

File copy

265119

REGISTRY
POSTAL AND TELECOMMUNICATIONS REGULATORY AUTHORITY OF ZIMBABWE
IN THE HIGH COURT OF ZIMBABWE CASE NO. HC

HELD AT HARARE

In the matter between: -

ZIMBABWE LAWYERS FOR HUMAN RIGHTS

1ST APPLICANT

And

MEDIA INSTITUTE OF SOUTHERN AFRICA

(Zimbabwe Chapter)

And

MINISTER OF STATE IN THE PRESIDENT'S OFFICE FOR NATIONAL SECURITY

2ND APPLICANT

And

DIRECTOR-GENERAL OF INTELLIGENCE SERVICES

2ND RESPONDENT

And

THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE

3RD RESPONDENT

And

ECONET WIRELESS ZIMBABWE LIMITED

4TH RESPONDENT

And

NET ONE CELLULAR (PRIVATE) LIMITED

5TH RESPONDENT

And

TELECEL ZIMBABWE (PRIVATE) LIMITED

6TH RESPONDENT

And

POSTAL AND TELECOMMUNICATIONS REGULATORY AUTHORITY OF ZIMBABWE

7TH RESPONDENT

INDEX

ITEM	DOCUMENT	PAGE
1.	The Urgent Chamber Application.	1-4
2.	Certificate of Service	5-6

PRESIDENT'S DEPARTMENT
17 JAN 2019
P.O. BOX 2278, HARARE
ZIMBABWE

for 1st & 2nd

17/1/19
D. No. 1156 hrs.

3. Founding Affidavit of Roselyn Hanzi. 7-24
4. Supporting Affidavit of Calvin Jakachira. 25-26
5. Annexure "A" being letter dated 16 January 2019 from Atherstone & Cook to the Minister of State in the President's Office for National Security. 27-29
6. Provisional Order. 30-32

Dated at Harare this......day of January 2019.


WINTERTONS

Beverly Corner

11 Selous Avenue

HARARE [DH/nm]

TO: **THE REGISTRAR**

High Court of Zimbabwe

HARARE

AND

TO: **MINISTER OF STATE IN THE PRESIDENT'S
OFFICE FOR NATIONAL SECURITY**

1st Respondent

Mapondera Building

Central Avenue

HARARE

AND

TO: **DIRECTOR-GENERAL OF INTELLIGENCE SERVICES**

2nd Respondent

Mapondera Building

Central Avenue

HARARE

AND

TO: **THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE**

3rd Respondent

Munhumutapa Building

Samora Machel Avenue

HARARE

*Received by Mr Matibiri
14/01/2019
12:20 am*

AND

TO: **ECONET WIRELESS ZIMBABWE (PRIVATE) LIMITED**

4th Respondent

2 Old Mutare Road, Msasa

HARARE

AND

TO: **NET ONE CELLULAR (PRIVATE) LIMITED**

5th Respondent

Kopje Building

HARARE

AND

TO: **TELECEL ZIMBABWE (PRIVATE) LIMITED**

6th Respondent

148 Seke Road

HARARE

AND

TO: **POSTAL AND TELECOMMUNICATIONS REGULATORY
AUTHORITY OF ZIMBABWE**

7th Respondent

1008 Performance Close

Mount Pleasant Business Park

HARARE

IN THE HIGH COURT OF ZIMBABWE
HELD AT HARARE

CASE NO. HC

In the matter between: -

ZIMBABWE LAWYERS FOR HUMAN RIGHTS 1ST APPLICANT

And

MEDIA INSTITUTE OF SOUTHERN AFRICA
(Zimbabwe Chapter) 2ND APPLICANT

And

MINISTER OF STATE IN THE PRESIDENT'S
OFFICE FOR NATIONAL SECURITY 1ST RESPONDENT

And

DIRECTOR-GENERAL OF INTELLIGENCE SERVICES 2ND RESPONDENT

And

THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE 3RD RESPONDENT

And

ECONET WIRELESS ZIMBABWE LIMITED 4TH RESPONDENT

And

NET ONE CELLULAR (PRIVATE) LIMITED 5TH RESPONDENT

And

TELECEL ZIMBABWE (PRIVATE) LIMITED 6TH RESPONDENT

And

POSTAL AND TELECOMMUNICATIONS REGULATORY
AUTHORITY OF ZIMBABWE 7TH RESPONDENT



**URGENT CHAMBER APPLICATION FOR AN INTERRIM INTERDICT AND
DECLARATORY ORDER OF WARRANT TO SUSPEND INTERNET SERVICES**

FORM 29 A

TAKE NOTICE THAT the Applicants intends to apply to the High Court of Zimbabwe at Harare for an Order in terms of the Draft Order annexed to this notice and that the accompanying affidavit/s and documents will be used in support of the application.

TAKE NOTICE that an application is hereby made for an Order in terms of the Draft Order that is attached to this application for the following reasons:

1. There is no legal basis for the 1st and 2nd Respondent to issue a directive in terms of the Interception and communications Act Chapter 11:16 of Zimbabwe.
2. The directive has caused the violation of fundamental freedoms and rights of the applicants and members of the public in general.
3. The directive has caused serious inconveniences, loss of business and income, threats to life, right to health care among other issues.
4. The decision was made on the 15th of January 2019 and therefore the matter is extremely urgent.
5. The accompanying affidavits and documents are rendered in support of the application.

If you intend to oppose this application you will have to file a Notice of Opposition in Form No. 29A, together with one or more opposing affidavits, with the Registrar of the High Court of Zimbabwe at Harare forthwith and in any event before the hearing of this matter before a judge in Chambers. You will also have to serve a copy of the Notice of Opposition and affidavit/s on the Applicant at the address for service specified below. Your affidavit/s may have annexed documents verifying the facts set out in the affidavits.

If you do not file an opposing affidavit within the period specified above, this application will be set down for hearing in the High Court of Zimbabwe at Harare without further notice to you and will be dealt with as an unopposed application.

Dated at Harare this...  ...day of January 2019.


WINTERTONS

Beverly Corner

11 Selous Avenue

HARARE [DH/nm]

TO: THE REGISTRAR

High Court of Zimbabwe

HARARE

AND

**TO: MINISTER OF STATE IN THE PRESIDENT'S
OFFICE FOR NATIONAL SECURITY**

1st Respondent

Mapondera Building

Central Avenue

HARARE

AND

TO: **DIRECTOR-GENERAL OF INTELLIGENCE SERVICES**

2nd Respondent

Mapondera Building

Central Avenue

HARARE

AND

TO: **THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE**

3rd Respondent

Munhumutapa Building

Samora Machel Avenue

HARARE

AND

TO: **ECONET WIRELESS ZIMBABWE (PRIVATE) LIMITED**

4th Respondent

2 Old Mutare Road, Msasa

HARARE

AND

TO: **NET ONE CELLULAR (PRIVATE) LIMITED**

5th Respondent

Kopje Building

HARARE

AND

TO: **TELECEL ZIMBABWE (PRIVATE) LIMITED**

6th Respondent

148 Seke Road

HARARE

AND

TO: **POSTAL AND TELECOMMUNICATIONS REGULATORY
AUTHORITY OF ZIMBABWE**

7th Respondent

1008 Performance Close

Mount Pleasant Business Park

HARARE

IN THE HIGH COURT OF ZIMBABWE

CASE NO. HC

HELD AT HARARE

In the matter between: -

ZIMBABWE LAWYERS FOR HUMAN RIGHTS

1ST APPLICANT

And

MEDIA INSTITUTE OF SOUTHERN AFRICA

2ND APPLICANT

(Zimbabwe Chapter)

And

MINISTER OF STATE IN THE PRESIDENT'S
OFFICE FOR NATIONAL SECURITY

1ST RESPONDENT

And

DIRECTOR-GENERAL OF INTELLIGENCE SERVICES

2ND RESPONDENT

And

THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE

3RD RESPONDENT

And

ECONET WIRELESS ZIMBABWE LIMITED

4TH RESPONDENT

And

NET ONE CELLULAR (PRIVATE) LIMITED

5TH RESPONDENT

And

TELECEL ZIMBABWE (PRIVATE) LIMITED

6TH RESPONDENT

And

POSTAL AND TELECOMMUNICATIONS REGULATORY
AUTHORITY OF ZIMBABWE

7TH RESPONDENT

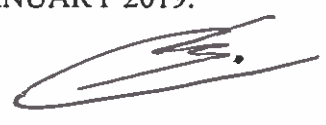
CERTIFICATE OF URGENCY

I, CHRISTOPHER MHIKE a registered legal practitioner and practising as such at
ATHERSTONE & COOK, hereby confirm that:

1. I have read the Applicants' Founding Affidavit and accompanying documents and certify that the matter is urgent in that:

2. Internet services have been suspended at the special request and instance of the 1st and 2nd Respondents in terms of a warrant issued under the provisions of the Interception of Communications Act.
3. The directive to suspend internet services is drastic and disproportionate. The warrant in terms of which the directive was issued is too wide. There are other alternative remedies that the 1st and 2nd Respondents could have resorted to without the complete shutdown of all internet access in Zimbabwe. Fundamental rights and freedoms of innocent people have needlessly been violated.
4. Innocent people and businesses are suffering loss of income and business as a result of the suspension of internet services. In worst case scenarios, the right to life is under threat as some people are not able to access vital communication relating to their medication. In some instances, people are unable to access funds remitted from abroad as internet banking services have also been affected. People's constitutional rights have been affected.
5. The matter is urgent because the internet services were completely suspended on the 15th of January 2019. The sequence of events is that on or about the 14th of January 2019 the internet service providers throttled their services and on the 15th of January 2019 eventually blocked it altogether.
6. For these reasons therefore, I certify that the matter is urgent.

CERTIFIED AT HARARE THIS...16th...DAY OF JANUARY 2019.



CHRISTOPHER MHIKE



CHRISTOPHER MHIKE
LL.B. (Hons) UZ
LLM (Michigan State)
Notary Public
Commissioner Of Oaths
16/01/2019
LEGAL PRACTITIONER

IN THE HIGH COURT OF ZIMBABWE
HELD AT HARARE

CASE NO. HC

In the matter between: -

ZIMBABWE LAWYERS FOR HUMAN RIGHTS

1ST APPLICANT

And

MEDIA INSTITUTE OF SOUTHERN AFRICA
(Zimbabwe Chapter)

2ND APPLICANT

And

MINISTER OF STATE IN THE PRESIDENT'S
OFFICE FOR NATIONAL SECURITY

1ST RESPONDENT

And

DIRECTOR-GENERAL OF INTELLIGENCE SERVICES

2ND RESPONDENT

And

THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE

3RD RESPONDENT

And

ECONET WIRELESS ZIMBABWE LIMITED

4TH RESPONDENT

And

NET ONE CELLULAR (PRIVATE) LIMITED

5TH RESPONDENT

And

TELECEL ZIMBABWE (PRIVATE) LIMITED

6TH RESPONDENT

And

POSTAL AND TELECOMMUNICATIONS REGULATORY
AUTHORITY OF ZIMBABWE

7TH RESPONDENT

FOUNDING AFFIDAVIT

I, ROSELYN HANZI do hereby make oath and state that:

1. I am the Executive Director of the 1st Applicant. I am duly and specifically authorised to make this affidavit on behalf of the 1st Applicant. The facts deposed herein are, are fully within my personal knowledge and to the best of my belief true and correct.

2. The 1st Applicant is the Zimbabwe Lawyers for Human Rights, being a universitas at law whose main functions are to promote human rights, the rule of law and constitutionalism. The Zimbabwe Lawyers for Human Rights also act actively in advocacy work around the Constitution, international human rights, as well as protecting and defending victims of human rights abuses. Our address of service is care of Messrs Wintertons, Beverly Corner, 11 Selous Avenue, Harare.
3. The 2nd Applicant is the Media Institute of Southern Africa – (Zimbabwe Chapter) (MISA ZIMBABWE), being a universitas at law whose primary function is to promote journalists and journalism in Zimbabwe whilst advocating for the establishment of free, independent, diverse and pluralistic media. The address of service of the 2nd Applicant is care of Messrs Wintertons, Beverly Corner, 11 Selous Avenue, Harare.
4. The 1st Respondent is the Minister of State in the President’s office for National Security whose office is designated in terms of section 225 of the Constitution of Zimbabwe and duly appointed as such by the President in terms of section 104 of the Constitution of Zimbabwe.
5. The 2nd Respondent is the Director General of Intelligence Services whose office and functions are set out in terms of section 226 of the Constitution of Zimbabwe and duly appointed by the President in terms of the Constitution.
6. The 3rd Respondent is the President of the Republic of Zimbabwe whose office is established in terms of CHAPTER 5 of the Constitution of Zimbabwe, cited as such in this action, only because he is responsible for the administration of the Interception of Communications Act [Chapter 11:20], by virtue of the Assignment of Functions (His Excellency the President of the Republic of Zimbabwe) Regulations published as SI 212 of 2018.
7. The 4th Respondent is Econet Wireless (Private) Limited being a company duly registered in accordance with the laws of Zimbabwe. The same is a licensed cellular

telecommunications operator in terms of Part VI of the Postal and Telecommunications Act [Chapter 12:05]

- 8. The 5th Respondent is Net One Cellular (Private) Limited being a company duly registered in accordance with the laws of Zimbabwe. The same is a licensed cellular telecommunications operator in terms of Part VI of the Postal and Telecommunications Act [Chapter 12:05]

- 9. The 6th Respondent is Telecel Zimbabwe (Private) Limited being a company duly registered in accordance with the laws of Zimbabwe. The same is a licensed cellular telecommunications operator in terms of Part VI of the Postal and Telecommunications Act [Chapter 12:05]

- 10. The 7th Respondent is Postal and Telecommunications Regulatory Authority of Zimbabwe, duly established in terms of section 3 of the Postal and Telecommunications Act (Chapter 12:05) In terms of section 4 of the Postal and Telecommunications Act, its duty is to ensure the provision of domestic and international telecommunications, the promotion and development of telecommunications services as well as the promotion of interests of consumers, purchasers and other user of telecommunications services.

FACTUAL BACKGROUND

11. In the early hours of Tuesday 15th of January 2018, the 1st Respondent purportedly through the 2nd Respondent, issued a Warrant in terms of Section 6 (2) of the Interceptions of Telecommunications Act Chapter 11:20 in respect of which it directed all mobile telecommunications operators being the 4th, 5th and 6th Respondents as well as all internet service providers, to shut and close the provision of internet services and communication in Zimbabwe.

12. Pursuant to this warrant, and throughout the interity of Zimbabwe, internet services have been shut down. The net effect of this is that ordinary citizens have not been able to access their email, has not been able to go on the internet, has not been able to use social media such as Whatsapp, Face book, Instagram, snap chat and tweeter to name a few.
13. The ordinary citizen in Zimbabwe has also not been able to use, internet based platforms of communication such as electronic mail, whatsapp, skype, viber, telegram and others.
14. For business operations, students, hospitals, scholars the shutdown is having catastrophic effect. Businesses which operate on the basis of the internet in accessing their bank accounts, in communicating locally and internationally through email, have in fact been shut down.
15. In view of the high charges of mobile phone communications whatsapp in particular has become an important means of communication amongst individuals. The shutting down of the internet has effectively meant that those who use whatsapp who are the majority of our citizens have been denied the right to communication.

Consequences of the Shutdown

16. Thus, the consequences of the directive to shutdown internet access has had far reaching implications. Natural and juristic persons have been affected as a result of the sudden and unexpected unlawful suspension

(shutdown) of internet services in Zimbabwe with effect from the 14th of January 2019. Users of these services in Zimbabwe are effectively unable to communicate on internet within and outside of Zimbabwe. As a consequence of this directive, everyone is unable to have access to their emails, business websites, social media sites, among other internet services. The directive will unnecessarily cost some people significant amounts of money in loss of business and income. The drastic measure has also put human lives (including that of breadwinners) at risk as telemedicine and financial services such as diaspora remittances which rely on internet based communication and banking services have also been affected. The personal security of people has also been compromised as they are not able to efficiently communicate using the popular Whats App, Skype, Twitter and Facebook platforms to alert each other of the security situations in their respective areas as well as sharing other issues of public interest and concern such as availability of essential services and products. The true and full extent of the human and monetary loss is still being ascertained and quantified.

17. The directive has resulted in the serious violation of the fundamental rights of both juristic and natural persons to the extent of their application to them. In broad terms the directive does not promote the values and principles that underlie a democratic society based on openness, good governance, justice, rule of law and fundamental human rights and freedoms to enable people to enjoy prosperous, happy and fulfilling lives as envisaged in the Constitution of Zimbabwe Amendment (No. 20). More specifically the directive has caused the violation of people's right to freedom of conscience in terms of section 60 of the Constitution of Zimbabwe, which envisages "(a) freedom of thought, opinion, religion or

belief; and (b) freedom to practice or propagate and give expression to their thought, opinion, religion or belief, whether in public or in private and whether alone or together with others". Further the directive has also resulted in the infringement of people's freedom of expression and freedom of the media in section 61 of the Constitution of Zimbabwe. In terms of the provisions of section 61 (1) "every person has the right to freedom of expression, which includes- (a) freedom to seek, receive and communicate ideas and other information." In terms of section 61 (2) of the Constitution, "every person is entitled to freedom of the media". Further the directive has also undermined political rights as contemplated in section 67 of the Constitution of Zimbabwe, which stipulate that every Zimbabwean citizen has the right to participate, individually or collectively, in gatherings or groups or in any other manner, in peaceful activities to influence or support the policies of the Government or any political or whatever cause. It is not a secret that the directive was made against the background of an announcement of new fuel prices by the President of Zimbabwe on Saturday the 12th of January 2019, which provoked public debate and dissatisfaction.

18. We believe that that the directive was made precipitously in the spur of the moment to silence the voices of the people in the interactive public discourse enabled by social media platforms. The decision to compel internet service providers to suspend internet services in Zimbabwe is also questionable in that there is no public emergency necessitating the limitations of fundamental rights and freedoms. To the Applicants' knowledge the 1st and 2nd Respondents did not seek nor obtain a court order authorising the directive. They simply abused authority to bully internet services providers into complying with their unreasonable and

politically motivated directive. In other words, the directive was not made in good faith at all but to stifle public discourse and debate surrounding the topical issues of fuel price increase and national stay away.

The Shutdown is an infringement of section 61 of the Constitution:

19. The actions of the 1st and 2nd Respondents issuing a warrant, in directing the shutting down of the internet is drastic. It is an unmitigated interference on the right of the citizen, to freedom of expression, and access to information as defined in Section 61 of the Constitution of Zimbabwe.
20. The Constitution is very clear in section 61 that every person has the right to freedom of expression which includes the freedom to seek, receive and communicate ideas and other information. The same Constitution also provides for the freedom of Artistic Expression and Scientific Research and Creativity as well as academic freedom.
21. Normal ordinary communication in this modern era is so vital. That normal and ordinary communication in this modern era depends on the internet. The majority of our citizens, will use internet, whatsapp and other forms of ICT based communications.
22. The blanket ban of the internet is not justified and is regrettable.
23. I am aware that since Monday the 14th of January 2018, the Zimbabwe Congress of Trade Unions has initiated a stay away protest. I am aware that

hundreds of people had been arrested on various as a result of this stay away protest. Many of these individuals, we as the Zimbabwe Lawyers for Human Rights we are in fact representing the same.

24.It is however, my contention that despite the allegations of any unlawful activity such as looting, arising or associated with this stay away, the same does not justify the arbitrary closure of space.

25.I therefore consider the activities of the 1st and 2nd Respondent clearly as being unlawful and unconstitutional.

26. I therefore pray that the shutdown be set aside simply and purely on the basis that it is a fundamental breach of section 61 of the Constitution.

The 1st Respondent’s failure to comply with section 6 (2)

27.The procedure for issuing a warrant is provided for in terms of Section 5 of the Interception of Communications Act Chapter 11:20 which reads as follows;

- “(1) An application for the lawful interception of any communication may be made by the following persons—*
 - (a) the Chief of Defence Intelligence or his or her nominee;*
 - (b) the Director-General of the President’s department responsible for national security or his or her nominee;*
 - (c) the Commissioner of the Zimbabwe Republic Police or his or her nominee;*
 - (d) the Commissioner General of the Zimbabwe Revenue Authority or his or her nominee.*
- (2) An application in terms of subsection (1) shall be made by an authorised person to the Minister for the Minister to issue a warrant for the interception of any communication.*
- (3) An application in terms of subsection (1) shall contain the following information—*
 - (a) the person or customer, if known, whose communication is required to be intercepted;*
 - and*

- (b) the service provider to whom the direction to intercept the communication must be addressed, if applicable; and*
- (c) the nature and location of the facilities from which, or the place at which, the communication is to be intercepted, if known; and*
- (d) full particulars of all the facts and circumstances alleged by the applicant in support of his or her application; and*
- (e) whether other investigative procedures have been applied and have failed to produce the required evidence, or the reason why other investigative procedures appear to be unlikely to succeed if applied, or whether they involve undue risk to the safety of members of the public or to those wishing to obtain the required evidence:*
Provided that this paragraph shall not apply to an application for the issuing of a warrant in respect of a serious offence; and
- (f) the period for which the warrant is required to be issued; and*
- (g) the basis for believing that communication relating to the ground on which the application is made will be obtained through the interception; and*
- (h) any other information which may be required by the Minister for the Minister to make an appropriate decision."*

28. In the early hours of 16 January 2019, the 4th respondent, Econet Wireless, issued the following message to all its subscribers including myself:

“Further to a warrant issued by the Minister of State in the President’s Office for National Security through the Director General of the President’s Department, acting in terms of the Interception of Communications Act, Internet Services are currently suspended across all networks and Internet Service Providers. We are obliged to act when directed to do so and the matter is beyond our control. All inconveniences are sincerely regretted.”

29. From the 4th Respondent's message above, it is clear that the 1st Respondent who acted in terms of section 6(2) issued a warrant on the 15th of January 2019.
30. Further, it is clear from this message that the warrant was issued through the 2nd Respondent.
31. I contend that, the 1st Respondent failed to comply with section 6 (2) of the act. The minister is not empowered to issue a warrant under section 6 (2). He himself, can only issue a directive and not through the 2nd Respondent.
32. I therefore contend that for this reason alone, the shutdown should be set aside.

Section 5 and 6 as an infringement to due process and separation of powers

33. A close look at section 5 and 6 above, shows that in essence, the 2nd Respondent applies for the issuance of a warrant to the 1st Respondent.
34. In terms of Section 6, the 1st Respondent shall issue a warrant if satisfied that there are reasonable grounds of the commission of offences specified in section 6 (1).
35. Section 6 (2) allows the Minister to issue a directive to a service provider not involving any interception or monitoring of communication.
36. It is my respectful contention that the issuance of any warrant or of any order or directive in terms of Section 6 involves potentially such a serious invasion of an individual's fundamental freedoms and rights.

37. The warrant clearly potentially infringes on the right to privacy of an individual codified in Section 57 of the Constitution of Zimbabwe. It infringes on the right of expression and freedom of the media codified in terms of Section 61 of the Constitution of Zimbabwe.
38. Thirdly, the warrant, and indeed the directive under Section 6 (2) can be so wide and arbitrary as to affect innocent third parties who in no way, would have been involved or suspected of involvement in the crimes or activities provided under Section 6 (a).
39. Moreover, whilst a warrant of search or interference with communication maybe issued with a point made but not conceded upon reasonable suspicion that an individual, a subjective individual has committed an offence, it is wrong and unlawful, to issue a warrant that effectively affects everyone.
40. Further, it is submitted that a warrant that is permitted to be issued in terms of the Interception of Communications Act pertains to the lawful interception of communication of specific targets. This is clear from the provisions of section 5 of the Act. This is to prevent the blanket interception of all communication as has happened now. Accordingly, to the extent that the warrant issued by the 1st Respondent in favour of the 2nd Respondent purports to apply across the board, it cannot be allowed to stand.

41. I content that Section 6 (2) allows the Minister to issue a directive of such a wide, general and arbitrary nature. It clearly is a breach of Section 56 of the Constitution of Zimbabwe.
42. Moreover, even assuming that there could be reasonable grounds upon which a warrant could be issued, surely, that warrant could only be issued on the basis of the rule of law. In other words, it is my respectful contention that the Executive on its own in this case the director and his Minister, who are all part of the executive arm of the State cannot issue any warrant or order without due process.
43. There is a duty to approach a court and justify the issuance of a warrant before a court.
44. Any individual suspected of having committed an offence is protected by the Constitution. Firstly he has the right to be presumed innocent, a right codified in terms of Section 50 of the Constitution.
45. Secondly that individual has a right to equal protection of the law as codified in Section 56 of the Constitution of Zimbabwe.
46. Thirdly that individual has a right to administrative justice and fairness which are codified in the common law, the access to Administration Justice Act as well as Section 68 and 69 of the Constitution.
47. Put simple, a warrant cannot be issued by the Executive. A warrant should be issued by the Judiciary.

48. This is in the interest of the doctrine of separation of powers, this in the interest of the equal protection of the law as defined in Section 56 of the Constitution of Zimbabwe.

49. It is my respectful contention that Section 5 and 6 of the Interception of Communications Act are unconstitutional in the following respect ,

- (a) To the extent that the warrant is issued by the Minister, without due process, and without the involvement of the judiciary, the same is clearly unconstitutional and a breach of Section 56 of the Constitution of Zimbabwe.
- (b) Section 6(2), is clearly unconstitutional in that it allows the Minister to issue an in determinant wide order such as the one that has been issued *in casu*. It does not stand scrutiny of the law.

A Shut Down Is Not Authorised By the Act

50. Any executive action must have a legal basis for the same. There is nowhere in the act in respect of which a shut down or suspension of internet services is permitted.

51. The Act deals with interception of communications. It defines intercept as follows:

“in relation to any communication which is sent.

- (a) By means of a telecommunication system or radio communication system, means to listen to, record, or copy whether in whole or part;*
- (b) By post means to read or copy the contents, whether in whole or in part”*

52. Interception clearly does not include the suspension or shutting down of communications.

53. The Respondents' actions are therefore clearly unlawful.

LOCUS STANDI IN JUDICIO

54. The application is being made in terms of section 85(1) (d) of the Constitution of Zimbabwe. The Constitution of Zimbabwe makes it possible for any person acting in his or her own interest or on behalf of others or acting as a member, or in the interests of a group or class of persons, or in the public interest to approach the Court alleging that a fundamental right or freedom enshrined in the Chapter 4 of the Constitution has been, is being or is likely to be infringed, and the Court may grant appropriate relief, including a declaration of rights.

55. Further organisations such as the Applicants are entitled to act in the interests of their members as well as in the public interest.

56. I am advised that section 85 of the Constitution contemplates a broad approach to legal standing whenever there are allegations that a right guaranteed by the Constitution has been infringed or is threatened. It is submitted that a broad approach to legal standing is consistent with the mandate given to the Court to uphold the Constitution and ensure that citizens of Zimbabwe enjoy the full measure of the protection to which they are entitled.

CAUSE OF ACTION

57. From the above, it is clear that this is an application to set aside, the Respondent's actions in banning and proscribing the use of internet and more particularly setting aside the warrant given by the 1st and 2nd Respondents to all internet service providers including the 4th, 5th and 6th Respondents to switch off all internet services.
58. In addition, this is an application to challenge the constitutionality of Section 5 and 6 of the Interception of Communications Act. I base our application on the following;
- (a) The shutdown or suspension of internet services is a breach of section 61 of the Constitution of Zimbabwe.
 - (b) The warrant itself, in any event was issued ultra-vires the provision of section 6(2) of the Act.
 - (c) There is no legal provision in the act authorising a suspension or shutdown. The act only empowers interception of communications.
 - (d) The directive issued by the Minister should be set aside on the basis that neither the Interception of Communications Act nor any other law authorises the blanket banning or switching off of internet services.
 - (e) Section 5 and 6 of the Interception of Communications Act Chapter 11:20 are a breach of Section 56 of the Constitution of Zimbabwe.

- (d) More particularly Section 6(2) of the interceptions of Communications Act is on its own, such a fundamental violation and infringement of the citizens rights as guaranteed under section 56 of the Constitution of Zimbabwe.

URGENCY OF THE MATTER

- 59. This matter is clearly urgent. The public of Zimbabwe have a right to the use of the internet. They have a right to receive their emails. They have a right to access the internet. They have a right to use social media.
- 60. Denying the public of Zimbabwe internet use, is affecting, businesses, individuals, churches, civic organisations, embassies, schools, researchers and basically everyone else. It is such a blatant abuse of human rights that one doesn't even need to justify urgency.
- 61. The matter is clearly urgent and I therefore pray that this application be treated as urgent.
- 62. Before we issued our application, we wrote a letter to the 1st Respondent dated the 16th of January 2019 a copy of which is attached hereto as **Annexure A**. The Respondents, received this letter but had the audacity to refuse to formally acknowledge our letter.
- 63. This matter is clearly urgent and I pray for an order in terms of the draft.


64. In the circumstances, I humbly submit that the Applicants has made a good case and pray for an order in terms of the draft.

THUS DONE AND SWORN TO AT HARARE THIS 16th DAY OF JANUARY 2019.



ROSELYN HANZI

BEFORE ME:



COMMISSIONER OF OATHS

KUDZAYI ERICK KADZERE
Legal Practitioner
Conveyancer, Notary Public
Commissioner Of Oaths

IN THE HIGH COURT OF ZIMBABWE

CASE NO. HC

HELD AT HARARE

In the matter between: -

ZIMBABWE LAWYERS FOR HUMAN RIGHTS

1ST APPLICANT

And

MEDIA INSTITUTE OF SOUTHERN AFRICA

(Zimbabwe Chapter)

2ND APPLICANT

And

MINISTER OF STATE IN THE PRESIDENT'S
OFFICE FOR NATIONAL SECURITY

1ST RESPONDENT

And

DIRECTOR-GENERAL OF INTELLIGENCE SERVICES

2ND RESPONDENT

And

THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE

3RD RESPONDENT

And

ECONET WIRELESS ZIMBABWE LIMITED

4TH RESPONDENT

And

NET ONE CELLULAR (PRIVATE) LIMITED

5TH RESPONDENT

And

TELECEL ZIMBABWE (PRIVATE) LIMITED

6TH RESPONDENT

And

POSTAL AND TELECOMMUNICATIONS REGULATORY
AUTHORITY OF ZIMBABWE

7TH RESPONDENT

SECOND APPLICANT'S SUPPORTING AFFIDAVIT

I, the undersigned **KELVIN JAKACHIRA**, do hereby swear and state that:

1. I am a Trustee of the 2nd Applicant. I am duly and specifically authorised to make this affidavit on behalf of the 2nd Applicant. The facts deposed herein are, are fully within my personal knowledge and to the best of my belief true and correct.

- 2. I confirm that I have read the Founding Affidavit of the 1st Applicant sworn to by Roselyn Hanzi and confirm that the 2nd Applicant fully associates with the position adopted by the 1st Applicant and incorporate herein as if specifically traversed the entire contents of the 1st Applicant's affidavit.
- 3. I simply need to add that the basis of our own locus standi is section 85 (1) (a) of the Constitution.
- 4. Under the circumstances I pray for an order in terms of the draft.

THUS SWORN AND SIGNED AT HARARE ON THIS 16th DAY OF JANUARY 2019.

KELVIN JAKACHIRA

BEFORE ME:

COMMISSIONER OF OATHS

KUDZAYI ERICK KADZERE
Legal Practitioner
Conveyancer, Notary Public
Commissioner Of Oaths

IN THE HIGH COURT OF ZIMBABWE

CASE

NO...../19

HELD AT HARARE

In the matter between

ZIMBABWE LAWYERS FOR HUMAN RIGHTS

1ST APPLICANT

MEDIA INSTITUTE OF SOUTHERN AFRICA

2ND APPLICANT

And

THE MINISTER OF STATE IN THE PRESIDENT'S

OFFICE RESPONSIBLE FOR NATIONAL

SECURITY

1ST RESPONDENT

DIRECTOR GENERAL OF INTELLIGENCE

2ND RESPONDENT

PRESIDENT OF THE REPUBLIC OF ZIMBABWE

3RD RESPONDENT

ECONET PRIVATE LIMITED

4TH RESPONDENT

NETONE CELLULAR PRIVATE LTD

5TH RESPONDENT

TELECEL COMMUNICATIONS

ZIMBABWE (PVT) LTD

6TH RESPONDENT

PROVISIONAL ORDER

TO THE RESPONDENTS

TAKE NOTICE THAT on the day of 2019 the Court sitting at Harare before the Honourable Justice issued a Provisional Order as shown overleaf.

The annexed Chamber Application, Affidavits and documents were used in support of the Application for this Provisional Order.

If you intend to oppose the confirmation of this Provisional Order, you will have to file a Notice of Opposition in Form No. 29B, together with one of more opposing Affidavits, with the Registrar of High Court at Harare within ten (10) days after the date in which the Provisional Order and Annexures were served upon you. You also

have to serve a copy of the Notice of Opposition and Affidavit(s) on the Applicant at the address for service in the Application.

If you do not file an opposing Affidavit within the period specified above, this matter will be set down for hearing in the High Court at Harare without further Notice to you and will be dealt with as an unopposed matter for confirmation of the Provisional Order.

If you wish to have the Provisional Order changed or set aside sooner than the Rules of Court normally allow and can show good cause for this, you should approach the Applicant's legal practitioners to agree in consultation with the Registrar on a suitable hearing date. If this cannot be agreed there is great urgency you may make a Chamber Application, a Notice to the Application, for directions for a judge as to when the matter can be argued

Date

By the Judge

Terms of the Interim Relief Granted

- (1) That the directive or warrant issued by the 1st and 2nd Respondents shutting down or suspending all internet communications on the 15th of January 2019 be and is hereby suspended forthwith;
- (2) That the 4th, 5th and 6th Respondents and all other holders of internet and communications licences be and are hereby ordered to resume the provision of internet communications forthwith.

Terms of the Final Order Sought

- 1. It is ordered and declared that:
 - (a) It is declared that the 1st Respondent's directive issued in terms of Section 6(2) of the Interception of Telecommunications Act Chapter 11:20, in January 2018 be and is hereby set aside.
 - (b) Section 5 and 6 of the Interceptions of Communications Act are in breach of Section 56 of the Constitution of Zimbabwe and are hereby set aside.

(c) The 1st and 2nd Respondent each paying the other the other to be absolved pay cost of suit on a scale calculated as between attorney and client.

DATE

BY THE JUDGE

BY THE REGISTRAR



ATHERSTONE & COOK
Legal Practitioners

Attorneys • Notaries and Conveyancers • Executors and
Administrators of Estates • Patent and Trade Mark Agents

Praetor House
119 J. Chinamano Avenue

P.O.Box 2625
Harare, Zimbabwe

Telephone: 263 8677 04999
263 04 794994
263 04 704244
Fax: 263 04 705180
Email: tafadzwa@praetor.co.zw
Website: www.atherstoneandcook.com

Our ref: CM/TMC/ak
(Please quote this when replying)

Your ref:

16 January 2019

Attention: Honourable Minister Owen Ncube

Minister of State in the President's Office for National Security
Chaminuka Building
5th Street
HARARE

Dear Sir,

Re: **WARRANT IN TERMS OF THE INTERCEPTION OF COMMUNICATIONS
ACT [CHAPTER 11:20] – SUSPENSION OF INTERNET SERVICES**

1. We refer to the above matter and hereby write in that regard at the instance of our clients:
 - 1.1. Columbus Mavhunga, and
 - 1.2. Godwin Mangudya, and
 - 1.3. Philemon Jambaya, and
 - 1.4. The Media Institute of Southern Africa (MISA),

who are all aggrieved by the ongoing nationwide internet shutdown in Zimbabwe.

2. The individuals listed above (Mangudya, Mavhunga and Jambaya) are Zimbabweans who are duly accredited journalists and whose profession heavily hinges on access to the internet. On the internet platform, these journalists access the information that is needed for them to effectively carry out their duties, and on the same platform they disseminate information in the form of news stories, features and other forms of journalistic output.
3. MISA is a local Trust duly registered in terms of the laws of Zimbabwe operating as a non-governmental organisation primarily to promote free, independent, diverse and pluralistic

A member of



Independent legal & accounting firms

Partners: L.H Cook B.Comm, LL.B; S.G.J Bull B.L, LL.B; G.M Crosland B.A, LL.B; A.M.T Mutsonziwa B.L, LL.B;
L.A Cook B.Proc; I. Chagonda B.L, LL.B; C.C Chitiyo B.L, LL.B; C. Mhike LL.B (Hons);
T. Nyamasoka LL.B (Hons); M. F Khumalo B.S.S, LL.B; T.J Gumbo LL.B (Hons);
Assisted by: T. Chagudumba LL.B (Hons); A.N Manuel LL.B (Hons); T. M Chagonda LL.B.

media, as envisaged in Section 61 of the Constitution of Zimbabwe. Further they work to promote access to information in terms of Section 62 of the Constitution.

- 4. As stated in the foregoing, our clients strongly object to the ongoing closure of all internet services, officially acknowledged through Econet Wireless (our clients' service provider), in a bulk SMS message sent out to clients this morning – Wednesday 16th January 2019. In that message, Econet Wireless Zimbabwe Limited announced thus:

“Further to a warrant issued by the Minister of State in the President’s Office for National Security through the Director General of the President’s Dept, acting in terms of the Interception of Communications Act, internet services are currently suspended across all networks and internet service providers.

“We are obliged to act when directed to do so and the matter is beyond our control. All inconveniences are sincerely regretted.”

- 5. We have perused the Interception of Communications Act [Chapter 11:20] carefully and cannot find anything in that statute that would authorize such blanket interference with an essential means of communication in the manner you have proceeded.
- 6. In particular, our considered view is that the Act is applicable only as far as “listening, recording or copying” of telecommunication systems or radicomunicaton systems and “reading and copying” in respect of comminucations by post. It is our view that there is no provision in the Act that empowers the Minister to issue a blanket warrant that suspends/shuts down internet services throughout the country.
- 7. Such conduct is a clear violation of universal fundamental rights recognised by various Internation Law Instruments and in the Constitution of Zimbabwe, including the right to freedom of expression and freedom of the media, and the right of access to information.
- 8. In addition, it goes without saying that the ongoing nationwide shutdown of internet services has wider grave implications on Zimbabwean society in general, for example;
 - 8.1. Schools cannot efficiently call back all their staff and pupils;
 - 8.2. The banking system has been crippled and therefore people are unable to transact;
 - 8.3. Businesses generally cannot transact;
 - 8.4. The justice delivery system has been hampered; and



Partners: L.H Cook B.Comm, LL.B; S.G.J Bull B.L, LL.B; G.M Crosland B.A, LL.B; A.M.T Mutsonziwa B.L, LL.B; L.A Cook B.Proc; I. Chagonda B.L, LL.B; C.C Chitiyo B.L, LL.B; C. Mhike LL.B (Hons); T. Nyamasoka LL.B (Hons); M. F Khumalo B.S.S, LL.B; T. I Gumbo LL.B (Hons);
 Assisted by: T. Chagudumba LL.B (Hons); A.N Manuel LL.B (Hons); T. M Chagonda LL.B.

- 8.5. Our clients are unable to disseminate information essential to people's safety and security, particularly in the context of the current situation as they have no access to their e-mails and other internet services.
9. As long as you, in your capacity as Minister, allow the unlawful warrant to stand with all access to e-mails and other internet services blocked, the Government's mantra that "*Zimbabwe is open for business*" would be significantly undermined.
10. In addition to being *ultra vires* the Act and the afore-mentioned rights, the nationwide shutdown of all internet services is in violation of **section 68 (1) of the Constitution** in that it amounts to administrative conduct which is not lawful, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.
11. We note that the Act authorises you to revoke a warrant, and the present circumstances require that this be **IMMEDIATELY** done.
12. As a result of the afore-said, we have been instructed to demand, as we hereby do;
- 12.1. the immediate revocation of the warrant; and
- 12.2. a copy of the warrant, and
- 12.3. your written assurance that there will be no further shutdown/suspension of internet services.
13. We further advise that if the above is not done **PROMPTLY**, we have been instructed to proceed to institute legal proceedings without further notice to you.

Yours Faithfully


ATHERSTONE & COOK

- CC - Econet Wireless Zimbabwe Limited
- CC - The President's Office (The Director General of the President's Department)
- CC - The Minister of Information, Communication and Technology
- CC - Attorney General of Zimbabwe

A member of



Independent legal & accounting firms

Partners: L.H Cook B.Comm, LL.B; S.G.J Bull B.L, LL.B; G.M Crosland B.A, LL.B; A.M.T Mutsonziwa B.L, LL.B; L.A Cook B.Proc; I. Chagonda B.L, LL.B; C.C Chitiyo B.L, LL.B, C. Mlike LL.B (Hons); T. Nyamasoka LL.B (Hons); M. F Khumalo B.S.S, LL.B; T.I Gumbo LL.B (Hons);
Assisted by: T. Chagudumba LL.B (Hons); A.N Manuel LL.B (Hons); T. M Chagonda LL.B.