that, regulation 12 does not contravene the Constitution of the United Republic of Tanzania.

Challenging ground No. 7, Mr. Ladislaus Komanya stated that by the date of the application of these Regulations a total number of 233 online content service providers had submitted their applications for registration through online website. He attached a list of the application as of 5th May, 2018.

On ground No. 8, learned senior state attorney argued that since the Regulations are already in operation, the applicants' averments can be dealt with by the 2nd respondent administratively.

As regards paragraph 10 of the applicants' statement, it was submitted for the respondents that the Regulations adhere to the principles of natural justice including an adequate right to be heard before imposing any of the prescribed sanctions.

And, denying the contents of paragraph 11 of the applicants' statement, learned senior state attorney argued that the Regulations meet the standard of subsidiary legislation enactment process and, therefore, the Regulations are lawful, reasonable, are not arbitrary and unambiguous, and have been made within the powers provided for under the parent legislation.

The respondents' counter affidavits are, in most part, a replica of what is stated by the respondents in the statement in reply. It is averred, in addition, that the Regulations were made in accordance with the Constitution, the parent Act and other written laws and embody the principles of natural justice.

Having sketched the necessary detailed background including the statement, the statement in reply, the affidavits of the Principal Officers of the applicants' organizations and the counter affidavits of the respondents, I now turn to the issue for adjudication.

The hearing of this application was conducted by way of written submissions. Mr. Mpoki of Mpoki & Associates, Advocates submitted for the applicants whereas Mr. Ladislaus Komanya, learned senior state attorney from the Office of Solicitor General, Mtwara, submitted on behalf of the three respondents.

Before delving into the merits or otherwise of this application, I have, at this stage, to consider the concern by the learned senior state attorney that the applicants, in their submission, have gone beyond their grounds of prayers set out in the chamber summons and statement. It is true that the grounds relating to procedural impropriety and proportionality were not among the grounds raised in their application for certiorari in question. According to the chamber summons, the applicants are seeking judicial review of the 1st respondent's ministerial power of promulgating the impugned Regulations in excess of powers, illegally and against the principles of natural justice, unreasonable, arbitrary and ambiguous. These grounds have been itemized in ground No. 1 (ultra vires), ground No. 2 (unreasonable, arbitrary and ambiguous), ground No. 3 (illegality and unreasonable), ground No. 4 (illegality), ground No. 5 (arbitrary), ground No. 6 (ambiguous), ground No. 7(arbitrary), ground No. 8 (against principles of natural justice).

Although, the issue of procedural impropriety was not one of the grounds in both the chamber summons and statement of the applicants,

this issue was pleaded by using other terminologies as I will demonstrate in my ruling. Clearly, the issue of proportionality was not pleaded in the statement nor was it stated in the chamber summons but merely set out from the bar in the written statement submissions, I will decline to consider it as parties are bound by their pleadings.

In the alternative, learned senior state attorney gave a strange but an interesting submission bear repeating:

> "In the alternative, we submit that the application and submission by the Applicants looked at as a whole, it only connotes and invites the Honourable Court to declare the impugned Regulations without proposing a recourse to what will happen after the same Regulations are voided, which to us will bring about a lawless state in as so far as the Online Content Regulations are concerned. In other words, the Applicants are seeking the Court to void the Regulations which will result in the proliferation of unregulated freedom on the part of online content users. It is our humble submission, therefore, that if the impugned Regulations are voided this will amount to inviting danger to the society if we are to leave the main source of information in the current world of science and technology unregulated."

With unfeigned respect to learned senior state attorney, this argument holds no water, his is but a misconception of what judicial review entails. In judicial review the power of the High Court is limited

to a supervisory role that is the decision or rule and the decision or rule-making process. If the High Court finds the decision or the action being flawed, then it may quash it but it will then be for the decision or rule maker to reconsider the decision or rule. So, if the court nullifies the Regulations the Minister would still be at liberty to make new Regulations provided, he avoids committing the same mistakes for, certiorari does not go that far.

It is clear as correctly noted by learned senior state attorney that from page 1 to page 7 of the applicants' submission, an attempt has been made to discuss on the case laws and principles relating to judicial reviews. Those principles, in my view, are sound and may be of assistance to this application whereby the applicants are seeking to challenge the Minister's rule-making procedure and the Regulations promulgated therefrom.

Generally, courts review the validity of a subsidiary legislation by applying the doctrine of ultra vires in that the subsidiary legislation may be declared void if it is made in excess of statutory authority conferred by the parent Act or a particular mandatory procedure prescribed by the parent Act has not been followed or is contrary to the Constitution.

In the same vein, the parent Act would most times set out the procedure to be followed to enact any subsidiary legislation under it. It would also set out the nature and substance of such subsidiary legislation so that where there is a defect in procedure adopted to pass

the subsidiary legislation it becomes void for procedural ultra vires and where the subsidiary legislation infringes the substance of the parent Act, it becomes void for substantive ultra vires

The applicants base their application on the exercise powers of the 1st respondent in promulgating the Electronic and Postal Communications (Online Content) Regulations, 2018 in excess, illegally, against the principles of natural justice, unreasonably, arbitrarily and ambiguous. The impugned Regulations were made by the Minister pursuant to the provisions of section 103 (1) of the Electronic and Postal Communications Act [Cap. 306 R.E.2002] which state:

"103.-

(1) The Minister may make regulations upon recommendation of the Committee on content related matters.

(2) In exercising its powers, the Authority acting upon recommendation of the Content Committee may make rules on content related matters"

It is submitted for the applicant on ground No. 1 that as per section 103(1) of EPOCA, the power of the Minister for Information, Culture, Arts and Sports in this context is limited to content related matters only but that the Minister went far beyond by making regulations touching on regulatory issues which are not matters under his mandate. To buttress this point, learned counsel referred this court to the definition of the word "content" by EPOCA to mean ***"information in the form of***

speech or other sound, data, text or images whether still or moving, except where transmitted in private communications," and therefore submitted that under the law the Minister was required to deal with content related matters and not otherwise. Further that failure on the part of a public authority to act in accordance with the procedural requirement of the law is a ground for the interference of the court. This court was referred to the case of **Council of Civil Service Unions *Versus* Minister for the Civil Service [1985] AC 374 (HL)** where the terms **procedural impropriety**, was used to denote the common-law grounds or heads of Judicial Review of administrative action. In resume, it is argued for the applicants that the above regulation deals with compliance, procedural and or regulatory issues which, according to Mr. Mpoki, under section 103 (1) EPOCA are solely vested to the 2nd respondent.

The other reason for seeking the nullification of the Regulations is that the Regulations are in conflict with the parent Act reference being made to the definition of the word content. To support the argument that the Regulations are ultra vires, learned counsel cited the case of **General Officer Commanding -in-Chief versus Subbash Chandra Yadav** (1988) 2 SCC 351. Learned counsel was emphatic that the definition of the word content in the Regulations differs materially and substantially with the definition assigned by the parent Act. It was concluded that since the definition under the Regulations is in conflict

with the enabling Act, it therefore renders almost all regulations null and void.

Submitting in reply to ground No. 1, learned senior state attorney for the respondents argued that a subsidiary legislation is not a replica of the main Act and that as a general rule, subsidiary legislation provides clarity, elaboration and more explanation on how the parent Act should be realised and implemented. Mr. Ladislaus Komanya detailed the reasons why the legislation is delegated by the Parliament and insisted that the subsidiary legislation has the same effect as if they were passed in the Parliament. On the procedural impropriety, learned senior state attorney submitted, and rightly so, that it is the Statute which has to provide procedures and if no such procedure are provided, there cannot be procedural impropriety. It is true, as contended by learned senior state attorney that section 103 of EPOCA does not mandatorily require the Minister to consult the interested groups and that the same section does not set limits to the power of the Minister when making these Regulations. On the issue of the definition of the word "content" in the Regulations being different from the definition assigned in the parent Act, learned senior state attorney told this court that there is no difference. Essentially, it is being argued for the respondents that the 1st respondent, in promulgating the impugned Regulations acted intra vires.

Having considered the rival submissions, I have the following to say. The Parliament lays down the policy in more or less general terms and confers on an extraneous authority the power to make regulations or rules to carry out the legislative policy by implementing and administering the requirements of the parent Act within that framework. The doctrine of *ultra vires* envisages that an authority can exercise only so much power as is conferred on it by law. An action of the authority is *intra vires* when it falls within the limits of the power conferred on it but it is *ultra vires* if it is in conflict with the parent Act, is made without following the mandatory procedure prescribed by the parent Act or goes beyond the scope of authority conferred on the delegate. When a piece of subsidiary legislation is declared to be ultra vires, it is void and becomes unenforceable.

As far as the ground No. 1 is concerned, a close reading of the EPOCA and section 103 in particular, does not reveal the procedures set by the Parliament but which were flawed by the 1st respondent in promulgating the impugned Regulations. The law did not categorise limits of power of the 1st respondent. I have considered the case of **Council of Civil Service Union versus Minister for the Civil Service** [1985] AC 374 HL cited by learned counsel for the applicants to support the existence of procedural impropriety. This case is distinguishable and inapplicable to the present matter particularly in view of the underlined words 'this is because susceptibility to Judicial Review under this head

covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.' In the first place, the 1st respondent in this matter was not an Administrative Tribunal. Second, there is no evidence indicating that there are procedural are rules laid down in the legislative instrument by which its jurisdiction is conferred which the 1st respondent failed to observe. Third, the word online content was not defined either in the parent Act or in the Regulations.

However, I find that the 1st respondent acted *ultra vires* when, under rule 3 of the Regulations, he defined the word content to mean 'sound, data, text or images whether still or moving' which definition, as rightly argued by learned counsel for the applicants, is in conflict with the definition of the same word assigned by the Parliament in the parent Act. Under section 3 of the Electronic and Postal Communications Act the word 'content' is defined to mean 'information in the form of speech or other sound, data, text or images whether still or moving, except where transmitted in private communications'. Here, the phrases 'information in the form of' and 'except where transmitted in private communications' were omitted by the 1st respondent. This means that 1st respondent went beyond the scope of authority conferred on him. This illegality, does not, however, vitiate the whole Regulations.

I now turn to ground No. 2. It was essentially submitted for the applicants that Regulations 16 and 17 are unreasonable, ambiguous and arbitrary being manifested by lack of definition of common terms such as 'online content provider' and 'online content services provider'. Under this ground there is a complaint of shortness of duration of 12 hours to settle complaints, lack of appellate mechanism and involvement of stranger in the complaint mechanism. This was also termed as irrationality and learned counsel relied again on the case of **Council of Civil Service Unions *Versus* Minister for the Civil Service** [1985] AC 374 (HL) and the case of **Associated Provincial Picture House versus Wednesbury** (1948) KB 223 which later came to be known as "Wednesbury test". Apart from the shortness period of time, it was also submitted that there is no safeguard provision and, on the notice, -and-takedown system which is vague and ambiguous, the possibility of there being multiple and unsubstantiated requests, lack of opportunity to challenge it and over censorship, no appeal or avenue for review and hence the proposal to involve the judiciary. On the issue of vagueness, learned counsel relied on the case of **Vice Chancellor, M.D. University, Rohtak,** (2007) SCC77. On his part, learned senior state attorney replying to this ground No. 2 denied there being irrationality under this ground. He submitted that the provisions provide for a well-established procedure to deal with the complaints emanating from the online services providers. It gives the affected person the right to

complain and the owner of the online page to defend himself and that if the dispute persists the matter is taken to the content committee for determination. Further that if the matter is not settled it can be taken to the Fair Competition Commission or a court of competent jurisdiction. In fine, learned state attorney argued that a balance has to be struck between the individual online service providers and the society at large and that the circumstances of the locality have to be taken into account. it was further argued that by placing executive functions into the judiciary the principle of separation of powers may be frustrated. Finally, that if the press including the online services is left uncontrolled, it will jeopardize the whole society. Reference was made to the mass killing (genocide) in Rwanda as reported in the case of **Prosecutor versus Jean-Paul Akayesu**, Case No. ICTR-96-4-T at page 64, 65 and 67. Learned state attorney concluded his submission by stating that there is no ambiguity or arbitrary use of the regulations which should not be read in isolation, rather in conjunction with the parent Act.

With respect, I agree to the learned senior state attorney's submission on this ground. First, the principle of irrationality is not applicable in this case because, apart from it not having been pleaded in the statement, no evidence in the affidavit was led to prove its existence. The cited cases of **Civil Service Unions *Versus* Minister for the Civil Service** and **Associated Provincial Picture House versus**

Wednesbury which relate to decision, are not applicable in this matter. Second, there is no evidence showing that the definitions of those terms was a mandatory requirement under the parent Act. Third, the parent Act is the EPOCA and not the Cybercrime Act, 2015; therefore, the provisions of section 45 are not applicable. Fourth, the case of **Vice Chancellor, M.D. University, Rohtak** cited by learned counsel for the applicants is inapplicable to this case because we are not dealing with the date when the Regulations came into operation. Fifth, since the enabling Act did not set the time, I see nothing wrong for the subsidiary legislation to do so. Sixth, we are not bound to follow the UK in our legislation and there is no evidence for the rationale.

Submitting on ground No. 3, learned counsel dwelt heavily on the principle of proportionality but as I hinted hereinbefore, this ground was not pleaded and I, therefore, refrain from discussing it. Besides, the issue of illegality and unreasonableness have been tackled in grounds 1 and 2 above.

Coming to grounds Nos. 4 and 5, it was submitted on part of the applicants that regulation 4 (b) is subjective and thus prone to arbitrary use as it fails to mention which action to be taken. Here, it is not clear whether the complaint by the applicants is the arbitrariness or vagueness of the said provision. As correctly submitted by learned state attorney, there is no ambiguity or arbitrary use of the above provision. When this provision is read in conjunction with other provisions of the

Regulations and the parent Act, one will come to realise that the powers of the 2nd respondent are clear and the same authority has been conferred with powers to make rules subject to the limits stipulated in the parent Act.

As regards ground No. 6 learned counsel for the applicants submitted that regulation 12 prohibits overly broad and ambiguous categories of content. He argued that the type of speech prohibited are wide ranging and poorly defined hence ambiguous and restricts freedom of expression. Learned senior state attorney responded, I think correctly, that the applicants have not understood the provision. He contended that the provisions were not intended to apply to the whole public but only to the licenced online content service providers who must have professional background to run the website by making sure that the prohibited contents do not form part of their own websites. Apart from the fact that this argument has been repeated, it is also devoid of merit. It is not clear how the said regulation contravened the parent Act particularly where it is clear that the Parliament did not limit the categories of the content.

Ground No. 7 is on the conditions for registration. According to the submission on part of the applicants, the principle of proportionality applies. As said above, this ground was not pleaded in the statement and evidenced in the supporting affidavits. Besides, I doubt if this argument can pass the test of Article 30 of the Constitution. After all,

the same citizens particularly vulnerable groups such as children require protection from the exposure of such content. People cannot be left to do whatever they want in the name of freedom of expression. In my view, the Parliament empowered the 1st respondent to make such regulations in order to control cyber content. Aside that, cost cannot be a factor that may affect the legality of the regulation and the authorities have the discretion to require what documents to be supplied.

On the last ground, despite my microscopic scrutiny of the Regulations vis a vis the parent Act, I have found no evidence supporting the allegations that the principles of natural justice were breached.

Before I pen down, I have the following observation to make:

To make judicial control more efficacious, it is necessary that the delegating legislation does not confer power in too broad and generalized terms and language, otherwise, the court may find it extremely difficult to hold a regulation as falling outside the scope of the power delegated. This is what is envisaged by the doctrine of excessive delegation.

It cannot be contested that there are some permissible delegated legislation and impermissible delegated legislation. The former include commencement –the operation of the Act may depend on the decision of the Government, supplying details-ancillary function in aid to the exercise of the legislative function and power of making rules and regulations. The latter includes essential legislative function: these cannot be delegated. Legislative policy must be laid down by the

legislature itself. I am doubtful if the definitions of some important words and expressions are excluded from this category. The other aspect is **Offences and Penalties**: the making of a particular act into an offence and prescribing punishment for it is an essential legislative function and cannot be delegated. However, if the legislature lays down the standards or principles to be followed by the executive in defining an offence and provides the limits of penalties, such delegation is permissible but only for prescribing punishments.

There might be situations where some definitions provide no clarity or guidance, others may be excessively vague or even failure to comply with the requirements of the international law and/or instruments such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples' Rights (ACHPR) and the Declaration of Principles on Freedom of Expression in Africa, 2002.

The other circumstances can be lack of right to freedom of expression guaranteed to all people including the freedom to seek, receive or impart information or ideas of any kind through any media of a person's choice provided that that right does not contravene the constitution and any written law.

Having so observed, the question I pose is the following: is section 103 (1) of the Electronic and Postal Communications Act, 2010 a

sufficient legal basis for the creation of the Electronic and Postal Communications (Online Content) Regulations, 2018? As is clear from my discussion of the law and my analysis of the rival arguments of the disputing parties herein, I am settled in my view that section 103 (1) of the Act provides sufficient basis for the creation of the Regulations except in the context I have explained above.

The next question would then be: In promulgating the Regulations, has the 1st respondent acted, in the words of the applicants, "in excess of powers, illegally, against the principles of natural justice, unreasonably, arbitrarily and ambiguously"? My answer to this question is in the negative—the only exception being in respect of the definition of the word "content" in the Regulations, where I find the 1st respondent to have exceeded his powers in defining that word in a way that is in conflict with the definition provided by the parent Act. Having said that, certiorari is granted by quashing the definition of the word **content** in the Regulations.

Save for the aforesaid, the application is dismissed, with an order that each party to bear its own costs.

Order accordingly.

Dated and delivered at Mtwara this 9th day of January, 2019.

W.P. DYANSOBERA

JUDGE

9.1.2019