CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 278/19

In the matter between:

AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	First Applicant
STEPHEN PATRICK SOLE	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
OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE	Sixth Respondent
OFFICE FOR INTERCEPTION CENTRES	Seventh Respondent
NATIONAL COMMUNICATIONS CENTRE	Eighth Respondent
JOINT STANDING COMMITTEE ON INTELLIGENCE	Ninth Respondent
STATE SECURITY AGENCY	Tenth Respondent
MINISTER OF TELECOMMUNICATIONS	

AND POSTAL SERVICES	Eleventh Respondent
and	
MEDIA MONITORING AFRICA TRUST	First Amicus Curiae
RIGHT2KNOW CAMPAIGN	Second Amicus Curiae
PRIVACY INTERNATIONAL	Third Amicus Curiae

CCT 279/19

In the matter between

MINISTER OF POLICE	Applicant
and	
AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	First Respondent
STEPHEN PATRICK SOLE	Second Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
MINISTER OF STATE SECURITY	Fourth Respondent
MINISTER OF DEFENCE AND MILITARY VETERANS	Fifth Respondent
OFFICE FOR INTERCEPTION CENTRES	Sixth Respondent
NATIONAL COMMUNICATIONS CENTRE	Seventh Respondent
STATE SECURITY AGENCY	Eighth Respondent

Neutral citation: *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others* [2021] ZACC 3

Coram: Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ

Judgments: Madlanga J (majority): [1] to [157]
Jafta J (dissenting): [158] to [199]

Heard on: 25 February 2020

Decided on: 4 February 2021

ORDER

On application for confirmation of the order of the High Court of South Africa, Gauteng Division, Pretoria:

1. The appeal by the Minister of State Security is dismissed with costs, including the costs of two counsel.
2. The appeal by the Minister of Police is dismissed with costs, including the costs of two counsel.
3. The appeal by the applicants against the costs order granted by the High Court, Gauteng Division, Pretoria (High Court) is upheld with costs, including the costs of two counsel.
4. The High Court's order referred to in paragraph 3 is set aside.
5. The Minister of Justice and Correctional Services, the Minister of State Security, the Minister of Defence and Military Veterans, the Minister of Police, the Office for Interception Centres, the National Communications Centre and the State Security Agency must pay the applicants' costs of the application before the High Court, such costs to include the costs of two counsel.
6. The declaration of unconstitutionality by the High Court is confirmed only to the extent that the Regulation of Interception of Communications

and Provision of Communication-Related Information Act 70 of 2002 (RICA) fails to—

(a) provide for safeguards to ensure that a Judge designated in terms of section 1 is sufficiently independent;

(b) provide for notifying the subject of surveillance of the fact of her or his surveillance as soon as notification can be given without jeopardising the purpose of surveillance after surveillance has been terminated;

(c) adequately provide safeguards to address the fact that interception directions are sought and obtained *ex parte*;

(d) adequately prescribe procedures to ensure that data obtained pursuant to the interception of communications is managed lawfully and not used or interfered with unlawfully, including prescribing procedures to be followed for examining, copying, sharing, sorting through, using, storing or destroying the data; and

(e) provide adequate safeguards where the subject of surveillance is a practising lawyer or journalist.

7. The declaration of unconstitutionality in paragraph 6 takes effect from the date of this judgment and is suspended for 36 months to afford Parliament an opportunity to cure the defect causing the invalidity.

8. During the period of suspension referred to in paragraph 7, RICA shall be deemed to include the following additional sections:

"Section 23A **Disclosure that the person in respect of whom a direction, extension of a direction or entry warrant is sought is a journalist or practising lawyer**

(1) Where the person in respect of whom a direction, extension of a direction or entry warrant is sought in terms of sections 16, 17, 18, 20, 21, 22 or 23, whichever is applicable, is a journalist or practising lawyer, the application must disclose to the designated Judge the fact that the intended subject of the direction, extension of a

direction or entry warrant is a journalist or practising lawyer.

(2) The designated Judge must grant the direction, extension of a direction or entry warrant referred to in subsection (1) only if satisfied that it is necessary to do so, notwithstanding the fact that the subject is a journalist or practising lawyer.

(3) If the designated Judge issues the direction, extension of a direction or entry warrant, she or he may do so subject to such conditions as may be necessary, in the case of a journalist, to protect the confidentiality of her or his sources, or, in the case of a practising lawyer, to protect the legal professional privilege enjoyed by her or his clients."

"Section 25A **Post-surveillance notification**

(1) Within 90 days of the date of expiry of a direction or extension thereof issued in terms of sections 16, 17, 18, 20, 21 or 23, whichever is applicable, the applicant that obtained the direction or, if not available, any other law enforcement officer within the law enforcement agency concerned must notify in writing the person who was the subject of the direction and, within 15 days of doing so, certify in writing to the designated Judge, Judge of a High Court, Regional Court Magistrate or Magistrate that the person has been so notified.

(2) If the notification referred to in subsection (1) cannot be given without jeopardising the purpose of the surveillance, the designated Judge, Judge of a High Court, Regional Court Magistrate or Magistrate may, upon application by a law enforcement officer, direct that the giving of

notification in that subsection be withheld for a period which shall not exceed 90 days at a time or two years in aggregate.

9. The Minister of Police and the Minister of State Security must pay the applicants' costs in this Court, including the costs of two counsel.

JUDGMENT

MADLANGA J (Khampepe J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring):

Introduction

[1] The Constitution proclaims that "[n]ational security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life".[1] It does so against a historical backdrop in which the pursuit of a skewed notion of national security was weaponised and calculated to subvert the dignity of the majority of South Africans.[2] As part of this pursuit, law enforcement involved searches of people, their homes, and their belongings. Over the years, law enforcement evolved to include the surveillance of people, their homes, their movements, and their communications.[3] Today technology

[1] Section 198(a) of the Constitution.

[2] Skewed because it was securing South Africa to prop up the apartheid government and thus guarantee white privilege and all that that government stood for.

[3] I use "surveillance" not to relate only to the interception by state functionaries in terms of the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 of real-time communications of individuals (whether made face to face or "indirectly", i.e. in the sense that the people communicating were not in each other's presence), but to also include all access by these functionaries in terms of RICA to material related to communications. By the latter I am referring to, for example, information about the location at which a call was (or is being) made or a text was (or is being) sent or received and by what devices; if the communication-related information is more than 90 days old, it is called "archived communication-related information" (see the definition in section 1) and if it concerns communications that are

enables law enforcement agencies to not only physically – as opposed to electronically – invade the "intimate personal sphere"[4] of people's lives, but also to maintain and cement its presence there, continuously gathering, retaining and – where deemed necessary – using information.

[2] At the heart of this matter is the right to privacy, an important constitutional right which, according to this Court, "embraces the right to be free from intrusions and interference by the state and others in one's personal life".[5] State intrusions into individuals' privacy may occur in many and varied ways. In this case, we are called upon to consider intrusions in the context of the surveillance of individuals, including the interception of their private communications, under the Regulation of Interception of Communications and Provision of Communication-Related Information Act (RICA). Section 14(d) of the Constitution entrenches the right of everyone "not to have the privacy of their communications infringed", which is a component of the right to privacy.[6] Whilst RICA prohibits the interception of any communication,[7] it leaves the door wide open for the interception of communications in a variety of ways. It does this by providing that interceptions may be effected as long as that is in accordance with the provisions of RICA. RICA then regulates the circumstances under which communications may be intercepted.

taking place currently, or are up to 90 days old, it is called "real-time communication-related information" (see the definition in section 1).

[4] *Bernstein v Bester N.O.* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR (CC) 449 at para 77.

[5] *Gaertner v Minister of Finance* [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC) at para 47.

[6] The right to privacy is protected in section 14, which provides:

> "Everyone has the right to privacy, which includes the right not to have—
>
> (a) their person or home searched;
>
> (b) their property searched;
>
> (c) their possessions seized; or
>
> (d) the privacy of their communications infringed."

[7] Section 2.

[3] The first question before us is whether RICA unreasonably and unjustifiably fails to protect the right to privacy and is, therefore, unconstitutional to the extent of this failure. The High Court of South Africa, Gauteng Division, Pretoria, answered this question in the affirmative.[8] It declared that in several respects RICA is deficient in meeting the threshold required by section 36(1) of the Constitution to justify its infringement of the right to privacy, particularly considering the interplay between the privacy right and other constitutional rights protected in sections 16(1),[9] 34[10] and 35(5).[11] More on these and other constitutional rights later. The declaration of invalidity was suspended for two years to allow Parliament to cure the defects. The High Court granted interim relief by reading-in certain provisions.[12]

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[8] *Amabhungane Centre for Investigative Journalism NPC v Minister of Justice* 2020 (1) SA 90 (GP).

[9] Section 16(1) of the Constitution states:

> "Everyone has the right to freedom of expression, which includes—
>
> (a) freedom of the press and other media;
>
> (b) freedom to receive or impart information or ideas;
>
> (c) freedom of artistic creativity; and
>
> (d) academic freedom and freedom of scientific research."

[10] Section 34 of the Constitution provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[11] Section 35(5) states:

> "Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."

[12] In its entirety the order says:

> "Order No 1:
>
> It is declared that:
>
> (a) RICA, including sections 16(7), 17(6), 18(3)(a), 19(6), 20(6), 21(6) and 22(7) thereof, is inconsistent with the Constitution and accordingly invalid to the extent that it fails to prescribe procedure for notifying the subject of the interception;
>
> (b) The declaration of invalidity is suspended for two years to allow Parliament to cure the defect; and
>
> (c) Pending the enactment of legislation to cure the defect, RICA shall be deemed to read to include the following additional sections 16(11), (12) and (13):
>
> '(11) The applicant that obtained the interception direction shall, within 90 days of its expiry, notify in writing the person who was the subject of the interception and shall certify to the designated Judge that the person has been so notified.

(12) The designated Judge may in exceptional circumstances and on written application made before the expiry of the 90-day period referred to in sub-section (11), direct that the obligation referred to in sub-section (11) is postponed for a further appropriate period, which period shall not exceed 180 days at a time.

(13) In the event that orders of deferral of notification, in total, amount to three years after surveillance has ended, the application for any further deferral shall be placed before a panel of three designated Judges for consideration henceforth, and such panel, as constituted from time to time, by a majority if necessary, shall decide on whether annual deferrals from that moment forward should be ordered.'

Order No 2:

It is declared that:

(a) RICA, including the definition of 'designated Judge' in section 1, is inconsistent with the Constitution and accordingly invalid to the extent that it fails to prescribe an appointment mechanism and terms for the designated Judge which ensure the designated Judge's independence;

(b) The declaration of invalidity is suspended for two years to allow Parliament to cure the defect; and

(c) Six months after the date of this order and pending the enactment of legislation to cure the defect, 'designated Judge' in RICA shall be deemed to read as follows:

> 'any judge of a High Court discharged from active service under section 3(2) of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act 47 of 2001), or any retired judge, who is nominated by the Chief Justice, and upon which nomination is appointed by the Minister of Justice, for a non-renewable term of two years to perform the functions of a designated Judge for purposes of this Act.'

Order No 3:

It is declared that:

(a) RICA, including section 16(7) thereof, is inconsistent with the Constitution and accordingly invalid to the extent that it fails to adequately provide for a system with appropriate safeguards to deal with the fact that the orders in question are granted ex parte; and

(b) The declaration of invalidity is suspended for two years to allow Parliament to cure the defect.

Order No 4:

It is declared that:

(1) RICA, especially sections 35 and 37, are inconsistent with the Constitution and accordingly invalid to the extent that the statute, itself, fails to prescribe proper procedures to be followed when state officials are examining, copying, sharing, sorting through, using, destroying and/or storing the data obtained from interceptions;

(2) The declaration of invalidity is suspended for two years to allow Parliament to cure the defect.

[4] The second question before us is whether there is a legal basis for the state to conduct bulk surveillance.[13] The High Court held that the state's practice of bulk interception of communications is not authorised by law. This question arises as a result of an appeal by the Minister of State Security against this holding. A subsidiary issue is whether the appeal is properly before this Court.

Order No 5:

It is declared that:

(1) Sections 16(5), 17(4), 19(4), 21(4)(a), and 22(4)(b) of RICA are inconsistent with the Constitution and accordingly invalid to the extent that they fail to address expressly the circumstances where a subject of surveillance is either a practising lawyer or a journalist.

(2) The declaration of invalidity is suspended for two years to allow Parliament to cure the defects.

(3) Pending the enactment of legislation to cure the defect, RICA shall be deemed to include an additional section 16A, which provides as follows:

'16A Where an order in terms of sections 16(5), 17(4), 19(4), 21(4)(a), 22(4)(b) is sought against a subject who is a journalist or practising legal practitioner:

(a) The application for the order concerned must disclose and draw to the designated Judge's attention that the subject is a journalist or practising legal practitioner;

(b) The designated Judge shall only grant the order sought if satisfied that the order is necessary and appropriate, notwithstanding the fact that the subject is a journalist or practising legal practitioner; and

(c) If the designated Judge grants the order sought, the designated Judge may include such further limitations or conditions and he or she considers necessary in view of the fact that the subject is a journalist or practising legal practitioner.'

Order No 6:

It is declared that the bulk surveillance activities and foreign signals interception undertaken by the National Communications Centre are unlawful and invalid."

[13] The High Court accepted the following explanation around bulk surveillance, which was provided by the respondents:

"'Bulk surveillance is an internationally accepted method of strategically monitoring transnational signals, in order to screen them for certain cue words or key phrases. The national security objective is to ensure that the State is secured against transnational threats. It is basically done through the tapping and recording of transnational signals, including, in some cases, undersea fibre optic cables.'

'[I]ntelligence obtained from the interception of electromagnetic, acoustic and other signals, including the equipment that produces such signals. It also includes any communication that emanates from outside the borders of [South Africa] and passes through or ends in [South Africa].'"

[5] The applicants, AmaBhungane Centre for Investigative Journalism NPC, and its managing partner, Mr Stephen Patrick Sole, a journalist, seek confirmation of the High Court's declaration of invalidity. They support the High Court's interim reading-in. The Minister of Police partially appeals the judgment and orders of the High Court. More on that later. In the event that the appeal is not upheld, the Minister opposes the confirmation of one part of the order of the High Court. That is the part relating to post-surveillance notification. The Minister of State Security appeals the whole judgment and order of the High Court. The Minister of Justice does not appeal the High Court's declaration of invalidity, nor does he oppose the application for confirmation. His submissions seek merely to assist this Court. Even though two are appellants, for convenience I collectively refer to the Ministers as the respondents. The remaining respondents[14] have not participated in the proceedings in this Court.

Overview of the legislative framework

[6] RICA is the result of an overhaul of the Interception and Monitoring Prohibition Act.[15] Its adoption was informed by considerable technological developments in electronic communications, including cellular communications, satellite communications and computer communications. These rendered the old legislation, which mainly revolved around the interception of postal articles and fixed line communications, outdated.

[7] Focusing on some of the provisions of RICA that are of relevance to this matter, section 2 provides that all forms of interception and monitoring of communications are prohibited unless they take place under one of the recognised exceptions. RICA regulates the interception of both direct and indirect communications, which are defined

[14] These are the Minister of Communications, the Minister of Defence and Military Veterans, the Office of the Inspector-General of Intelligence, the Office for Interception Centres, the National Communications Centre, the Joint Standing Committee on Intelligence, the State Security Agency and the Minister of Telecommunications and Postal Services.

[15] 127 of 1992.

broadly to include oral conversations, email and mobile phone communications (including data, text and visual images) that are transmitted through a postal service or telecommunication system.[16]

[8] Without a "designated Judge"[17] RICA would be substantially inoperable. With the exception of only one type, at the centre of all surveillance directions issued under RICA is a designated Judge; she or he must authorise all directions that fall within the purview of functions of a designated Judge. These directions are provided for in sections 16 to 18, 21 and 23. Explaining briefly what each of these sections is about, section 16 provides for "interception directions".[18] These are directions for the

[16] Section 1 of RICA.

[17] The term "designated Judge" is defined in section 1 of RICA. I deal with the concept later.

[18] Section 16(5) of RICA provides:

> "(5) An interception direction may only be issued if the designated Judge concerned is satisfied, on the facts alleged in the application concerned, that—
>
> (a) there are reasonable grounds to believe that—
>
> (i) a serious offence has been or is being or will probably be committed;
>
> (ii) 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;
>
> (iii) the gathering of information concerning a potential threat to the public health or safety or national security of the Republic is necessary;
>
> (iv) 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, is in—
>
> (aa) accordance with an international mutual assistance agreement; or
>
> (bb) the interests of the Republic's international relations or obligations; or
>
> (v) 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;
>
> (b) there are reasonable grounds to believe that—
>
> (i) the interception of particular communications concerning the relevant ground referred to in paragraph (a) will be obtained by means of such an interception direction; and

interception of direct or indirect communications.[19] Section 17 governs the issuing of real-time communication-related directions. In terms of section 18 an application may be made to a designated Judge for combined applications for interception directions, for real-time or archived communication-related directions, or for interception directions supplemented by real-time communication-related directions.[20] Section 21 empowers a designated Judge to issue a decryption direction.[21] All applications to a designated Judge under sections 16 to 18 and 21 and 22[22] must be in writing, some even on affidavit. Section 20 authorises the amendment or extension of an existing direction by a designated Judge. Section 22 provides for the issuing by a designated Judge of an entry warrant. Entry in terms of this warrant may be for the purpose of installing an

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(ii) subject to subsection (8), 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 paragraph (a) are commonly used by the person or customer in respect of whom the application for the issuing of an interception direction is made; and

(c) in respect of the grounds referred to in paragraph (a)(i), (iii), (iv) or (v), other investigative procedures have been applied and have failed to produce the required evidence or reasonably appear to be unlikely to succeed if applied or are likely to be too dangerous to apply in order to obtain the required evidence and that the offence therefore cannot adequately be investigated, or the information therefore cannot adequately be obtained, in another appropriate manner: Provided that this paragraph does not apply to an application for the issuing of a direction in respect of the ground referred to in paragraph (a)(i) or (v) if the—

(i) serious offence has been or is being or will probably be committed for the benefit of, at the direction of, or in association with, a person, group of persons or syndicate involved in organised crime; or

(ii) property is or could probably be an instrumentality of a serious offence or is or could probably be the proceeds of unlawful activities."

[19] Direct communications are communications that take place whilst those communicating are in each other's presence (see definition in section 1). Indirect communications are those where the communicators are not together. Such communications may be in the form of speech, text or any other format (see definition in section 1).

[20] I understand an interception direction supplemented by a real-time communication-related direction to mean a direction for the interception of communications as they take place and accompanied by a direction in respect of information about the location at which, for example, a call is being made or a text is being sent or received and by what devices (i.e. all of that in real-time).

[21] From the definitions of "decryption direction", "decryption key" and "encrypted information" in section 1 of RICA, I understand "decryption" (which is not defined) to mean the act of making encrypted information accessible or understandable to the law enforcement officer concerned.

[22] I will explain shortly what a section 22 application entails.

interception device to facilitate interceptions conducted in terms of an interception direction issued under section 16.

[9] In terms of section 23 applications may be made orally to a designated Judge for the issuing of the directions envisaged in sections 16 to 18 and 21 and an entry warrant envisaged in section 22. An oral application may be made where – because of urgency or exceptional circumstances – it is not reasonably practicable to apply in writing.[23] In terms of section 23(5) directions and entry warrants must be in writing. They too may be oral if that be dictated by urgency or exceptional circumstances.[24]

[10] Surveillance under these sections, i.e. 16 to 18 and 20 to 23, covers almost the entire spectrum of state surveillance.[25] As shown by this discussion, that wide spectrum involves a designated Judge. What remains is – by comparison – a minuscule aspect provided for in section 19.

[11] Although directions under section 19 are not issued by a designated Judge, at its centre this section also has a Judicial Officer. This section empowers a High Court Judge, Regional Court Magistrate or Magistrate to issue archived communication-related directions. This differs from section 18 in that it applies where only archived communication-related directions are sought. On the other hand, section 18 authorises combined directions where the combinations include archived communication-related directions. And in the case of section 18, the issuer is a designated Judge, not the Judicial Officers mentioned in section 19.

[12] All surveillance under the various forms of directions is in relation to serious offences; actual or potential threats to the public health or safety, national security or compelling national economic interests of the Republic; organised crime or terrorism;

[23] Section 23(4)(iii).

[24] Section 23(7).

[25] This, of course, is with the exception of interceptions to prevent bodily injury or determine a location in an emergency, under sections 7 and 8 respectively.

or property which is or could be an instrumentality of serious offences or the proceeds of unlawful activities.[26]

Background

[13] The facts are not central to the issues before us, but illustrate the potential constitutional difficulties that may arise in the application or misapplication of RICA. In the High Court Mr Sole recounted his undisputed first-hand experience of the abuse of RICA by state authorities. In 2008 he suspected that his communications were being monitored and intercepted. In 2009 he took steps to obtain full disclosure of the details relating to the monitoring and interception of his communications from the Office of the Inspector-General of Intelligence. These efforts were fruitless because – as he was told in a letter – the Inspector-General had found the National Intelligence Agency (NIA) and the crime intelligence division of the police not to be guilty of any wrongdoing. The letter continued that, as RICA prohibits disclosure of information relating to surveillance, Mr Sole could not be furnished with the information.[27] Mr Sole was thus left in the dark as to whether his communications had in fact been intercepted and, if so, what the basis for interception was.

[14] In 2015 in court proceedings in which Mr Sole was not a litigant transcripts of telephonic conversations between him and Mr Downer – a state prosecutor – were

[26] Section 16(5)(a), in the case of interception directions; section 17(4), in the case of real-time communication-related directions; section 18(3), in the case of a combination of interception, real-time communication or archived communication directions; and section 19(4), in the case of archived communication-related directions.

[27] Section 42(1) of RICA provides:

> "No person may disclose any information which he or she obtained in the exercising of his or her powers or the performance of his or her duties in terms of this Act, except—
>
> (a) to any other person who of necessity requires it for the performance of his or her functions in terms of this Act;
>
> (b) if he or she is a person who of necessity supplies it in the performance of his or her functions in terms of this Act;
>
> (c) information which is required in terms of any law or as evidence in any court of law; or
>
> (d) to any competent authority which requires it for the institution, or an investigation with a view to the institution, of any criminal proceedings or civil proceedings as contemplated in Chapter 5 or 6 of the Prevention of Organised Crime Act."

attached to an affidavit filed in court. This, of course, proved that Mr Sole's communications had indeed been intercepted in 2008. Following this discovery, Mr Sole again attempted to obtain details of the interception, this time from the State Security Agency. In 2016 he was provided with two extensions of an initial interception direction granted in respect of his communications. The extensions did not disclose details of the basis for the initial interception direction. Of course, those details would have been part of the initial interception direction, which was not forthcoming. He was also provided with the same transcripts of his telephonic conversations with Mr Downer, which were attached to the court papers. The State Security Agency informed him that these documents were all that it had on record in relation to the interception of his communications. Consequently, Mr Sole remained in the dark regarding the reason for and lawfulness of the interception.

[15] The applicants accordingly approached the High Court, alleging that RICA is unconstitutional to the extent that it fails to provide adequate safeguards to protect the right to privacy. It was common cause before the High Court that state surveillance under RICA does limit the right to privacy. That Court accordingly focused its analysis on the justification leg: can this limitation be justified under section 36(1) of the Constitution? It adjudged RICA inconsistent with the Constitution and declared it invalid to the extent of the inconsistency. It suspended the declaration of invalidity for two years, and – as interim relief to apply during the period of suspension – read-in fairly extensive provisions.[28]

[16] The applicants' challenge was founded on various discrete grounds, alleging that RICA is constitutionally deficient on each. First, they argued that RICA is unconstitutional to the extent that it does not provide for a subject of surveillance ever to be notified – even post-surveillance – that she or he was subjected to surveillance

[28] High Court judgment above n 8 at orders 1 and 5.

(notification issue). The High Court agreed with them on this notification issue. In the interim, it read-in provisions that create a post-surveillance notification regime.[29]

[17] Second, the applicants argued that RICA is unconstitutional to the extent that it fails to ensure the independence of the designated Judge, and lacks any form of adversarial process or other mechanism to ensure that the intended subject of surveillance is protected in the ex parte application process.[30] These concerns will be referred to as the "independence issue" and the "ex parte issue", respectively. In relation to the independence issue, the High Court held that the selection of a designated Judge by the Minister of Justice alone, through a secretive process and for a potentially indefinite term (through renewals of term), compromises the perceived and actual independence of a designated Judge. It declared RICA unconstitutional to this extent. It granted interim relief by reading-in provisions to the effect that candidates for appointment must be nominated by the Chief Justice, and then appointed by the Minister of Justice for a non-renewable term.[31] In relation to the ex parte issue, the High Court agreed that RICA is constitutionally deficient to the extent that it lacks appropriate safeguards to deal with the fact that the orders are granted ex parte. It did not grant interim relief in this respect.[32]

[18] Third, the applicants argued that RICA is unconstitutional to the extent that it lacks adequate safeguards regarding the archiving of data and accessibility of communications. In particular, they challenged: (i) the three to five-year period for mandatory retention of communication-related information by electronic communications service providers; and (ii) the procedures to be used in examining, copying, sharing, sorting through, using, destroying or storing the surveillance data (management of information issue). The High Court dismissed the challenge

[29] Id at order 1.

[30] An application is ex parte if made without notifying or serving it on any other party.

[31] Id at order 2.

[32] Id at order 3.

concerning the period of retention. It held that it is difficult for a court to second guess Parliament's choice of the period.[33] It upheld the challenge on the management of information issue.[34]

[19] Fourth, the applicants contended that RICA fails to provide any special protections where the intended subject of surveillance is a practising lawyer or journalist. The High Court agreed. It highlighted the importance of legal privilege which is enjoyed by the client, not the lawyer. It noted: the reality – giving examples[35] – that the surveillance of a practising lawyer's communications may be justified; that there may be the "inadvertent disclosures" of the lawyer's clients' communications; and that RICA does not give special attention to the reality that these inadvertent disclosures may occur.[36] The High Court rejected the applicants' plea for the involvement of an intermediary who could "filter out these inadvertent disclosures".[37] However, it held that at the very least the fact that the intended subject of the surveillance is a lawyer should be brought to the attention of the designated Judge.

[20] About journalists, the High Court held that it is axiomatic to the exercise of investigative journalism to keep journalists' sources secret. It further held that it is a necessary dimension of the right to freedom of expression – in particular freedom of the press – that journalists' sources be protected from prying. A purposive interpretation of section 16 of the Constitution which guarantees this right enjoins us – continued the High Court – to recognise this dimension. And that has the effect of fostering and not denuding[38] the role of the media. The High Court also held – in essence – that the right

[33] Id at para 95.

[34] Id at order 4.

[35] Examples are: where the lawyer is the suspected subject of criminality, including defrauding clients, or where the lawyer's client is the target of surveillance.

[36] High Court judgment above n 8 at para 120.

[37] Id at para 121.

[38] See *Bosasa Operation (Pty) Ltd v Basson* 2013 (2) SA 570 (GSJ) at para 38.

to withhold the identity of sources can be truly effective only if journalists are protected from being spied on, subject to extreme circumstances that warrant spying.

[21] The High Court then held that RICA is unconstitutional to the extent that it fails "to address expressly the circumstances where a subject of surveillance is either a practising lawyer or a journalist".[39] It made a fairly extensive interim reading-in order to fill the identified gap.[40]

[22] Finally, the applicants contended that the bulk interception currently undertaken by the National Communication Centre is not authorised by RICA or any other law. The High Court upheld the argument. It declared the National Communication Centre's bulk surveillance activities unlawful and invalid.[41]

Constitutionality of RICA

[23] The interception and surveillance of an individual's communications under RICA is performed clandestinely. By nature, human beings are wont – in their private communications – to share their innermost hearts' desires or personal confidences, to speak or write when under different circumstances they would never dare do so, to bare themselves on what they truly think or believe. And they do all this in the belief that the only hearers of what they are saying or the only readers of what they have written are those they are communicating with. It is that belief that gives them a sense of comfort – a sense of comfort either to communicate at all; to share confidences of a certain nature or to communicate in a particular manner. Imagine how an individual in that situation would feel if she or he were to know that throughout those intimate communications someone was listening in or reading them.

[39] High Court judgment above n 8 at order 5.

[40] Id.

[41] Id at order 6.

[24] If there ever was a highly and disturbingly invasive violation of privacy, this is it. It is violative of an individual's inner sanctum.[42] In *Hyundai* Langa DP held that "privacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings and less intense as it moves away from that core".[43] What I have typified – insofar as it relates to the sharing of intimate personal confidences – certainly falls within the "intimate personal sphere". RICA allows interception of all communications. The sanctioned interception does not discriminate between intimate personal communications and communications, the disclosure of which would not bother those communicating. Nor does it differentiate between information that is relevant to the purpose of the interception and that which is not. In other words, privacy is breached along the entire length and breadth of the "continuum".[44] And this intrusion applies equally to third parties who are not themselves subjects of surveillance but happen to communicate with the subject. That means communications of any person in contact with the subject of surveillance – even children – will necessarily be intercepted.[45]

[25] There can be no question that the surveillance of private communications limits the right to privacy. Unsurprisingly, the respondents do not dispute this. Is that limitation reasonable and justifiable under section 36(1) of the Constitution?[46]

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[42] Compare *Bernstein* above n 4 at para 67.

[43] *Hyundai Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at para 18.

[44] Here is how Ackermann J's words from *Bernstein* above n 4 were characterised in *Mistry v Interim National Medical and Dental Council of South Africa* [1998] ZACC 10; 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC) at para 27:

> "Ackermann J posited a continuum of privacy rights which may be regarded as starting with a wholly inviolable inner self, moving to a relatively impervious sanctum of the home and personal life and ending in a public realm where privacy would only remotely be implicated."

[45] Any arbitrary or unlawful interception of children's communications is at odds with South Africa's international law obligations under Article 16(1) of the Convention on the Rights of the Child, 20 November 1989, which provides that "[n]o child shall be subjected to arbitrary or unlawful interference with his or privacy, family, home or correspondence" and Article 10 of the African Charter on the Rights and Welfare of the Child, 1 July 1990, which provides that "[n]o child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence".

[46] Section 36 provides as follows:

Nature of the right

[26] The country's apartheid history was characterised by the wanton invasion of the privacy of people by the state through searches and seizures, the interception of their communications and generally by spying on them in all manner of forms. Here is what *Mistry* tells us:

> "The existence of safeguards to regulate the way in which state officials may enter the private domains of ordinary citizens is one of the features that distinguish a constitutional democracy from a police state. South African experience has been notoriously mixed in this regard. On the one hand there has been an admirable history of strong statutory controls over the powers of the police to search and seize. On the other, when it came to racially discriminatory laws and security legislation, vast and often unrestricted discretionary powers were conferred on officials and police. Generations of systematised and egregious violations of personal privacy established norms of disrespect for citizens that seeped generally into the public administration and promoted amongst a great many officials habits and practices inconsistent with the standards of conduct now required by the Bill of Rights. [The right to privacy] accordingly requires us to repudiate the past practices that were repugnant to the new constitutional values, while at the same time re-affirming and building on those that were consistent with these values."[47]

"Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking 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] *Mistry* above n 44 at para 25.

[27] Although the focus of this is on searches and seizures, it is very much relevant to the interception of communications. The constitutionally protected right to privacy seeks to be one of the guarantees that South Africa will not again act like the police state that it was under apartheid. Axiomatically, therefore, the right to privacy is singularly important in South Africa's constitutional democracy.

[28] To this, one may add the fact that the invasion of an individual's privacy infringes the individual's cognate right to dignity,[48] a right so important that it permeates virtually all other fundamental rights.[49] About its importance, Ackermann J said "the right to dignity is a cornerstone of our Constitution".[50] And in *Hugo* this Court quoted the words of L'Heureux-Dube J with approval.[51] They are that "inherent human dignity is at the heart of individual rights in a free and democratic society".[52]

Importance of the purpose of the limitation

[29] The respondents submit that, notwithstanding the magnitude of the incursion into privacy, the purpose and importance of state surveillance render surveillance under RICA reasonable and justifiable. Its purpose is to investigate and combat serious crime, guarantee national security, maintain public order and thereby ensure the safety of the

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[48] The relationship between the rights to privacy and dignity is highlighted by O'Regan J in *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 27:

> "It should . . . be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in section 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity."

[49] See *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 35; *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 328; Chaskalson "The Third Bram Fischer Lecture – Human Dignity as a Foundational Value of our Constitutional Order" (2000) 16 *SAJHR* 193 at 204.

[50] *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 28.

[51] *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) (*Hugo*) at para 41.

[52] *Egan v Canada* [1995] 2 SCR 513 at 543. The words of Chaskalson CJ in *Makwanyane* above n 49 at para 144 are worth noting:

> "The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in the [Bill of Rights]. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others."

Republic and its people. In this regard, the Minister of Police explains that the interception of communications for this purpose is part of the fulfilment of the South African Police Service's obligation under section 205(3) of the Constitution.[53] The other Ministers echo this. The Minister of Justice adds that South Africa is plagued by serious and violent crime which necessitates the adoption of measures such as RICA to detect, investigate and curb serious crimes.

[30] Without question, it is crucial for the state to secure the nation, ensure that the public is safe and prevent serious crime. These are constitutional obligations.[54] Through RICA, interceptions of communications have come to be central to the fulfilment of these obligations. Thus they serve an important purpose. Unsurprisingly, a number of constitutional democracies have adopted similar measures.[55] This Court

[53] Section 205(3) of the Constitution provides:

> "The objects of the police service 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."

The Minister of Police also relies on the following constitutional provisions: section 2, which enjoins the state to fulfil the obligations imposed by the Constitution; section 7(2), which imposes upon the state the obligation to respect, promote and fulfil the rights in the Bill of Rights; section 8, which provides that the Bill of Rights binds the state; section 11, which guarantees to everyone the right to life; and section 12(1)(c), which guarantees to every person the right to be free from violence.

[54] Sections 198(a) and 205(3) of the Constitution.

[55] A few examples are Botswana, Kenya, Canada and the United State of America. In Botswana, section 22 of the Intelligence and Security Act Chapter 2302 provides that the Directorate of Intelligence and Security – in investigating threats to national security or carrying out its functions – is authorised to "conduct an investigation of a personal or intrusive nature such as searches or interception of postal mail, electronic mail, computer or telephonic communications". This may be done upon receipt of a warrant from a court, which will be granted if "cause" has been shown. The hearing of the application for such a warrant must take place in secret.

Section 31 of the Constitution of Kenya protects the right to privacy. Interception of communications is generally a punishable offence (Article 31 of the Kenya Information and Communications Act 1 of 2009). However, the right to privacy may be limited in certain instances. For example, section 36 of the National Intelligence Service (NIS) Act 28 of 2012 allows the NIS to investigate, monitor or interfere with a person's communications, where that person is suspected to have committed an offence. The Prevention of Terrorism Act 30 of 2012 permits the investigation, interception and interference with a person's communications in the course of investigating, detecting or preventing a terrorist act.

In Canada, Part VI of the Criminal Code, RSC 1985, c C-46 sets out the framework for law enforcement to obtain judicial authorisation to conduct electronic surveillance for criminal investigations – though only for certain serious offences and subject to the requirements of exhausting alternative investigative procedures and furthering the best interests of the administration of justice (sections 183-6).

Likewise in the United States, the Federal electronic surveillance statutes (commonly referred to collectively as "Title III" and codified at 18 U.S.C. § 2510, *et seq*) allow for interception of electronic communications to investigate any Federal felony (18 U.S.C. § 2516(3)), subject to restrictions including the requirement that the Department of Justice approves such use prior to even obtaining a court order authorising interception. Notably

has acknowledged that "the rate of crime in South Africa is unacceptably high"[56] and that "the need to fight crime is thus an important objective in our society".[57] This is as true today as it was when it was said in the year 2000.

Nature and extent of the limitation

[31] The indiscriminate tentacles of interceptions reach communications of whatever nature, including the most private and intimate. Some of the communications do not in the least have anything to do with the reason for the surveillance. And some of those communicating with the subject of surveillance are collateral victims. I cannot but conclude that the limitation of the right is egregiously intrusive.

Proportionality

[32] Whilst I must accept that RICA serves an important government purpose, the question to answer here is: is it doing enough to reduce the risk of unnecessary intrusions? In *Van der Merwe*, this Court considered whether search and seizure warrants were valid despite their failure to mention the offences to which the search related. It held:

> "Warrants issued in terms of section 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.
>
> *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*

however, interceptions conducted pursuant to the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801, *et seq*., are explicitly excluded from the ambit of Title III (see 18 U.S.C. § 2511(2)(a)(ii), (2)(e), and (2)(f)).

[56] *Hyundai* above n 43 at para 53.

[57] Id.

> *and execute warrants is exercised within the confines of the authorising legislation and the Constitution*."[58] (Emphasis added.)

[33] This statement of the law is about safeguards on the exercise of the power of search and seizure in accordance with the Constitution and empowering legislation. At issue here is whether RICA itself does have safeguards that help ensure that the interception of communications and surveillance generally are within constitutionally compliant limits. Put differently, are there safeguards that acceptably minimise the trampling of the privacy right? Let me reiterate what this Court said in a different context in *Mistry*:

> "The existence of safeguards to regulate the way in which state officials may enter the private domains of ordinary citizens is one of the features that distinguish a constitutional democracy from a police state."[59]

[34] Subject to RICA, no interceptions of private communications may be effected.[60] Chapter 9 of RICA criminalises interceptions that are at variance with its provisions. RICA provides for the interception of communications in certain instances. Most pertinently, state agents[61] may apply to a designated Judge for authorisation to intercept

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[58] *Minister of Safety and Security v Van Der Merwe* [2011] ZACC 19; 2011 (5) SA 61 (CC); 2011 (9) BCLR 961 (CC) at paras 35-6.

[59] *Mistry* above n 44 at para 25.

[60] Section 2 of RICA.

[61] For purposes of an application for an interception direction under section 16 of RICA, an applicant includes the following persons:

> "(a) an officer referred to in section 33 of the South African Police Service Act, if the officer concerned obtained in writing the approval in advance of another officer in the Police Service with at least the rank of assistant commissioner and who has been authorised in writing by the National Commissioner to grant such approval;
>
> (b) an officer as defined in section 1 of the Defence Act, if the officer concerned obtained in writing the approval in advance of another officer in the Defence Force with at least the rank of major-general and who has been authorised in writing by the Chief of the Defence Force to grant such approval;
>
> (c) a member as defined in section 1 of the Intelligence Services Act, if the member concerned obtained in writing the approval in advance of another member of the Agency, holding a post of at least general manager;

the private communications of any person, provided certain requirements are met. In summary, RICA requires the application to include the identity of the intended subject, the intended period of interception, the full particulars of the facts and circumstances in support of the application (including details of other investigative procedures that have been applied and failed), a description of the place of interception and type of communications to be intercepted, and the ground on which the application is made.[62] The latter requirement is important; an interception direction may only be issued on certain limited grounds, and – as discussed above – all are of some magnitude.[63]

[35] However, RICA is silent on a number of crucial issues, many of which have been highlighted by the applicants.

[36] The United Nations Human Rights Committee's 2015 report on RICA supports the contention that the structures, processes and safeguards in RICA are insufficient to protect the privacy rights of subjects. To this end, the report states:

> "The Committee is concerned about the relatively low threshold for conducting surveillance in the State party and the relatively weak safeguards, oversight and remedies against unlawful interference with the right to privacy contained in [RICA]."[64]

[37] I turn to specific constitutional challenges on the basis of which the applicants claim the safeguards contained in RICA are inadequate. In this judgment my use of

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(d) the head of the Directorate or an Investigating Director authorised thereto in writing by the head of the Directorate;

(e) a member of [any component of the prosecuting authority, designated by the National Director to specialise in the application of Chapter 6 of the Prevention of Organised Crime Act], authorised thereto in writing by the National Director; or

(f) a member of the Directorate, if the member concerned obtained in writing the approval in advance of the Executive Director."

[62] Section 16(2) of RICA.

[63] Section 16(5)(a) of RICA. See also [12].

[64] United Nations Human Rights Committee for the International Covenant on Civil and Political Rights: List of issues in relation to the initial report of South Africa, adopted at its 114 session (29 June 2015 to 24 July 2015), dated 19 August 2015.

"adequate" or "sufficient" and their derivatives in the context of "safeguards" is not meant to introduce a standard that is higher than the reasonableness and justifiability standard set by section 36(1) of the Constitution. All I mean is: are the safeguards sufficient to meet that reasonableness and justifiability standard?

Notification issue

[38] We have before us evidence of abuse of the power of surveillance. One example is that of two journalists, Mr Mzilikazi wa Afrika and Mr Stephen Hofstatter, whose phones were tapped by the police's Crime Intelligence Division while the two were investigating corruption scandals in the South African Police Service. In order to obtain interception directions under RICA, the police told the designated Judge that the phone numbers to be tapped were those of suspected ATM bombers. That, of course, was a lie. The interception direction was granted on the basis of that lie. It authorised the real-time interception of the calls, text messages and metadata of the journalists. These facts have not been disputed by the respondents.[65]

[39] Regarding the next example, it is immaterial whether actual surveillance had been conducted and – if it was – what the results were. What I am about to narrate manifests the power that state agencies entrusted with the mandate of surveillance wield and the lengths to which they can and do go for purposes best known to them, all facilitated by the fact that they operate in complete secrecy. That is the importance and relevance of this example: the fact of being able to do anything purportedly under RICA. The agencies can obtain interception directions by unlawful means or they may not conduct surveillance at all but produce a negative fictional "intelligence report" about an individual. They can produce this kind of report even where they have conducted surveillance that did not yield the desired results. Now this next example. In 2006 the Inspector-General concluded a report on surveillance that had been conducted by NIA operatives on prominent South African businessman, Mr Sakumzi Macozoma. The

[65] Hunter and Smith "Spooked: Surveillance of Journalists in SA" (2018) *Right2Know Campaign* at 12.

Inspector-General looked into the matter pursuant to a request from the Minister for Intelligence Services in terms of section 7(7)(c) of the Intelligence Services Oversight Act.[66] The principal motivation of the NIA for the surveillance was stated to be Mr Macozoma's links with a foreign intelligence service, which were inimical to national security.[67] The Inspector-General's report found that certain emails had allegedly been intercepted. Purportedly, those emails revealed various conspiracies,[68] which, in turn, allegedly resulted in the electronic and physical surveillance of certain individuals and political parties.[69] The report concluded that the emails were fabricated by the NIA team.[70]

[40] It would be naïve to think that these examples are odd ones out and that in all other instances state agencies responsible for surveillance have always acted lawfully. The fact that it is now *said* that the document on the basis of which Mr Sole was subjected to surveillance cannot be found is quite curious; I deliberately put it no higher.

[41] The last two examples show us that blatant mendacity may be the basis of an approach to the designated Judge. And a designated Judge has no means meaningfully to verify the information placed before her or him. As a result, she or he is left none the wiser. Also, by its very nature – in particular because it takes place in complete secrecy,[71] on the understanding that the subject of surveillance who is best placed to identify an abuse will never know – surveillance under RICA is susceptible to abuse. A key factor which likely emboldens those who conduct surveillance to abuse the process is thus a sense of impunity. The question then is whether lesser restriction on secrecy in the form of notification would thwart the realisation of what RICA

[66] 40 of 1994.

[67] Office of the Inspector-General of Intelligence "Executive Summary of the Final Report on the Findings of an Investigation into the Legality of the Surveillance Operations Carried Out by the NIA on Mr S Macozoma" Media Briefing, 23 March 2006 at 5.

[68] Id at 20.

[69] Id at 17.

[70] Id at 24.

[71] This is so because section 16(7)(a) of RICA expressly forbids disclosure of any kind to the subject of the surveillance.

interceptions are meant to achieve. Obviously, pre-interception disclosure would defeat the very purpose of surveillance. What about post-surveillance notification?

[42] The Minister of Police, who appeals the High Court's order on this issue, is arguing for the retention of the blanket non-availability of notification. He contends that the Constitution confers no right to notification; not pre- or post-surveillance. That, of course, is a misconceived approach. The question is whether – for purposes of the proportionality analysis – denying post-surveillance notification is not overbroad.

[43] Sections 42(1) and 51 of RICA respectively prohibit and criminalise the disclosure of the fact that an interception direction was issued.[72] Unlike search and

[72] In full, section 42 reads:

> "(1) No person may disclose any information which he or she obtained in the exercising of his or her powers or the performance of his or her duties in terms of this Act, except—
>
> (a) to any other person who of necessity requires it for the performance of his or her functions in terms of this Act;
>
> (b) if he or she is a person who of necessity supplies it in the performance of his or her functions in terms of this Act;
>
> (c) information which is required in terms of any law or as evidence in any court of law; or
>
> (d) to any competent authority which requires it for the institution, or an investigation with a view to the institution, of any criminal proceedings or civil proceedings as contemplated in Chapter 5 or 6 of the Prevention of Organised Crime Act.
>
> (2) No—
>
> (a) postal service provider, telecommunication service provider or decryption key holder may disclose any information which he or she obtained in the exercising of his or her powers or the performance of his or her duties in terms of this Act; or
>
> (b) employee of a postal service provider, telecommunication service provider or decryption key holder may disclose any information which he or she obtained in the course of his or her employment and which is connected with the exercising of any power or the performance of any duty in terms of this Act, whether that employee is involved in the exercising of that power or the performance of that duty or not,
>
> except for the purposes mentioned in subsection (1).
>
> (3) The information contemplated in subsections (1) and (2) includes information relating to the fact that—
>
> (a) a direction has been issued under this Act;
>
> (b) a communication is being or has been or will probably be intercepted;

seizure warrants which, although also obtained without the knowledge of the subject, do come to the notice of the subject, interception directions under RICA are applied for, granted and implemented in complete secrecy. Even if a direction ought not to have been granted, all things being equal, the subject will never know. Of course, there cannot be a challenge to the lawfulness of something the subject of surveillance is not aware of. And it is purely fortuitous that some subjects of surveillance do become aware of their surveillance. In the vast majority of cases they never do. That must surely incentivise or facilitate the abuse which we know does take place.

[44] Therefore, an individual whose privacy has been violated in the most intrusive, egregious and unconstitutional manner never becomes aware of this and is thus denied an opportunity to seek legal redress for the violation of her or his right to privacy. In her or his case the right guaranteed by section 38 of the Constitution[73] to approach a court to seek appropriate relief for the infringement of the right to privacy is illusory. This, at a stage that is post-surveillance and when no prejudice can be suffered by the state agency responsible for the surveillance. That is overbroad and does not help advance the achievement of the purpose of surveillance. What it does instead is to facilitate the abuse of the process under the cloak of secrecy.

(c) real-time or archived communication-related information is being or has been or will probably be provided;

(d) a decryption key is being or has been or will probably be disclosed or that decryption assistance is being or has been or will probably be provided; and

(e) an interception device is being or has been or will probably be installed."

Section 51 provides that any person who contravenes or fails to comply with section 42(1) is guilty of an offence.

[73] Section 38 provides:

"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members."

[45] Because of its likely outcomes, post-surveillance notification will go a long way towards eradicating the sense of impunity which certainly exists. The concomitant will be a reduction in the numbers of unmeritorious intrusions into the privacy of individuals. I explain this presently. In a sense, post-surveillance notification functions as less restrictive – or should I say less intrusive – means and serves at least two purposes. First, the subject of surveillance is afforded an opportunity to assess whether the interception direction was applied for and issued in accordance with the Constitution and RICA. If need be, she or he may seek an effective remedy for the unlawful violation of privacy. Second, because there will be challenges to illegally sought and obtained interception directions, that will help disincentivise abuse of the process and reduce violations of the privacy of individuals. I am not addressing myself to the possibility that surveillance may, in any event, take place outside of the law, i.e. not even under colour of compliance with RICA. That issue is not before us.

[46] While internationally there is no consensus on when and how post-surveillance notification is an absolutely necessary safeguard of the right to privacy, considerable comparative practice supports the conclusion that *some* form of notice is crucial to minimising abuse. Subject to varying exceptions and qualifications, the default position in the United States of America and Canada is to give notice 90 days after surveillance, if safe to do so.[74] Likewise in Denmark, there is a general requirement to inform the

[74] High Court judgment above n 8 at para 47. At fn 10 the High Court details the provisions of the relevant legislative provisions in the United States of America and Canada. The Procedure for interception of wire, oral, or electronic communications in the United States (18 U.S. Code§ 2518) provides, in section 8(d):

> "Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518 (7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—
>
> (1) the fact of the entry of the order or the application;
>
> (2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and
>
> (3) the fact that during the period wire, oral, or electronic communications were or were not intercepted.
>
> The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and

subject at the end of surveillance, provided that such notification does not undermine the purpose of the investigation.[75] Germany adopts a similar approach.[76]

[47] The jurisprudence of the European Court of Human Rights similarly links notification to whether it no longer jeopardises the purpose of the surveillance. This is captured in this passage from *Association for European Integration and Human Rights*:

> "According to the Court's case law, the fact that persons concerned by such measures are not apprised of them while the surveillance is in progress or even after it has ceased cannot by itself warrant the conclusion that the interference was not justified under the terms of paragraph 2 of Article 8, as it is the very unawareness of the surveillance which ensures its efficacy. However, *as soon as notification can be made without jeopardising the purpose of the surveillance after its termination, information should be provided to the persons concerned*".[77] (Emphasis added.)

> orders as the judge determines to be in the interest of justice. On an *ex parte* showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed."

Likewise, section 196(1) of the Canadian Criminal Code RSC 1985, c C-46 states:

> "The Attorney General of the province in which an application under subsection 185(1) was made or the Minister of Public Safety and Emergency Preparedness if the application was made by or on behalf of that Minister shall, within 90 days after the period for which the authorisation was given or renewed or within such other period as is fixed pursuant to subsection 185(3) or subsection (3) of this section, notify in writing the person who was the object of the interception pursuant to the authorisation and shall, in a manner prescribed by regulations made by the Governor in Council, certify to the court that gave the authorisation that the person has been so notified."

[75] Denmark, Administration of Justice Act, LBK nr 1139 af 24/09/2013 Gældende, Article 788 (1)(4).

[76] Germany, § 5 read with § 12(2) of the Act on Restrictions on the Secrecy of Mail, Post and Telecommunications, June 26, 2001, BGBL. I at 1254, 2298.

[77] *Association for European Integration and Human Rights and Ekimdzhiev v Bulgaria*, No. 62540/00, 28 June 2007 at para. 91 (*The Bulgarian case*). This mirrors the Court's ruling in *Weber and Saravia v Germany*, No. 54934/00, 29 June 2006 at para 135:

> "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. [A]s soon as notification can be carried out without jeopardising the purpose of the restriction after the termination of the surveillance measure, information should, however, be provided to the persons concerned."

[48] Reverting to South Africa, none of the respondents proffered any cogent reason why there should never be post-surveillance notification. And they could not have been able to. I say so because I just cannot conceive of any legitimate reason why the state would want to keep the fact of past surveillance a secret in perpetuity. "[A]s soon as notification can be made *without jeopardising the purpose of the surveillance after its termination*",[78] just why would the state want to keep the fact of surveillance secret? This, of course, is not about those instances where – for a while perhaps – the state may be able to justify why it would be injurious to its interest prematurely to give notification. I am thus led to the conclusion that post-surveillance notification should be the default position, which should be departed from only where, on the facts of that case, the state organ persuades the designated Judge that such departure is justified. And RICA is unconstitutional to the extent that it fails to provide for it. This conclusion is buttressed by the fact that at present the infringement is such as to implicate the rights of access to courts[79] and to an appropriate remedy.[80]

Automatic review

[49] Plainly, RICA applies to all citizens; the influential and the barely noticed, the well-resourced and the deprived, the well-placed in society and the marginalised, those who can stand and fight for themselves and those who – because of all manner of deprivation – are susceptible to abuse. In South Africa, the vast majority of people cannot afford to litigate where they have suffered the infringement of their rights at the hands of the state. For many, therefore, post-surveillance notification will not translate to the vindication of their privacy rights through the exercise of the right of access to court. As a result of financial want, exercising the right will be an impossibility. It seems to me what could give this vulnerable group of South Africans a fair chance of also being in a position to vindicate their privacy right would be if they were to be afforded relatively inexpensive, speedy and effective access to judicial review. This

[78] *The Bulgarian case* id at para 90.

[79] Section 34 of the Constitution.

[80] Section 38 of the Constitution.

could, for example, be in the form of automatic review by the designated Judge in an informal, mainly paper-based non-court process. It could, of course, be open to the designated Judge to call for whatever information she or he might require from whomsoever. The idea is for a summary, but effective process. The detail on how the process should unfold is best left to Parliament.

[50] In addition to the vindication of the privacy right, here is what commends automatic review. The knowledge by the relevant law enforcement officers that the vast majority of South Africans are most likely not going to be in a position to challenge their surveillance may serve as an incentive for continued abuse. And – as shown by the examples I gave above – abuse is a shocking reality. On the other hand, constant awareness that all interceptions of communications in respect of which RICA has been invoked will be subjected to automatic review will likely serve as a disincentive.

[51] Automatic review is not an unknown quantity in our legal system. Two examples are the automatic review by Judges of certain sentences imposed by Magistrates[81] and the automatic review by the Land Claims Court of orders of eviction granted in the Magistrates' Courts.[82] Plainly, these examples are an attempt at guaranteeing justice, and the vast majority of those who stand to benefit are the vulnerable and financially deprived. What we have before us in this application is comparable.

[52] Automatic review is thus another possible safeguard which, though not highlighted by the applicants, Parliament may consider, given the context in which the current surveillance regime exists. However, it is worth noting that the lack of such a process does not alone render RICA unconstitutional, as the lack of post-surveillance notification does. Automatic review is a complementary mechanism tied to notification.

[81] Section 302 of the Criminal Procedure Act 51 of 1977.

[82] Section 19(3) of the Extension of Security of Tenure Act 62 of 1997.

[53] To the extent that automatic review would add to the volume of the designated Judge's work, Parliament is best placed to assess whether the answer would lie in an increase in the number of designated Judges. And the number could be stipulated by Parliament itself or that could be left for the determination of the Minister from time to time. Provision could even be made for the designated Judge initially to enquire from the person concerned if they opt for automatic review or – if so minded – for challenging the surveillance in court.

[54] Two things are worth noting. First, what is said here about automatic review is not meant to serve as precedent for automatic review in all areas where infringements of rights by the state occur. Second and linked to the first point, this is but a possible safeguard that Parliament may consider. It is not obligatory that it be adopted. What is obligatory is for Parliament to put in place a communication surveillance system that sufficiently safeguards against infringements of the privacy right. If – upon evaluation – a new system does serve this purpose even though it does not provide for automatic review, that will pass muster. Initially it lies with Parliament to craft that system. But, of course, it is the judicial system that is the final arbiter on whether the system is constitutionally compliant.

Independence issue and designated Judge

[55] At the beginning of oral argument, counsel for the applicants was asked to clarify if the independence issue was a standalone challenge or was a facet of the Bill of Rights challenge under section 14, i.e. the privacy challenge. Counsel clarified that the independence issue was a facet of the privacy challenge and that the point being made was that the mooted lack of independence detracted from the sufficiency of safeguards for purposes of the section 36(1) justification exercise. It is on that basis that I deal with the independence issue.

[56] As shown above, RICA's framework for surveillance has as its centrepiece a "designated Judge" who authorises surveillance both in real time and of archived communications. Safeguards on the appointment, term, and function of a designated

Judge are accordingly pivotal in assessing whether RICA meets the section 36 threshold. I will set out the grounds of the independence challenge later. Before dealing with this challenge, there is an issue that must be resolved first. I next focus on it.

[57] This issue was not raised by any of the parties. It is that beyond the definition of "designated Judge", nothing in the rest of RICA provides for the designation or appointment. What arises from this is whether the Minister does have the power to designate a Judge. This question was raised by this Court during argument and debated with counsel. In their affidavits and submissions – written and oral – the parties proceeded from an assumption that the Minister does have the power. They were subsequently invited by way of post-hearing directions to address this issue and its implications in supplementary written submissions. The applicants, the Minister of Justice and Correctional Services and Minister of Police did. All three submit that there is an implied power to designate a Judge.

[58] Since this issue was not raised by the parties, can this Court consider it *mero motu* (of its own accord)? This Court in *Director of Public Prosecutions, Transvaal*[83] held that a court may raise a constitutional issue[84] of its own accord.[85] Additionally, "[w]here a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law".[86] This is rooted in the supremacy of the Constitution.[87] It may turn out that the assumption from which the

[83] *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC).

[84] The *vires* question, i.e. whether the Minister does have the power to designate, implicates the principle of legality, a constitutional issue (see *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) (*Fedsure*) at para 58, read with *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*) at para 17, where this Court held that the principle of legality is a subset of the rule law).

[85] *Director of Public Prosecutions, Transvaal* above n 83 at para 34.

[86] *CUSA v Tao Ying Metal Industries* [2008] ZACC 15; 2009 (2) SA 402 (CC); 2009 (1) BCLR 1 (CC) at para 68. See also *Matatiele Municipality v President of RSA* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) at para 67.

[87] *Director of Public Prosecutions, Transvaal* above n 83 at para 36.

parties proceeded is not wrong. That notwithstanding, in a given case circumstances may be such that a court must raise and determine the legal point underlying the assumption. Since courts are ordinarily required to decide only issues properly raised, constitutional issues should only be raised *mero motu* in exceptional circumstances:

> "The first is where it is necessary for the purpose of disposing of the case before it, and the second is where it is otherwise necessary in the interests of justice to do so. It will be necessary for a court to raise a constitutional issue where the case cannot be disposed of without the constitutional issue being decided. And it will ordinarily be in the interests of justice for a court to raise, of its own accord, a constitutional issue where there are compelling reasons that this should be done.
>
> . . .
>
> It is neither necessary nor desirable to catalogue circumstances in which it would be in the interests of justice for a court to raise, of its own accord, a constitutional issue. This is so because this depends upon the facts and circumstances of a case."[88]

[59] The question whether RICA empowers the Minister to designate a Judge falls within both circumstances. First, this Court cannot dispose of the independence issue without considering the nature and manner of designation. And it can do that by analysing the power of designation and all that pertains to its exercise. To do that, it must know everything that pertains to the designation, for example: the exact nature of the powers and functions of a designated Judge;[89] the duration of the designation; how that duration comes to an end and the Minister's role, if any, in that regard; and whether, and to what extent, the designated Judge's powers are subject to the Minister's control. It thus becomes necessary for purposes of properly determining this application to deal with the question of the Minister's power to designate.

[88] Id at paras 40-1.

[89] This does not appear to present problems as the actual powers or functions are provided for in RICA. In that regard, see sections 7(6), 8(6), 16(4), 16(7), 16(10), 17(3), 18(3), 20(3), 21(3), 22(3), 23(3), 23(7), 23(10)-(12), 24-5 and 58 of RICA.

[60] Second, considering the centrality of the designated Judge in the application of RICA and in the matrix of statutes regarding surveillance,[90] the lack of an empowering provision in RICA, if there be, is potentially catastrophic. It is thus also in the interests of justice for this issue to be raised *mero motu*.

[61] The question whether RICA empowers the Minister to designate a Judge "is apparent on the papers".[91] In the face of the challenge that the designated Judge lacks independence because of, inter alia, the manner of designation and concerns around the Judge's term, one cannot avoid asking: where is the designation provided for and what does it stipulate? For that reason, the question of the existence of the power is a perfect candidate for being raised by the Court *mero motu* on the papers before us.[92] And I cannot conceive of any prejudice that may be suffered by any of the parties.[93] This is especially so here as the parties were afforded an opportunity to address us on the issue.

[62] In terms of section 1 of RICA "'designated Judge' means any Judge of a High Court discharged from active service under section 3(2) of the Judges' Remuneration and Conditions of Employment Act [47 of 2001], or any retired Judge, who is designated by the Minister to perform the functions of a designated Judge for purposes of [RICA]". This definition indicates that RICA meant to empower the Minister to designate a Judge. That this is so is strengthened by the reference in other legislation to the "Judge *designated by the Minister of Justice* for the purposes of [RICA]".[94] However, there is only mention of designation in the section 1 definition and nothing in

[90] As will be seen later, other statutes rely for authorisations of surveillance under them on a judge designated in terms of RICA; the other statutes cross-refer to RICA in this regard. That means if we are to hold that the Minister does not have the power to designate a Judge, that will affect surveillance under those statutes as well.

[91] Compare *CUSA* above n 86 at para 68.

[92] *Director of Public Prosecutions, Transvaal* above n 83 at paras 40-1.

[93] Id at para 42; see also *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) at para 27.

[94] See, for example, section 35 of the Financial Intelligence Centre Act 38 of 2001. Further examples will be discussed below.

the substantive provisions[95] of RICA expressly empowers the Minister to designate a Judge. Is this power of designation implied in RICA?

[63] This case presents us with an opportunity to deal not with the common and oft-dealt-with necessary or ancillary implied power (which I will simply call the ancillary implied power), but with what I would call a primary implied power.[96] A distinction must be drawn between an implied primary power and an ancillary implied power. I consider it necessary to draw this distinction because quite often discussions of implied powers entail ancillary implied powers, and not primary implied powers. The distinction will be better understood if I first discuss the well-known concept, the ancillary implied power. An ancillary implied power arises where a primary power – whether express or implied – conferred by an Act cannot be exercised if the ancillary implied power does not also exist. For example, in *Masetlha* Moseneke DCJ, considering the President's power to dismiss a head of an intelligence agency under section 209(2) of the Constitution, held:

> "The power to dismiss is necessary in order to exercise the power to appoint. . . . Without the competence to dismiss, the President would not be able to remove the head of the Agency without his or her consent before the end of the term of office, whatever the circumstances might be. That would indeed lead to an absurdity and severely undermine the constitutional pursuit of the security of this country and its people. That is why the power to dismiss is an essential corollary of the power to appoint. . ."[97]

[64] There, the power to dismiss was found to be an *essential corollary* of the power to appoint, and this Court thus interpreted the power in section 209(2) of the Constitution to appoint the head of the NIA to include a power to dismiss. The power to dismiss was an ancillary implied power, ancillary because it flowed from the power to appoint. In *Matatiele Municipality* Ngcobo J wrote:

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[95] I use the term "substantive provisions" in contradistinction to the definitional provisions.

[96] Shortly I will explain what I mean by the concepts primary power and implied primary power.

[97] *Masetlha v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at para 68.

> "It was . . . inevitable that the alteration of provincial boundaries would impact on municipal boundaries. This is implicit in the power to alter provincial boundaries. It is trite that the power to do that which is expressly authorised includes the power to do that which is necessary to give effect to the power expressly given. The power of Parliament to redraw provincial boundaries therefore includes the power that is reasonably necessary for the exercise of its power to alter provincial boundaries."[98]

[65] What I refer to as an ancillary power arises in the context of one power being *necessary* in order for an unquestionably existing power to be exercised.

[66] Examples of implied powers that I have picked up from academic writings have also been about implied ancillary powers. Hoexter says:

> "As a general rule, express powers are needed for the actions and decisions of administrators. Implied powers may, however, be ancillary to the express powers, or exist either as a necessary or reasonable consequence of the express powers. Thus 'what is reasonably incidental to the proper carrying out of an authorised act must be considered as impliedly authorised'."[99]

[67] According to De Ville—

> "[w]hen powers are granted to a public authority, those granted expressly are not the only powers such public authority will have. The powers will include those which are reasonably necessary or required to give effect to and which are reasonably or properly ancillary or incidental to the express powers that are granted."[100]

[68] Baxter says something that is to similar effect as what Hoexter and De Ville say. He says:

> "Powers may be presumed to have been impliedly conferred because they constitute a logical or necessary consequence of the powers which have been expressly conferred, because they are

[98] *Matatiele Municipality* above n 86 at para 50.

[99] Hoexter *Administrative Law in South Africa* (Juta, Cape Town 2012) at 43-4.

[100] De Ville *Judicial Review of Administrative Action in South Africa* (LexisNexis Butterworths, 2003) at 108.

> reasonably required in order to exercise the powers expressly conferred, or because they are ancillary or incidental to those expressly conferred."[101]

[69] Coming to an implied primary power, an antecedent question is: what do I mean by a primary power? A primary power is a power to do something required to be done in terms of an Act and which does not owe its existence to, or whose existence is not pegged on, some other power; it exists all on its own. That is what makes it primary, and not ancillary. If it owed its existence to another primary power, then it would be an ancillary power.

[70] A primary power may be express or implied. It is express if it is specifically provided for. Examples of express primary powers are the President's power to appoint the head of the intelligence agency,[102] which featured in *Masetlha*, and the power to determine or alter provincial boundaries, which featured in *Matatiele Municipality*.[103] The primary power is implied if it is not expressly provided for. It is implied from a reading of the Act and a consideration of all that must be factored in the interpretative exercise. It owes its existence to provisions of the Act and everything that is relevant to the interpretative exercise.[104] The fact that provisions of the Act, including provisions conferring other primary powers, may shed light on whether an implied primary power exists does not mean the implied primary power derives its existence from these provisions. These provisions and all that must be factored in determining whether a

[101] Baxter *Administrative Law* (Juta, Cape Town 1984) at 404-5.

[102] Section 209(2) of the Constitution.

[103] Section 155(3)(b) of the Constitution.

[104] What De Ville says on what to consider in the interpretative exercise, albeit in the context of implied ancillary powers, is useful. Here it is:

> "[I]mplied powers cannot simply be determined with reference to the language of the empowering provision; the rest of the provisions of the enactment, the purpose of the provision and that of the Act, other requirements for valid administrative action, the Constitution, . . . and the broader social and economic context, also have to be taken account of in determining the scope of the powers of public authority." (De Ville above n 100 at 108-9).

primary implied power exists serve as interpretative tools that point to its existence. As we now know, the Constitution plays a crucial role in that interpretative exercise.[105]

[71] So, the interpretative exercise is not confined to the four corners of a statute. The answer to the question whether an implied primary power exists is yielded by the usual interpretative exercise that seeks to establish what a statute or a provision in it means. There is nothing unusual about this. That, in the main,[106] available jurisprudence and learning on implied powers concerns ancillary implied powers does not mean there aren't primary implied powers. And cases like *Masetlha*[107] and *Matatiele Municipality*[108] never suggested otherwise. If we were to say they did, we would be erring. They pronounced on something different, which is what was before them. That is, in each instance the question was whether the *ancillary* implied power at issue existed. They did not in the least purport to declare that there is nothing like an implied *primary* power. And they could not have so declared as that was not before the Court. In other words, they did not suggest that an interpretative exercise can never yield the result that an implied primary power is provided for in a statute. To put it bluntly, the question whether there may be an implied primary power was irrelevant to the issues at hand in those cases. Thus those cases are of no assistance to us in the present matter.

[72] What I must answer next is whether the power to designate a Judge does exist. What is clear is that if it does, it is not express, nor is it an ancillary implied power. It is not a cognate implied power pegged on, and owing its existence to, some primary power.

[105] See, for example, *Hyundai* above n 43 at para 24, where this Court held that "it is the duty of a Judicial Officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible".

[106] I do not want to discount the possibility that there may be some jurisprudence or learning that has adopted my approach because I cannot claim to have even attempted to trawl all that is available out there.

[107] *Masetlha* above n 97.

[108] *Matatiele Municipality* above n 86.

[73] For present purposes, the Promotion of Administrative Justice Act[109] (PAJA) is a useful guide. Section 1 of PAJA provides an example that similarly talks about "designation" by the Minister. A ringingly similar feature is that the designation by the Minister is also in the definition section and the substantive provisions of PAJA say nothing more about the conferral of a power to designate. Section 1 of PAJA defines "court" to include "a Magistrate's Court . . . designated by the Minister by notice in the *Gazette*". One may be led to believe that this definition is merely descriptive and points to the Minister being empowered elsewhere in PAJA to designate Magistrates' Courts. But nowhere in PAJA is there such empowering provision. Section 9A of PAJA twice refers to a "Magistrate's Court *designated by the Minister in terms of section 1 of this Act*". A reading of section 9A and the definition section put it beyond question that the power to designate is conferred by the definition section itself. Plainly, PAJA meant for the power to designate to stem directly from the definition. Put differently, the empowerment of the Minister to designate is implied in the definition in section 1. And this power to designate is a primary power implied from the language and context of PAJA; it is not ancillary to another power in PAJA.

[74] It seems to me it would be unduly formalistic to suggest that – in the absence of a substantive provision in PAJA providing for the power to designate a Magistrate's Court – PAJA has not made provision for the power to designate. It is plain from the definition that it is envisaged that designations may be made by the Minister. It also seems clear that the Minister need do nothing more than to reflect the court she or he has designated in the Gazette. It would be too formalistic to expect that there be a substantive provision saying the Minister has a power to designate a Magistrate's Court by notice in the Gazette. What would that substantive provision add? Nothing at all.

[75] Of importance, what is to be gleaned from the definition of "court" in section 1 of PAJA is that the conferral of a power by a provision in the definition section is not

[109] 3 of 2000.

something unknown. So, we must approach the definition of "designated Judge" in RICA with this awareness in mind and be wary not instinctively to reject the notion that a definition section may well be a power-conferring provision. Of course, RICA is a different statute and it must be its own interpretation that yields a determination that the power to designate exists or does not. My reliance on section 1 of PAJA does not, in the least, mean I am not alive to this. What I seek to point out is that it is not unheard of that a power to do something may be implied from the definition section.

[76] Reverting to RICA, the definition of "designated Judge" refers to a Judge falling within one of the two identified categories and "who is designated by the Minister to perform the functions of a designated Judge for purposes of [RICA]". The definition tells us what the functions of the designated Judge are; they are to be found in RICA. And they have largely been identified above. So, we know who qualifies to be a designated Judge. We know what a designated Judge is required to do. What remains is the formal act of designating, which – in essence – need not entail more than to identify a Judge falling within the two identified categories and advising her or him that she or he has been so identified "to perform the functions of a designated Judge for purposes of [RICA]". Why then can't the Minister designate? Reading the definition and the provisions on the functions of a designated Judge together and taking into account the fact that the act of designating need not go beyond what I have just identified, it would be the height of formalism to insist that the power to designate must be expressly provided in the substantive provisions of RICA. Yes, a substantive provision conferring the power would have been a "nice-to-have", but I do not agree that its absence must legally result in a lack of power. Crucially, the many provisions on the functions of a designated Judge appear to proceed from the premise that the power to designate a Judge does exist in RICA. These provisions must have been meant to be operable based on the definition of "designated Judge" in section 1. To suggest otherwise would be to place form ahead of substance. The conclusion has to be that the power to designate a Judge is implicit in a proper conjoined reading of the definition of "designated Judge" and other provisions of RICA.

[77] Also, in accordance with the maxim *ut res magis valeat quam pereat*,[110] rather than render RICA virtually inoperable as a result of a perceived lack of power to designate, an interpretation that finds a power to designate a Judge in section 1, read with the other provisions I have referred to, commends itself. The maxim may be a useful tool of interpretation. And it is here. In *Hess* the Court held that, in terms of this maxim, "[w]here the meaning of a section in a law is uncertain or ambiguous it is the duty of the Court to consider the law as a whole, and compare the various sections with each other and with the preamble, and give such meaning to the particular section under consideration that it may, if possible, have force and effect".[111] The reading I am advocating is quite viable. Hoexter – albeit in the context of necessary ancillary powers – argues that "[t]here is a very strong argument in favour of implying a power if the main purpose of the statute cannot be achieved without it".[112]

[78] If there is no power to designate, no Judge can be designated lawfully. On the *Fedsure*[113] and *Pharmaceutical Manufacturers*[114] principle, it would be unconstitutional for the Minister to designate. As the role of the designated Judge is key to RICA surveillance, the lack of the power to designate hollows the Act out and leaves it bereft of meaningful operability. Take the designated Judge out of the picture, directions under sections 16 to 18 and 21 and 23, extensions and amendments of these directions under section 20 and entry warrants under section 22 cannot be issued. The only directions that can still be issued are archived communication-related directions under section 19. And those are issued, not by a designated Judge, but by a High Court

[110] Directly translated "the thing may avail (or be valid) rather than perish" (Claassen's Dictionary of Legal Words and Phrases). A less literal meaning is that an instrument must be interpreted such that it is given some meaning rather than rendered nugatory.

[111] *H Hess v The State* (1985) 2 Off Rep 112 at 117.

[112] Hoexter above n 99 at 45.

[113] *Fedsure* above n 84 at paras 58-9. This Court held "[i]t seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law". As a result, the common law principles of *ultra vires* are underpinned by the constitutional principle of legality.

[114] *Pharmaceutical Manufacturers* above n 84 at para 20, where this Court held "[t]he exercise of *all public power* must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law".

Judge, a Regional Court Magistrate or a Magistrate. The only surveillance that remains possible where a designated Judge would otherwise have had to grant authorisation is in instances where urgency or exceptional circumstances require of law enforcement officers to act without first seeking authorisation from a designated Judge.[115] Surely those instances must constitute a small percentage of surveillance conducted by law enforcement agencies. So, this does not detract from the fact that without a designated Judge, the RICA edifice becomes substantially inoperable; a far-reaching result.

[79] Faced with that ominous terminal reality, I can conceive of no compelling reason for not concluding that the power to designate is implied in the definition of "designated Judge" in section 1 of RICA; it is an implied primary power. Considering section 1 with the structure and purpose of RICA as a whole, this seems the only viable interpretation. The only argument against this that I can think of is purely the lack of express provision in the substantive provisions of RICA conferring the power to designate. Surely, that cannot of necessity be dispositive of the question. Not when we

[115] Section 7(1) of RICA provides:

> "Any law enforcement officer may, if—
>
> (a) he or she is satisfied that there are reasonable grounds to believe that a party to the communication has –
>
> (i) caused, or may cause, the infliction of serious bodily harm to another person;
>
> (ii) threatens, or has threatened, to cause the infliction of serious bodily harm to another person; or
>
> (iii) threatens, or has threatened, to take his or her own life or to perform an act which would or may endanger his or her own life or would or may cause the infliction of serious bodily harm to himself or herself;
>
> (b) he or she is of the opinion that because of the urgency of the need to intercept the communication, it is not reasonably practicable to make an application in terms of section 16(1) or 23(1) for the issuing of an interception direction or an oral interception direction; and
>
> (c) the sole purpose of the interception is to prevent such bodily harm,
>
> intercept any communication or may orally request a telecommunication service provider to route duplicate signals of indirect communications specified in that request to the interception centre designated therein."

And section 8(2) provides:

> "A law enforcement officer . . . may, if he or she is of the opinion that determining the location of the sender is likely to be of assistance in dealing with the emergency, orally request, or cause any other law enforcement officer to orally request, the telecommunication service provider concerned to act as contemplated in subsection 1(i)(aa)(bb)."

know from sections 1 and 9A of PAJA, considered with the principles underlying implied powers, that a definition section can confer a power. In sum, I conclude that section 1 of RICA, read with the provisions on the functions of a designated Judge, does provide for the power to designate a Judge.

[80] I am yet to deal with the independence challenge. One may ask: what is the point of "saving" RICA insofar as the question of the power to designate is concerned, if we may still invalidate it based on the independence challenge? These are two distinct aspects that must be dealt with separately. It would be illogical to say there is no power because, in any event, the power-conferring provision is unconstitutional for inconsistency with the Bill of Rights. There is an antecedent question. That is, is there a power? If there is, there is a second question: is the power constitutional? I now proceed to deal with the independence challenge.

[81] In their pleaded case the applicants contend that the definition of "designated Judge" which – as I have now held – is the power-conferring provision does not provide adequate safeguards for the structural and perceived independence of the designated Judge. The independence challenge is founded on the grounds that: RICA fails to prescribe or limit the designated Judge's term of office, making it possible for the Minister to make indefinite reappointments; each term is for a duration determined at the whim of the Minister; and appointments of designated Judges are exclusively made by a member of the Executive in a non-transparent manner in that there is no role for the Judicial Service Commission (JSC), Parliament or the Chief Justice. The Minister of State Security argues that the Constitution is silent on the appointment of Judges to perform the functions contemplated in RICA. She stresses that the designated Judge is appointed from the ranks of Judges who are presumed independent, and that the Constitution does not require extra measures to guarantee their independence.

[82] That search and seizure warrants – which by their nature result in the violation of privacy – must be issued by an *independent* Judiciary is a leitmotif across our constitutional jurisprudence. In *Thint* this Court recognised "the fact that the decision

as to whether a warrant is to be issued is taken by *an impartial and independent Judicial Officer* . . . as an important consideration *in determining the constitutionality* of search powers", and held that "requiring a search warrant to be issued by a Judicial Officer *is an important part of the protection of fundamental rights* and, in particular, the right to privacy".[116] Plainly, that puts it beyond question that it is a constitutional requirement that the issuing of search and seizure warrants be authorised by an independent Judicial Officer.

[83] This concern for independent judicial authorisation of intrusions into privacy echoes the ruling in *Van der Merwe*, regarding the validity of search and seizure warrants issued in terms of section 21 of the Criminal Procedure Act.[117] Mogoeng J stated that—

> "[t]he judicious exercise of this power by [Judicial Officers] 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".[118] (Emphasis added.)

[84] Why this is crucial is because – by its very nature – the execution of warrants of search and seizure results in the violation of privacy. The involvement of independent functionaries like members of the Judiciary helps ensure that the risk of unmeritorious intrusions into the privacy of individuals is minimised. This must apply *a fortiori* (with more force) in the case of surveillance under RICA. That is so because the non-transparent, if not impenetrable, circumstances in which the power of issuing RICA surveillance directions is exercised make it singularly important that there be no apprehension or perception of lack of independence; more important than in the case of issuing search and seizure warrants where the possibility of a challenge is always a reality. And the operative words are "apprehension" and "perception".

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[116] *Thint (Pty) Ltd v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions* [2008] ZACC 13; 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) (*Thint*) at para 83 (emphasis added).

[117] *Van Der Merwe* above n 58.

[118] Id at para 38.

[85] Once satisfied that the Constitution requires an independent designated Judge to authorise interceptions, it is necessary to ascertain the meaning of independence. The Supreme Court of Canada in *R v Valente* defined independence thus:

> "The word 'independent' . . . connotes not merely a state of mind or attitude in the actual exercise of judicial function, but a status or relationship to others, particularly to the Executive branch of government, that rests on objective conditions or guarantees."[119]

[86] This Court in *McBride*, in considering the independence of the Independent Police Investigative Directorate, explained that—

> "it is difficult to attempt to define the precise contours of a concept as elastic as [independence]. It requires a careful examination of a wide range of facts to determine this question. Amongst these are the *method of appointment, the method of reporting, disciplinary proceedings and method of removal* of the Executive Director from office, and *security of tenure*."[120] (Emphasis added.)

[87] In examining the elements of independence, this Court in *Glenister II* accepted that the question is not whether an institution has absolute independence, but rather "whether it enjoys an adequate level of structural and operational autonomy that is secured through institutional and legal mechanisms designed to ensure that it 'discharges its responsibilities effectively', as required by the Constitution".[121] Additionally, the perception of independence plays a critical role in ascertaining whether an institution is independent. In particular, "[w]hether a reasonably informed and reasonable member of the public will have confidence in an entity's

[119] *R v Valente* (1985) 24 DLR (4th) 161 (SCC) at para 15.

[120] *McBride v Minister of Police* [2016] ZACC 30; 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC) at para 31.

[121] *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC) (*Glenister II*) at para 125.

autonomy-protecting features is important to determining whether it has the requisite degree of independence".[122]

[88] Admittedly, many of this Court's judgments regarding independence deal with inspectorates and other institutions, and not with the independence of Judges. One case where focus was on judicial officers is *Van Rooyen* where Chaskalson CJ said:

> "In *De Lange v Smuts N.O. and Others*, Ackermann J referred to the views of the Canadian Supreme Court in *The Queen in Right of Canada v Beauregard*, *Valente v The Queen* and *R v Généreux* on the question of what constitutes an independent and impartial court, describing them as being 'instructive'. In this context, he mentioned the following summary of the essence of judicial independence given by Dickson CJC in *Beauregard*'s case:
>
> > 'Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them; no outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.'
>
> This requires judicial officers to act independently and impartially in dealing with cases that come before them, and at an institutional level it requires structures to protect courts and judicial officers against external interference."[123]

[89] It is generally expected and accepted that Judges act independently, impartially and fairly, without bias or prejudice.[124] This is supported by the burdensome onus on

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[122] Id at para 207. Addressing the Cape Law Society Chaskalson CJ noted that:

> "Judicial independence is a requirement demanded by the Constitution, not in the personal interests of the Judiciary, *but in the public interest, for without that protection judges may not be, or be seen by the public to be, able to perform their duties without fear or favour*. This is necessary in the best of times, and crucial at times of stress." (Justice Chaskalson on the future of the profession at the Cape Law Society AGM [2013] De Rebus 10).

[123] *S v Van Rooyen (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 8210 (CC) at para 19.

[124] According to Cowen SC, the express requirements of the Constitution allow for the identification of five qualities relating to fitness and propriety for judicial office: independence, impartiality, integrity, judicial

an applicant for recusal of a Judge, which is based on the presumption that Judicial Officers are impartial.[125] But it does not mean that Judges are infallible,[126] nor does it mean there is no possibility that Judges may attempt to abuse their office.[127] As Judges, we should not – because of our own belief in our independence – be sanctimoniously dismissive of the fact that we may be susceptible to these ills. Indeed, Nelson explains that "it would not be realistic" for Judges to "assume a sanctimonious or puritanical attitude".[128]

[90] As such, structures, mechanisms and processes that strengthen the independence of an institution or office are imperative even where the incumbent is a Judge. Indeed, in *Justice Alliance*, this Court held that "[n]on-renewability [of the term] fosters public confidence in the institution of the Judiciary as a whole, since its members function with neither threat that their terms will not be renewed nor any inducement to seek to secure renewal".[129] The fact that it was the prestigious office of the Chief Justice[130] that was at the heart of the enquiry in that matter did not render the scrutinisation of its structural

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temperament and commitment to constitutional values (Cowen "Judicial selection: What Qualities Do We Expect in a South African Judge?" in Bentley et al (eds) *Falls the Shadow: Between the Promise and the Reality of the South African Constitution* (UCT Press, Cape Town 2013) at 155).

Upon assuming office, South African judges are required by section 174(8) of the Constitution to take an oath or affirm that they will uphold and protect the Constitution.

[125] *President of the Republic of South Africa v South African Rugby Football Union - Judgment on recusal application* [1999] ZACC 9; 1999 (4) SA 147; 1999 (7) BCLR 725 (CC) at para 40; *Stainbank v South African Apartheid Museum at Freedom Park* [2011] ZACC 20; 2011 (10) BCLR 1058 (CC) at para 36. See also Freedman "The Impartiality of the Judiciary" in *LAWSA* 3rd ed vol 7(2) at 318.

[126] Bassett argues that "[a]lthough judges may believe themselves free of bias, the bias blind spot, like unconscious bias, is simply a human phenomenon, and therefore, again, one from which judges are not immune". (Bassett "Three Reasons Why the Challenged Judge Should Not Rule on a Judicial Recusal Motion" (2015) 18 *NYU Journal of Legislation and Public Policy* 659 at 671).

[127] Judge Wallace states that "[j]udicial corruption certainly exists; I know of no country that is completely free of corruption, with its insidious effect of undermining the rule of law" and that "[j]udicial corruption not only knocks judges off [their] perceived pedestals, but also erodes respect for law". (Wallace "Resolving Judicial Corruption While Preserving Judicial Independence: Comparative Perspectives" (1998) 28 *California Western International Law Journal* 341 at 341-2).

[128] Nelson *The Legalist Reformation: Law, Politics and Ideology in New York: 1920-1980* (The University of North Carolina Press, Chapel Hill & London 2001) at 222.

[129] *Justice Alliance of South Africa v President of the Republic of South Africa* [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) at para 73.

[130] Id at para 78, where this Court considered the importance of the role of the Chief Justice, and the distinctive appointment process therefor.

or perceived independence unnecessary. Put differently, the fact that it is generally expected and accepted that Judges act independently, impartially and fairly, without bias or prejudice did not stand in the way of this Court considering the independence challenge in relation to the office of Chief Justice.

[91] Judges are appointed by the President after a constitutionally prescribed process of consultation which differs according to the judicial office applied for.[131] In terms of section 174(3) of the Constitution, the JSC must also be consulted.[132] In practical terms, the JSC is able to participate meaningfully in that consultation process by subjecting candidates for appointment as Judges to an interview process. Needless to say, the object of the interviews is to determine whether candidates are suitable for the judicial office applied for. The interview process is rigorous and public. Acting Judges of the Constitutional Court are appointed by the President on the recommendation of the Minister of Justice, acting with the concurrence of the Chief Justice.[133] And acting Judges of other courts are appointed by the Minister of Justice after consulting the senior Judge of the relevant court.[134] The criteria for selection of Judges are publicly accessible.[135] And once appointed, Judges' terms of office are strictly regulated.[136] Court hearings are almost exclusively conducted in open court, and reasons for Judges' decisions are largely accessible. If dissatisfied with the outcome, parties can generally appeal or seek the review of a decision. These processes allow for public scrutiny, accountability and public trust.

[92] None of these protective processes and structures are in place for the designated Judge under RICA. At present, the designated Judge is appointed by the Minister of

[131] Section 174 of the Constitution.

[132] See also *Justice Alliance* above n 129 at para 77.

[133] Section 175(1) of the Constitution.

[134] Section 175(2) of the Constitution.

[135] Cowen above n 124 at 148-9.

[136] In terms of section 176 of the Constitution "[a] Constitutional Court judge holds office for a non-renewable term of 12 years". Other Judges hold office until they are discharged from active service in terms of the Judges' Remuneration and Conditions of Employment Act 47 of 2001, which limits a Judge's term to 15 years, subject to certain conditions and exceptions.

Justice – a member of the Executive – without the involvement of any other person or entity. And in practice, terms of designated Judges have been renewed. Also, the lack of specificity on the manner of appointment and extensions of terms raises independence concerns. As *Justice Alliance* tells us, the power to extend the term of a Judge goes to the core of the tenure of the judicial office, judicial independence and the separation of powers, and that open-ended discretion in respect of appointments may raise a reasonable apprehension or perception that the independence of the Judge may be undermined by external interference by the Executive.[137] It is so that the Minister does not appoint a designated Judge as a Judge, but rather as a designated Judge; the designated Judge is already a Judge. But the point is that – based on *Thint*[138] and *Van der Merwe*[139] – the requirement of independence is a constitutional imperative. And there may be factors that conduce to a perception of lack of independence even in the case of a Judge. That, indeed, was one of the underlying bases even for the *Justice Alliance ratio* (basis for a decision). The designation by a member of the Executive in ill-defined circumstances or circumstances that completely lack description does not conduce to a reasonable perception of independence.

[93] Additionally, directions are sought and issued in complete secrecy, and, therefore, without public scrutiny, or the possibility of review or appeal, which points to a lack of "mechanisms for accountability and oversight".[140] My reference to lack of review has in mind not those instances where the subject of RICA surveillance may fortuitously become aware of her or his surveillance. All of these considerations indicate the lack of structural, operational and perceived independence of the designated

[137] *Justice Alliance* above n 129 at para 65, where this Court stated that "[t]he power to extend the term of a Constitutional Court judge goes to the core of the tenure of the judicial office, judicial independence and the separation of powers".

[138] *Thint* above n 116 at para 83.

[139] *Van Der Merwe* above n 58 at paras 36-8.

[140] *Glenister II* above n 121 at para 210. However, in *Helen Suzman Foundation v President of the Republic Of South Africa* [2014] ZACC 32; 2015 (2) SA 1 (CC); 2015 (1) BCLR 1 (CC) at para 31, Mogoeng CJ held that reference to public confidence could not have been intended to mean that public opinion must from time to time be solicited to determine what the public thinks of the independence of an institution. The overriding consideration is whether the legislation has inbuilt autonomy-protecting features to enable its members to carry out their duties without any inhibitions or fear of reprisals.

Judge. To exacerbate the situation, this lack of structural independence may also lead to a reasonable perception of lack of independence. Obviously, this is something Parliament may address with relative ease.

[94] RICA is thus declared unconstitutional to the extent that it fails to ensure adequate safeguards for an independent judicial authorisation of interception.

Ex parte issue

[95] Section 16(7)(a) of RICA provides that "[a]n application must be considered and an interception direction issued without any notice to the person or customer to whom the application applies and without hearing such person or customer". The rationale for this ex parte process is obvious: the surveillance would be futile if the subject were to be aware of it. The applicants do not challenge this.

[96] However, the result is that an application for an interception direction that may severely and irreparably infringe the privacy rights of the subject is granted on the basis of information provided only by the state agency requesting the direction. The designated Judge is required to issue the direction on the basis of that one-sided information. Save perhaps for relatively obvious shortcomings, inaccuracies or even falsehoods, the designated Judge is not in a position meaningfully to interrogate the information. For that reason, as evidenced by the example of the surveillance of Mr Mzilikazi wa Afrika and Mr Stephen Hofstatter, surveillance directions may be issued on unadulterated lies. And the designated Judge could not be any the wiser. According to the Minister of State Security, there is no cause for complaint because RICA contains sufficient safeguards to ensure that the designated Judge has all the facts and circumstances justifying the surveillance direction. Of course, it is simply not correct that the designated Judge is in a position to confirm the veracity of every detail furnished to her or him.

[97] In the High Court the applicants argued that the ex parte process undermines the *audi alteram partem* (listen to the other side) principle and thus violates the right to a

fair hearing guaranteed by section 34 of the Constitution. The argument continued that this is exacerbated by the fact that the interception direction is final, unlike most other ex parte orders, which are granted on an interim basis. As a result, the applicants suggested that there should be some form of adversarial process to ensure that the interests of the subject of surveillance are properly protected and ventilated before an interception direction is granted. According to them the task of safeguarding the interests of the subject should be performed by a "public advocate".

[98] While the High Court agreed with the applicants that the ex parte nature of the process renders RICA unconstitutional, it held that it was not well-placed to consider the security risks, or the method for selecting, vetting and briefing public advocates. It further noted that there are other options that could be adopted to deal with the ex parte issue. As a result, it simply declared section 16(7) unconstitutional "to the extent that it fails to provide for a system for a public advocate *or other appropriate safeguards* to deal with the fact that the orders in question are granted ex parte".[141] It did not grant any interim relief.

[99] In this Court, the applicants again refer to the institution of a public advocate as a potential solution to the ex parte issue. However, here they argue that the option merely demonstrates that less restrictive means exist. I agree only that surely means that can temper the effects of the ex parte nature of the process do exist. The risk of abuse of the ex parte process highlights the general deficiencies in RICA. With more and better safeguards, chances of unlawful intrusions into privacy would be minimised. I prefer not to comment on the participation of a public advocate as one such safeguard. The choice of safeguards to address the inadequacies resulting from the ex parte nature of the process is something best left to Parliament. And those need not be an adversarial process. If Parliament opts for that process, that is its choice.

[141] Emphasis added.

[100] In sum, RICA is unconstitutional to the extent that it lacks sufficient safeguards to address the fact that interception directions are sought and obtained ex parte.

Management of information issue

[101] Once a person's communications are intercepted and obtained, does RICA contain safeguards relating to how that information is handled, stored, and eventually destroyed? The applicants contend that RICA lacks procedures for examining, copying, sharing, sorting through, using, storing or destroying surveillance data. RICA is thus unconstitutional to the extent of this shortcoming. The applicants' concern is that the lack of regulation in this regard exposes subjects of interceptions to even more aggravated intrusions into their privacy. The Minister of State Security argues that section 35(1)(f) and (g), read with section 37 of RICA, provides the necessary procedures and that, in any event, section 42 provides for a general prohibition of the disclosure of intercepted communications. The High Court upheld the applicants' contention.

[102] Section 35(1)(f) does no more than to enjoin the Director of the Office for Interception Centres (director) to prescribe what information must be kept in terms of section 37 by the heads of information centres.[142] Such information must include *particulars* relating to: applications for the issuing of directions; the directions themselves; and the results obtained pursuant to the execution of each direction. As the applicants correctly argued, reference to "particulars" means all that the director need prescribe must be kept is an identification of both the application for directions and the directions issued, and an indication of the nature of the result obtained pursuant to the

[142] The section provides:

> "(1) In order to achieve the objects of the Act, the Director—
>
> . . .
>
> (f) must prescribe the information to be kept by the head of an interception centre in terms of section 37, which must include particulars relating to—
>
> (i) applications for the issuing of directions and the directions issued upon such applications which is relevant to the interception centre of which he or she is the head; and (ii) the results obtained from every direction executed at that interception centre."

direction. That means it is not obligatory for the director to prescribe that the actual application, direction and data unearthed by the surveillance must be kept in terms of section 37. That is so because "particulars of an application", "particulars of a direction" or "particulars of the result" are not the same as an application, direction or result. If the object of the section was to refer to an application, direction or result, it is oddly convoluted to say "particulars relating to applications, directions or results".

[103] To the extent that section 35(1)(f) provides that the information in respect of which the director must prescribe "*must include*" what the section specifies, that means what is prescribed may be more than that.[143] That does not assist the Minister. It cannot be left to the director to make a choice on so important an issue. That choice effectively leaves it to chance whether a director may prescribe that the information that must be kept must include actual applications, directions and results. This to me seems to be the most important information that a subject of surveillance would have an interest in. That is the type of information that would help her or him make an informed decision whether to litigate for the vindication of rights. Plainly, the threat of litigation has the potential of limiting abuse and, concomitantly, the intrusion into the privacy of individuals. Now whether this important information will be part of what is prescribed to be kept is left to the unbounded discretion of the director. That simply cannot be. There needs to be clear parameters on the exercise of discretion.[144]

[104] Section 35(1)(g) provides that the director must prescribe the manner in, and the period for, which the information referred to in section 35(1)(f) must be kept. Section 35(1)(g) is thus of no assistance because it refers us back to section 35(1)(f). So, whatever it says is also tainted by whatever shortcomings section 35(1)(f) has.

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[143] See *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (8) BCLR 872 (CC) at para 455.

[144] Compare *Dawood* above n 49 at para 47 which tells us – in a different context – that—

> "if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision."

[105] Section 37(1) also refers back to section 35(1)(f). It provides that the head of an interception centre must keep or cause to be kept proper records of such information as may be prescribed by the director in terms of section 35(1)(f). Obviously, this too does not assist the case of the Minister of State Security. In terms of section 37(2) heads of interception centres must on a quarterly basis or as required by the director submit reports to the director. For present purposes, the reports must deal with the records kept in terms of section 37(1). I need not say what has now become the usual refrain of the inutility of these sections as they all have as their base the deficient section 35(1)(f).

[106] Section 42, another section relied upon by the Minister of State Security, contains a blanket prohibition on the disclosure of information obtained through the application of RICA. Absent detail on what information must be kept and how it must be kept, this does not help much.

[107] Looked at in their totality, all the sections invoked by the Minister of State Security to meet the applicants' challenge fail to address the substance of the complaint. And it is a valid complaint. The sections give no clarity or detail on: what must be stored; how and where it must be stored; the security of such storage; precautions around access to the stored data (who may have access and who may not); the purposes for accessing the data; and how and at what point the data may or must be destroyed. Thus there is a real risk that the private information of individuals may land in wrong hands or, even if in the "right" hands, may be used for purposes other than those envisaged in RICA. All this exacerbates the risk of unnecessary intrusions into the privacy of individuals. The minimum standards for the proper management of surveillance data were set out as follows by the European Court of Human Rights (ECHR) in *Weber*:

> "[T]he nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; *the procedure to be followed for examining, using and storing the data obtained*; *the precautions to be taken when communicating the data to other*

> *parties*; *and the circumstances in which recordings may or must be erased or the tapes destroyed*".[145] (Emphasis added.)

[108] In this regard, RICA thus fails to provide for means that guarantee lesser invasions of privacy. As a result, the extent of the limitation of the privacy right becomes more egregious. And there is no relation between the purpose of state surveillance and the absence of procedures to safeguard private intercepted communications. RICA is, therefore, unconstitutional to the extent that it fails adequately to prescribe procedures to ensure that data obtained pursuant to the interception of communications is managed lawfully and not used or interfered with unlawfully, including prescribing procedures to be followed for examining, copying, sharing, sorting through, using, storing or destroying the data.

[109] The third amicus, Privacy International, contends that the High Court order is too narrow. It notes that, although the applicants' challenge before the High Court also related to communication data in the hands of private telecommunication service providers, the High Court order is limited to information intercepted and retained by the state. It submits that there is no difference – from the perspective of intrusions into privacy – between data retained by the state, on the one hand, and that retained by private entities, on the other. It urges us to amend the order to add that RICA is unconstitutional also to the extent that it fails to prescribe proper procedures to be followed when a telecommunication service provider is examining, copying, sharing, sorting through, using, storing or destroying archived communications-related data.

[110] Essentially, the third amicus is lodging its own appeal. Ordinarily (and I use this word guardedly), an amicus participates in proceedings to raise "new contentions which *may be useful to the Court*".[146] This same idea was captured by this Court in *In re Certain Amicus Curiae Applications* where it held that "the special duty" of an amicus

[145] *Weber v Germany* (2008) 46 EHRR 5, [2006] ECHR 1173 at para 95.

[146] Rule 10 of the Rules of this Court.

to the court "is to provide cogent and helpful submissions that *assist the court*".[147] (My emphasis). A court's task is to determine the dispute presented to it by the parties. It stands to reason then that assistance to it must relate to the determination of that dispute. Adding a different dispute – like an additional appeal – not litigated by the parties is not assistance with the dispute before the court. If anything, that amounts to burdening the Court with something else to determine. That is not what rule 10 and the *In re Certain Amicus Curiae Applications* statement of law envisage.

[111] Therefore, it seems to me that it is not in the interests of justice to entertain the issue raised by the third amicus. That said, I will not categorically decide the question whether an amicus may lodge an appeal outside of the application or appeal being litigated by the parties. That is not necessary here. I limit what I say to a conclusion that is based on the interests of justice in the circumstances of this case; interests of justice do not dictate that the additional appeal of the third amicus be entertained. It is so that in our age of mass data surveillance, private actors arguably pose a comparable threat to privacy as does the state. So, one cannot make light of the issues raised in the appeal by the third amicus. Although the arguments of the third amicus on the issues are compelling, they were not adequately ventilated by the parties. That is understandable because they do not relate to the issues in dispute between the parties.

Practising lawyers and journalists issue

[112] Before the High Court the applicants contended that a practising lawyer owes a client a duty to keep communications between them confidential, and that it is essential to the practice of journalism for journalists to preserve the confidentiality of the identities of their sources. The argument continued that the surveillance of journalists constitutes a limitation of the right to freedom of expression and the media under section 16. And the surveillance of a practising lawyer infringes legal professional privilege. Because this privilege is an essential part of the right to a fair trial, the

[147] *In re Certain Amicus Curiae Applications: Minister of Health v Treatment Action Campaign* [2002] ZACC 13; 2002 (5) SA 713 (CC); 2002 (10) BCLR 1023 (CC) at para 5 (emphasis added).

surveillance of lawyers limits the rights to a fair hearing and trial, respectively guaranteed under sections 34 and 35(3) of the Constitution. That, of course, is in addition to limiting the right to privacy. The applicants then sought an order declaring RICA unconstitutional to the extent that it does not expressly address the circumstances where a subject of surveillance is either a practising lawyer or journalist. The High Court agreed.

[113] Before us the applicants clarified that invoking sections 16, 34 and 35(3) is not meant to constitute three discrete constitutional challenges. Rather, this must be considered within the scope of the section 36 enquiry. In other words, the argument that RICA's limitation of the right to privacy is not reasonable and justifiable is buttressed by the interplay between the rights protected by these sections and the privacy right.

[114] Let me preface whatever I am going to say about this challenge by making this point. To state the obvious, it can never be suggested that practising lawyers and journalists should not be subjected to surveillance, which includes the interception of their communications. They are not immune to the very same type of conduct that justifies the surveillance of other members of society. There may be reasonable grounds of suspecting them of being guilty of, for example, serious criminality or conduct that places the security of the Republic at serious risk. Indeed, in certain instances they may actually be guilty of such conduct.

[115] I agree that keeping the identity of journalists' sources confidential is protected by the rights to freedom of expression and the media. This Court has acknowledged the constitutional importance of the media in our democratic society, and has confirmed that "[t]he Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of section 16".[148] It follows that the confidentiality of journalists' sources, which is crucial for the

[148] *Khumalo* above n 54 at para 24.

performance by the media of their obligations, is protected by section 16(1)(a). Like the High Court, I place reliance on Tsoka J who held as much in *Bosasa*. Relying on local and foreign authorities, he put it thus:

> "[I]t is apparent that journalists, subject to certain limitations, are not expected to reveal the identity of their sources. If indeed freedom of press is fundamental and *sine qua non* for democracy, it is essential that in carrying out this public duty for the public good, the identity of their sources should not be revealed, particularly, when the information so revealed, would not have been publicly known. This essential and critical role of the media, which is more pronounced in our nascent democracy founded on openness, where corruption has become cancerous, needs to be fostered rather than denuded."[149]

[116] I agree with the applicants that legal professional privilege is an essential part of the rights to a fair trial and fair hearing. This Court in *Thint* held:

> "The right to legal professional privilege is a general rule of our common law which states that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met. The rationale of this right has changed over time. It is now generally accepted that these communications should be protected in order to facilitate the proper functioning of an adversarial system of justice, because it encourages full and frank disclosure between advisors and clients. This, in turn, promotes fairness in litigation. In the context of criminal proceedings, moreover, the right to have privileged communications with a lawyer protected is necessary to uphold the right to a fair trial in terms of section 35 of the Constitution, and for that reason it is to be taken very seriously indeed."[150]

[117] This means that, although originally sourced from the common law, legal professional privilege is now undergirded by the Constitution. The proper functioning of our legal system is reliant on the confidentiality of communications between lawyer and client. That in turn promotes the rule of law. Thus the wholesale interception of

[149] *Bosasa* above n 38 at para 38.

[150] *Thint* above n 116 at para 184.

lawyer-client communications without any recognition of this legal, indeed constitutional, reality would be at odds with the rule of law.

[118] This would not be an isolated carve out. Canada's section 186(2) of the Criminal Code[151] prohibits authorisation of an interception "at the office or residence of a solicitor" without "reasonable grounds to believe that the solicitor" or his associates are about to commit an offence. And the United Kingdom's Interception of Communications Code of Practice pursuant to section 71 of the Regulation of Investigatory Powers Act 2000 establishes stringent safeguards where the communications intercepted may be of a confidential nature, including journalistic or legally privileged communications.[152]

[119] In sum, the confidentiality of lawyer-client communications and journalists' sources is particularly significant in our constitutional dispensation. There is thus a need that special consideration be given to this fact when interception directions are sought and granted. Plainly there are means that may help minimise this particularly egregious form of intrusion into privacy; particularly egregious because of its impact on other constitutional rights.[153] Some of the foreign examples tell us as much. While reference to them should not be seen as dictation to Parliament, they serve as examples of less restrictive means, which do not subvert the purpose of RICA. RICA is thus unconstitutional to the extent that, when the intended subject of surveillance is a practising lawyer or a journalist, it fails to provide for additional safeguards calculated to minimise the risk of infringement of the confidentiality of practising lawyer and client communications and journalists' sources.

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[151] R.S.C., 1985, c. C-46.

[152] For example, where legally privileged communications may be intercepted, the application for an interception warrant should include an assessment of how likely it is that communications which are subject to legal privilege will be intercepted, and whether one of the purposes of interception is to obtain privileged communications. If so, the Secretary of State will only issue the warrant if there are exceptional and compelling circumstances (see paras 9.48-9.63). And where journalistic material is intended to be intercepted, the reasons should be clearly stipulated and specific necessity and proportionality of doing so should be carefully considered. Once intercepted, communications should then be retained only where necessary and proportionate to do so, for an authorised purpose under section 15(4) of the Act (see paras 9.74-9.88 of the Code).

[153] That is, its impact on rights guaranteed under sections 16(1), 34 and 35(3) of the Constitution.

[120] I should perhaps make the point that before us we do not have other professions seeking similar relief on the basis that they too are deserving of special protection. Nor have the applicants made out such a case. Therefore, we need not consider that aspect. The first amicus, Media Monitoring Africa Trust, has referred to civil society actors and children. This is being raised for the first time before this Court.

[121] We do not have the benefit of the views of the High Court on the issue. It is by no means an issue capable of easy resolution. Take, for example, civil society actors. While I understand that some of them perform a watchdog function, I do not readily see the confidentiality of their communications to have as strong a constitutional claim to special treatment as does that of journalists and practising lawyers. I am not saying they do not have that claim; it is just not readily apparent to me. But that is only a prima facie view. Also, how exactly in a judgment like this would we describe "civil society actors" for Parliament to know what we are talking about? Maybe if we try hard enough, we can. But must we? I think not. The term is rather nebulous for us to stray into that terrain as a court of first and last instance on the issue. Also, for reasons similar to those I expressed in respect of the additional appeal by the third amicus, it is doubtful that this relief is properly before us. I need say nothing more.

[122] The interception of children's communications is on a different footing. Section 28(2) of the Constitution demands the paramountcy of children's best interests in all matters affecting them.[154] This Court in *Centre for Child Law* held that the "analysis of the right to privacy is even more pressing when dealing with children".[155] Is that enough for us to grant the relief sought by the first amicus? Most people have contact and communicate with children in one form or another. It is likely that a substantial number of intercepted communications will include communication by or

[154] Section 28(2) of the Constitution provides that "[a] child's best interests are of paramount importance in every matter concerning the child".

[155] *Centre for Child Law v Media 24 Limited* [2019] ZACC 46; 2020 (4) SA 319 (CC); 2020 (3) BCLR 245 (CC) at paras 48-9.

with children. This is an issue that affects children who are the subjects of surveillance and those who are not. Must a special carve out be made only for the second category of children, or for both categories? If for both categories, must there be a distinction that gives recognition to the fact that children in the first category are the subjects of an interception, and, if so, what should the nature of the distinction be? These possibilities, if not imponderables, underscore the fact that this is just too unfirm a terrain for us to venture into under the circumstances in which the issue has been raised before us.

[123] To summarise, it is not in the interests of justice to decide the issues concerning communications of children and civil society actors. We would have benefited from their ventilation before, and determination by, the High Court.

Bulk communications surveillance

[124] According to the respondents, bulk surveillance is—

> "an internationally accepted method of strategically monitoring transnational signals, in order to screen them for certain cue words or key phrases. The national security objective is to ensure that the State is secured against transnational threats. It is . . . done through the tapping and recording of transnational signals, including, in some cases, undersea fibre optic cables."

It may also be explained to relate to "intelligence obtained from the interception of electromagnetic, acoustic and other signals, including the equipment that produces such signals. It also includes any communication that emanates from outside the borders of [South Africa] and passes through or ends in [South Africa]."[156] Bulk surveillance thus involves, inter alia, the interception of all internet traffic that enters or leaves South Africa, including the most personal information such as emails, video calls, location, and browsing history.

[156] High Court judgment above n 8 at para 143.

[125] The question before us is this: is there a legal basis for the state to conduct bulk communications surveillance? Before answering this question, we must determine whether the appeal in relation thereto is properly before us.

Appeal by Minister of State Security

[126] The Minister of State Security has filed a notice of appeal that was not accompanied by an application for leave to appeal directly to this Court in respect of the order relating to bulk surveillance. For that reason, the applicants argue that this part of the appeal is fatally defective. That is so because – continues the argument – the High Court order relating to this part of the appeal does not involve any declaration of a statute invalid. Rather, what the High Court did was to declare unlawful bulk surveillance conducted by state agencies in the absence of a law authorising it. It is only in respect of the issues on which the applicants are seeking confirmation that the Minister of State Security had an automatic right of appeal.[157] The bulk surveillance issue is not one of those issues. The Minister ought to have sought leave from this Court in terms of rule 19.[158] Lastly, the applicants submit that the Minister of State Security has not explained why it is in the interests of justice for a direct appeal to be heard.

[127] The applicants are correct to submit that the Minister of State Security ought to have sought leave to appeal. But in terms of section 173 of the Constitution, this Court is at liberty to determine its own process. A pragmatic approach is to entertain the appeal. The issue it raises was part of the same proceedings before the High Court. Determining it together with the confirmation proceedings will contribute towards a

[157] Section 15(1)(a) of the Superior Courts Act 10 of 2013 provides:

> "Whenever the Supreme Court of Appeal, a Division of the High Court or any competent court declares an Act of Parliament, a provincial Act or conduct of the President invalid as contemplated in section 172 (2) (a) of the Constitution, that court must, in accordance with the rules, refer the order of constitutional invalidity to the Constitutional Court for confirmation."

[158] Rule 19 provides:

> "[A] litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the registrar an application for leave to appeal: provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave."

saving in time, costs and court resources; it simply makes practical sense. The appeal is here. All parties that wished to, have made submissions on it. The issue to be determined is fairly simple, and no party will suffer any prejudice if we determine the merits at this stage. Requiring the Minister of State Security to go back and follow the normal appellate hierarchy or to bring a proper application for leave to appeal directly to us would be placing formalism ahead of what the interests of justice dictate. The appeal on the surveillance issue will thus be entertained. But this judgment must not be read to say that in comparable situations leave to appeal is not necessary. The determinant will be the circumstances of each case.

[128] Coming to the merits of the appeal, the Minister of State Security argues that the answer to the question at hand lies in a proper interpretation of section 2 of the National Strategic Intelligence Act[159] (NSIA). She argues that in terms of this section, the state is empowered, subject to section 3 of the NSIA,[160] to "gather, correlate, evaluate and analyse" various types of intelligence in order to identify any threat, potential or otherwise, to national security. This provision, she argues, authorises the state to conduct bulk surveillance. Furthermore, RICA provides sufficient safeguards designed to ensure that this practice is not susceptible to abuse and unlawful invasion of privacy. The High Court disagreed with this interpretation, and held that the state's practice of bulk surveillance is not authorised by the NSIA or any other law, and is thus unlawful.

[129] The impact of bulk surveillance is highlighted by the third amicus. That amicus argues that: bulk surveillance entails the interception of virtually all internet traffic without a warrant or suspicion about the people whose communications are intercepted, and without statutory safeguards; no legal limits are placed on how data obtained

[159] 39 of 1994.

[160] Section 2(3) of the NSIA provides:

> "It shall be the function of the South African Police Service, subject to section 3- (a) to gather, correlate, evaluate, co-ordinate and use crime intelligence in support of the objects of the South African Police Service as contemplated in section 205 (3) of the Constitution; (b) to institute counter-intelligence measures within the South African Police Service; and (c) to supply crime intelligence relating to national strategic intelligence to National Intelligence Co-ordinating Committee."

through bulk surveillance is captured, copied, stored, analysed, or distributed; this unregulated, untargeted surveillance of all information is an extreme violation of the right to privacy; this violation is contrary to comparative and international law; and section 39(2) of the Constitution calls for an interpretation of the NSIA that avoids an extensive violation of the right to privacy and, therefore, does not permit unregulated bulk surveillance. The effect of bulk surveillance, i.e. the interception of virtually all internet traffic without a warrant or suspicion about the people whose communications are intercepted, was not denied by the respondents.

[130] In a technologically developing society like ours, it is understandable that the state, through its intelligence services, may wish to use the latest technological means to ensure the safety of its citizens and uphold national security. These measures may involve the monitoring of communications – through these technological means – by citizens with others (whether citizens or not). Without doubt, that monitoring constitutes the exercise of public power. And that power can be exercised only in a constitutionally compliant manner. In this regard, the principle of legality requires that any exercise of public power must have a basis in some law.[161] Bulk surveillance must therefore have a legal basis. The question is: is section 2 of the NSIA on which the Minister of State Security relies that legal basis?

[131] Section 2 of the NSIA empowers certain state agencies, including the State Security Agency, on which the argument of the Minister of State Security focused, to "gather, correlate, evaluate and analyse" the following types of intelligence: domestic intelligence; crime intelligence; departmental intelligence; foreign intelligence; foreign military intelligence; and domestic military intelligence.[162] The section goes on broadly

[161] *Fedsure* above n 84 at para 58 and *Pharmaceutical Manufacturers* above n 84 at para 20.

[162] In full, section 2 of the NSIA provides:

> "(1) The functions of the Agency shall, subject to section 3, be—
>
> (a) to gather, correlate, evaluate and analyse domestic and foreign intelligence (excluding foreign military intelligence), in order to-
>
> (i) identify any threat or potential threat to national security;

(ii) supply intelligence regarding any such threat to [the National Intelligence Co-ordinating Committee];

(b) to fulfil the national counter-intelligence responsibilities and for this purpose to conduct and co-ordinate counter-intelligence and to gather, correlate, evaluate, analyse and interpret information regarding counter-intelligence in order to-

(i) identify any threat or potential threat to the security of the Republic or its people;

(ii) inform the President of any such threat;

(iii) supply (where necessary) intelligence relating to any such threat to the South African Police Service for the purposes of investigating any offence or alleged offence; and

(iv) supply intelligence relating to any such threat to the Department of Home Affairs for the purposes of fulfilment of any immigration function; and

(ivA) supply intelligence relating to any such threat to any other department of State for the purposes of fulfilment of its departmental functions; and

(v) supply intelligence relating to national strategic intelligence to [the National Intelligence Co-ordinating Committee];

(c) to gather departmental intelligence at the request of any interested department of State, and, without delay to evaluate and transmit such intelligence and any other intelligence at the disposal of the Agency and which constitutes departmental intelligence, to the department concerned and to [the National Intelligence Co-ordinating Committee].

(2) It shall, subject to section 3, also be the functions of the Agency—

(a) to gather, correlate, evaluate and analyse foreign intelligence, excluding foreign military intelligence, in order to-

(i) identify any threat or potential threat to the security of the Republic or its people;

(ii) supply intelligence relating to any such threat to [the National Intelligence Co-ordinating Committee];

(b) in the prescribed manner, and in regard to communications and cryptography-

(i) to identify, protect and secure critical electronic communications and infrastructure against unauthorised access or technical, electronic or any other related threats;

(ii) to provide crypto-graphic and verification services for electronic communications security systems, products and services used by organs of state;

(iii) to provide and coordinate research and development with regard to electronic communications security systems, products and services and any other related services;

(c) to liaise with intelligence or security services or other authorities, of other countries or inter-governmental forums of intelligence or security services;

(d) to train and support users of electronic communications systems, products and related services;

to describe various other functions, which include that the State Security Agency is authorised to: collect intelligence that may show threats to the Republic; supply such intelligence to other security agencies or governmental departments; liaise with other security agencies; and use the intelligence for analysis and other purposes.

[132] At best for the Minister of State Security, section 2 is ambiguous. Section 39(2) of the Constitution obliges us not only to give effect to the object of legislation, but also to seek a meaning of the relevant provisions of a statute that promotes the spirit, purport and objects of the Bill of Rights.[163] Thus, we must interpret section 2 of the NSIA in a way that best promotes the right to privacy.

(e) to develop, design, procure, invent, install or maintain secure electronic communications systems or products and do research in this regard; and

(f) to cooperate with any organisation in the Republic or elsewhere to achieve its objectives.

(2A) When performing any function referred to in subsection (2)(b) the Agency is exempted from any licensing requirement contemplated in-

(a) the Broadcasting Act, 1999 (Act 4 of 1999); and

(b) the Electronic Communications Act, 2005 (Act 36 of 2005).

(3) It shall be the function of the South African Police Service, subject to section 3-

(a) to gather, correlate, evaluate, co-ordinate and use crime intelligence in support of the objects of the South African Police Service as contemplated in section 205(3) of the Constitution;

(b) to institute counter-intelligence measures within the South African Police Service; and

(c) to supply crime intelligence relating to national strategic intelligence to [the National Intelligence Co-ordinating Committee].

(4) The National Defence Force shall, subject to section 3-

(a) gather, correlate, evaluate and use foreign military intelligence, and supply foreign military intelligence relating to national strategic intelligence to the [National Intelligence Co-ordinating Committee], but the National Defence Force shall not gather intelligence of a non-military nature in a covert manner;

(b) gather, correlate, evaluate and use domestic military intelligence excluding covert collection, except when employed for service as contemplated in section 201(2)(a) of the Constitution and under conditions set out in section 3 (2) of this Act, and

(c) institute counter-intelligence measures within the National Defence Force.

[163] See *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* [2015] ZACC 29; 2015 (6) SA 440 (CC); 2015 (11) BCLR 1265 (CC) at paras 33-4.

[133] With this in mind, it is significant that in RICA there is an express prohibition of communication interceptions without interception directions. To interpret section 2(1)(a) of the NSIA in the manner suggested by the Minister of State Security would be to undermine this prohibition. Also, there is the principle of interpretation that says that where a provision is ambiguous, its meaning may be determined in light of other statutes on the same subject matter.[164] This principle points away from the interpretation advocated by the Minister, particularly because it results in an intrusion into the privacy right that is expansive in its reach and most egregious in nature.

[134] Also, the section has shortcomings of another nature and these too impact negatively on the privacy right. This as well is an indication that the section ought not to be interpreted to authorise bulk surveillance. The section does not stipulate in clear, precise terms the manner, circumstances or duration of the collection, gathering, evaluation and analysis of domestic and foreign intelligence. It merely broadly enumerates the "functions" of the State Security Agency, with no details as to the nuts and bolts of those functions. It also fails to set out the ambit of how these various types of intelligence must be captured, copied, stored, or distributed. It is thus not clear at all that section 2 provides for a practice that so significantly intrudes on the right to privacy.

[135] In sum, I am not convinced that the broad terms of section 2 serve as authorisation for the practice of bulk surveillance. The practice is thus unlawful and invalid, as there is no law that authorises it.

Remedy

[136] Questions that arise from what was argued are whether – in the exercise of this Court's remedial power under section 172(1)(b) – we should: limit the retrospective effect of the declaration of invalidity; suspend the declaration and, if so, for how long;

[164] *Independent Institute of Education (Pty) Ltd v Kwazulu-Natal Law Society* [2019] ZACC 47; 2020 (2) SA 325 (CC); 2020 (4) BCLR 495 (CC) at para 38.

or grant interim relief, in the event of a suspension of the declaration of invalidity, and if we do, what its nature should be.

Retrospectivity

[137] If the declaration of invalidity has full retrospective effect, that will render unlawful everything done under RICA pursuant to the grant of all previous interception directions. These should not be undone. That scrambled egg is incapable of being unscrambled. Indeed, this Court has held that "[a]s a general rule . . . an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity".[165]

Suspension of declaration of invalidity

[138] There is no question that interceptions of communications in terms of RICA serve an important government purpose. That much is clear from the several purposes for which interception directions may be issued, which have been discussed above. The country's surveillance system would be seriously dislocated if a declaration of invalidity were not suspended. To refocus our minds on what would be affected, let me render a collection of the purposes for which interception directions may be issued. They may be issued if there are reasonable grounds to believe that: "a serious offence has been or is being or will probably be committed";[166] it is necessary to gather information concerning an actual threat to the public health or safety, national security or compelling national economic interests;[167] it is necessary to gather information concerning a potential threat to the public health or safety or national security;[168] the rendering of assistance to a foreign country in connection with or in the form of interception of communications is in accordance with an international mutual assistance agreement or is in the interests of South Africa's international relations or

[165] *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32.

[166] Section 16(5)(a)(i).

[167] Section 16(5)(a)(ii).

[168] Section 16(5)(a)(iii).

obligations;[169] or, lastly, it is necessary to gather 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.[170] So, the dislocation of our surveillance system would have a grave impact on matters that are important to the country and its people. To avert this, we must suspend the declaration of invalidity.

[139] The High Court suspended its orders of invalidity for a period of two years to allow Parliament time to cure the various constitutional defects identified. The Minister of Justice requests that this period be increased to three years. He submits that a process to review RICA has already commenced although there is no Bill in place yet, and advises that the Executive requires time to proceed with its investigations and develop suitable remedial legislation. To this end, he argues that three years is not inordinately long when the following factors, amongst others, are taken into account: the technical and complex nature of the legislation; the need for extensive consultation due to the contentious nature of the legislation and the obligations that it will impose on telecommunication service providers; the need for a careful consideration of developments and trends in other countries on the interception of communications; and the fact that the process of consultation and collation of comments received during the Bill drafting stage takes considerable time. The Minister of Justice further submitted that three years will guard against the Executive having to return to this Court to request an extension.

[140] This is reasonable. Thus the declaration of invalidity must be suspended for three years.

Interim relief

[141] The High Court granted interim relief, the effect of which was to make substantial insertions into RICA, to be applicable during the period of suspension. The

[169] Section 16(5)(a)(iv).

[170] Section 16(5)(a)(v).

Ministers of Police and Justice argue that the doctrine of separation of powers militates against the interim relief because it strays into policy which is the preserve of the Executive.[171] And the Minister of Justice invokes *Glenister II* where Ngcobo CJ stated:

> "Under our constitutional scheme it is the responsibility of the Executive to develop and implement policy. It is also the responsibility of the Executive to initiate legislation in order to implement policy. And it is the responsibility of Parliament to make laws. When making laws Parliament will exercise its judgment as to the appropriate policy to address the situation."[172]

[142] The respondents also emphasise that the interim relief will have unintended detrimental consequences on ongoing crime prevention measures by law enforcement agencies. They therefore submit that the expansive nature of the interim relief also falls within the terrain of legislating. That, according to them, is best left to the Legislature.

[143] The interim relief granted by the High Court and advocated by the applicants before us – entailing as it does, several insertions into RICA – is quite extensive. Those insertions do appear to be legislative in nature. That immediately raises the question whether it is within this Court's province to grant relief of that nature. Courts are required – pursuant to declaring a legislative provision invalid – to balance the obligation to provide appropriate relief with the constitutional reality of the separation of powers principle.[173] Beyond that, the outer limits of a remedy are bounded only by

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[171] See section 85(2)(b) of the Constitution.

[172] See also *Glenister II* above n 121 at para 67.

[173] In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at paras 65-6 this Court explained:

> "In fashioning a declaration of invalidity, a court has to keep in balance two important considerations. One is the obligation to provide the 'appropriate relief' under section 38 of the Constitution, to which claimants are entitled when 'a right in the Bill of Rights has been infringed or threatened'.
>
> . . .
>
> The other consideration a court must keep in mind, is the principle of the separation of powers and, flowing therefrom, the deference it owes to the Legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the courts in not trespassing onto that part of

considerations of justice and equity. That is indeed very wide. It may come in different shapes and forms dictated by the many and varied manifestations in respect of which the remedy may be called for. The odd instance may require a singularly creative remedy.[174] In that case, the court should be wary not to self-censor. Instead, it should do justice and afford an equitable remedy to those before it as it is empowered to. In the words of Cameron J, "the bogeyman of separation of powers concerns should not cause courts to shirk from [their] constitutional responsibility".[175]

[144] The infringement of the privacy right through the interception of individuals' communications is egregiously invasive. The suspension of the declaration of invalidity means that this situation will persist for a while. And that is exacerbated by the fact that – because of the complexity and wide-ranging nature of the required revision – the period of suspension must be relatively long.[176] So, the egregious invasion of the privacy right will persist for some time to come. In those circumstances, justice and equity dictate that the effect of the intrusive violation of the privacy right be blunted by granting appropriate interim relief. Indeed, in *Hoffman* this Court held that in determining appropriate relief, it must "carefully analyse the nature of the constitutional infringement, and strike effectively at its source".[177]

[145] Before considering the nature of interim relief, let me mention that I take the view that there must be no interim relief in respect of the independence issue. The objectionable facets in respect of this issue are not of such a nature that they may not be endured for the period of suspension.

> the legislative field which has been reserved by the Constitution, and for good reason, to the Legislature."

[174] In *Fose v Minister of Safety and Security* [1996] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 69 Ackermann J held that with regard to remedy "[t]he courts … are obliged to 'forge new tools' and shape innovative remedies, if needs be".

[175] *Mwelase v Director-General for the Department of Rural Development and Land Reform* [2019] ZACC 30; 2019 (6) SA 597 (CC); 2019 (11) BCLR 1358 (CC) at para 51. See also *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 200.

[176] Compare *Johncom Media Investments Limited v M* [2009] ZACC 5; 2009 (4) SA 7 (CC); 2009 (8) BCLR 751 (CC) at para 37.

[177] *Hoffman v South African Airways* [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1211 (CC) at para 45.

Post-surveillance notification

[146] The High Court granted interim relief by reading-in a fairly substantial provision providing for post-surveillance notification. Essentially, the High Court made the giving of post-surveillance notification subject to exceptional circumstances. The Ministers of Police and Justice pointed out what they claimed to be unintended consequences of the provisions read-in by the High Court. These are: their impact on other sections in RICA, which impact may necessitate a further reading-in; their application irrespective of whether an investigation is completed or still ongoing, or the subject is charged for the offences or not; uncertainty as to the manner in which the notification should take place; and the lack of clarity as to what "exceptional circumstances" should be considered for deferral of notification. I do not quite see how – in a situation where a person is no longer under surveillance – post-surveillance notification may affect how RICA operates. This is a discrete addition that affects someone who – so to speak – is out of the surveillance system. How that system gets affected escapes me.

[147] The complaint about lack of clarity on exceptional circumstances does not have to arise. In this regard, there is guidance from foreign jurisprudence. In accordance with that jurisprudence, post-surveillance notification must be given as soon as that can be done without jeopardising the purpose of surveillance after surveillance has been terminated.[178] I doubt that the relevant law enforcement officers will have any difficulties knowing whether notification after termination of surveillance will jeopardise the purpose of surveillance. After all they are best placed to know that.

[148] Of course, it can never be that the reason for the jeopardy will last forever with the result that, in a given case, a law enforcement officer can claim that at no stage will notification ever be given. In any event, what complaint the state may have in relation

[178] *The Bulgarian case* above n 77 at para 79.

to the formulation of the basis for a temporary withholding of notification pales when regard is had to the egregious infringement at issue.

[149] It is thus appropriate to read-in provisions that provide for post-surveillance notification as the default position.

Automatic review

[150] I do not think it would be appropriate to order that – during the period of suspension – there must be automatic review. First, I have noted that automatic review is a safeguard worth considering; I did not conclude that it *must* be included in RICA. Second, the interim reading-in of an automatic review mechanism is complex. For example, we do not know how many surveillance directions are executed over what period. Therefore, we have no idea what load of automatic reviews a designated Judge or designated Judges would have to attend to. Nor do we know what additional resources may be necessary. In the circumstances, I do not think it appropriate to allow automatic review in the interim.

Lawyers and journalists

[151] Save for some minor adjustments, the interim relief granted by the High Court in respect of interception or surveillance directions affecting practising lawyers and journalists is appropriate.

The rest of the issues

[152] In respect of the remaining issues, I take the view that interim relief should not be granted.

Costs

[153] The High Court held that "[i]n keeping with the character of the controversy and the conventions in this genre of litigation, there shall be no order as to costs". The applicants seek their costs and are appealing against this. They claim that this is a

misdirection because if applicants are successful in a constitutional challenge against the state, they should be awarded their costs.

[154] The principles on costs in constitutional litigation were established in *Biowatch*.[179] This Court held that—

> "the general rule for an award of costs in constitutional litigation between a private party and the state is that if the private party is successful, it should have its costs paid by the state, and if unsuccessful, each party should pay its costs."[180]

[155] This Court is generally reluctant to interfere in costs orders of the courts below—

> "unless it is satisfied that the discretion was not exercised judicially, the discretion was influenced by wrong principles, or a misdirection on the facts, or the decision reached could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. There must have been a material misdirection on the part of the lower court".[181]

[156] These are such exceptional circumstances. It is unclear which genre of litigation the High Court is referring to, but – on the authority of *Biowatch* – its decision on costs is based on a material misdirection. According to *Biowatch* the applicants ought to have been awarded their costs against all the respondents that opposed the application before the High Court.[182] In this Court as well the applicants are entitled to their costs. Only the Ministers of State Security and Police can be said to have really opposed the confirmation application. They must pay the costs in this Court.

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[179] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

[180] Id at para 43.

[181] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC) at para 144.

[182] They are the Minister of Justice and Correctional Services, the Minister of State Security, the Minister of Defence and Military Veterans, the Minister of Police, the Office for Interception Centres, the National Communications Centre and the State Security Agency.

Order

[157] The following order is made:

1. The appeal by the Minister of State Security is dismissed with costs, including the costs of two counsel.
2. The appeal by the Minister of Police is dismissed with costs, including the costs of two counsel.
3. The appeal by the applicants against the costs order granted by the High Court, Gauteng Division, Pretoria (High Court) is upheld with costs, including the costs of two counsel.
4. The High Court's order referred to in paragraph 3 is set aside.
5. The Minister of Justice and Correctional Services, the Minister of State Security, the Minister of Defence and Military Veterans, the Minister of Police, the Office for Interception Centres, the National Communications Centre and the State Security Agency must pay the applicants' costs of the application before the High Court, such costs to include the costs of two counsel.
6. The declaration of unconstitutionality by the High Court is confirmed only to the extent that the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (RICA) fails to—
    (a) provide for safeguards to ensure that a Judge designated in terms of section 1 is sufficiently independent;
    (b) provide for notifying the subject of surveillance of the fact of her or his surveillance as soon as notification can be given without jeopardising the purpose of surveillance after surveillance has been terminated;
    (c) adequately provide safeguards to address the fact that interception directions are sought and obtained *ex parte*;
    (d) adequately prescribe procedures to ensure that data obtained pursuant to the interception of communications is managed lawfully and not used or interfered with unlawfully, including

prescribing procedures to be followed for examining, copying, sharing, sorting through, using, storing or destroying the data; and

(e) provide adequate safeguards where the subject of surveillance is a practising lawyer or journalist.

7. The declaration of unconstitutionality in paragraph 6 takes effect from the date of this judgment and is suspended for 36 months to afford Parliament an opportunity to cure the defect causing the invalidity.

8. During the period of suspension referred to in paragraph 7, RICA shall be deemed to include the following additional sections:

"Section 23A **Disclosure that the person in respect of whom a direction, extension of a direction or entry warrant is sought is a journalist or practising lawyer**

(1) Where the person in respect of whom a direction, extension of a direction or entry warrant is sought in terms of sections 16, 17, 18, 20, 21, 22 or 23, whichever is applicable, is a journalist or practising lawyer, the application must disclose to the designated Judge the fact that the intended subject of the direction, extension of a direction or entry warrant is a journalist or practising lawyer.

(2) The designated Judge must grant the direction, extension of a direction or entry warrant referred to in subsection (1) only if satisfied that it is necessary to do so, notwithstanding the fact that the subject is a journalist or practising lawyer.

(3) If the designated Judge issues the direction, extension of a direction or entry warrant, she or he may do so subject to such conditions as may be necessary, in the case of a journalist, to protect the confidentiality of her or his sources, or, in the case of a practising lawyer, to protect the legal professional privilege enjoyed by her or his clients."

"Section 25A **Post-surveillance notification**

(1) Within 90 days of the date of expiry of a direction or extension thereof issued in terms of sections 16, 17, 18, 20, 21 or 23, whichever is applicable, the applicant that obtained the direction or, if not available, any other law enforcement officer within the law enforcement agency concerned must notify in writing the person who was the subject of the direction and, within 15 days of doing so, certify in writing to the designated Judge, Judge of a High Court, Regional Court Magistrate or Magistrate that the person has been so notified.

(2) If the notification referred to in subsection (1) cannot be given without jeopardising the purpose of the surveillance, the designated Judge, Judge of a High Court, Regional Court Magistrate or Magistrate may, upon application by a law enforcement officer, direct that the giving of notification in that subsection be withheld for a period which shall not exceed 90 days at a time or two years in aggregate.

9. The Minister of Police and the Minister of State Security must pay the applicants' costs in this Court, including the costs of two counsel.

JAFTA J (Mogoeng CJ concurring)

[158] I have had the benefit of reading the judgment prepared by my colleague Madlanga J (first judgment). I agree with much of what is contained in the first judgment, except its conclusion on whether RICA empowers the Minister of Justice to designate a Judge for the purposes of RICA. I am not persuaded that RICA

confers such power on the Minister whilst the first judgment holds that it does.[183] This has a bearing on the order proposed in the first judgment, to the extent that it defines the functions to be performed by a designated Judge.

Power to designate

[159] There is no provision in the entire RICA which expressly empowers the Minister to designate a Judge for the purposes of determining applications for authorisation to intercept private communications and also perform other functions. There is none at all. The first judgment concludes that the power is conferred by section 1 of RICA. I am not convinced.

[160] Section 1 is an interpretation provision which tells us the meaning to be assigned to certain words as they appear in the body of RICA. The heading to section 1 is "definitions and interpretation". This makes it plain that this provision's purpose is to help in the interpretation of words employed in the Act. Where Parliament in an Act uses words in a sense other than their ordinary meaning, Parliament includes a definition provision like section 1 of RICA. In that provision, Parliament defines the meaning of each word it wishes should carry a special meaning.

[161] It is an established principle of our law that words defined in a statute must be given their defined meaning whenever they appear in the statute unless doing so would lead to an injustice or absurdity not intended by Parliament[184]. In *Moosa* the Appellate Division held in 1929:

> "An interpretation clause has its uses, but it also has its dangers, as it is obvious from the present case. To adhere to the definition regardless of subject-matter and context

[183] First judgment at [79].

[184] *SATAWU v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) at para 37; *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at paras 13-4; and *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 543.

> might work the gravest injustice by including cases which were not intended to be included."[185]

[162] As it appears from this statement, courts have declined to apply the defined meaning where the result would be an injustice or absurdity which could not have been intended. What is important to note is that the application of a definition section is discretionary. Where it is clear that adherence to a statutory definition would lead to an injustice or absurdity, a court is entitled to depart from the defined meaning and assign the relevant words their ordinary meaning. This discretion does not extend to other provisions of a statute.

[163] Here a court that interprets RICA has a discretion to apply the meanings defined in section 1, including the meaning of "designated judge". If it appears to that Court that giving the phrase "designated judge" its defined meaning would lead to an injustice or absurdity, the court would be entitled to jettison the defined meaning and opt for the ordinary meaning, if it differs from the defined meaning. That this was what Parliament had envisaged is apparent from the wording of section 1 itself.

[164] In the relevant part section 1 of the RICA reads:

> "(1) *In this Act, unless the context otherwise indicates—*
>
> 'designated judge' means any judge of a High Court discharged from active service under section 3(2) of the UNIFORM COURT RULES Remuneration and Conditions of Employment Act, 2001 (Act 47 of 2001), or any retired judge, who is designated by the Minister to perform the functions of a designated judge for purposes of this Act."

[165] Under this section the words "designated judge" wherever they appear in RICA mean a retired Judge designated to perform functions of such Judge for purposes of the Act. Indeed these words appear on a number of occasions in RICA[186]. Whenever

[185] *Town Council of Springs v Moosa* 1929 AD 401 at 417.

[186] The words "designated judge" appear in sections 16, 17, 18 and 20 of the RICA.

"designated judge" appears in the Act, it must be given the defined meaning unless, as section 1 declares, the context indicates otherwise. In *Canca* the principle was formulated in these terms:

> "The principle which emerges is that the statutory definition should prevail unless it appears that the Legislature intended otherwise and, in deciding whether the Legislature so intended, the Court has generally asked itself whether the application of the statutory definition would result in such injustice or incongruity or absurdity as to lead to the conclusion that the Legislature could never have intended the statutory definition to apply."[187]

[166] Reverting to the language of section 1 of RICA, it is apparent that the section is concerned with what the phrase "designated judge" means and nothing else. Textually, the section does not contemplate even remotely, the Minister's power to designate. It merely tells us that a designated Judge is a retired Judge designated to perform functions of such a Judge by the Minister. The essential features of this definition is the act of designating by the Minister and the position of being retired. Therefore, the process of assigning the defined meaning to the words "designated judge" wherever they appear in RICA does not include an assertion that the Minister has the power to designate. This process is interpretive in nature and does not constitute a conferral of power.

[167] The definition is not concerned with the power to designate. It informs us that the Minister designates a Judge from a pool of retired Judges. It proceeds from an assumption that the Minister has the power to designate. The Minister's power to do so may be located in RICA itself or in another statute. It does not have to be repeated in RICA if the Minister already has such powers under another Act. But what cannot be right to do is to take the assumption that the Minister has the power to designate as if he actually has the power. This has no textual foundation.

[187] *Canca v Mount Frere Municipality* 1984 (2) SA 830 (TkS) at 832E-F.

[168] The question whether the Minister has the power to designate is a matter of interpretation. There must be a provision in RICA or another statute which may be construed as giving the power to designate to the Minister. The first judgment employs PAJA as a guide and draws attention to the fact that section 1 of PAJA defines "court" to include a "Magistrates' Court . . . designated by the Minister by notice in the Gazette" and points out that PAJA does not in its body confer power on the Minister to designate a Magistrate's Court.

[169] It is true that PAJA does not confer power on the Minister to designate a Magistrates' Court by notice in the Gazette. But it does not follow as a matter of course that the Minister lacks the power to designate. The definition of a Magistrates' Court itself tells us that the Minister establishes or designates Magistrates' Courts in terms of section 2 of the Magistrates' Courts Act[188]. It is clear from section 2 of the latter Act that the Minister's powers include the power to create and abolish Magistrates' Courts.

[170] Although section 2 of the Magistrates' Courts Act does not expressly confer upon the Minister the power to designate courts for specific classes of administrative actions, it may reasonably be argued that this power is implied in section 2 of the Magistrates' Courts Act. It must be noted that the distinction between that situation and the present is that the implied power does not flow from the definition of "court" in PAJA but stems from the Minister's power under section 2 of the Magistrates' Courts Act. Here we do not have a provision equating to section 2.

[171] Moreover, PAJA draws a distinction between a designation of "courts" as institutions and a designation of "presiding judicial officers". Because the power to establish and abolish Magistrates' Courts vests in the Minster, the definition assumes that the Minister may designate a court for purposes of determining administrative actions. And section 9A of PAJA empowers senior magistrates to designate magistrates as presiding officers over courts designated by the Minister in terms of section 1 of

[188] 32 of 1944.

PAJA. A court that may be designated under PAJA is a district Magistrate's Court or a court of regional division established by the Minister for purposes of adjudicating civil disputes, either generally or in respect of a class of administrative actions.

[172] The distinction appears to be in accordance with the principle of separation of powers. While the Minister may establish courts and determine their competence, he or she may not determine who should preside over specific matters. Section 9A of PAJA reserves that power for the head of a particular Magistrates' Court who may designate magistrates who have completed relevant training.

[173] The definition of "court" in PAJA which pertains to Magistrates' Courts has two components. The first is that it is a court for a district or regional division designated by the Minister in the Gazette. The second is that such a court must be presided over by a magistrate designated by the head referred to in section 9A of PAJA.

[174] I remain unpersuaded that PAJA is helpful to the exercise of interpreting section 1 of RICA with a view to determining whether the Minister's power to designate a Judge is implied. My opinion is fortified by the principle that it is statutes which are in *pari materia* (on the same subject matter) that must be read in conformity with one another. PAJA and RICA are not dealing with the same subject matter. In addition, one statute may not be used in interpreting another statute.

[175] In *Independent Institute of Education*[189] this Court had the occasion to consider what is meant by the expression: "[i]n this Act, unless the context indicates". This was interpreted to mean that the defined meaning applies to the relevant Act only and that even then, it may not be applied if context indicates otherwise. In that matter, Mogoeng CJ stated:

> "More tellingly, the Higher Education Act opens its definition section in these terms:

[189] *Independent Institute of Education* above n 164.

> 'In this Act, unless the context otherwise indicates – "university" means any university established, deemed to be established or declared as a university under this Act.'

It follows that the special meaning given to 'university' in that Act is confined to instances where the Higher Education Act itself applies. But, even then, the definition applies subject to context. Room is left for the word 'university' to be given a meaning that is at variance with that specially defined one even where the Higher Education Act applies. And this is in line with our jurisprudence. In *Liesching I* we said:

> '"Appeal" is defined in section 1 of the Superior Courts Act. Where a word is defined in a statute, the meaning ascribed to it by the Legislature must prevail over its ordinary meaning. The definition makes plain that the word 'appeal' would only bear the meaning ascribed to it by the Legislature if the context so requires. If, however, there are compelling reasons, based on the context, to disregard the ascribed meaning then the ordinary meaning of the word must be used. If a defined word or phrase is used more than once in the same statute it must be given the same meaning unless the statutory definition would result in such injustice or incongruity or absurdity as to lead to the conclusion that the Legislature could never have intended the statutory definition to apply.'

To concretise this approach, the following must never be lost sight of. First, a special meaning ascribed to a word or phrase in a statute ordinarily applies to that statute alone. Second, even in instances where that statute applies, the context might dictate that the special meaning be departed from. Third, where the application of the definition, even where the same statute in which it is located applies, would give rise to an injustice or incongruity or absurdity that is at odds with the purpose of the statute, then the defined meaning would be inappropriate for use and should therefore be ignored. Fourth, a definition of a word in the one statute does not automatically or compulsorily apply to the same word in another statute. Fifth, a word or phrase is to be given its ordinary meaning unless it is defined in the statute where it is located. Sixth, where one of the meanings that could be given to a word or expression in a statute, without straining the language, 'promotes the spirit, purport and objects of the Bill of Rights', then that is

> the meaning to be adopted even if it is at odds with any other meaning in other statutes."[190]

[176] RICA replaces the Interception and Monitoring Prohibition Act. A perusal of the latter Act reveals that in addition to the definition section, the Act dedicates a specific provision in its body to the Minister's power to designate. Section 3 stipulates in an inelegant manner that an interception direction may be issued only by a Judge designated by the Minster. This is lacking in RICA. On the respondents' approach to the construction of the definition section, section 3 of RICA's predecessor was superfluous because the Minister's power was derived from the definition itself.

[177] I am not aware of any decision which used a definition section for purposes other than applying its meanings to the defined words wherever they appear in the text of a statute. I can think of no cogent reasons for treating the definition of a designated Judge in RICA as a source of the Minister's implied power to designate a Judge. To do otherwise suggests to me that the definition section in RICA is used for a purpose other than the one it was meant to serve. That purpose is to give meaning to the words "designated judge" and nothing more.

Implied power

[178] In *GNH Office Automation*,[191] the Supreme Court of Appeal quoted the following description of implied power in our law:

> "Powers may be presumed to have been impliedly conferred because they constitute a logical or necessary consequence of the powers which have been expressly conferred, because they are reasonably required in order to exercise the powers expressly conferred, or because they are ancillary or incidental to those expressly conferred."[192]

[190] Id at para 16-8.

[191] *GNH Office Automation CC v Provincial Tender Board, Eastern Cape* [1998] ZASCA 25; 1998 (3) SA 45 (SCA).

[192] Id at 51G-H.

[179] In *Matatiele Municipality*,[193] this Court formulated the principle in these words:

> "It is trite that the power to do that which is expressly authorised includes the power to do that which is necessary to give effect to the power expressly given. The power of Parliament to redraw provincial boundaries therefore includes the power that is reasonably necessary for the exercise of its power to alter provincial boundaries."[194]

[180] What is clear from these authorities is that for a power to be implied, there must be an express power in which it is implied. This means there can be no implied power without an express power. The explicit power must of necessity include the implied power. And power is implied if it is necessary to give effect to the exercise of the explicit power. *Matatiele Municipality* qualified the statement approved by *GNH Office Automation* by leaving out "ancillary or incidental" to the express power. Necessity appears to be the only standard for determining whether power is implied.[195]

[181] Consistent with this principle, this Court in *Masetlha*[196] held:

> "The power to dismiss is necessary in order to exercise the power to appoint. . . . Without the competence to dismiss, the President would not be able to remove the head of the Agency without his or her consent before the end of the term of office, whatever the circumstances might be. That would indeed lead to an absurdity and severely undermine the constitutional pursuit of the security of this country and its people. That is why the power to dismiss is an essential corollary of the power to appoint and the power to dismiss must be read into s 209(2) of the Constitution."[197]

[182] In *Masetlha,* section 209(2) of the Constitution conferred upon the President the power to appoint the head of the Intelligence Agency without expressly authorising the

[193] *Matatiele Municipality* above n 86.

[194] Id at para 50.

[195] *Lekhari v Johannesburg City Council* 1956 (1) SA 552 (A) at 567B.

[196] *Masetlha* above n 97.

[197] Id at para 68.

President to dismiss such head if circumstances warranted a dismissal.[198] The power to appoint is expressly conferred on the President but the power to dismiss is not. This Court held that the power to dismiss was implied because it was necessary for the exercise of the power to appoint. Of importance to note is the fact that both powers, express and implied, must vest in the same functionary.

[183] It cannot be correct to suggest that without the Minister's power to designate, the designated Judge will not be able to exercise powers conferred on him or her by sections 16 to 18 of RICA, and therefore the Minister's power to designate is implied. This is because the power that is said to be implied is not necessary for the Minister to exercise any powers under sections 16 to 18 of RICA. But it is an antecedent power necessary for the lawful exercise of powers conferred upon the designated Judge, in terms of those sections.

[184] In other words, the express powers conferred upon the designated Judge do not constitute explicit powers in which the Minister's power is implied. On the contrary, the powers of the designated Judge and those of the Minister amount to different powers conferred on different functionaries and must be exercised at different stages in order to attain the objectives of RICA.

[185] The Minister's power to designate cannot be said to constitute an implied power under section 1 of RICA. This is so because that section does not confer an express power. There can be no question of an expressly authorised power including "the power to do that which is necessary to give effect to the power expressly given". There can be no implied power without the expressly conferred power. Thus in *Matatiele Municipality*, the power to change municipal boundaries was taken to be a part of the explicitly conferred power to alter provincial boundaries. In *Masetlha* too,

[198] Section 209(2) of the Constitution provides:

> "The President as head of the national executive must appoint a woman or a man as head of each intelligence service established in terms of subsection (1), and must either assume political responsibility for the control and direction of any of those services, or designate a member of the Cabinet to assume that responsibility."

the implied power to dismiss was the corollary of the power to appoint. In those matters, both kinds of power vested in the same functionary.

[186] For all these reasons I conclude that here the power to designate a Judge is not expressly or impliedly conferred by RICA. As mentioned, this conclusion has a bearing on the remedy proposed in the first judgment.

[187] But before addressing the question of remedy, it is necessary to express a view on the validity of the impugned provisions. While the applicants acknowledge that the right to privacy, on which they rely for their challenge, is not absolute, they contend that the limitation of that right by the relevant provisions of RICA is not reasonable and justifiable. Their attack is directed mainly at Chapter 3 of RICA which authorises interception of private communications by public officials. As the first judgment illustrates, the interception of communications which are not authorised by this Chapter are unlawful.

[188] Such interceptions primarily limit the right to privacy guaranteed by section 14 of the Constitution.[199] This section pledges privacy of communications. The limitation imposed by Chapter 3 of RICA on this right may be constitutionally permissible only if it is reasonable and justifiable. The respondents bore the onus of proving this fact. In an attempt to justify the limitation, the Minister of Justice contended, in an affidavit filed on his behalf, that the designation of a Judge to authorise the interception safeguards the privacy of the affected parties. He submitted that "the appointment of the designated judge is governed by the Judges' Remuneration and Conditions of Employment Act" which provides that retired Judges must be available to perform

[199] Section 14 of the Constitution provides:

> "Everyone has the right to privacy, which includes the right not to have—
>
> (a) their person or home searched;
>
> (b) their property searched;
>
> (c) their possessions seized; or
>
> (d) the privacy of their communications infringed."

service for at least 3 months in a year until they reach the age of 75 years.[200] The Minister proceeded to submit 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 a designated Judge".

[189] The Minister's argument is flawed. The Judges' Remuneration and Conditions of Employment Act does not, even remotely, empower the Minister to designate a Judge for purposes of RICA. And since the role played by a designated Judge is so crucial to the justification of the limitation of privacy of communications, absent a lawful and valid designation of a Judge, must mean that the limitation is not justifiable. Nor can it be said that it is reasonable.

Remedy

[190] The failure to prove that the limitation authorised by Chapter 3 meets the standard laid down by section 36 of the Constitution means that the Chapter is not valid and a declaration to this effect must be made. The absence of a power to designate a Judge in RICA makes suspension of the declaration of invalidity inappropriate. This is because the Minister of Justice cannot continue to purport to be exercising a power which RICA in its defective form does not confer on him.

[200] Section 7(1)(a)(i) provides that:

> "(1)(a) A Constitutional Court judge or judge who has been discharged from active service, except a Constitutional Court judge or judge who has been discharged in terms of section 3 (1) (b) or (c) or (2) (b), (c) or (d), who-
>
> (i) has not attained the age of 75 years must, subject to paragraph (c), be available to perform service until he or she attains the age of 75 years, for a period or periods which, in the aggregate, amount to three months a year: Provided that such a Constitutional Court judge or judge may voluntarily perform more than three months' service a year, if his or her services are so requested."

[191] This is not a case of allowing an invalid law to continue to operate whilst Parliament remedies the defects. In this matter if the declaration of invalidity is suspended, it will not cure the problem of lack of power to designate. That is the kind of problem which can be remedied by granting the Minister the relevant power. And that remedy can be effected by Parliament only. This is because the remedy entails legislating which is the competence of Parliament.

[192] The wide remedial power of making a just and equitable order under section 172 of the Constitution has limits.[201] Here, the words "a court . . . may make any order that is just and equitable" must be read in proper context. They do not mean that a court is free to grant whatever order it considers to be just and equitable. In context, these words enable a court to issue a just and equitable remedy within its jurisdiction. The limit to what a court may order is apparent from the opening words of section 172(1). These words reveal that the court in question must have the power to decide the matter before it and the section proceeds to say that the court may make a just and equitable order. The just and equitable order is determined with reference to the circumstances of a particular case.

[193] Justice and equity contemplated in section 172(1) does not entail the exercise of power not conferred upon a court. The section does not empower a court to exercise legislative power under the guise of issuing a just and equitable order. However, our courts recognise that sometimes it becomes just and equitable to read words into a

[201] Section 172(1) of the Constitution provides:

> "(1) When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

statutory provision in order to cure a defect in the provision concerned. But the principle of separation of powers is a countervailing consideration to the remedy of reading-in. In *National Coalition for Gay and Lesbian Equality*,[202] this Court cautioned:

> "The other consideration a court must keep in mind, is the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature."[203]

[194] It is always important to remember that the reading-in remedy involves a process of reading words into a statute. Ordinarily that process entails reading words into the defective provision. If what is required to cure the defect is to create and add new sections to the statute, the reading-in is not appropriate. As a guide to reading in, this Court laid down the following principles:

> "In deciding to read words into a statute, a court should also bear in mind that it will not be appropriate to read words in, unless in so doing a court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading in (as when severing) a court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution. Even where the remedy of reading in is otherwise justified, it ought not to be granted where it would result in an unsupportable budgetary intrusion."[204]

[195] A reading-in that creates a new section intrudes unduly into the domain of Parliament. This is because the introduction of a new provision or section constitutes an amendment of the statute. It cannot properly be characterised as reading words into the statute if an entire section is added. Here the lack of the Minister's power to

[202] *National Coalition for Gay and Lesbian Equality* above n 173.

[203] Id at para 66.

[204] Id at para 75.

designate cannot be cured unless a new section is added to RICA. As a result, a reading-in is not appropriate.

[196] It bears emphasis that here a declaration of invalidity sufficiently protects individual rights to privacy. Without the authorisation by a designated Judge, there can be no interception of communication under RICA unless conditions prescribed by that Act elsewhere are met. Consequently, there is no need for an interim remedy aimed at protecting the rights of individuals.

[197] The only issue of concern is that the declaration of invalidity would leave law enforcement officers without a legal tool to combat and investigate crimes. They will not be able to use authorised interceptions of communications. But the difficulty in this matter is that the lacuna does not flow from the declaration of invalidity. Instead, it arises from Parliament's failure to empower the Minister to designate a Judge. As a result, the hands of this Court are tied. It cannot competently close the gap in RICA.

[198] However, the law enforcement officers may still intercept communications under Chapter 2 of RICA. They may do so under section 5 of RICA if one of the parties to a communication consents to the interception.[205] The officers may also intercept communications without consent or a direction from a designated Judge. This may be done in circumstances described in both sections 7 and 8 of RICA. The only challenge

[205] Section 5(2) of RICA provides:

> "(2) Any law enforcement officer may intercept any communication if —
>
> (a) one of the parties to the communication has given prior consent in writing to such interception;
>
> (b) he or she is satisfied that there are reasonable grounds to believe that the party who has given consent as contemplated in paragraph (a) will —
>
> (i) participate in a direct communication or that a direct communication will be directed to him or her; or
>
> (ii) send or receive an indirect communication; and
>
> (c) the interception of such direct or indirect communication is necessary on a ground referred to in section 16 (5)(a),
>
> unless such communication is intercepted by such law enforcement officer for purposes of committing an offence."

is that following an interception, the officers are required to submit to the designated Judge certain documents pertaining to the interception, for record-keeping. In the absence of the designated Judge, the officers' superiors may keep the records. This would reduce the lacuna emanating from the declaration of invalidity.

[199] For these reasons and in addition to paragraphs 1 to 4 of the order proposed in the first judgment, I would simply declare the impugned provisions invalid. I would grant no additional remedies.

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