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IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION, PRETORIA]

CASE NO: 25978/2017

In the matter between:

AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	**1ST APPLICANT**
SOLE, STEPHEN PATRICK	**2ND APPLICANT**

And

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**1ST RESPONDENT**
MINISTER OF STATE SECURTIY	**2ND RESPONDENT**
MINISTER OF COMMUNICATIONS	**3RD RESPONDENT**
MINISTER OF DEFENCE AND MILITARY VETERANS	**4TH RESPONDENT**
MINISTER OF POLICE	**5TH RESPONDENT**
THE OFFICE OF THE INSTECTOR-GENERAL OF INTELLIGENCE	**6TH RESPONDENT**
THE OFFICE FOR INTERCEPTION CENTRES	**7TH RESPONDENT**
THE NATIONAL COMMUNICATIONS CENTRE	**8TH RESPONDENT**
THE JOINT STANDING COMMITTEE ON INTELLIGENCE	**9TH RESPONDENT**
THE STATE SECURITY AGENCY	**10TH RESPONDENT**

FILING SHEET

DOCUMENTS: **1ST, 4TH AND 5TH RESPONDENTS' HEADS OF ARGUMENTS**

ON THE ROLL: **4TH, 5TH AND 6TH JUNE 2019**

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***AMICUS CURIAE* RESPONDENTS' ATTORNEYS**

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Makhubela Meshack

From: Makhubela Meshack
Sent: 01 April 2019 08:48 AM
To: dario.milo@webberwentzel.com; 'Lavanya.Pillay@webberwentzel.com'; 'Rapulane Kgoroeadira'; Carina du Toit (carina@lrc.org.za)
Subject: RE: AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC AND ANOTHER // THE MINISTER OF JUSCTICE AND CORRECTIONAL SERVICES AND OTHERS
Attachments: SKM_75819040108400.pdf

Importance: High

GOOD MORNING

The above matter refers.

Please find attached herewith copy of a Filing Sheet to 1st , 4th and 5th Respondents' Heads of Argument for your attention.

Regards

the doj & cd
Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

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"I can do all things through Christ who strengthens me." Philippians 4:13

From: minolta@justice.gov.za [mailto:minolta@justice.gov.za]
Sent: 01 April 2019 08:41 AM
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Subject: Message from KM_758

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 2598/2017

In the matter between:

AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	**First Applicant**
SOLE, STEPHEN PATRICK	**Second Applicant**

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**First Respondent**
MINISTER OF STATE SECURITY	**Second Respondent**
MINISTER OF COMMUNICATIONS	**Third Respondent**
MINISTER OF DEFENCE AND MILITARY VETERANS	**Fourth Respondent**
MINISTER OF POLICE	**Fifth Respondent**
THE OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE	**Sixth Respondent**
THE OFFICE FOR INTERCEPTIONS CENTRES	**Seventh Respondent**
THE NATIONAL COMMUNICATIONS CENTRE	**Eighth Respondent**
THE JOINT STANDING COMMITTEE ON INTELLIGENCE	**Ninth Respondent**
THE STATE SECURITY AGENCY	**Tenth Respondent**

FIRST, FOURTH, AND FIFTH RESPONDENTS' HEADS OF ARGUMENT

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A. NOMENCLATURE

(a) Definitions

1. "*The Constitution*", means the Constitution of the Republic of South Africa, 1996.

2. "*Defence*", means the Minister of Defence and Military Veterans.

3. "*The ECHR*", means the European Court of Human Rights.

4. "*The Interim Constitution*", means the Constitution of the Republic of South Africa, 1993.

5. "*Justice*", means the Minister of Justice and Constitutional Development.

6. "*The Old Interception Act*", means the Interception and Monitoring Prohibition Act, Act No. 127 of 1992.

7. "*Police*", means the Minister of Police.

8. "*The RICA*", means the Regulation and Interception of Communications and Communications-Related Information Act, 70 of 2002.

9. "*State Security*", means the Second, Seventh, Eight and Tenth Respondents collectively.

(b) Acronyms

10. AA Answering Affidavit

11. FA Founding Affidavit

12. NoM Notice of Motion

13. RA Replying Affidavit

B. INTRODUCTION

14. *"All law-abiding citizens of this country are deeply concerned about the scourge of crime. In order to address this problem effectively, every lawful means must be employed to enhance the capacity of the police to root out crime or at least reduce it significantly. Warrants issued in terms of s 21 of the [Criminal Procedure Act] are important weapons designed to help the police to carry out efficiently their constitutional mandate of, amongst others, preventing, combating and investigating crime. In the course of employing this tool, they inevitably interfere with the equally important constitutional rights of individuals who are targeted by these warrants."*[1]

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1 *Minister of Safety and Security v Van der Merwe and Others* 2011 (5) SA 61 (CC).

15. Approximately 11 years ago[2], the second applicant's communications were allegedly intercepted.[3] The second applicant, despite being aggrieved, did not seek legal redress.

16. The applicants' position on state surveillance and the interception of private communications is that surveillance is not "inherently unconstitutional"[4]. They accept, as they must, that state surveillance can serve legitimate and important purposes and is (at times) necessary.[5]

17. The applicants launch a rationality attack[6] on section 16(7) of the RICA, and provisions which refer to it, and claim that it is arbitrary. They argue that because of this, the provisions violate of the rule of law.[7]

18. It is worth highlighting that the applicants do not assail the provisions of the RICA which permit the interception of communications on the basis that they constitute an unjustifiable limitation on the rights of privacy.

19. The applicants argue that the provisions of the RICA are constitutionally repugnant because they limit, in addition to the right to privacy, the right of access to court, freedom of expression and the media, and (the right of) legal privilege

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2 p.28: FA: para 37.

3 p.27: FA, para 36-37.

4 p.4: Applicant's Heads, para. 2.3.

5 p.4: FA, para 2.3.

6 p.40: FA, para 73.1; p. 32: Heads, para 68.1.

7 p. 40: FA, para 73.1.

protected by sections 34 and 35 of the Constitution, and they cannot be saved by section 36 thereof. [8]

C. THE PROPER CHARACTERISATION OF THE CHALLENGE

20. We submit that this application is not about the constitutionality of the interception and monitoring of communications under the scheme of the RICA; but it is about the Legislature's judgment on the appropriate policy to meet the scourge of serious crime. According to Chaskalson P, "*these judgments are political. It is not for a court to disturb political judgments, ..., In a democracy it would be a serious distortion of the political process if appointed officials (the judges) could veto the policies of elected officials.*"[9]

(a) Intrusion on the separation of powers

21. We submit that the RICA is entrenched in the State's policy on combatting crime.

22. We submit that the complaints raised by the applicants in this application are not rights issues: (i) whether or not a subject of an interception order should be given the right to notification, (ii) who the authority should be, how he or she should be appointed and (iii) for how long, what procedure must be followed when considering an application for a direction and circumstances under which

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8 P. 5: Applicants' Heads, para 3.2.

9 *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) at para 42 adopting the views of Professor Hogg.

notification must take place, are policy issues which, fall outside the ambit of the Court's power and lie within the ambit of the Legislature and Executive.[10]

D. WHAT ARE THE ISSUES?

23. The following issues arise in this application.

(a) Whether by precluding notice to the subject of the interception, section 16(7)(a) (and the provisions which refer to it)[11] infringe:

(i) the subject's right to privacy[12]. In our view, this question does not have to be answered because it is common cause (i) that the interception of communications does constitute a limitation on the right to privacy; and (ii) that the limitation, is justifiable. Hence the provision passes constitutional muster. This is the end of this enquiry.

(ii) the right to freedom of expression and freedom of the media where the subject of the interception is a journalist? [13]

(iii) the "*constitutional right to legal professional privilege*" where the subject is a lawyer, or the client of a lawyer. We submit that the applicants are not contending that an interception in every case will

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10 p.610.6, para 15 - AA (DM), p.618, para 17 - AA (DOJ), also see *DPP Transvaal v Minister of Justice and Constitutional Development* [2009] ZACC 8, 2009 (4) SA 222 (CC).

11 The applicants faintly contended for a right to notice before an interception direction is issued. (p. 49: FA, par 92). They accept in the heads of argument (p. 37, para 86) that prohibiting pre-surveillance notification is a justifiable limitation of the rights involved.

12 p. 40: FA, para 73.2 and p.49-50: FA, para 91.

13 p. 40: FA, para 73.3.

violate the "*constitutional right to legal professional privilege*". This is evident from the following statement in the founding affidavit:

"where the subject is a lawyer or a client of a lawyer the interception will in certain circumstances"[14] violate the right (underlining inserted). We submit that the peculiar circumstances of each case would determine whether there is a violation. In other words, whether there is a violation, is fact-dependent.

(iv) upon the subject's right to access court in that without notification of the interception direction, the person cannot review the decision to issue an interception direction and is unable to obtain particulars of the application and interception direction.[15]

(b) Whether in the absence of a process for a substitute "*to assume the side of the proposed subject of interception to test the evidence and propositions put forward by the law enforcement agencies*",[16] the prohibition in section 16(7)(a) (and in the provisions which refer to it) on notifying the subject of the interception thereof, violate:

(i) the rule of law because it is arbitrary and irrational[17]; and

(ii) the right of access to court because the veracity of the facts relied upon for an interception direction cannot be tested.[18]

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14 p. 40: FA, para 73.4.

15 p. 40: FA, para 73.5.

16 p.50: FA, para 94.

17 p. 50: FA, para 95.1.

18 p. 50: FA, para 95.2 read together with para 96 (at pp 50-51).

(c) Whether the failure to provide a procedure for the examination, use and storage of intercepted data violate the rights listed in paragraphs 23(a)(i) to (iv) above? [19]

(d) Whether section 30(1)(b) by requiring the mandatory retention of data by electronic communications service providers, violates the rights listed in paragraphs 23(a)(i) to (iv) above and renders section 30(2)(a)(iii) unconstitutional.[20]

(e) Whether the granting of an interception direction by the designated judge, (who will always be a judge of the High Court, albeit a judge discharged from active service), undermines the independence of the designated judge because:

(i) the term of the appointment is not fixed, and there is no bar to a renewal (or renewals) thereof;[21] and

(ii) the designated judge is appointed by the Minister (of Justice and Correctional Services)[22]

and because of this the definition of "designated judge" is irrational and arbitrary, and therefore violates (i) the rule of law; and (ii) the right of access

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19 p. 43: FA, para 77 read with para 82 (p.45) and para 85 (pp 46-47).

20 p. 47: FA, para 86 read with para 89 and 90 (pp 48-49).

21 p. 51: FA, para 99.1.

22 p. 51: FA, para 99.2.

to court because the issuing authority under the RICA is not an independent tribunal.[23]

24. The applicants contend that because sections 16(7)(a)[24] and 30(1)(b) are (i) inconsistent with the right to privacy and the right of access to court; and (ii) violate the rule of law, they must be declared invalid. While the applicants seek that the declaration of invalidity be suspended,[25] they also seek interim relief in the form of a reading-in which we submit encroaches on the separation of powers.

25. We submit that the interim relief proposed by the applicant lures this court into the terrain of the Executive and the Legislature. Effectively, this court is asked to create and impose a dispensation which would regulate the interception of communications until the Legislature has crafted remedial legislation.[26]

26. We submit that the RICA is not inconsistent with the Constitution. To the contrary, it gives effect to the constitutional rights to (i) privacy, (ii) freedom from violence; and (iii) security of the person.

E. THE APPLICANTS' STANDING

27. The first applicant is an organisation which ostensibly aims to promote open, accountable, and just democracy by developing investigative journalism in the

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23 p. 55: FA, para 109.1 and 109.2.

24 As well as the provisions which refer to s.16(7)(a).

25 p. 986: RA, para 156.6.

26 *Cf.* p. 3: NoM, para 3; Draft order attached to applicant's heads.

public interest and helps to secure information rights[27]for investigative journalists.[28] Mr Sam Sole, a journalist, is the second applicant.[29] He is one of two joint managing partners of the first applicant.[30]

28. The applicants claim to be acting:

(a) in their own interests in terms of section 38 (a) of the Constitution; [31]

(b) in the interests of the class of investigative journalists in terms of section 38(c);[32] and

(c) in the public interest in terms section of 38(d)[33]to determine whether the RICA is inconsistent with the Constitution[34].

29. They claim to have standing, because:

(a) communications and communications-related information of South Africa's inhabitants are intercepted daily;[35] and

(b) national and international bodies, as well as numerous civil society organizations, have raised concerns regarding the prevalence of surveillance and the constitutional inadequacies in the RICA.[36]

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27 The applicants refer to information rights. It is assumed that the right they assert is a right to information.

28 p. 15: FA, para 14.1.

29 pp.15 to 16: FA, par 14.

30 p.16: FA, para 14.3.

31 p. 16: FA; para 16.1.

32 p.16: FA, para 16.2.

33 p. 16: FA, para 16.3.

34 p.17: FA, para 16.3.5.

35 p.17: FA, para 16.3.1.

36 p.17: FA, para 16.3.4.

30. We will demonstrate presently that no rights issue arises in this application. We therefore submit that the applicants do not have standing either in terms of section 38(a) nor, 38(c).

31. We submit that while there may be substantial public interest on the issue of the interception of communications, in the sense of public curiosity and media attention, this does not confer upon the applicants standing automatically in the public interest.

32. In the absence of the applicants having demonstrated the requisite standing, we submit that this application must fail.

33. At best for the applicants, if it is found that a rights issue does arise, they can lay claim to standing under sections 38(a) and 38(c), but not under section 38(d).

F. THE NATURE OF THE PROCEEDINGS: AN ABSTRACT CHALLENGE

(a) Introduction

34. We submit that the applicants are seeking a declaration of invalidity in the abstract, as will be demonstrated.

35. The applicants accept that the RICA is not "*inherently*" unconstitutional.[37] They also accept that the limitation on the right to privacy, is reasonable and justifiable in terms of section 36 of the Constitution.[38]

36. They accept furthermore, that the RICA contains safeguards[39]but they contend that they are insufficient to justify the infringement on the rights alleged [40] and that there are constitutional flaws therein.[41]

37. An applicant seeking declaratory relief must show that it has an interest in an existing, future, or contingent right or obligation. We submit that the applicants have not done so. The court has the discretion under section 21(1)(c) of the Superior Courts Act, Act 10 of 2013 to entertain an application for declaratory relief, notwithstanding that an applicant cannot claim any consequential relief. The applicants have however not demonstrated that this is an appropriate case for the exercise of the discretion.

(b) Applicable legal principles

38. The first issue this court will have to grapple with is whether this application should be entertained, regardless of its merits. We submit not.

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37 p.4: Applicant's Heads; para 2.3.

38 p.14: FA; para 12.

39 p. 15: Applicant's Heads, para 21.1

40 p.15: Applicant's Heads, para 22.

41 p.12: FA, para 8.

39. The Constitutional Court has been critical of abstract challenges as will become evident. An applicant must rely on a specific set of facts[42] in support of the relief sought and in view of the far-reaching implications attaching to constitutional decisions, the precise facts to which the constitutional challenge is to be applied must be established. [43] The applicants have failed to do this. We submit that the challenge is indeed abstract and should not be entertained.

40. The issue of standing (*locus standi)* and an abstract/theoretical challenge must not be conflated. Whether a person has standing to bring an application or not, is a separate issue from whether an abstract challenge should be entertained by a court. Even though a party may have established sufficient interest to claim standing, the challenge remains in the abstract and bears upon the fate of an application. In this regard the Constitutional Court in *Savoi v National Director of Public Prosecutions* stated:

> *"So, the applicants plainly have standing to bring this challenge. This does not, however, make it irrelevant that this challenge is brought in the abstract. Courts generally treat abstract challenges with disfavour. And rightly so. ... Abstract challenges ask courts to peer into the future, and in doing so they stretch the limits of judicial competence....".*

41. The High Courts, as well as the Constitutional Court, have expressed a disinclination to grant declaratory orders which are academic. Didcott J, speaking for the Constitutional Court in *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others*[44] made the following pertinent remarks:

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42 *Savoi v National Director of Public Prosecutions* 2014(5) SA 317 (CC) at para 13.

43 *Qwelane v Minister of Justice and Constitutional Development and Others* 2015 (2) SA 493 (GJ) at para 10.

44 1997 (3) SA 514 (CC) at para 15.

"... a declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer. A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones. I see no reason why this new Court of ours should not adhere in turn to a rule that sounds so sensible. Its provenance lies in the intrinsic character and object of the remedy, ... rather than some jurisdictional concept peculiar to the work of the Supreme Court or otherwise foreign to that performed here. Perhaps what is more, a declaratory order an issue quite unsuitable for one does not even amount to 'appropriate relief', the type which s 7(4)(a) [of the Interim Constitution] empowers us to grant... Section 98 (5) [of the Interim Constitution] admittedly enjoins us to declare that a law is invalid once we have found it to be inconsistent with the Constitution. But the requirement does not mean that we are compelled to determine the anterior issue of inconsistency when, owing to its wholly abstract, academic or hypothetical nature should it have such in a given case, our going into is can produce no concrete or tangible result, indeed none whatsoever beyond the bare declaration."

42. The Constitutional Court's reluctance is not surprising considering the finding by Ngcobo J (as he then was) in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* that:

"[221] The consideration of constitutional issues in vacuo is typically entrusted to the legislature. This is so both because of the legislature's democratic legitimacy and also because of the particular competence of that branch of government in addressing polycentric issues.
[222] It follows, then, that the core responsibility of the judiciary is to resolve live disputes on the basis of evidence presented by opposing parties. Indeed, this court in Zantsi, relying on the decision of the Supreme Court of Canada in Borowski v Canada, set out the rationale for this as follows:

'First, in an adversary system, issues are best decided in the context of a live controversy. The second consideration is based on concern for judicial economy and the last is that it is generally undesirable and possibly an intrusion into the role of the legislature for a court to pronounce judgments on constitutional issues in the absence of a dispute affecting the rights of the parties to the litigation.' (Borowski v Canada (Attorney General) [1989] 1 SCR 342 at 358-362 (a case which discusses this principle in the context of mootness)"

[underlining added]

43. We submit that this court should adopt Chaskalson P's approach in *Zantsi v Council of State, Ciskei, and Others*, quoting with approval the following passage

from the opinion of Matthews J in the *United States Supreme Court in Liverpool, New York and Philadelphia Steamship Company v Commissioners of Emigration*:

"...

> *'(N)ever . . . anticipate a question of constitutional law in advance of the necessity of deciding it; . . never . . . formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'*
>
> *This rule allows the law to develop incrementally. In view of the far-reaching implications attaching to constitutional decisions, it is a rule which should ordinarily be adhered to by this and all other South African Courts before whom constitutional issues are raised."*

(c) The factual setting

44. The founding affidavit is a narrative of the alleged abuse of the provisions of the RICA, and of the potential for its abuse. All of this is based only on the second applicant's experience more than ten years ago.

45. Mr Sole alleges that during 2008 he strongly suspected that his communications were being intercepted.[45] A complaint was lodged with the Inspector General of Intelligence ("*the IG*") in May 2009.[46] He had no knowledge of the interception until April 2015 when it emerged from affidavits filed in court proceedings, unrelated to him, that his conversations had been intercepted. [47]

46. It is significant that even though Mr Sole was aggrieved by this, he did not then, and does not now, seek redress for the alleged wrong. There is not the faintest suggestion that he intends to seek legal redress in the future.

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45 P.28: FA para 37.

46 p.28: FA, para 38

47 p.45: FA, para 45

47. In the founding affidavit, the applicants claim that there are "*various examples of applications*" in which interception directions were allegedly based on false information given to the designated judge.[48] This is hearsay, and we submit has no probative value.

48. The applicants mention two incidents where an interception direction was authorised on the basis of false information. The one in 2010 allegedly related to journalists, Messrs Mzilikazi wa Afrika and Hofstätterin. The identities of the proposed subjects were allegedly fictional and the motivation for the interception direction was false. It was apparently alleged that the interception related to an investigation into a crime syndicate. This was not true. [49]

49. The other incident had nothing to do with the RICA. It involved a rogue police officer, Paul Scheepers, who was charged amongst others with fraud because the information which he applied for, and obtained subpoenas on, in terms of section 205 of the Criminal Procedure Act, Act No. 51 of 1977 was false. He was also charged with contravening section 45 (1) read with sections 1, 44, 45(2), 46, 51(1) (a) and (b) of the RICA in that he purchased, possessed, and /or sold a cell phone grabber/locator which could be used to determine and monitor the geographical location of a person, vehicle, or object.

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[48] p.41: FA, para 73.7.

[49] p. 41: FA, para.73.8.

50. Incidentally, he was also charged with contravening the provisions of the Prevention of Organized Crime Act, Act No. 121 of 1998.[50]

51. It is submitted that these incidents show firstly, that interceptions can and do happen outside of the framework of the RICA, and in breach of it. Secondly, that these illegal interceptions happened not because the provisions of the RICA were enforced, but because they were not. Scheepers was on a frolic of his own.

52. The Scheepers' example as well as that of the second applicant, brings to mind the following apt remarks of La Forest J in *R v Duarte* (1990) 53 CCC (3d) 1 (SCC) ([1990] 1 SCR 30) (at 11 (CCC)) which were referred to by the court in *Tap Wine Trading CC and Another v Cape Classic Wines (Western Cape) CC*:[51]

> *"The rationale for regulating the power of the State to record communications that their originator expects will not be intercepted by anyone other than the person intended by the originator to receive it (see definition section of Part IV. 1 of the Code) has nothing to do with protecting individuals from the threat that their interlocutors will divulge communications that are meant to be private. No set of laws could immunise us from that risk. Rather, the regulation of electronic surveillance protects us from a risk of a different order, i.e. not the risk that someone will repeat our words but the much more insidious danger inherent in allowing the State, in its unfettered discretion, to record and transmit our words.".*
>
> [underlining added]

53. In the replying affidavit, other anecdotes are proffered.[52] They prove nothing; no admissible and reliable evidence has been produced by the applicants.

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50 pp 483-485: FA, Annexure "SP-23", counts 26 and 27.

51 1999 (4) SA 194 (C) at 197I-198F.

52 pp.1019–1020: RA, para.96.

54. The applicants elevate anecdotes to compelling evidence that the RICA does not have adequate safeguards. They argue that it should have the safeguards they argue for, and conclude that because these safeguards are absent, the impugned provisions are unconstitutional.

55. It is noteworthy that the applicants do not call on these alleged occurrences in aid of a pronouncement by this court (i) that the conduct of a state official was inconsistent with the Constitution or, unlawful for want of compliance with the RICA and therefore unconstitutional; and (ii) consequently, the impugned sections of the RICA are unconstitutional.

56. The applicants have assumed, and want it to be assumed, and accepted as a proven fact that (i) interception directives issued by the Designated Judge are applied for, and generally obtained, for purposes not contemplated in the RICA; (ii) the State's law enforcement agencies target innocent people and do so in pursuit of an ulterior motive. These assumptions are the foundation of this application.

57. We submit that the applicants have to do more than assume (i) that interception directives issued by a Judge are applied, and obtained, for purposes not contemplated in the RICA; and (ii) that the State's law enforcement agencies target innocent people for ulterior motives. The applicants must adduce acceptable and credible evidence of this. They have failed to do so.

58. We submit that unconstitutionality cannot be visited on legislation because it has been abused. If the misuse or abuse constitutes a constitutional infraction, it is the act of misuse or abuse that is constitutionally reprehensible.

59. The constitutional validity of legislation cannot, and should not be, decided purely on the basis of the unscrupulous conduct of individuals who abused it or can abuse it, and thereby breach the Constitution.

60. The applicants' anecdotes do not prove that the enforcement of the RICA, has resulted in its abuse. All that the anecdotes show is that interceptions can and do occur without resorting to the RICA, in other words outside of the statutory framework, and in breach of section 2 thereof. We submit that this does not render the impugned provisions of the RICA constitutionally repugnant; it renders the interceptor's conduct unconstitutional. The applicant's attack is misdirected.

61. We submit that the test of the constitutionality of the impugned provisions is when they are being enforced. It is only then, we submit, that the efficiency of the safeguards can be tested.

G. THE ATTACK ON THE RICA

62. The parties are *ad idem* that the provisions of the RICA limit a person's right to privacy. They are also *ad idem* that the limitation is reasonable and justifiable in

terms of section 36 of the Constitution[53] and the limitation therefore is not unconstitutional. It is not clear whether the applicants are persisting with the attack on the RICA on the basis that some of its provisions infringe upon the right to privacy or whether the basis of the attack has shifted away from the right to privacy and is directed only at the right of access to court, to freedom of expression and the media and the right of legal privilege.[54]

63. The applicants complain that while the RICA does regulate specific matters, it does not do so adequately, and in instances it under-regulates.[55] We submit that the applicants' complaint is limited to process.

64. The applicants complain, amongst others, that:

64.1. the subject of the interception direction is never notified;[56]

64.2. there is no procedure for examining, copying, sharing, sorting, using, and storing information obtained through an interception[57];

64.3. the period for mandatory retention of data by telecommunications service providers is inappropriately long;[58] and

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53 p.14, Founding Affidavit: para 12, also p.618, Answer: Justice, para 16. The applicants say that the limitation on the right to privacy, is reasonable and justifiable under some circumstances, but do not elaborate.

54 p.5: Applicant's heads: para 3.2.

55 pp.12-13, Founding Affidavit, par. 8 and 9.

56 P. 37: FA, para 64.1.

57 *Cf.* p. 14: FA, para 13.4.2; p. 37: FA, para 64.2.

58 *Cf.* p.14: FA, para 13.4.3; p 37: FA, para 64.3.

64.4. the independence of the designated judge is undermined and there is no adversarial process before the designated judge.[59]

64.5. there is inadequate protection for subjects who have a source-protection duty.[60]

65. They argue that these limit the following rights and the limitation does not pass constitutional muster:

65.1. the right to privacy;

65.2. the right of access to court ;

65.3. the right to freedom of expression and the media;

65.4. the legal professional privilege; and

65.5. a journalist's duty to protect confidential sources.

H. THE CRUX OF JUSTICE, POLICE AND DEFENCE'S OPPOSITION

66. Firstly, it is submitted that no rights issue arises in this application. The applicants do not claim that any of their rights are being infringed. Nor, do they claim that

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[59] p. 37: para 64.4

[60] p. 37: FA, para 64.5.

they will in the future be seeking redress for past wrongs. The applicants have mounted an abstract challenge. This issue is dispositive of the application.

67. Secondly, the conditions which the applicants seek to impose implicate the State's policy towards crime, its investigation and prevention. Whether the subject of the interception should be notified be it before or after the interception, who the issuing authority should be, how it should be appointed and for how long, what procedure must be followed when considering an application for an interception direction, how the intercepted information must be stored and for how long it must be retained, all impact upon, and are connected with, the State's policies on investigating and preventing crime and their effectiveness. The applicants do not challenge the constitutionality of the State's crime fighting policy. We submit that the policy issues at stake dictate that the doctrine of the separation of powers should prevail and this application must be dismissed.

68. It is not disputed that the right to privacy is limited. We submit however that the limitation is justifiable: it is rational and reasonable and is in pursuit of a legitimate government purpose.

69. We submit though that the right of access to court and freedom of expression and of the media, are not implicated by the provisions of the RICA. In the event that this honourable court finds that the impugned provisions do constitute a limitation on these rights, we submit that the limitation is reasonable and justifiable, as contemplated in section 36 of the Constitution, and hence pass constitutional muster.

70. Neither in South Africa nor elsewhere in the world does a blanket privilege attach to communications between a journalist and his sources.

71. Insofar as the legal professional privilege is concerned, the provisions of the RICA do not undermine it. We submit that:

71.1. considering that the legal professional privilege forms part of the right to a fair trial[61]is only compromised if intercepted material qualifies for privilege and, is used in a manner that is prejudicial to the subject.

71.2. it cannot be over-emphasised that the RICA can only be called in aid in limited circumstances.

I. THE LEGISLATIVE SETTING

(a) The considerations underpinning the RICA

72. Section 12(2)(c) of the Constitution confers upon every person the right to be free from violence. The right to physical safety is therefore guaranteed by the Constitution.

73. The state security services, which consist of amongst others the South African National Defence Force and South African Police Service, have the obligation to "*defend and protect the Republic, its territorial integrity and its people.*"[62] and

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61 *Legal aid Board v The State* 2011 (1) SACR (SCA) at paras 1-2.

62 s 200(2) of the Constitution.

"*prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.*"[63]

74. The South African Police Service Act, Act 68 of 1995("*the SAPS Act*") has been enacted to give effect to its constitutional obligation. It reads:

> *WHEREAS there is a need to provide a police service throughout the national territory to-*
> *(a) ensure the safety and security of all persons and property in the national territory;*
> *(b) uphold and safeguard the fundamental rights of every person as guaranteed by Chapter 3 of the Constitution;*
> *(c)...*
> *(d)...*
> *(e)...*
> *AND WHEREAS there is a need to provide for a Directorate in the Service that is dedicated to the prevention, investigation and combating of national priority offences, in particular serious organised and transnational crime, serious commercial crime and serious corruption, and that enjoys adequate independence to enable it to perform its functions*

75. Chapter 6A of the SAPS Act creates a Directorate for Priority Crime Investigation. Its aim is "*to prevent, combat and investigate national priority offences, in particular serious organised crime, serious commercial crime and serious corruption*".[64]

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63 s 205(3) of the Constitution.

64 s 17B(a).

76. The Constitution imposes upon the State the positive[65] obligation to "*respect, promote and fulfil*" this right[66]. In *Minister of Safety and Security v Van Duivenboden* [67] Nugent JA expressed this as follows:

> "*...in this country the State has a positive constitutional duty to act in the protection of the rights in the Bill of Rights. The very existence of that duty necessarily implies accountability and s 41(1) furthermore provides expressly that all spheres of government and all organs of State within such sphere must provide government that is not only effective, transparent and coherent, but also government that is accountable (which was one of the principles that was drawn from the interim Constitution).*"

77. The Constitutional Court in *Minister of Safety and Security v Van Duivenboden*[68] discussed this positive obligation on the State to protect the rights enshrined in the Bill of Rights. This positive obligation includes the obligation to take preventative operational measures to protect individuals from the criminal acts of others.[69]

78. In *Carmichele v Minister of Safety and Security and Another*,[70] in the context of the European Convention on Human Rights, the court held as follows:

> *"...the provisions of the European Convention on Human Rights (Convention). Article 2(1) of the Convention provides that '(e)veryone's right to life shall be protected by law'. This corresponds with our Constitution's entrenchment of the right to life. We would adopt the following statement in Osman v United Kingdom 29 EHHR 245 at 305, para 115.:*

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65 *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at para 20. See also *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) at para 45.

66 s 7 (2) of the Constitution.

67 *Minister of Safety and Security v Van Duivenboden* at para 20.

68 2002 (6) SA 431 (SCA) at para 20.

69 *Carmichele* para. 45.

70 2001 (4) SA 938 (CC) at para 45.

> '*It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that art 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual*.'" [underlining added]

79. The Court observed[71] that:

> "*Under both the [Interim Constitution] and the Constitution, the Bill of Rights entrenches the rights to life, human dignity and freedom and security of the person. The Bill of Rights binds the State and all of its organs. Section 7(1) of the [Interim Constitution] provided:*
>
> *'This chapter shall bind all legislative and executive organs of State at all levels of government.'*
>
> *Section 8(1) of the Constitution provides:*
>
> *'The Bill of Rights applies to all law, and binds the Legislature, the Executive, the Judiciary and all organs of State.'*
>
> *It follows that there is a duty imposed on the State and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.*"
>
> [underlining added]

80. It is therefore evident that the State's obligation to prevent and investigate crime and protect its inhabitants from harm is steeped in the Constitution. Against this constitutional obligation is the State's constitutional obligation to "*respect, promote and fulfil*" a person's right to privacy.

(b) The Role of the RICA

81. The RICA regulates the interception and monitoring of communication related information. It allows the interception of communications under very specific

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71 At para 44.

circumstances, and for very specific reasons. It must be highlighted that the RICA is an investigating and information gathering tool that can be used only:

81.1. for investigating or preventing serious offences as defined in the RICA;[72]

81.2. if it is necessary for gathering information concerning a potential threat to the public health or safety or national security of the Republic; [73]

81.3. for the making of a request for the provision (or the provision to the competent authorities of a country or territory outside the Republic) of any assistance in connection with, or in the form of, the interception of communications relating to organised crime or any offence relating to terrorism or the gathering of information relating to organised crime or terrorism;[74] and

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72 Section 16(5)(a)(i). Section 1 defines a "serious offence" to mean any—

"(a) offence mentioned in the Schedule; or

(b) offence that is allegedly being or has allegedly been or will probably be committed by a person, group of persons or syndicate-

(i) acting in an organised fashion which includes the planned, ongoing, continuous or repeated participation, involvement or engagement in at least two incidents of criminal or unlawful conduct that has the same or similar intents, results, accomplices, victims or methods of commission, or otherwise are related by distinguishing characteristics;

(ii) acting in the execution or furtherance of a common purpose or conspiracy; or

(iii) which could result in substantial financial gain for the person, group of persons or syndicate committing the offence, including any conspiracy, incitement or attempt to commit any of the above-mentioned offences;"

73 Sub-section (5)(a)(ii), see also pp.26 to 27: FA, paras 31to 34.

74 Sub-section (5)(a)(iv).

81.4. the gathering of information concerning property which is or could probably be an instrumentality of a serious offence or is or could probably be the proceeds of unlawful activities is necessary.[75]

82. It is thus evident that the RICA, which is an extension of the conventional methods of crime investigation and not a substitute therefor. It plays a significant role in the State's fight against crime, but is a crime fighting tool of the last resort.[76]

83. Not only South Africa, but most constitutional democracies have resorted to the interception of communications to deal with serious offences, or to gather intelligence regarding potential threats to the public health or safety or national security[77] or compelling national economic interests.

(c) The Competing Interests Implicated by RICA

84. It is settled in South Africa and other jurisdictions, that neither the right to privacy[78] nor, the right to freedom of expression, is absolute. These fundamental rights are subject to a limitation in accordance with what is reasonable and

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75 Sub-section (5)(a)(v).

76 *Cf.* section 16(2)(e) and 16(5)(a).

77 It has been opined that even though "*popular accountability is the bedrock of governmental oversight in most areas of governance [in South Africa], it can be difficult to rely upon it in the national security arena-with some information must quite properly remain hidden from the public's direct view*". See: Christopher A. Ford, Watching the Watchdog: Security Oversight Law in the New South Africa, 3 Michigan Journal of Race & Law (1997) p. 137.

78 *Protea Technology Limited and another v Wainer and Others* [1997] All SA 594 (W) at 611f-g; *S v Cwele* 2011 (1) SACR 409 (KZP) para 25.

justifiable in an open democratic society. The right of access to courts may also in the appropriate circumstances be restricted.[79]

85. Even though section 14 of the Constitution guarantees the right to privacy and section 14(4) specifically protects an individual's right not to have the privacy of his communications infringed, the right to privacy is however not absolute. There are circumstances under which the right is attenuated or even lost. Ackermann J discussed this in *Bernstein and Others v Bester NO and Others* 1996(4) BCLR 449 (CC) and found that:

> *[77] A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation."*

86. In *Key v Attorney General Cape Provincial Division and Another* 1996 (4) SA 167 (CC) at para 13 Kriegler J discussed the tension between crime prevention and investigation and rights such as privacy. He expressed it thus:

> *"[13] In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators..."*

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79 Currie & De Waal *The Bill of Rights Handbook* (6th ed) p.714.

87. The European Court of Human Rights ("*ECHR*") in *Ku v Finland* [2008] ECHR 2872/02, at para 9, in echoing this principle, found that

> "*...Although freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others.... it is nonetheless the task of the legislator to provide the framework for reconciling the various claims which compete for protection in this context.*"
>
> [underlining added]

88. The tension between these two competing rights arose again in *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others* [80] Langa CJ in discussing this tension remarked:

> "*[74] In Hyundai this court made the point that s 29 strikes a balance between protecting the privacy interests of individuals on the one hand and not interfering with the State's constitutionally mandated task of prosecuting crime on the other.*
>
> *There is no doubt that search and seizure provisions, in the context of a preparatory investigation, serve an important purpose in the fight against crime. That the State has a pressing interest which involves the security and freedom of the community as a whole is beyond question. It is an objective which is sufficiently important to justify the limitation of the right to privacy of an individual in certain circumstances. The right is not meant to shield criminal activity or to conceal evidence of crime from the criminal justice process. On the other hand, State officials are not entitled without good cause to invade the premises of persons for purposes of searching and seizing property; there would otherwise be little content left to the right to privacy. A balance must therefore be struck between the interests of the individual and that of the State.*
>
> *[75] Both these interests are important and neither can be sacrificed. The court went on to describe the importance of the State's powers under s 29 in the fight against crime:*
>
> > *It is a notorious fact that the rate of crime in South Africa is unacceptably high. There are frequent reports of violent crime and incessant disclosures of fraudulent activity. This has a seriously adverse affect not only on the security*

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[80] 2009 (1) SA 1 (CC) at para 98.

of citizens and the morale of the community but also on the country's economy. This ultimately affects the government's ability to address the pressing social welfare problems in South Africa. The need to fight crime is thus an important objective in our society, and the setting up of special Investigating Directorates should be seen in that light. The Legislature has sought to prioritise the investigation of certain serious offences detrimentally affecting our communities and has set up a specialised structure, the Investigating Directorate, to deal with them. For purposes of conducting its investigatory functions, the Investigating Directorates have been granted the powers of search and seizure.

[76] The privacy of the individual is no less important. Section 14 of the Constitution entrenches everyone's right to privacy, including the right not to have one's person, home, or property searched, possessions seized or the privacy of his or her communications infringed. These rights flow from the value placed on human dignity by the Constitution. The courts therefore jealously guard them by scrutinising search warrants 'with rigour and exactitude'."

89. The Constitutional Court has found that although the fight against crime may infringe upon the right to privacy, the infringement is justified.

90. In *S v Cwele and Another* 2011 (1) SACR 409 (KZP), the court was confronted with the question of the admissibility of information which was intercepted with specific reference to the right to privacy and the right to dignity. The following remarks are noteworthy:

"Although the interception of communications infringes on the right as contemplated in section 14(d) of the Constitution, the guaranteed right is not absolute and must yield to the broader rights of other persons to be protected against crimes. The right to privacy is not absolute and can in terms of section 36 of the Constitution be limited. It is also submitted that the State has a substantial interest requiring the limitation, which can directly be linked to section 7(2) of the Constitution, namely the State must protect other rights in the Bill of Rights which are affected by criminal conduct."

[underlining added]

91. We submit that competing against the individual's right to privacy are:

91.1. the State's constitutional duty to ensure that every person is free from violence; that national security is protected and that effective criminal law provisions exist to deter crime; and

91.2. the public interest which demands that (i) crime is promptly investigated and that the perpetrators are brought to book, (ii) measures are implemented to prevent, combat, and investigate crime; and (iii) public order is maintained to protect and secure the inhabitants of South Africa and their property.

92. The RICA gives effect to the right of privacy by prohibiting the interception of communications. However, it lifts the prohibition only under narrowly prescribed circumstances and for the limited purpose of preventing and investigating **serious** crime, or gathering information concerning actual or potential threats to the public health or safety, the national security, or compelling national economic interests[81] and to prevent serious bodily harm[82]or in any emergency affecting life.[83]

(d) History and background to the enactment of the RICA

93. The RICA is the product of a review of the Interception and Monitoring Prohibition Act, Act No. 127 of 1992 ("*the Old Interception Act*") by the South African Law Reform Commission ("*the SALRC*") after the adoption of the

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81 p.625: AA (Robbertse), paras 36 and 36.

82 Section 7(1).

83 Section 8(1)(b)

Constitution, 1996. The review was aimed at the enactment of legislation which was in accordance with international norms, the Constitution and South Africa's circumstances and requirements.[84]

94. The promulgation of the RICA took into account considerable technological developments in electronic communications, among others, cellular communications, satellite communications and computer communications, which followed the enactment of the Old Interception Act and mainly concentrated on the interception of postal articles, conversations and fixed line communications.[85]

95. The changes to the Old Interception Act were also dictated, amongst others, by (i) the high and ever-increasing rate of crime, especially organised crime which is facilitated by electronic communications, (ii) crime investigation and prevention policies of the State, (iii) the heightened awareness of crime, and (iv) the demand for stricter, expedient, and swift crime fighting measures.[86]

96. Another consideration was South Africa's international undertaking to fight global terrorism. South Africa's porous borders create an opportunity for South Africa to be used as a conduit for attacks on other countries. As it appears from the submissions later in these heads, there is an increased awareness globally that law enforcement agencies require advanced tools to investigate crimes.[87]

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84 p.620: AA: Justice, par 24.

85 p.621: AA: (DOJ), para 25.

86 p.622: AA (DOJ) para 28.

87 *Ibid*, at para 27.

97. Developing technology presented sophisticated methods for organising and perpetrating crimes. Legislation had however not kept up with technological advances to the detriment of effective crime prevention and investigation.

98. While perpetrators of serious crimes had the benefit of advanced technology to plan criminal activities and carry them out, outlaw enforcement agencies were emasculated because the law did not allow then to employ the necessary and available technologies in response, and in the fight against crime prevention and crime investigation.[88]

99. The new technologies and technical solutions strengthened the capabilities of the law enforcement agencies investigating offences generally and also those facilitated by electronic communications.[89]

100. However, new capabilities to intercept communications and access communication-related information encroached on the rights of individuals. Therefore, appropriate safeguards had to be introduced to restrict the use of intrusive measures to fighting serious crime.[90]

(e) An overview of the RICA

101. The object of the RICA is discernible from the long title. It is "*to regulate the interception of certain communications,...and the provision of certain*

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88 *Ibid*, at para 26.

89 *Ibid*, at para 26.

90 p.622:AA (DOJ), para 28.

communication-related information; to regulate the making of applications for, and the issuing of, directions authorising the interception of communications and the provision of communication-related information under certain circumstances...".

102. The RICA is not a license to intercept communications and monitor individuals. To the contrary it prohibits this.

103. The court in *Tap Wine Trading CC and Another v Cape Classic Wines (Western Cape) CC*[91] found the following rationale expressed by La Forest J in *R v Duarte* (1990) 53 CCC (3d) 1 (SCC) ([1990] 1 SCR 30) for regulating the power of the State to intercept communications, persuasive (at 11 (CCC)):

> *"...the regulation of electronic surveillance protects us from a... danger inherent in allowing the State, in its unfettered discretion, to record and transmit our words.*
>
> ...
>
> *This is not to deny that it is of vital importance that law enforcement agencies be able to employ electronic surveillance in their investigation of crime. Electronic surveillance plays an indispensable role in the detection of sophisticated criminal enterprises. Its utility in the investigation of drug related crimes, for example, has been proven time and again. ...."*

104. Not only does the RICA censure[92] the general (and arbitrary) interception and monitoring of communications, it criminalises it.[93]

105. The gravity with which an intrusion on the right to privacy is viewed by the State is evident from the penalties which may be imposed for the infringement of the

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91 1999 (4) SA 194 (C) at 197I-198F.

92 s 2.

93 s49.

RICA. Penalties in the form of fines can range up to R2 million (in the case of a person) and imprisonment of up to 10 years.[94] Juristic persons in instances are liable to fines up to R5 million for certain contraventions.[95] There is thus no impunity for the infraction on the privacy of individuals.

106. The prohibition on the interception of communications is lifted under very limited, and narrowly defined circumstances[96].

107. The RICA countenances the interception of communications by the State in the following exceptional circumstances:

107.1. To prevent serious bodily harm;[97]

107.2. To determine the location of a person in the event of the endangerment, or threat to life or serious injury;[98]

107.3. To investigate serious offences[99], such as high treason, sedition, terrorism, terrorist activities (such as activities which are connected with the engagement in terrorist activities, by way of example, the provision of

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94 *Cf.* s. 51(1)(b)(i).

95 *Cf.* s. 51(2)(b)(i)(bb) and *Cf.* s. 51(3) (i) (bb).

96 In the context of the Old Interception Act, Hehr J in *Protea Technology Limited and Another v Wainer and Others* [1997] 3 All SA 594 (W) described the circumstances as "*severely limited*" (at 605b-c) and in *S v Kidson* 1999 (1) SACR 338 (W) Cameron J found that a "rigorous antecedent procedure is prescribed" before an interception direction can be issued.

97 s.7.

98 s. 8.

99 *Cf.* s. 16(1)(e)(i) and s 16(5).

weapons, the training or instruction or the recruiting of training, the recruiting of entities[100]), an offence which could result in the loss of a person's life, or serious risk of loss of a person's life, and any offence (i) relating to the dealing in or smuggling of ammunition, firearms, explosives or armament and the unlawful possession of these; (ii) under any law relating to the illicit dealing in or possession of precious metals or precious stones; (iii) which attracts imprisonment for life or a minimum sentence prescribed by section 51 of the Criminal Law Amendment Act, Act No 105 of 1997; (iv) which attracts a period of imprisonment exceeding five years without the option of a fine; (v) genocide; (vi) crimes against humanity; (vii) war crimes; (viii) racketeering activities; (ix) money laundering; (x) acts relating to the proceeds of unlawful activities; (xi) dealing in dangerous dependence-producing substances or any undesirable dependence producing substances; (xii) corrupt activities.

107.4. If, a serious offence has been or, is being or, will probably be committed;[101]

107.5. If, it is necessary to gather information concerning:

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100 Cf. section (b) to the definition of *"specified offence"* in section 1 of the RICA read together with the Schedule thereto and para (b) of the definition of *"specified offence" in* the Protection of Constitutional Democracy Against Terrorism and Related Activities Act, Act No. 33 of 2004 and sections 2 and 3 thereof.

101 *Cf.* s.16(5)(a).

(i) an **actual threat** or a **potential threat** to:

(aa) public health or to the safety of public health; and

(bb) national security.[102]

(ii) an actual **threat** (only, not a potential threat) to compelling national economic interests[103];

(iii) the gathering of information concerning property which is or could probably be an instrumentality of a serious offence or is or could possibly be the proceeds of unlawful activities.[104]

107.6. Organised crime or an offence relating to terrorism or the gathering of information in relation to these.[105]

108. The mere existence of these circumstances however does not confer an automatic right to intercept communications. Except in the circumstances contemplated in sections 7(1) and 8(1), a motivated written application must be made to a Judge (referred to as the "designated judge").

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102 s. 16 (5)(a)(ii).

103 s. 16 (5)(a)(ii).

104 s. 16(5)(a)(v).

105 *Cf.* s. 16(5)(a)(iv).

109. Apart from the circumstances listed in paragraph 110 above, the RICA can be used amongst others only if:

109.1. there are reasonable grounds to believe that the interception of particular communications concerning the relevant ground in section 16(5)(a) will be obtained by means of the interception direction[106]; and

109.2. the facilities from which, or the place at which, the communications are to be intercepted are being used, or are about to be used (in connection with the relevant ground referred to in section 16(5)(a)) are commonly used by the person or customer in respect of whom an application for an interception direction is being made;[107]

109.3. other investigative procedures have been applied and have failed to produce the required evidence, or the other investigative methods reasonably appear to be unlikely to succeed if applied or they are likely to be too dangerous; [108] and

109.4. as a result, the offence cannot be investigated, or the information cannot adequately be obtained, in another appropriate manner.[109]

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106 s16 (5)(b)(i).

107 s 16 (5)(b)(ii).

108 s16 (5)(c).

109 *Ibid.*

110. The RICA, hence, prohibits the interception of communications in general,[110] and creates a closed list of circumstances under which the interception of communications is permissible, and it imposes safeguards. The interception of communications must occur within the confines of the RICA in order for it to be lawful.

J. LEGISLATION IN SOME FOREIGN JURISDICTIONS

111. We submit that the RICA is broadly in line with parallel domestic legislation in other democratic countries and as we demonstrate below it compares favourably.

(a) *Australia: The Telecommunications (Interception and Access) Act, 1979*

112. In terms of the Telecommunications (Interception and Access) Act, 1979 ("*the TIA*") communications may be intercepted if authorised by an "*eligible judge*" (who has consented to being nominated and has been declared an "*eligible judge*" by the Minister of the Crown) or a "*nominated AAT member*" (namely, a member of the Administrative Appeals Tribunal nominated by the Minister to issue warrants to intercept communications) (section 39).

113. The eligible judge or nominated AAT member may issue a (interception) warrant if he/she is satisfied, amongst others, that there are reasonable grounds for

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110 s.2 reads as follows:

"Prohibition of interception of communication

Subject to this Act, no person may intentionally intercept or attempt to intercept, or authorise or procure any other person to intercept or attempt to intercept, at any place in the Republic, any communication in the course of its occurrence or transmission."

suspecting that the person is using, or likely to use the telecommunications service, that information that would be likely to be obtained by the interception would be likely to assist in connection with the investigation of a serious offence/s (section 46).

114. No notification is required in terms of the TIA.

(b) *Canada: the Canadian Criminal Code (R.S.C., 1985, c. C-46)*

115. In terms of the Canadian Criminal Code (R.S.C., 1985, c. C-46), communications may be intercepted if authorised by a provincial court judge or, a judge of the superior court of criminal jurisdiction.

116. The application is made *ex parte* and in writing, accompanied by an affidavit, sworn on the information and belief of a peace officer, or public officer, or of any other peace officer or public officer that there are reasonable grounds to believe that an offence under the Criminal Code or an Act of Parliament has been, or will be committed (section 184.2(1) and 184.5 (2) read with section 184.2(1)).

117. The judge may authorise the interception if he/she is satisfied that:

117.1. there "*are reasonable grounds to believe*" that:

117.1.1. a specific offence/s has/have been, or will be committed;

117.1.2. information concerning the offence will be obtained through the interception; (section 184.2(3))

117.2. it would be in the interests of justice to authorise the interception; and other investigative procedures have been tried and failed (section 186(1)).

118. Section 184.4 permits an interception, without authorisation, to prevent bodily harm.

119. The Canadian issuing authority, unlike in South Africa, is not a dedicated Judge. An inspection can be authorised by any provincial court judge or a judge of the superior court of criminal jurisdiction.

120. We submit that this does not mean that the South African dispensation is constitutionally wanting. We submit that the Canadian policy choice is dictated by its peculiar circumstances and may not necessarily be appropriate for other States who may be guided by different policies.

(c) ***New Zealand***

121. The object of the Search and Surveillance Act, 2012 in New Zealand:

> *"is to facilitate the monitoring of compliance with the law and the investigation and prosecution of offences in a manner that is consistent with human rights values by— (a) modernising the law of search, seizure, and surveillance to take into account advances in technologies and to regulate the use of those technologies; and (b) providing rules that recognise the importance of the rights and entitlements affirmed in other enactments, including the New Zealand Bill of Rights Act 1990, the Privacy Act 1993, and the Evidence Act 2006; and (c) ensuring investigative tools are effective and adequate for law enforcement needs."*

122. An enforcement officer (as defined) may intercept a private communication under the authority of a surveillance device warrant issued by a District Court Judge or a Judge of the High Court.

123. In terms of section 48(1), surveillance device may be used for a period not exceeding 48 hours without a surveillance warrant device in some emergency and urgent circumstances which are listed in section 48(2). In such cases the enforcement officer has the obligation to provide a report to the Judge within one month.

124. A surveillance device warrant may be issued if there are reasonable grounds to suspect that certain specified offences have been or will be committed.

125. The Judge, has a discretion[111] to order post surveillance notification[112] if –

125.1. the surveillance warrant should not have been issued; or

125.2. there has been a serious breach of any of the conditions of its issue, or of any applicable statutory provision.

126. However, the Judge "must not" order post surveillance notification unless he or she is satisfied that –

126.1. the public interest in notification outweighs any potential prejudice to any one or more of the following:

126.1.1. any investigation by the law enforcement agency;

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111 In terms of section 61(1)

112 section 61(1)(c)

126.1.2. the safety of informants or undercover officers;

126.1.3. the supply of information to a law enforcement agency;

126.1.4. any international relationships of the law enforcement agency; and

126.2. the warrant should not have been issued; or

126.3. there has been a serious breach of any of the conditions of its issue, or of any applicable statutory provision.

127. This Act recognises some exceptions to the warrant requirement. A surveillance device warrant is not required if the interception is authorised by an interception warrant issued under the Government Communications Bureau Act 2003 or the New Zealand Security Intelligence Act.

(d) *The United Kingdom: The Data Retention and Investigatory Powers Act, 2016*

128. In terms of the United Kingdom's Data Retention and Investigatory Powers Act, 2016 ("*the Investigatory Powers Act*") the application for the authority to intercept is made to the Secretary of State without notice. There are however measures that ensure oversight over the implementation of the Act in an attempt to guard against abuses. No provision is made for any notification.

K. ISSUES

129. The issues to be determined in this application are:

129.1. Whether the subject of an interception order should be notified (the "**Notification issue**);

129.2. whether the appointment, and independence of the designated judge is sufficiently transparent ("**The Designated Judge Issue**");

129.3. how intercepted material is examined, copied, shared, sorted through, used, destroyed, and/or stored ("**The Intercepted Material Issue**");

129.4. whether the period for mandatory retention by electronic communications service providers of communication-related information is proportionate or adequate ("**The Retention Issue**");

129.5. the sufficiency of oversight mechanisms by electronic communications service providers ("**Service Provider Oversight**");

129.6. the need for an adversarial process to protect the rights of the subject of an interception direction (**The "Adversarial Process/Procedural Issue**"); and

129.7. the implications of an interception on areas of privilege, such as the protection of journalists and lawyers. ("**The Confidential Sources and Legal Privilege Issue**").

L. JUSTICE, POLICE AND DEFENCE'S SUBMISSIONS

130. The applicants contend that the RICA infringes the constitutional right of a subject of the interception, to privacy[113], freedom of expression, constitutional right to legal professional privilege and the right to access court. It appears that the complaint of an infringement of the right to privacy is not being pursued.

131. They argue that this is because, amongst other things:

131.1. in terms of section 16(7)(a) of the RICA, the subject will never know that his communications were intercepted, notwithstanding the direction having lapsed, or the investigation completed. (This is the notification issue). Therefore, they argue that the subject is not able to:

a) review the decision of the designated judge in court;

b) raise professional privilege if he/she is a lawyer;

c) raise freedom of expression or protect his/her sources, if a journalist.

131.2. the RICA does not prescribe a procedure for examining, using, and storing the data obtained through the interception, in that "*RICA does not adequately deal with these aspects*".[114] The "*Dealing with Intercepted*

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113 It appears that the applicants are not persisting with the complaint that the provisions of the RICA breach the right to privacy.

114 p.43, para 79 – FA.

Material Issue".[115]The applicants state in this regard that there is no proper provision made in the RICA regarding, amongst others:

a) where intercepted information is stored;

b) who may have access to it and under what conditions;

c) whether access has to be recorded/registered;

d) whether copies may be made; and

e) whether the material must be or may be destroyed at any time and if so when/under what conditions. [116]

131.3. Section 30(1) compels telecommunications service providers to firstly, provide a communication service that has the capability of being intercepted and secondly, to store communication-related information. This is the "*Retention of Information Issue*".[117]

132. The essence of the latter complaint appears to lie in (i) the duration for which the communication-related information must be stored; and (ii) that not only are

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115 pp.42 to 44, paras 77, 80, 81 and 82 – FA.

116 p.44: FA, para 82

117 p.46: FA, para 86, and pp.47 – 48: FA, paras 89 and 90.

telecommunications service providers compelled to retain communication-related information, but they must do so for at least three years[118].

133. In so far as the notification issue is concerned, the applicants' case is that the subject of the interception must be informed of the surveillance after it has occurred.[119] It follows from this that they do not take issue with the provisions of section 16(7)(a). The essence of their argument is that the provisions of the RICA do not go far enough. The same goes for the "*Dealing with Intercepted Material Issue*".

134. In light of the above, we submit that the gravamen of the application is the sufficiency of the safeguards which the RICA provides, and the under-regulation under the RICA. We submit in this regard that the abuse of legislation, as well as under-regulation, where applicable, do not render the legislation constitutionally repugnant. The very object of safeguards is to keep the abuse in check.

135. However, the appropriateness of the safeguards is a policy matter. We submit there can be no "one fits all" regime. The appropriateness of safeguards depends amongst others, on the prevailing climate domestically and globally. The assessment of the appropriateness of safeguards is ultimately a matter reserved for the Executive and the Legislature. Both making policy choices considered appropriate for various reasons.

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118 p.48: FA, para 88-89.

119 p.41, para 74 – FA, read with p.993: Reply, para 26.

136. We therefore submit that no constitutional rights issue arises in this case.

137. However, on the basis that this view does not find favour with the court we proceed to demonstrate that the impugned provisions pass constitutional scrutiny.

(a) ***Privacy***

138. It is trite that the right to privacy is the right to be left alone.

139. In *Case and Another v Minister of Safety and Security and Others* 1996 (5) BCLR 609 (CC), Didcott J Court expressed this as follows:

> *"[w]hat erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the state."*

140. Similar sentiments were expressed by Langa DP (as he then was) in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2000 (10) BCLR 1079 (CC):

> *"[w]hen people are in their offices, in their cars or on mobile telephones, they still retain a right to be left alone by the State unless certain conditions are satisfied"*

141. A very high level of protection is given to the individual's intimate personal sphere of life and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. However, this inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire

a social dimension and the right of privacy in this context becomes subject to limitation.[120]

142. We submit that these authorities demonstrate that in providing for the right to privacy, the Constitution sought to protect that which is intimate and personal to an individual, and not affecting anybody else, or the public. Anyone involved in a serious crime, who is the subject of interception, cannot reasonably demand "to be left alone".

143. As pointed out above, the applicants properly concede firstly, that the interception of communications will not be constitutionally objectionable in all cases, and secondly, that the interception of communications can be necessary.

144. The following four crucial facts about the RICA must be emphasised:

144.1. First, the RICA prohibits the interception of any communication at any place in the Republic of South Africa as well as the provision of communication-related information.

a) Interception may only be permitted in exceptional circumstances, on application by a defined category of persons, with a view to investigating specific crimes and under delineated circumstances, and only if an independent judicial officer authorises it;

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120 *Bernstein and Others v Bester and Others NNO* 1996(2) SA 751 (CC) at para 77.

b) The exception to this is the interception of a communication to prevent serious bodily harm (section 7 of the RICA) and the interception of a communication for the express purpose of determining the location of a person in the case of an urgent situation (section 8 of the RICA).

144.2. Second, the RICA is a tool for investigating specific serious crimes which are contained in the Schedule thereto;

144.3. Third, it is an investigation tool of last resort;

144.4. Fourth, it contains numerous safeguards against abuse.

145. Furthermore, it must be noted that electronic communications have been used and are being used to plan and execute serious crimes. This is a factor which has motivated countries around the world to enact crime fighting measures such as the RICA.

146. Ordinary investigative measures are usually not enough to obtain electronic information about the planning and execution of serious crimes. In line with similar international instruments, the RICA was enacted to empower law enforcement agencies, under regulated circumstances, and subject to judicial authorisation, to access communications where conventional investigative procedures and methods failed to produce the necessary evidence.

147. Therefore, the limitation on the right to privacy under the RICA only occurs in cases of serious crimes and then only if the circumstances identified in section 16(5)(a) are present and secondly, with stringent safeguards to prevent abuse.

148. The RICA is not available where other methods of investigation have not been applied. The only exceptions are that, if applied reasonably, the ordinary methods of investigation appear unlikely to succeed or are too dangerous to apply and, without the intercepted evidence, the offence cannot be adequately investigated, or the information therefore be obtained in another appropriate manner. The RICA permits interception as a measure of last resort. Section 16(5)(c) is clear in this regard.

149. The privacy of a person must therefore yield (i) to the broader rights of other persons to be protected against crimes and the State's constitutional duty to ensure that every person is free from violence; and (ii) so that national security is protected and also that effective criminal law provisions exist to deter crime and to take preventative operational measures to protect individuals from the criminal acts of others.

150. We submit that this is constitutionally permissible.

151. It is submitted in this regard that an individual's right to privacy also has to yield to the public interest which demands that (i) crime is promptly investigated and that the perpetrators are brought to book, (ii) measures are implemented to

prevent, combat and investigate crime; and (iii) public order is maintained to protect and secure the inhabitants of South Africa and their property.

152. At an operational level, the importance of RICA to SAPS, as one of the law enforcement arms of the State tasked with the enforcement of the RICA, can be fully appreciated when its provisions are considered against the background of the Constitution as well as the South African Police Service Act, Act No 68 of 1995 ("*the SAPS Act*").[121]

153. Section 205 of the Constitution provides for a National Police Service which is structured to function in the national, provincial and the local spheres of government. It further provides that national legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively.

154. The objects of the police service are listed in Section 205(3). They are "*to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law*".

155. The South African Police Service Act, Act No 68 of 1995 ("*the SAPS Act*") is the national legislation contemplated in section 205(3) of the Constitution.

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121 p.931: Answer: Police, para 14.

156. The preamble to the SAPS Act is an indication of the purpose of the Act and it is also an indication of the obligations which the SAPS owes to all individuals. It must combat crime, uphold, and safeguard the fundamental rights of every person.

157. The legislature has enacted several pieces of legislation that create special investigative units. It is submitted that this is a recognition that the prevention of crime is in the public interest. The provisions of the RICA support this and give effect thereto.[122]

158. Section 12 of the Constitution guarantees to every person the right *inter alia* to security of the person. This includes the right to be free from all forms of violence from either public or private sources. The South African Police Service therefore has the constitutional obligation to ensure this.

159. Section 17B of the SAPS Act establishes a Directorate for Special Crimes Investigation to prevent, combat and investigate, amongst others:[123]

159.1. national priority offences (including serious organised crime, serious commercial crime, and serious corruption crime) that require national prevention or investigation, or crime which requires specialised skills in the prevention and investigation thereof, as referred to in section 16 (1) of the SAPS Act);

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122 p.932: Answer: Police, para 19.

123 p.933, para 21 - AA (SAPS).

159.2. selected offences referred to in Chapter 2 of the SAPS Act and section 34 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004).

160. The Constitutional Court has had occasion to consider more than once statutory crime investigation methods aimed fighting serious crime and the issue of the right to privacy.

161. In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others,*[124] Langa J (as he then was) the court stated that:

> *[52] The proper interpretation of section 29(5) therefore permits a judicial officer to issue a search warrant in respect of a preparatory investigation only when he or she is satisfied that there exists a reasonable suspicion that an offence which might be a specified offence has been committed. The warrant may only be issued where the judicial officer has concluded that there is a reasonable suspicion that such an offence has been committed, that there are reasonable grounds to believe that objects connected with an investigation into that suspected offence may be found on the relevant premises, and in the exercise of his or her discretion, the judicial officer considers it appropriate to issue a search warrant. These are considerable safeguards protecting the right to privacy of individuals. In my view, the scope of the limitation of the right to privacy is therefore narrow. It is now necessary to consider briefly the purpose and importance of section 29(5).*
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> *[53] It is a notorious fact that the rate of crime in South Africa is unacceptably high. There are frequent reports of violent crime and incessant disclosures of fraudulent activity. This has a seriously adverse effect not only on the security of citizens and the morale of the community but also on the country's economy. This ultimately affects the government's ability to address the pressing social welfare problems in South Africa. The need to fight crime is thus an important objective in our society, and the setting up of special Investigating Directorates should be seen in that light. The legislature has sought to prioritise the investigation of certain serious offences detrimentally affecting our communities and has set up a specialised structure, the Investigating Directorate, to deal with them. For purposes of conducting its*

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124 2000 (10) BCLR 1079 (CC).

investigatory functions, the Investigating Directorates have been granted the powers of search and seizure. The importance of these powers for the purposes of a preparatory investigation has been canvassed above."

[underlining added]

162. Although the interception of communications invades the privacy of the subject of interception, it is submitted, in light of the above, that the interception of communications is permissible, and it is essential in a constitutional state to protect other rights.

(b) ***The right to access court***

163. There is a three-fold attack on the alleged infringement of the subject's right of access to court:

163.1. First, the absence of notice prevents a review of the designated judge's decision. This, the applicants argue, impinges on the right of access to court.

163.2. Second, the subject of an interception is deprived the protection afforded by an adversarial process;

163.3. Third, the process of appointing the designated judge is not transparent and the term of office is not stipulated. This according to the applicants taints the independence of the designated judge. (This goes to the "Designated Judge issue").

(i) <u>The Notification Issue</u>

164. It bears mention that there is no constitutional right to notification. It also bears mention that the absence of notification does not infringe upon the right to privacy. The infringement rests in the interception of a communication. But this is not the basis of this application.

165. It deserves to be pointed out South Africa is not the only democracy in which the interception of communications is authorised *ex parte*. For example, the interception laws of Australia[125], Canada[126] and the United Kingdom[127] do not allow for pre-interception notification to the intended subject. The Canadian and New Zealand laws allow post interception notification strictly under the circumstances set out therein. However, the failure in the RICA to provide for notification to the subject of the interception does not render the RICA unconstitutional. Firstly, the RICA contains adequate safeguards against unwarranted invasion. Secondly, an issue such as notification of a crime investigation or prevention measure is informed by a State's own policy which is dictated by its peculiar circumstances. The policy adopted by one State may not necessarily be appropriate for other States who may be guided by different policy considerations.

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125 Para 114 *supra.*

126 Para 116 *supra.*

127 Para 128 *supra.*

166. Langa CJ in *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others* [128] discussed the risks of notification and found that:

> *"[98]...there is normally a risk that, if suspects and their associates receive notice of an impending search, it is not unlikely that they will remove or destroy the evidence sought. It may well be that the more serious the crime, the more likely it will be that suspects or their associates will remove or destroy incriminating evidence. In the absence of such inherent risk, a judicial officer may justifiably require notification of the party to be searched, for the Act does not preclude this. However, in the ordinary course, the provision of notice to affected parties has the potential to frustrate the purpose of the detection and investigation of serious, complex and organised crimes".*

167. The applicants accept that notice to the subject before the interception direction is issued, can undermine the effectiveness of an interception direction.[129]

168. We submit that it follows as a matter of logic that revealing the existence of an interception direction can have the same effect. At the risk of stating the obvious, the effectiveness and essence of interception is secrecy. The object of, and necessity for, maintaining secrecy is to ensure that the purpose of the interception measure is not defeated.

169. In the nature of serious crimes, the circumstances, and details as to when and by who specifically the criminal activities will be carried out are unknown to the law enforcement agencies. Law enforcement agencies invoke interception measures to obtain this type of knowledge; knowledge of the existence of an interception measure would thwart this.

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128 2009 (1) SA 1 (CC) at para 98.

129 p.37: FA, para 69, read with p. 48 para 92.

170. We find support for these submissions in the *dictum* of Langa CJ said the following in *Thint* [130]which recognised in the context of a search and seizure warrant, the imperative to preserve surprise, especially where serious crimes are being investigated:

> *"[125]... When one considers that s 29 is used only to investigate serious crimes, including fraud and corruption, which bear heavy penalties of imprisonment, there is a real possibility that a request under the s 28 summons procedure will not result in the furnishing of incriminating items. Moreover, to ask the State to establish that a summons in terms of s 28 would not result in the production of the incriminating items would effectively require the State to prove something that could hardly ever be proved: that a subpoena would not yield the evidence. The effect would probably be that in each case, the State might have to follow s 28 first and then, and only if that failed, seek a search warrant under s 29. Proceeding in such a manner would destroy any element of surprise and would often, as found by the Supreme Court of Appeal, 'altogether undermine an investigation'. The interpretation preferred by Hurt J would inevitably provide accused persons who are dishonest with an opportunity to cover their tracks. This does not reflect an appropriate balance between the constitutional imperative to prevent crime and the duty to respect, promote, protect and fulfil the rights in the Bill of Rights."*

171. The applicants contend that the absence of notification opens the RICA up to abuse. [131]We disagree; the object of safeguards in intrusive legislation is to guard against unwarranted invasions of the right.[132]In *Weber and Saravia v Germany* [133] the European Court of Human Rights recognized that even subsequent notification of surveillance measures can defeat the purpose of the surveillance. The following is worth noting:

> *"The Court reiterates that the question of subsequent notification of surveillance measures is inextricably linked to the effectiveness of remedies before the courts and hence to the existence of safeguards against the abuse of monitoring powers, since there*

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130 2009 (1) SA 1 (CC) at p 61, para 125.

131 p.40: FA, para 73.8, also see p.646, AA (DOJ), para 83.

132 *Hyundai* para 125.

133 [2006] ECHR 1173, para 135

is principle little scope for recourse to the courts by the individual concerned unless the latter is advised of the measures taken without his or her knowledge and thus unable to challenge their legality retrospectively.... However, the fact that persons concerned by secret surveillance measures are not subsequently notified once surveillance has ceased cannot by itself warrant the conclusion that the interference was not 'necessary in a democratic society', as it is the very absence of knowledge of surveillance which ensures the efficacy of the interference. Indeed, such notification might reveal the working methods and fields of operation of the Intelligence Service..."

172. We submit that the constitutional validity of legislation cannot, and should not be, decided purely on the basis of the unscrupulous conduct of one individual who abused it or can abuse it, and thereby breach the Constitution.

173. The applicants' argument that in order to curb the abuse of the RICA the subject of the interception must be notified, or an adversarial process has to be employed, is flawed.

174. We submit that notification is not the only method of curbing potential abuse. Adequate safeguards against unwarranted intrusion on the right also curb and discourage abuse and unwarranted intrusion.

175. The proponents for notification argue that the absence of notification to a subject creates a climate for abuse. However, as stated by Kriegler J in *Key v Attorney General Cape Provincial Division and Another* 1996 (4) SA 167 (CC) at paragraph 13:

> "*the possibility of improper action by a dishonest, negligent or over-zealous official can never be completely ruled out whatever the system*".

176. Notification, whether pre-surveillance or post surveillance, is inimical to the efficacy of the interception of a communication. The investigation of criminal

conduct is often an on-going process to which there is no definitive end-point. While the interception ceases on the lapsing of the direction, the investigation into the criminal activity can continue beyond that. The disclosure of the interception will alert the subject of the interception to an investigation implicating him, or someone else. This can compromise the investigation and other investigations that may flow from it.[134]

177. Since the interception of communications is usually part of an investigation to identify participants in criminal activities, post surveillance notification has the potential to jeopardise the long-term efficacy of the interception. [135] Post surveillance notification can potentially stymie further investigations.[136]

178. Keeping the existence of an investigation confidential can be critical to its success. The failure to prevent the discovery of the interception measures can result in the perpetrators of crimes fleeing prosecution, destroying evidence, intimidating, or killing witnesses or, in organised crime even accelerating a plot to carry out an attack. In some instances, the slightest indication of interest by law enforcement agencies can lead to loosely connected cells dissolving only to re-form at some other place and time. If there are tenuous connections between participants in criminal activity not only can these dissolve, but evidence can quickly and easily be destroyed, and cooperating witness can be placed at great risk.

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134 p.961: AA (SAPS) para 77.4.

135 *Cf. Zakharov v Russia* [2015] ECHR 1065, para 286

136 *Cf. Klass and Others v Germany* (1978) 2 EHRR 214, p23, para 58; 962: AA (SAPS) para 77.5.

179. There are important reasons for dispensing with post-surveillance notification. These are amongst others, to protect –

179.1. on-going investigations;

179.2. the possible publication of information of undercover officers or informants;

179.3. the investigation techniques used by law enforcement agencies; and

179.4. the operational techniques of the covert collection of information which are and must remain secret.

180. The jurisprudence emanating from the European Court of Human Rights[137] shows that safeguards against the abuse of interception and monitoring legislation not only curb abuse but justify the absence of notification to the subject of the surveillance. According to the ECHR where safeguards against abuse exist, the intrusive provisions can survive constitutional scrutiny.

(ii) <u>The designated Judge</u>

181. In the *Hunter v Southam Inc*[138] the Canadian court stated that:

> "[16]...*a warrantless search is presumptively unreasonable. The presumed constitutional standard for searches and seizures in the criminal sphere is judicial*

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137 *Cf. Klass and Another v Germany pp. 22-23* and p.24 para 62 in the discussion of the decisions in *Weber* at para 95 and *Association for European Integration and Human Right v Ekimzhiev* App No 6254/00 (28 June 2007)

138 [1984] 2 S.C.R. 145 at para 16.

pre-authorisation by a neutral and impartial arbiter, acting judicially, that the search is supported by reasonable grounds, established on oath."

182. We submit that the most important safeguard built into the RICA is the requirement to obtain judicial authority to intercept communications.[139]

183. This is consonant with the rule of law that requires that the interference by executive authorities with an individual's rights should be subject to control by the judiciary.[140]

(iii) Independence of the designated judge

184. Under South Africa's interception regime, an interception must have judicial *imprimatur*. In this regard it is superior to the United Kingdom's dispensation under which an interception is authorised by a member of the Executive. [141] According to the applicants, the RICA, including section 1 thereof, in so far as it deals with the appointment of a designated judge, is unconstitutional in that it fails to prescribe an appointment mechanism and term for the designated judge which would ensure independence.[142]

185. The applicants also contend that the independence of the designated judge is constitutionally deficient in that the tenure of the designated judge is not stipulated

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139 *Cf. Tthe Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* para 35.

140 *Cf. Klaas and Others v Germany*, p20-21, para 55.

141 Namely, the Secretary of State.

142 p.50, para 99 – FA.

in the RICA. According to the applicants the term for which a designated judge is appointed (approximately one year) is short and the possibility of the renewal of the appointment undermines the independence of the office of the designated judge.[143]

186. The respondents have a fundamental difficulty with the applicants' contention that the independence of the designated judge is questionable because he/she is appointed by a member of the Executive.[144]

187. This argument is with respect without merit, especially, in South Africa where judges are appointed in terms of an open and transparent process before a body established in terms of the Constitution. It will be startling if what the applicants are contending is that a person who was found to be fit and proper to hold judicial office and who held a judicial office, on retirement or on discharge from active service, loses independence and ceases to be fit and proper.

188. It is submitted that because the designated judge performs a judicial function, it is not necessary to follow a further selection process to ensure that he or she is a fit and proper person to act as the designated judge. The fact that the designated judge is required to perform a "service" in terms of the Judges' Remuneration and Conditions of Employment Act, 2001, can hardly constitute the selective appointment of a judge.

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143 p.51, paras 101 to 103 – FA.

144 p.52, paras 105 – FA.

189. The applicants are quick to mention that they do not attack the reputation and the credibility of the present designated Judge and the challenge is systemic aimed at ensuring that – for all time – the appointment process under the Act will foster and maintain the independence of the appointed persons.[145]

190. In their replying affidavit the applicants argue that it is not enough that an independent process was followed previously when the designated judge was appointed as a judge. In support of this they argue that if a judge seeks elevation to the Supreme Court of Appeal, or the Constitutional Court, he/she is subjected to a fresh process before the Judicial Service Commission ("*the JSC*).[146]

191. We submit that the example is not apt. There are different considerations at play, such as experience and specialist knowledge, when a judge is to be elevated to a higher court or a specialist court. We submit that the JSC process is not a reassessment or review of whether a judge still holds true the qualities based on which he/she was had been appointed a judge.

192. We therefore submit that there is no basis to find that a selection of a designated Judge by the executive for a specific period compromises the independence of the system and is therefore unconstitutional.

193. As regards the limited term of appointment, (i.e. one year), the JSCI lamented the period as being insufficient for the designated Judge to establish a smooth

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145 p.1012: RA: para 74.

146 p.1013: RA para 78.

operational process and reporting.[147] The applicants are ambivalent in their position on the term of appointment. On the one hand they complain that the term is too short; on the other hand, they complain that the term of appointment may be renewed.

(iv) Lack of an adversarial process in the adjudication of an application for an interception direction

194. Section 16(7) of the RICA provides that the application must be made without notice and that the designated judge must decide the application without a hearing. It must be borne in mind that this is not confined to South Africa. This is the case for example in Australia, Canada, and the United Kingdom. It prevails in other democratic countries as well.

195. Section 16(7) is consistent with the object of an interception measure, and the overall object of the RICA. The applicants accept that the effectiveness of the interception rests in the confidentiality thereof.

196. As argued earlier, notification at whatever stage, defeats this.

197. The single most important safeguard in the RICA is that the issuing authority is a judge.[148] The very purpose of requiring judicial oversight is to protect a person's right to privacy.[149] In *Investigating Directorate: Serious Economic Offences and*

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147 p.51, para 101 to 103 – FA.

148 *Cf. Zakharov* para 233

149 *HO t/a Betxchange and Another v Minister of Police 2015(2)* SACR 147 (GJ) para 28.

Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others [150] the Constitutional Court found that:

> *"[35] ..Subsections (4) and (5) of s 29 are concerned with authorisation by a judicial officer before a search and seizure of property takes place. The section is an important mechanism designed to protect those whose privacy might be in danger of being assailed through searches and seizures of property by officials of the State. The provisions mean that an investigating director may not search and seize property, in the context of a preparatory investigation, without prior judicial authorisation.*
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> *[36] Section 29(5) prescribes what information must be considered by the judicial officer before a warrant for search and seizure may be issued. It must appear to the judicial officer, from information on oath or affirmation, that there are reasonable grounds for believing that anything connected with the preparatory investigation is, or is suspected to be, on such premises. That information must relate to (a) the nature of the preparatory investigation; (b) the suspicion that gave rise to the preparatory investigation; and (c) the need for a warrant in regard to the preparatory investigation. On the face of it, the judicial officer is required, among other things, to be satisfied that there are grounds for a preparatory investigation; in other words, that the investigating director is not acting arbitrarily. Further, the judicial officer must evaluate the suspicion that gave rise to the preparatory investigation as well as the need for a search for purposes of a preparatory investigation.*
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> *[37] It is implicit in the section that the judicial officer will apply his or her mind to the question whether the suspicion which led to the preparatory investigation, and the need for the search and seizure to be sanctioned, are sufficient to justify the invasion of privacy that is to take place. On the basis of that information, the judicial officer has to make an independent evaluation and determine whether or not there are reasonable grounds to suspect that an object that might have a bearing on a preparatory investigation is on the targeted premises.*
>
> *[38] It is also implicit in the legislation that the judicial officer should have regard to the provisions of the Constitution in making the decision. The Act quite clearly exhibits a concern for the constitutional rights of persons subjected to the search and seizure provisions. That is the apparent reason for the requirement in s 29(4) and (5) that a search and seizure may only be carried out if sanctioned by a warrant issued by a judicial officer."*

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150 2000 (10) BCLR 1079 (CC).

198. The ECHR has found that judicial control offers the best guarantee of independence, impartiality, and proper procedure.[151] Prior judicial control of special investigative measures is the normal practice in European States. In Szabo and *Vissy v Hungary*[152] the ECHR I found that prior judicial control is a check on security agencies, because "*the security agency has to go 'outside of itself' and convince an independent person of the need for a particular measure. It subordinates security concerns to the law, and as such it serves to institutionalize respect for the law. If it works properly, judicial authorization would have a preventative effect, deterring unmeritorious applications and/or cutting down the duration of a special investigative measure.*" [153]

199. Judicial officers are independent minded, they have the skills which allows them to weigh up information, form an opinion based on the facts and the giving of a decision on the basis of a consideration of all relevant information.[154]

200. We submit that just because the designated judge is selected by a member of the Executive does not mean that he would be executive-minded. It is submitted that his/her independence is preserved in that the will be remunerated in terms of the Judges' Remuneration and Conditions of Service Act, Act No.47 of 2001

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151 *Klass* para 55-56.

152 [2016] ECHR 579

153 *Szabo* para 204.

154 *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) para 34.

regardless of his inclinations and even after he has vacated the office of designated judge.

201. The designated judge is not obliged to issue an interception direction. To the contrary he has to be satisfied that an objective threshold has been met. The rule of law requires that the designated judge exercise a discretion in granting the direction.[155] Langa DP (as he then was) remarked that:

> *"It could be accepted that a judicial officer, because of his or her training, qualifications, experience and the nature of judicial office, would not act without applying his or her mind to the issue at hand. A judicial mind would thus be brought to bear on the reasonableness of the belief that an offence had been committed."*[156]

202. Contrasting the position with an Anton Pillar application, where the remedy is interim, the applicants argue that, the other side of the case is never presented to the designated judge and the subject of an interception direction may not even be aware, and indeed may never find out, that his communications were intercepted.[157] We submit that an analogy between an application for an Anton Pillar order and an application for an interception direction is misplaced. There are significant differences. For one, the latter is a physical search which is a single event. After the order has been executed there no longer exists a need for secrecy. The information that was sought has been obtained. Interception on the other hand is an on-going process and its effectiveness is dependent on secrecy.

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155 *Cf. R v Thompson* [1990] 2 SCR 1111, 1990 CanLII 43 (SCC).

156 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2000 (10) BCLR 1079 (CC).

157 pp.48 to 49, para 93 – FA.

203. The applicants advocate for a public advocate. According to the applicants the public advocate would serve as a substitute for the subject of the interception. His function will be to test "*the evidence and propositions put forward by the law enforcement agencies*". [158]

204. We submit that the designated judge undertakes this exercise in any event when he considers an application for an interception direction. The Court *in Malik v Manchester Crown Court* [2008] EWHC 1362 (Admin) the High Court of Justice Queen's Bench Division Administrative Court was confronted with an argument that a court deciding an *ex parte* application for a production order in terms of the Terrorism Act, 2000, should have asked the Attorney-General for the appointment of a special advocate[159]. Lord Justice Dyson's response was:

> "*101.... Even in a procedure which is entirely ex parte, the court may consider that the absent party is afforded a sufficient measure of procedural protection by the obligation on the party who is present to lay before the court any material that undermines or qualifies his case or which would assist the absent party. Further, the court itself can be expected to perform the role of testing and probing the case which is presented....We would wish to place particular emphasis on the duty of the court to test and probe the material that is late before it in the absence of the person who is affected. Judges who conduct criminal trials routinely perform this role when they hold public interest immunity hearings.*
>
> *102. A further relevant question is the extent to which the special advocate is likely to be able to further the absent party's case before the court.*"
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> [underlining added]

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158 p.50: FA, para 94.

159 The special immigration appeals commission act, 1977 (United Kingdom) created the special immigration appeals commission to hear immigration appeals in matters with a national security element. A special advocate would represent the interests of the appellant in any closed proceedings and test the secretary of state's objections to disclosure of material to the appellant. That model has been adopted in other legislative contexts but not for production orders under the Terrorism Act, 2000.

205. We submit that the aforesaid *dictum* is a complete answer to the appointment of a "public advocate".

206. In any event, we submit that the applicants' proposal that a "public advocate" is appointed to safeguard the rights of the subject, is ill-conceived. Such a process is potentially open to abuse.[160] The same arguments and criticisms raised by the applicants regarding the appointment, and independence, of the designate judge can be raised against the public advocate.

207. In this regard we submit:

(a) Firstly, that the process of obtaining an interception order is akin to that of obtaining a warrant for instance in terms of section 29 of the National Prosecuting Authority Act. It is not a court process where evidence should be tested.[161]

(b) Secondly, given the secretive nature of the interception procedure in terms of the RICA an adversarial process, no matter how well controlled could, and would, widen the circle of persons with knowledge of the interception direction. This is averse to the object of the RICA and the policy it promotes.

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160 p.1015: RA, para 83.

161 *Cf. Hyundai.*

208. Instead of serving as a safeguard it can become a threat to the balancing of other rights that may be infringed upon by crime and an interception subject's rights of privacy and introduces an element of arbitrariness.

209. The applicants' grievance that the process of applying for and obtaining an interception direction does not sufficiently protect the procedural and substantive rights of the subject because he cannot appear before the designated judge to resist the application nor to challenge the direction at a later stage, fails to take into account that:

209.1. The process culminating in an interception direction is neither arbitrary nor is it irrational;

209.2. the application is considered by an impartial and independent person. The applicants are unable to produce facts to support an attack on the integrity of the designated judge;

209.3. the designated judge must have before him/her an application that at the very least complies with the requirements detailed in section 16 (and in the case of other types of directions and the warrant of entry in those provisions of the RICA governing them);

209.4. the designated judge has the right to call for any information which he/she considers necessary;

209.5. furthermore, regardless of whether the application complies with the requisites for an application for a direction, the designated judge has a discretion whether to issue the direction or not. In this context sight must not be lost of the fact that the judiciary is the protector of the Constitution. Every judge is bound to act within the confines of the Constitution, protect the rights in the Bill of Rights and be independent.

210. The law enforcement agencies are accountable to the designated judge, who may demand reports in terms of section 24. In terms of section 25 the designated judge may cancel the interception direction if the law enforcement agency fails to report when required to do so. The direction can also be cancelled if the designated judge is satisfied that (i) the objectives of the interception direction have been achieved; or (ii) the ground on which the interception direction had been issued, has ceased to exist.

211. It is submitted that judicial oversight is the single most important and effective measure to safeguard the rights of the subject of an interception application, and direction.

212. The ultimate protection lies in the right which the subject of am interception has in proceedings where the intercepted material is intended to be used to challenge the validity of the interception direction and the admissibility of the intercepted information as evidence. The subject at this stage has all the safeguards that the right to a fair trial guarantees.

(v) Dealing with the intercepted material issue: the examining, copying, sharing, sorting through, using, destroying, and/or storing data emanating from an interception

213. According to the applicants, the RICA, including section 37, is unconstitutional to the extent that it fails to prescribe a proper procedure to be followed when state officials are examining, copying, sharing, sorting through, using, destroying, and/or storing the data from interceptions. The substance of the complaint is that the RICA lacks the safeguards which the ECHR has identified. It is submitted that if the existing measures in the RICA minimize the abuse and the intrusion on fundamental rights, it is irrelevant whether the RICA contains all the safeguards identified by the ECHR or some of them.[162]

214. We submit the RICA contains adequate safeguards against the intercepted material being abused. Some of these are:

214.1. Only a law enforcement officer, or person who is authorised in writing by the applicant for the interception direction is permitted to execute the direction or assist with the execution thereof. This limits the category of persons who can execute a direction.

214.2. An electronic communications service provider must on receipt of a direction, route indirect communications (in some instances this will also apply to real-time communication-related information on an ongoing

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162 pp.42 to 41, para 77, and pp.43 to 44, paras 80, 81 and 82 – FA.

basis as it becomes available as well as archived communication-related information) to the designated interception centre established in terms of section 32 of the RICA. The routing of information to the interception centre curbs the likelihood of unauthorised persons accessing the intercepted information;

214.3. Government Notice 1325 dated 28 November 2005 (*the Government Notice*), issued in terms of section 30(7)(a) read with 30(2) of the RICA prescribes security requirements for interception. Schedule A is the Directive for Fixed Line Operators and Schedule B for Mobile Cellular Operators;

214.4. Parts 2 and 3 of Schedule A are dedicated to the routing, provision and storing of indirect communications that were intercepted and real-time communication-related information. Part 4 thereof deals with the routing, provision and storing of archived communication-related information. Part 6 deals with the detailed security, functional and technical requirements of the facilities and devices for lawful interceptions. The same provisions appear in Schedule B.

215. In brief, the intercepted information is routed to the interception centre. There it is stored on its servers. The intercepted information is either collected from there

by an authorised person of the relevant law enforcement agency, or it is routed to the relevant law enforcement agency.[163]

216. The interception centre does not have access to the intercepted information. There is a secure process at the interception centre which allows only an authorised person who is entitled to the intercepted information to access and copy it. Information which is routed to the law enforcement agencies is encrypted to guard against unauthorised access.

217. In terms of section 42 of the RICA, there are restraints on the disclosure of the intercepted information. Intercepted communications may be disclosed under a closed list of circumstances, and to a closed list of persons. This is a further measure to protect the distribution of intercepted communications.

218. Because only communications which relate to conduct specified in section 16(5) or 17(4) of the RICA may be intercepted, the interception is part of the investigation process of the relevant law enforcement agency. The period for which the information must be retained is largely dependent on, and dictated by, the progress in an investigation.

(c) ***Retention of information issue***

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163 pp.658 to 659, paras 113 and 114 – AA (DOJ).

219. The applicants contend that section 30(2)(*a*)(ii) of the RICA, which concerns the mandatory data retention by telecommunications service providers, is unconstitutional because:[164]

219.1. the storage of personal communications is a limitation on the right to privacy, and that the period for which these communications must be stored, aggravates the infringement of privacy;

219.2. there are no oversight mechanisms in section 30(2)(*a*)(ii) which allow electronic communications service providers to control access to information which is in their possession and to ensure its protection.

220. Section 30(2)(*a*)(ii) of the RICA, requires the Cabinet member responsible for telecommunications and postal services to issue a directive, amongst others, prescribing the information that must be collected and stored, and the period for which it must be retained.

221. The Government Notice prescribes the retention of communication-related information by electronic communications service providers. The RICA provides for a retention period between three and five years. The Cabinet member responsible for telecommunications and postal services has prescribed three years for the retention of communication-related information.

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164 pp.46, paras 86 and 88 – FA.

222. The Minister of Justice's view is that the object of retaining data is to prevent, investigate, detect, and prosecute serious crimes, organized crime and terrorism, the length of time for which the information may be necessary it is not possible to foresee the duration of an investigation. It depends on several factors, amongst others:[165]

222.1. the time period necessary to complete investigations. This is dependent on the human resources in the law enforcement agencies.

222.2. the nature and extent of crime to be investigated to which the RICA applies.

222.3. the available human resources in the law enforcement agencies to investigate the crime.

222.4. in the case of specialised crime, expertise which is available in the law enforcement agencies to investigate the crime in question.

223. It is submitted that the duration of the retention of information is determined by a range of factors. The peculiar circumstances of the case would determine the duration for which the data should be stored.

224. In Australia for instance the information must be kept for two years.[166]

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165 p.661 to 662, para 122 - AA (DOJ).

166 See para 40 supra.

225. Against this background and considering the fact that the rate of crime in South Africa is particularly high and wide-spread and challenges which law enforcement agencies face numerous challenges, such as a lack of human resources, it is submitted that a reduction in the time for which data must be stored will reduce the efficacy of the RICA.[167]

226. The Minister of Justice submits that:[168]

226.1. the discretion to determine the duration for which the information must be retained, was set by Parliament after considering the peculiar circumstances that apply to South Africa and a discretion was given to the Cabinet member responsible for telecommunications and postal services to determine an appropriate period for retention of call-related information;

226.2. therefore, theissues around the retention of call-related information and the duration of the retention are matters of policy. They should be left to the Executive to deal with.

(d) ***Absence of oversight mechanisms by an electronic communications service provider to control access to call-related information***

227. In many countries access to communication-related information (information that relates to an indirect communication that, amongst others, indicates the time,

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167 p.662, para 125.5.

168 *Ibid.* at para 125.5.

equipment involved, service provider involved and the origins and destination of a call), by law enforcement agencies does not have to be sanctioned by a judicial officer. Various functionaries have the power to authorize access to the information. [169]

228. The position in South Africa on the other hand is controlled and stringent. Real-time and archived communication-related information can only be provided to law enforcement agencies in terms of a direction approved by a judicial officer. Where section 205 of the Criminal Procedure Act, 1977, is invoked to obtain the information, it must also be approved by a judicial officer. Although real-time communication-related information may be obtained in terms of this procedure, it cannot be obtained on an ongoing basis.[170]

229. In terms of section 19 of the RICA, a direction authorizing access to archived communication-related information can only be provided by the judicial officer, in limited circumstances, namely if there are reasonable grounds to believe that:[171]

229.1. a serious offence has been or is being or will be committed;

229.2. the gathering of information concerning an actual threat to the public health or safety, national security or compelling national economic interests of the Republic is necessary;

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169 p.663: AA (DOJ), para 124.

170 p.945, 43.2 - AA (SAPS).

171 pp.663 to 664, para 125 – AA (DOJ).

229.3. the gathering of information concerning a potential threat to the public health or safety of national security of the Republic is necessary;

229.4. the making of a request for the provision, or the provision to the competent authorities of a country or territory outside the Republic, of any assistance in connection with, or in the form of, the interception of communications relating to organized crime or any offence relating to terrorism or the gathering of information relating to organized crime or terrorism, is in-

(i) accordance with an international mutual assistance agreement; or

(ii) the interests of the Republic's international relations or obligations; or

229.5. the gathering of information concerning property which is or could probably be an instrument of a serious offence or is or could probably be the proceeds of unlawful activities is necessary; and that the provision of real-time communication-related information is necessary for purposes of investigating such offence or gathering such information.

230. The Government Notice restricts the ambit of the communication-related information (real-time and archived communication-related information) that is required to be stored by an electronic communications service provider. Parts 3 and 4 of Schedules A and B, respectively, mainly require the recording and storing of information which can be used to identify a person to a specific communication.

231. Section 50 read with section 51 of the RICA, criminalizes the provision of real-time and archived communication-related information in contravention of section 13, 14 and 15 of the RICA.

232. Paragraphs 11, 15 and 19 of Schedules A and B of the Government Notice, further impose obligations on electronic communications service providers to restrict access to communication-related information. The contravention of any of the provisions in Schedule A and B is criminalized in terms of section 51(3A) of the RICA.

233. It is submitted that section 30(2) of the RICA must be read with section 30(3)(*b*) thereof which provides that the Cabinet member responsible for telecommunications and postal services may in a directive issued in terms of section 30(2), prescribe any other matter which that Cabinet member in consultation with the Independent Communications Authority of South Africa, deems necessary or expedient. If there is a need for additional oversight measures by electronic communications service providers, the Government Notice can be amended to remedy this.

234. We therefore submit that the RICA provides sufficient safeguards and imposes sufficient obligations on electronic communications service providers to ensure that the communication-related information is secure and not used for purposes other than those intended in the RICA.

235. Although section 30(2)(*a*)(iii) allows for the information to be stored for a period of five years, the Cabinet Member responsible for Communication has elected to impose a shorter period and determined that call-related information must be kept for three years.

236. Various countries determine various periods for the preservation of communication-related information. These range in general from 6 months to two years.

237. The retention period for communication-related information is discussed in detail in a document attached as annexure "A" to the first respondent's answering affidavit entitled "Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014. The document relates to the review of surveillance legislation of Australia.[172]

238. In this document, although a two-year retention period was advocated, Justice contends that the reasons articulated there also support a three-year retention period.

239. In this regard the following is highlighted in the answering affidavit:[173]

    239.1. unlike most jurisdictions, investigations in the Republic of South Africa take longer to be completed. A retention requirement of three years is

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172 p.666, para 133, also see annexure "A" at p.695 to 743 - AA (DOJ).

173 pp.667 to 668, paras 133.3 to 133.6 - AA (DOJ).

necessary. This was a policy decision made by Parliament when the RICA was enacted.

239.2. although the international trend seems to indicate that a two-year retention period may be adequate, and that communication-related information of less than 6 months is required by law enforcement agencies in most investigations, complex investigations may require access to the information beyond the two-year period;

239.3. this trend cannot be applied to South Africa without considering its peculiar challenges to combatting and investigating crime, such as for instance, the high incidence thereof;

239.4. considering that a real-time or archived communication-related direction can only be requested in respect of serious offences as defined in the RICA, the investigation of most of these offences warrant call-related data being available for more than two years;

239.5. although the law enforcement agencies in South Africa ordinarily request communication-related information spanning less than 19 months, these requests generally relate to the investigation of crimes that are for instance easily detectable and unrelated to any other crime/s;

239.6. with organized crime investigations, it tends to take longer for a clear pattern of the relationships between events and individuals to emerge.

These types of investigations are not confined to a few individuals. They extend into criminal networks. It can take time to discover this;

239.7. In complex investigations, law enforcement agencies in most instances are required to piece together evidence from a wide range of sources, not all of which may be immediately evident;

239.8. in many instances, serious crimes are discovered or reported to the South African Police Service, long after the commission thereof;

239.9. transnational investigations involve significant challenges for agencies attempting to co-ordinate investigations across multiple jurisdictions. There are often delays in the investigations, especially when preliminary information is required from foreign agencies.

240. Considering the above, we submit that the attack on section 30(2)(*a*)(ii) has no substance because there is no limitation of any of the fundamental rights contended for, alternatively the limitation/s is/are reasonable and justifiable in terms of section 36 of the Constitution.

(e) ***Communications between journalists with sources or clients with legal representatives***

241. In paragraph 73.3[174] of the founding affidavit the applicants contend that section 16(7) is unconstitutional because, amongst others, it violates the right of freedom of expression and freedom of the media.

242. The applicants appear to lose sight of the fact that the press by virtue of its position is a bearer not only of rights, but also of constitutional obligations, in relation to the right to freedom of expression. The Constitutional Court has found that while the freedom of expression is fundamental to our democratic society, it is not of paramount value. It must be construed in the context of other values enshrined in our Constitution.

243. In *Holomisa v Argus Newspapers Ltd*_1996 (2) SA 588 (W), the Court stated as follows:

> *"It does not follow, however from the special constitutional recognition of the importance of media freedom, or from the extraordinary responsibilities the media consequently carry, that journalists enjoy special constitutional immunity beyond that accorded ordinary citizens. In Neethling, Hoexter JA rejected the notion of a general 'newspaper privilege' as being alien to our law at (77H-J). That approach seems to be supported by constitutional principle. As Anthony Lewis states in his perceptive account of the development of constitutional protection for free speech in the United States, Make No Law – the Sullivan Case and the First Amendment (1991), ...: 'Press exceptionalism– the idea that journalism has a different and superior status in the Constitution – is not an unconvincing but a dangerous doctrine.' (at 210). Ronald Dworkin A Matter of Principle (1985) at 386-7) puts the matter thus:*
>
> *'But if free speech is justified on principle, then it would be outrageous to suppose that journalists should have special protection not available to others, because that would claim that they are individuals, more important or worthier of more concern than others.' "*

(f) Confidential Sources of Information Issue

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174 At p.39.

244. There exists no constitutional right protecting a journalist from revealing his sources. The courts have however accepted as a general proposition that journalists' sources are fundamental to the freedom of the press.[175] However, neither in South Africa nor, in comparative democracies around the world do journalists enjoy blanket journalistic privilege.[176] In foreign democratic jurisdictions[177] journalists, subject to certain limitations, are not expected to reveal the identity of their sources.[178] For example in Goodwin v United Kingdom[179] the European Court of Human Rights stated the following:

> *"Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art 10) of the Convention unless it is justified by an overriding requirement in the public interest.'"*

245. In *Stichting Ostade Blade v The Netherlands* [180] the ECHR found that the prevention of crime was a legitimate aim which justified the interference with the right to receive and impart information as set out in article 10§ 1of the Convention.[181]

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175 *South African Broadcasting Corporation v Avusa Ltd and Another* 2010 (1) SA 280 (GSJ) at para 30.

176 *Bosasa Operations (Pty) Ltd v Basson and Another* 2013 (2) SA 570 (GSJ) at para.46.

177 *Branzburg v Hayes*12 408 v 665 (1972).

178 *Bosasa Operations* at para. 38.

179 (1996) 22 EHHR 123 at para 39.

180 Application No. 8406/06 heard on 27 May 2014.

181 At para 66 and 68.

246. There is no dispute, that our Courts have endorsed the proposition that journalists are afforded the special protection from disclosing their sources as this is fundamental to the freedom of speech.[182]

247. The applicants cite a list of incidents in which the communications of journalists were allegedly intercepted. Save for the incident that involved Hofstatter and wa Afrika which occurred in 2010 and the one involving Saba, where a section 205 subpoena was apparently issued in 2016, the remaining incidents are hearsay.[183]

248. The applicants argue that "*the surveillance of journalists undermines their ability to protect the anonymity of their sources*." [184] However, no journalist can give a source a total assurance of confidentiality. Inherent in such arrangements is the risk that the source's identity will be revealed. [185]

249. It must be emphasised that the interception of communications, is only permissible in the investigation of only some serious crimes.[186]

250. If a journalist is a party to an intercepted communication which relates to a serious crime, it is against public policy to protect the journalist's source and expose South Africa to a serious crime. The rights of persons who may be affected by serious crime, and the obligation of the State to protect persons from crime, are

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182 p.1018, para 95 – RA.

183 pp.1019 to 1020, para 96 – RA.

184 *Ibid.* at para 95

185 *Cf. R v National Post*, [2010] 1 SCR 477, 2010 SCC 16 (CanLII) at 69.

186 As defined in section 1.

compelling reasons for a journalist's duty to protect sources to yield to the interests of society as a whole.

251. Peter Hogg in The Constitutional Law of Canada vol 2 at 45-12 to 45-13, s 45.5(b)points out:

> *"In any conversation, no matter how confidential its subject matter, each participant runs the risk that his interlocutor will betray the confidence by repeating the conversation to someone else. If a participant is charged with a crime and the conversation is relevant to the charge, then his interlocutor is free to talk to the police and to testify in court about the conversation. Indeed, the interlocutor can be compelled to testify about the conversation in court. Since the disclosure of a private conversation is admissible in a court of law, then surely the recording of a conversation by a participant ought to be admissible too. The recording simply improves the participant's power of recollection making the evidence more reliable. For this reason, the Supreme Court of the United States of America has held that participant surveillance is not a search and seizure within the Fourth Amendment. When the accused discloses the confidence to someone else, he assumes the risk that his interlocutor will reveal the confidence to the police and therefore there is no breach of a reasonable expectation of privacy when the interlocutor does reveal that confidence to the police, even when electronic aid is employed. By rejecting this distinction, the Supreme Court of Canada has produced an ironic result. The police informers in Duarte and Wiggins are free to testify in Court about their conversations with the accuseds (sic), where their memory and credibility will no doubt be challenged by the accused; but the electronic records of the conversations, which would set all doubts at rest, are inadmissible!"* [187]

252. We submit that a journalist's position is safeguarded by the very institution that the applicants reject, namely the designated judge.

253. Section 16(6)(*c*) of the RICA, makes provision for the designated judge, to specify conditions or impose restrictions relating to the interception of communications. In this way, the designated judge is able to regulate the information which is intercepted. The designated judge when confronted with an application that

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187 As quoted in *S v Kidson*_1999 (1) SACR 338 (W) at p.345 D-H

affects a journalist, has the discretion to take this into account when he/she exercises his/her discretion whether to issue the direction or not

(g) ***Legal Privilege***

254. Legal privilege is recognised at law as deserving of protection. However, the right to legal privilege is not absolute. [188] Neither in South Africa, nor for instance Canada[189]. It may, depending upon the facts peculiar to a case, be outweighed by countervailing considerations.

255. There are two significant aspects concerning the attorney-client privilege in the context of interceptions in terms of the RICA:

255.1. the <u>first</u>, is the legal principle that legal professional privilege does not extend to advice which is aimed at facilitating a crime.[190]This qualification extends to foreign jurisdictions too.[191]

255.2. the <u>second</u>, which flows from the first, is that considering that interception measures in terms of the RICA are only invoked in the investigation only of (serious) crimes, assuming that the communications of an attorney come to be intercepted, if the communication concerns the commission of a serious crime, there is a strong likelihood that the communication would

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188 *South African Airways SOC v BDFM Publishers (Pty) Ltd and Others* 2016 (2) SA 561 (GJ)

189 *Cf.* C. Rizzuto c. R., 2018 QCCS 582, a decision of the Superior Court, Criminal and Penal Division, Canada, Province of Quebec, District of Montreal at para 60.

190 *Harksen v Attorney-General of the Province of the Cape of Good Hope and Others* 1998(2) SACR 681 (C)

191 *C. Rizzuto c. R.*, para 60.

centre around the commission of a serious crime. It is trite that privilege does not exist where communications between the lawyer and his client are criminal or made with the view to obtaining legal advice to facilitate the commission of a crime.

256. In those circumstances then, there would be grounds for exceptions to the professional legal privilege.

257. As Kriegler J stated in *Key*, "*the ordinary law-abiding members of the public expect the criminal courts to do their work properly — to acquit where there is reasonable doubt and to convict where there is not. If in the process of the commission of a string of offences the state alleges that the suspects before court have made extensive use of cellular communication in furtherance of their illegal enterprise (and of course I make no finding in that regard at this stage), then the interests of justice, in my considered view, demand that it should be afforded the reasonable opportunity to present that evidence. After all, nobody has obliged anyone to make use of cellular communication in a case such as this. If any of the accused elected to do so, they willingly ran the risk that those communications may later be detected by the authorities*."

258. The RICA does not specifically provide a special or different dispensation for the interception of indirect communications which might have a bearing on legal privilege. We submit that any judicial officer would take matters implicating legal professional privilege into account when adjudicating any matter.

259. Furthermore, in addition to this, section 16(6)(*c*), specifically allows the designated judge to specify conditions or restrictions concerning the interception

of communications authorised in terms of a direction. The designated judge in his discretion may impose protective measures in the form of conditions, to minimise the intrusion.

(i) Mechanisms to check abuse

(i) Internal statutory safeguards

260. A survey of decisions emanating from the ECHR shows that, the jurisprudence on the interception of communications has given rise to the formulation of the various types of safeguards against abuse that interception legislation should contain. The following are some of the safeguards:

260.1. Illegal interception must be criminalised. [192]

260.2. The legislation must be clear and precise for individuals to know and foresee its application.[193]

260.3. The category of persons liable to have their communications intercepted, must be defined. [194]

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192 *Cf Szabo* p. 20 para 84

193 *Liberty and Others v The United Kingdom* (2009) 48 EHRR 1 at p. 23.

194 *Liberty* at p. 25

260.4. The nature of the offences[195] which may give rise to interception measures must be set out, as well as the grounds for ordering them. [196]

260.5. May only be resorted to in the case of serious offences.[197]

260.6. The authorities who are competent to authorise and carry out the interception, must be specified. [198]

260.7. The duration of the interception measure must be specified[199], and a fresh application must be made for a renewal thereof and if statutory conditions were satisfied[200].

260.8. Imposing conditions under which the interception measure may be renewed.[201]

260.9. Interception may only occur under exceptional circumstances and only under the supervision of an independent authority.[202]

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195 *Zakharov* para 243

196 *Liberty* at p. 25.

197 *Weber*, para 115

198 *Zakharov* para 259.

199 *Liberty* p. 25, *Zakharov* para 230

200 *Weber* para 116.

201 *Zakharov* para 250

202 *Cf Szabo* para 81

260.10. Interception may not be employed where less invasive techniques are available and have not been exhausted.

260.11. The discretion of the issuing authority must not be unfettered, the scope of the discretion and the manner of its exercise must be sufficiently clear so as to give adequate protection against arbitrary interference.[203] (These give protection against arbitrariness) [204]

260.12. The Executive should not have the authority to grant the interception direction and the interception must occur under the supervision of an independent judicial authority. [205]

260.13. There should be oversight measures such as a reporting responsibility on the authorising authority.[206]

260.14. Information on the number of requests applied for, and rejected, should be published.

260.15. There should be independent oversight mechanisms capable of ensuring transparency and accountability of State surveillance of communications.

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203 *Liberty* p. 24 para 62, *Zakharov* para 247.

204 *Ibid*

205 *Cf. Zakharov*

206 *Cf. Weber para 117.*

260.16. The circumstances in which and conditions and the condition under which interception can be resorted.

260.17. The use of the urgency procedure should be limited to national, military, economic or ecological security.[207]

260.18. Where a person who suspects that his communications have been intercepted, a remedy to complain to an authority, the absence post interception notification is not incompatible with the European Convention on Human Rights.[208]

261. We submit that the provisions of the RICA conform with all the above principles.

(ii) Other oversight measures

262. Not only does the RICA provide for judicial oversight to guard against abuse, it also caters for a parliamentary process in which opposition parties are represented. This is a strong check against abuse.

263. In *Szabo* [209] the ECHR found that internal and governmental controls form a part of an overall accountability. It found that offices such as Inspectors-General provide for impartial verification and assurance for the government that secret

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207 *Cf. Zakharov*, para 266

208 Cf. *Zakharov* p. 74 para 288

209 p. 16 para 137

agencies are acting according to its policies, effectively and with propriety. Insofar as parliamentary involvement was concerned, the Court cited two reasons why Parliament should be involved in the oversight of security agencies:

> *"Firstly, the ultimate authority and legitimacy of security agencies is derived from legislative approval of the powers, operations and expenditure. Secondly, the is a risk that the agencies may serve the narrow political or sectional interests, rather than the State as a whole and protecting the constitutional order, if democratic scrutiny does not extend to them. A stable, politically bi-partisan approach to security may be ensured therefore by proper control, to the benefit of the state and the agencies themselves."* [210]

264. The designated judge is obliged to present a report to the JSCI regarding the discharge of his functions. The report may, however, not disclose any information contained in any application or directive. The rationale for this is to protect the privacy of the subject and also prevent the investigations, and the techniques employed, being exposed, and compromised.[211]

265. The JSCI is a committee of Parliament that oversees the activities of the State Security Agency, the Intelligence Division of the South African National Defence Force, and the Intelligence Division of the South African Police Service.[212] The breadth of their oversight is evident from the provisions of sections 3 and 4 of the Intelligence Services Control Act, Act No 40 of 1994. The JSCI has the obligation

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210 *Szabo* para 150.

211 p.675, para 156 - AA (DOJ).

212 The preparation of reports to Parliament has been found to be a safeguard (See: *Her Majesty The Queen v Tse* [2012] 1 R.C.S. 531 at para 89).

to report to Parliament at least once a year on its activities. Parliament may require the JSCI to furnish a special report.[213]

266. The Inspector-General of Intelligence ("*the IGI*") also plays an important oversight role over intelligence services. This office is loosely based on the inspector-general provisions of Canadian Intelligence law.[214] But there is the additional constitutional requirement in South Africa of parliamentary appointment.by "super majority" vote.[215] In "*the Parliamentary systems [of Canada, Australia, and the United Kingdom] the Inspectors-General of the Minister's 'eyes and ears' of the intelligence agencies target by the relevant legislation*" [216]

267. The office of Inspector General has been described to have been "*designed to provide an independent set of 'eyes and ears' within the intelligence apparatus charged with reporting 'whether anything done by a service is... unlawful or an unreasonable exercise of power*".[217]

268. The IGI is nominated by the JSCI but must be approved by the National Assembly by a resolution supported by at least two-thirds of its members. This is a

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213 *Ibid*, at para 157.

214 The Canadian Security Intelligence Service Act of 1984.

215 Christopher A. Ford, *Watching the Watchdog: Security Oversight Law in the New South Africa*, 3 Michigan Journal of Race & Law (1997) p. 137

216 Ibid. Fn 313.

217 *Ibid.* p.137

transparent process and serves as a mechanism to assure the independence of the IGI. The IGI is accountable to the JSCI and must report to it at least once a year.[218]

269. The IGI amongst others, monitors the intelligence activities of the State Security Agency, the Intelligence Division of the South African National Defence Force, and the Intelligence Division of the South African Police Service. It reviews their intelligence and counter-intelligence activities and receives and investigates complaints from the public on, amongst others, abuse of power, and transgressions of the Constitution.[219]

270. There are hence three independent bodies that monitor the activities performed under the RICA: The designated judge who is a judicial officer, Parliament and the IGI. These are the type of oversight measures which according to the ECHR curb abuse.[220]

(f) ***The doctrine of separation of powers***

271. It is Justice's case that the RICA governs several policy laden polycentric issues and that it is a fundamental reason why this application should not be entertained by this court.[221]This particularly, because of the factual assumptions the above honourable Court is requested to make in order to found constitutional non-compliance on the part of the RICA.

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218 *Ibid*, at para 158.

219 p.676, para 158 - AA (DOJ).

220 *Ibid*, at paras 160 and 161.

221 p.610.10, para 29 – AA (DM).

272. It lies within the provenance of the legislature, not the courts to address polycentric issues.[222]

273. It is settled law that the powers and functions of the three branches of government are distinct and that one cannot trespass on the terrain of another.[223] *In Doctors for Life International v Speaker of the National Assembly and Others* (CCT 12/05) 2006 ZACC 11 As per Ngcobo J (as he then was) stated that:

> " *Courts must be conscious of the vital limits on judicial authority and the constitutions design, to leave certain matters to the other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.*"

274. The development and implementation of policy lies in the domain of the Executive. The Executive then initiates legislation to give effect to its policies.

275. The process of initiating legislation by the Executive, as well as the process leading up to the enactment of legislation by the Legislature is the product of different processes. The Executive engages in a rigorous exercise of gathering facts and opinions, as well as executive research, on the subject of the proposed legislation. This includes but is not limited to considering other related domestic legislation, as well as legislation in other countries related to the same subject matter.[224]

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222 *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* para 221.

223 Ibid., at para 30 - AA (DM).

224 p.610.11, para 32 - AA (DM).

276. A considerable amount of research is necessary. Empirical data which bears on the issue may have to be gathered or commissioned, if necessary. In the context of the RICA, empirical data concerning the prevalence of crime, the nature of the crimes, the resources, both financial and human resources available to investigate and prevent crime are relevant. It is submitted that there are conflicting interests at stake. How they should be resolved, is a question of policy.[225]

277. There are many different considerations that must be taken into account by the Executive and the Legislature in the formulation of legislation relating to the prevention, investigation, and successful prosecution of a crime. The interception and monitoring of communications are important aspects in the fight against crime. It further relates to the storage of data and the period for which call-related information should be stored. It is the function of the Executive and Legislature to interrogate and explore these issues and make a policy choice.

278. The applicants are inviting this court to express a preference on these issues. This is an invitation to make a decision reserved for the Legislature and Executive in terms of the principle of the separation of powers. A court cannot usurp the powers and functions of another branch of the State by making decisions on its preference. It does not fall within the terrain of the judiciary to adjudicate on what the Executive's and Legislature's policy on the prevention and investigation of crime should be and how it should be implemented.

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225 *Ibid.* at para 33 – AA (DM).

279. We submit that the law-making process is not arbitrary. It is multifaceted and an expression of the will of South Africans.

280. We submit that this case is a scrutiny of the Executive's and Legislature's policies on crime prevention and investigation. We submit that this is the type of case where the doctrine of separation of powers should prevail.

281. The remarks of the Court in *Prince v Minister of Justice & Others 2017 (4) SA 299 (WCC)* are applicable here:

> *"[111]... While courts must retain the power to determine the legality and constitutionality of any legal provision, a court must limit its reach by ensuring that it is the political branches of the state which fashion policy and develop alternative responses to social and political mischief which requires legislative intervention. As Woolman et al Constitutional Law South Africa para 34-8 state, the analysis 'must be understood in terms of norm setting behaviour that provides guidance to other state actors without foreclosing the possibility of other effective safeguards for rights or other useful methods for their realisation'. This submission must also apply to the development of a justifiable limitation on rights enshrined in ch 2 of the Constitution.*
>
> *[112] What this means for the present dispute is that it is not for this court to prescribe alternatives to decriminalisation of the use of cannabis for personal use and consumption. It is for the legislature and the executive to decide on a suitable option or alternatives which can be made after these have been the subject of a deliberative process, which is inherent in the idea of Parliament."*
>
> [underlining added]

M. LIMITATION

282. We submit that save for the right to privacy, the impugned provisions of the RICA do not limit the constitutional rights which the applicants assert.

283. In the alternative to the foregoing, and in the event that the applicants persuade this court that the impugned provisions do constitute a limitation on the rights

asserted, we submit that the limitation is the result of the promotion of a legitimate government purpose and therefore survive scrutiny under section 36.

284. The approach to applying the limitation section of the Constitution is well-established. It requires a consideration of the various factors in section 36, once a violation of the right has been established. However, it not required that all the factors listed in section 36(1)(a) to (e) have to be satisfied. Section 36 (1)(a) to (e) is not intended to be a checklist.

285. Section 36 of the Constitution lists five factors which are taken into account in determining whether the limitation is justifiable. We submit that it is not required that each of these factors are satisfied. In this regard it was stated in *Mail & Guardian Media Ltd and others v Chipu NO and Others* 2013 (6) SA 367 (CC)

> *"[46] In seeking to determine whether s 21(5) is a reasonable and justifiable limitation of the right to freedom of expression, we are required by s 36 of the Constitution to take into account all relevant factors, including —*
>
> *(a) the nature of the right;*
>
> *(b) the importance of the purpose of the limitation;*
>
> *(c) the nature and extent of the limitation;*
>
> *(d) the relation between the limitation and its purpose; and*
>
> *(e) less restrictive means to achieve the purpose.'*
>
> *[47] These factors should not be considered as a check list. In Manamela this court said:*
>
> > *'It should be noted that the five factors expressly itemised in s 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically*

available in our country at this stage, but without losing sight of the ultimate values to be protected.' [Footnote omitted.]'"

286. The test is whether the limitation is reasonable in that it serves a constitutionally acceptable purpose and there is sufficient proportionality between the limitation and the benefits it is designed to achieve. [226]

287. The limitation approach as expressed in *S v Makwanyane* 1995 (3) SA 391 (CC) is as follows:

[104] The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1). The fact that different rights have different implications for democracy and, in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of s 33(1) and the underlying values of the Constitution."

288. The interception and monitoring of communications under the RICA, as well as similar legislation in other democratic countries, is aimed at fighting and investigating serious crime.

289. It is a measure employed by law enforcement agencies in democracies globally to fight serious crime. In South Africa this measure can be employed only when

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226 Currie & de Waal *The Bill of Rights Handbook* (6th ed) p.162-163.

other methods of investigating crime have proven to be ineffective. The RICA is explicit in this regard.[227]

290. It is submitted that the interception of communications on grounds of national security, public health or safety or compelling national economic interests or the prevention of crime, is a legitimate aim and a reasonable and justifiable ground for the limitation of individual rights.

291. The interception and monitoring of communications under the RICA, as well as similar legislation in other democratic countries, is aimed at fighting and investigating serious crime.

292. It is a measure employed by law enforcement agencies in democracies globally to fight serious crime. In South Africa this measure can be employed only when other methods of investigating crime have proven to be ineffective. The RICA is explicit in this regard.[228]

293. The applicants contended in the founding affidavit that the impugned provisions of the RICA are not rational.[229]

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227 *Cf.* sec 16(2)(e).

228 *Cf.* sec 16(2)(e).

229 *Cf.* p. 46: FA, para 85.1; p.48 para 90.1; p. 55, para 109.

294. The applicants have conceded that the limitation on the right to privacy is reasonable and justifiable. They also concede that the purpose of the RICA is "*generally, legitimate*".[230]

295. They however argue that the provisions are not rationally related to the purpose they seek to achieve.[231] The applicants correctly concede that the enquiry is not aimed at establishing whether some other means will achieve the same purpose better, only whether the selected measures could rationally achieve the same end.[232]

296. The applicants also argue that the impugned provisions do not pass constitutional muster because less restrictive means are available to balance the legitimate interests of the state in pursuing surveillance when necessary, and the rights of the public on the other hand.

297. We submit that the question is not whether other more desirable or favourable measures could have been adopted. The question is whether the measures which have been adopted are reasonable.[233] We submit that when deciding whether a limitation on a right is reasonable and justifiable *the Court should not "second-guess the wisdom of policy choices made by [L]egislature*".[234]

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230 p. 32: HoA, para 66.

231 *Ibid.*

232 p. 32: HoA, para 68.1.

233 *The Government of the Republic of South Africa v Grootboom and* Others 2001 (1) SA 46 (CC) at para39 and 41.

234 *S v Makwanyane* 1995 (3) SA 391 (CC) at para. 104.

298. The process of determining the constitutionality of any limitation involves a balancing process.[235]

299. In *Thint* the court confronted the conflict between the right to privacy and dignity and the need to fight crime, especially organised crime. Ngcobo J (as he then was) discussing the limitation of rights described the balance to be struck between the two rights as a "*delicate balance*".[236] He found that if less drastic measures are available resort to search and seizure cannot be reasonable.[237]

300. The RICA explicitly excludes resort to the *RICA* if other methods are available.[238] It cannot be emphasised enough that the RICA can only be implemented in the case of some and not all serious crimes.

301. In *Thint* [239] the Constitutional Court found that adequate safeguards saved the impugned legislation from constitutional invalidity. Langa CJ expressed this as follows:

> "*[78] Although a search and seizure operation will inevitably infringe a person's right to privacy, the Act provides considerable safeguards which ensure that the infringement goes no further than reasonably necessary in the circumstances. Furthermore, the requirement of judicial authorisation for search warrants is only one aspect of a broader scheme which ensures that the right to privacy is protected.*
>
> *[79] First, a judicial officer will exercise his or her discretion to authorise the search in a way which provides protection for the individual's right to privacy. Second, once the decision to issue the search warrant has been made, the judicial officer will ensure that the warrant is not too general nor overbroad, and that its terms are reasonably clear.*"

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235 *Thint*, para 284

236 Para 231.

237 Para 294.

238 Section 16 (2)(e).

239 2009 (1) SA (CC) at para 78-79.

302. We submit that the RICA contains adequate safeguards and that these save the impugned provisions from constitutional invalidity. We have discussed these earlier.

303. The imposition of the requirement that reasonable grounds must be shown to exist before an interception direction may be issued in itself strikes a balance between the competing rights implicated by the RICA. In this regard the RICA compares favourably with other democracies.

304. The Court of Queen's Bench of Manitoba discussed the "*reasonable grounds to believe*" standard in *R. v. Telfer & Crossman*, 2019 MBQB 12 (CanLII) and stated that:

> *"The concept of 'reasonable grounds to believe' is a compromise for accommodating the differing interests of privacy and law enforcement. This legal standard is grounded in objective facts that stand up to independent scrutiny (R v MacKenzie, 2013 SCC 50 (CanLII) at para 74). Reasonable grounds to believe is something more than mere suspicion but something less than the existence of a prima facie case, proof on a balance of probabilities or the standard required for a conviction."*[240]

305. In the context of a search and seizure warrant issued in terms of the National Prosecuting Authority Act 32 of 1998 for purposes of a preparatory investigation the Constitutional Court in *Hyundai* found the existence of "*reasonable grounds*" as the threshold to be overcome when applying for a warrant was a method of balancing the competing interests at play. In this regard Langa DCJ (as he then was) found that:

> *"The warrant may only be issued where the judicial officer has concluded that there is a reasonable suspicion that such an offence has been committed, that there are*

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240 Para 14.

reasonable grounds to believe that objects connected with an investigation into that suspected offence may be found on the relevant premises, and in the exercise of his or her discretion, the judicial officer considers it appropriate to issue a search warrant. These are considerable safeguards protecting the right to privacy of individuals. In my view, the scope of the limitation of the right to privacy is therefore narrow.

Section 29(5) thus requires a judicial officer to be satisfied, first, that there is a reasonable suspicion that an offence, which might be a specified offence in terms of the Act has been committed; and secondly, that there are reasonable grounds to believe that an item that has a bearing or might have a bearing on the investigation is on or is suspected to be on the premises to be searched. Finally, the judicial officer must consider whether it is appropriate to issue the search warrant. The decision to issue the search warrant clearly involves the exercise of a discretion, as the reasoning in Hyundai makes plain. Factors relevant to the exercise of that discretion will include the material set out in the affidavit seeking the search warrant and the text of the warrant itself. Section 29(5) requires that affidavit to state the nature of the inquiry, the suspicion which gave rise to the inquiry, and the need, in regard to the inquiry, for a search and seizure in terms of the section.

The legislation sets up an objective standard that must be met prior to the violation of the right, thus ensuring that search and seizure powers will only be exercised where there are sufficient reasons for doing so. These provisions thus strike a balance between the need for search and seizure powers and the right to privacy of individuals. Thus construed s 29(5) provides sufficient safeguards against an unwarranted invasion of the right to privacy. It follows, in my view, that the limitation of the privacy right in these circumstances is reasonable and justifiable.[241]

306. It cannot be emphasised enough that the RICA can only be implemented in the case of some and not all serious crimes and then too, only as a last resort.

307. In in *Minister of Safety and Security v Van der Merwe and Others* [242]the court was also confronted with the question whether safeguards could rescue legislation from constitutional invalidity. The Constitutional Court found that they could. This appears from the following:

[36] Safeguards are therefore necessary to ameliorate the effect of this interference. This they do by limiting the extent to which rights are impaired. That limitation may in turn be achieved by specifying a procedure for the issuing of warrants and by reducing the potential for abuse in their execution. Safeguards also ensure that the power to issue

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241 At para 55.

242 2001 (5) SA 61 (CC).

and execute warrants is exercised within the confines of the authorising legislation and the Constitution.

[37] These safeguards are: first, the significance of vesting the authority to issue warrants in judicial officers; second, the jurisdictional requirements for issuing warrants; third, the ambit of the terms of the warrants; and fourth, the bases on which a court may set warrants aside. It is fitting to discuss the significance of the issuing authority first.

[38] Sections 20 and 21 of the CPA give authority to judicial officers to issue search and seizure warrants. The judicious exercise of this power by them enhances protection against unnecessary infringement. They possess qualities and skills essential for the proper exercise of this power, like independence and the ability to evaluate relevant information so as to make an informed decision.

[39] Secondly, the section requires that the decision to issue a warrant be made only if the affidavit in support of the application contains the following objective jurisdictional facts: (i) the existence of a reasonable suspicion that a crime has been committed; and (ii) the existence of reasonable grounds to believe that objects connected with the offence may be found on the premises or persons intended to be searched. Both jurisdictional facts play a critical role in ensuring that the rights of a searched person are not lightly interfered with. When even one of them is missing that should spell doom to the application for a warrant."

308. We submit that the impugned provisions of the RICA passed constitutional muster because the RICA contains adequate safeguards to ameliorate the effect of the interference. In the result it is submitted that the limitation of rights is reasonable and justifiable, in furtherance of compelling governmental objectives and consistent with section 36 of the Constitution.

N. JUST AND EQUITABLE ORDER

309. In the event of this court finding that the limitations on the rights is not reasonable and justifiable, we submit that the appropriate order would be for the period of suspension in order for the Legislature to enact remedial legislation.

310. We submit that given all the important considerations and complex policy issues, this is a matter in which Parliament is best placed to fashion an appropriate

mechanism. Such an approach we submit accords with the separation of powers principle.[243]

311. We submit the approach adopted by Kollapen J in *Rahube* should with respect be adopted. Kollapen J stated:

> "[90] *Again, Parliament is better able to fashion this necessary remedy. Courts should defer to their genuine attempts to enact curative legislative reforms, subject to any new legislation complying with the Constitution....*"

312. We submit that the just and equitable order in the circumstances is to suspend the declaration of invalidity for 36 months to allow the Legislature to prepare legislation to cure the constitutional deficiency.

O. COSTS

313. We submit that if the applicants are successful, the Ministers of Justice, Police and Defence should not be mulcted in costs. The Executive has a duty to participate in proceedings where legislation is challenged. Therefore, it is imperative that the State is encouraged to participate in such proceedings. A court order against the State in such circumstances will discourage participation.

SK HASSIM SC
MPD CHABEDI
Circle Chambers
Brooklyn, PRETORIA
29 March 2019

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243 *Cf. Rahube v Rahube and Others* 2018 (1) SA 638 (GP) at 84