

**IN THE HIGH COURT OF SOUTH AFRICA
[GAUTENG DIVISION, PRETORIA]**

CASE NO: 2598/17

In the matter between:

AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	1ST APPLICANT
SOLE, STEPHEN PATRICK	2ND APPLICANT
And	
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	1ST RESPONDENT
MINISTER OF STATE SECURITY	2ND RESPONDENT
MINISTER OF COMMUNICATIONS	3RD RESPONDENT
MINISTER OF DEFENCE AND MILITARY VETERANS	4TH RESPONDENT
MINISTER OF POLICE	5TH RESPONDENT
THE OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE	6TH RESPONDENT
THE OFFICE FOR INTERCEPTION CENTRES	7TH RESPONDENT
THE NATIONAL COMMUNICATIONS CENTRE	8TH RESPONDENT
THE JOINT STANDING COMMITTEE ON INTELLIGENCE	9TH RESPONDENT
THE STATE SECURITY AGENCY	10TH RESPONDENT

FILING SHEET

DOCUMENTS: 4TH RESPONDENT'S ANSWERING AFFIDAVIT

ON THE ROLL:**FILED BY:**

ATTORNEY FOR 4TH RESPONDENT'S
STATE ATTORNEY PRETORIA
SALU BUILDING
316 THABO SEHUME STREET
PRIVATE BAG X 91
PRETORIA, 0001
Ref: 2937/2017/Z52/MC
Tel: (012) 309-1630
Fax: 086 640 1943
Dx: 298 PRETORIA
Enq: M MAKHUBELA**TO: THE REGISTRAR OF THE HIGH COURT
PRETORIA****AND TO: APPLICANT'S ATTORNEYS**
WEBBER WENTZEL ATTORNEYS
90 RIVONIA ROAD, SANDTON
JOHANNESBURG, 2196
Tel: (011) 530 5232
Fax: (011) 530 6232
E-mail: dario.milo@webberwentzel.com
Ref: Dario Milo / Makhotsa Lengane/ 3000547**AND TO: ATTORNEYS FOR 1ST, 7TH, 8TH & 10TH RESPONDENTS**
KGOROeadIRA MUDAU INC
OFFICE 26, 3RD FLOOR
158 JAN SMUTS BUILDING
9 WALTERS STREET
Tel: 2017
Fax: 086 519 4846
E-mail: rapulane@kgoroeadiramudauinc.co.za
Ref: M Kgoroeadira/MK0002

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 2598/2017

In the matter between:

AMABHUNGANE CENTRE FOR

INVESTIGATIVE JOURNALISM NPC

First Applicant

SOLE, STEPHEN PATRICK

Second Applicant

and

MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES

First Respondent

MINISTER OF STATE SECURITY

Second Respondent

MINISTER OF COMMUNICATIONS

Third Respondent

MINISTER OF DEFENCE AND MILITARY VETERANS

Fourth Respondent

MINISTER OF POLICE

Fifth Respondent

THE OFFICE OF THE INSPECTOR-GENERAL

OF INTELLIGENCE

Sixth Respondent

THE OFFICE FOR INTERCEPTIONS CENTRES

Seventh Respondent

UK N/A

THE NATIONAL COMMUNICATIONS CENTRE

Eighth Respondent

THE JOINT STANDING COMMITTEE ON
INTELLIGENCE

Ninth Respondent

THE STATE SECURITY AGENCY

Tenth Respondent

THE FOURTH RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

Vusumuzi Ramakala Masondo

declare under oath as follows:

A. DEPONENT

1. I am an adult male with the rank of Lieutenant General in the South African National Defence Force ("SANDF"). I am currently appointed and serving as the Chief of Staff who is stationed at Defence Head Quarters, Armscor Building, corner Nossob and Boeing Streets, Delmas Road, Erasmus Kloof, Pretoria. I am deposing to this affidavit as the Acting Chief of the SANDF.
2. The Chief of the SANDF is the officer duly authorised to delegate and / or grant approvals to applicants to apply for the directions contemplated in the Regulation of Interception of Communications and the Provision of Communication-Related Information Act, Act 70 of 2002 ("the RICA").

VK NH

3. I am duly authorised to depose to this affidavit on behalf of the Minister of Defence (*"the Minister"*).
4. The Minister is one of the five (5) "*relevant Ministers*" contemplated in the RICA.

5. The content of this affidavit falls within my personal knowledge or appears from documents to which I have access by the nature of my position, unless indicated to the contrary, and is true and correct. Legal submissions are made on the advice of the legal representatives.
6. The factual averments in the founding affidavit largely relate to matters which fall firstly, outside the Minister's knowledge and area of competence and secondly, are matters which the SANDF would not have knowledge of.
7. I intend to confine this affidavit largely to the SANDF'S constitutional and other legislative rights, obligations and functions, why RICA is invoked, the circumstances when and under which this happens, as well as the role and utility of RICA in Defence Crime Intelligence. Unless there are specific allegations concerning the SANDF in the founding affidavit, I will not be dealing with the averments in the founding affidavit, as I am advised that they are being dealt with in the affidavits filed on behalf of the other respondents who are opposing the application.

VK NK

8. It is disputed that the applicants' attack on the RICA is well-founded and has merit. In this regard, I am advised that this is fully canvassed on the affidavits that have been filed on behalf of the first, second, seventh, eighth and tenth respondents. I therefore wish to confirm that align myself with the arguments proffered and averments made on behalf of these respondents.
-

B. INTRODUCTION

9. The SANDF has an interest in the issues regarding the provisions of RICA, which the applicants seek to impugn.
10. However, because the SANDF does not undertake "*bulk surveillance*" and *foreign signals interception*" the declaratory order that (i) the RICA and the National Strategic Intelligence Act 39 of 1994 are inconsistent with the Constitution of the Republic of South Africa, 1996 ("*the Constitution*") and invalid to the extent that they failed to regulate properly or at all "*bulk surveillance*" and foreign signals interception undertaken by state officials including by the National Communications Centre and that (ii) the bulk surveillance activities and foreign signal interception undertaken by the National Communication Centre are unlawful and invalid, do not affect SANDF. I will therefore not be addressing the issues surrounding "*bulk surveillance*" and *foreign signals interception*."
11. It is significant that the applicants accept that in general the interception or surveillance of communications is not unconstitutional or impermissible.

C. THE RELEVANT STATUTORY FRAMEWORK

[i] *Introduction*

12. The RICA regulates the interception and monitoring of communication related information under very specific circumstances, and for very specific reasons. The importance of RICA to SANDF can be fully appreciated when its provisions are considered against the background of the Constitution of the Republic of South Africa, 1996 ("*the Constitution*") as well as the Defence Act, Act 42 of 2002 ("*the Defence Act*").
13. The Minister of Defence denies that any of the provisions of RICA are unconstitutional, particularly to the extent of all those listed by the applicant in the notice of motion.
14. All members and employees of the SANDF are state employees. Their employment is regulated by amongst others the Defence Act. For purposes of the RICA, the SANDF is accountable to another independent body, the Parliamentary Joint Standing Committee on Intelligence ("JSCI"), the ninth respondent in this matter.
15. The RICA was not promulgated, and therefore cannot be used, to (i) investigate ordinary crimes, (ii) in circumstances where ordinary investigative methods can be employed, and (iii) most significantly, monitor and intercept communications for any reason other than as contemplated in that Act.

✓
nkw

16. Furthermore as it will appear more fully later in this affidavit, its implementation is subject to the approval of the independent designated Judge at one level, and at the next and more public level, the oversight of the JSCI and the Inspector General of Intelligence.
-

[ii] The Constitution of the Republic of South Africa

17. Section 199 of the Constitution provides that the security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution, which must be structured and regulated by national legislation. Sub-section (2) states that the defence force is the only lawful military force in the Republic.
-
18. Section 199 provides further that the security services must act, and teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic. No member of any security service may obey a manifestly illegal order.
19. To give effect to the principles of transparency and accountability, multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament.

W
N.L.

20. Section 200 provides that the Defence Force must be structured and managed as a disciplined military force. The primary object of the Defence Force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.
-

[iii] RICA

21. Section 1 of RICA defines an "applicant" among others, as an officer referred to in section 1 of the Defence Act, Act 42 of 2002 if the officer concerned obtained in writing the approval in advance of another officer in the Defence Force with at least the rank of a Major-General and who has been duly authorised by the Chief of the South African National Defence Force to grant such approval. The Chief SANDF authorises or delegates relevant officials to carry out such tasks.
-

D. THE ROLE OF RICA IN THE OPERATIONS OF THE SANDF

22. The Department of Defence uses RICA to investigate only crimes committed by members of the SANDF where it is suspected that a serious offence has been or is being or will probably be committed. This is particularly so where a syndicate or group is involved and ordinary methods of investigation have proven to be ineffective.

VK NH

23. The SANDF as an employer is entitled to investigate the misconduct of its employees. The SANDF uses RICA for internal investigations. The applicants are not members of the SANDF. They are not and cannot be affected by the SANDF's investigations into matters that concern only the SANDF. My response to the application in these circumstances is very brief.

24. The SANDF comprises amongst others of the following services or divisions:

24.1 The South African Army;

24.2 The South African Navy;

24.3 The South African Air Force;

24.4 Defence Intelligence;

24.5 South African Medical Health Services; and

24.6 The Military Police.

25. Intelligence within the SANDF is centralised. Only the Defence Intelligence Division of the SANDF may apply for an interception direction.

26. Defence Intelligence investigates only organised crime involving members of the SANDF. Defence Intelligence does not have jurisdiction over civilians. Where civilians are also involved in the commission of the crime, the case would be referred to SAPS.

VK NL

27. However, each of the above services / divisions has a small internal counter intelligence unit headed by the unit counter intelligence officer. The units are responsible for counter intelligence related operations within the various Divisions of the Defence Force.
-
28. The function of the UCIOs is amongst others to ensure that the military is stable. To this end they take necessary measures to maintain a stable and disciplined Army.
29. The Military Police investigate crime perpetrated by members of the SANDF. The crimes are listed in the Military Discipline Code. The Military Police do not have jurisdiction over civilians.
-
30. Crime Intelligence (i.e. the investigation and prevention of crime) is the function of the Military Police and UCIOs. Where in the normal course of operations a division or unit within the division, discovers information relating to the commission of serious crimes affecting the military or the Republic, that information must be reported to the Military Police. It must simultaneously be reported to Defence Intelligence for further investigation.
31. In the last past few years, there have been only few occasions when it became necessary for the DOD to apply for an interception direction. In this regard, they were all restricted to call related data and not active calls. The SANDF does not gather intelligence for purposes of achieving its primary objects, being

K NK

to defend and protect the Republic, its territorial integrity and its people. This is the responsibility of the Department of State Security.

32. The SANDF does not employ bulk interceptions. In any event it does not have ~~the capacity for the storage of such information. The SANDF stores only the~~ information which it has obtained pursuant to an interception directive which was issued on application by it. The information may not be accessed until it is for the purpose of legal proceedings.
33. The Defence Intelligence Division of the SANDF is accountable to the Inspector General, as well the Joint Standing Committee on Intelligence.
34. As stated above, RICA is only used by the Defence Intelligence to investigate serious offences involving members of the SANDF in order to maintain stability, integrity and the morale of the Defence Force. Notifying the member of the intention to apply for an interception direction will defeat the object of ~~seeking the direction. Informing the member after the event will compromise~~ the investigation methods which are used in the SANDF.
35. The object of defence crime intelligence is to maintain discipline and order in the SANDF. It is therefore imperative that investigations are not compromised.

✓ NH

36. Interception of communications in the SANDF is resorted to as a measure of last resort, in identifying the perpetrators of serious crimes. Once a perpetrator is identified he will be tried before a military court. If the evidence is going to be used against the person he will come to know of the interception.
-

E. AD SERIATIM

37. I have read the allegations contained in the founding affidavit deposed to by STEPHEN PATRICK "SAM" SOLE on behalf of the applicants ("Sole").
38. The averments deal with interception directions of civilians. No specific averments are made against the SANDF. The policy issues surrounding the interception of communications are discussed in the affidavit made on behalf of the first respondent. My failure to deal with the averments and contentions in the founding affidavit and supporting document should not be construed to be an admission of the truth and correctness thereof. I am accordingly advised that the other respondents who are opposing the application are better placed to address them.
-

F. CONCLUSION

39. It is submitted that the applicants have failed to make out a case for the relief claimed in the notice of motion.

W
NH

40. In the premises, the Minister of Defence prays that the application is dismissed with costs, including that of two Counsels.

M. Masando

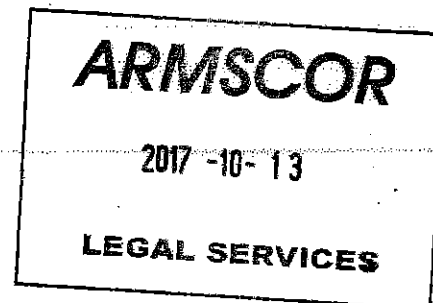
DEPONENT

I certify that the Deponent acknowledged that he knows and understands the contents of this affidavit, that he has no objection to the making of the prescribed oath and that he considers this oath to be binding on his conscience. I also certify that this affidavit was signed in my presence at Pretoria on this 13th day of October 2017 and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended by Government Notice R1648 of 19 August 1977, have been complied with.

[Signature]

COMMISSIONER OF OATHS

<i>Nomana Lepinoto</i>	
Kommissaris van Ede / Commissioner of Oaths	
Volle Name / Full Names	
Adres / Address	870 Nossob Street Erasmuskloof Ext. 4 Pretoria 0001
Gebied / Area	RSA
Ex Office	Kryskor/Arm Scor
Datum / Date	2017/10/13



78

IN THE HIGH COURT OF SOUTH AFRICA
[GAUTENG DIVISION, PRETORIA]

CASE NO: 2598/17

In the matter between:

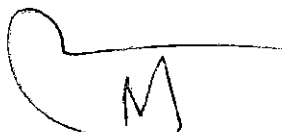
AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	1ST APPLICANT
SOLE, STEPHEN PATRICK	2ND APPLICANT
And	
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	1ST RESPONDENT
MINISTER OF STATE SECURITY	2ND RESPONDENT
MINISTER OF COMMUNICATIONS	3RD RESPONDENT
MINISTER OF DEFENCE AND MILITARY VETERANS	4TH RESPONDENT
MINISTER OF POLICE	5TH RESPONDENT
THE OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE	6TH RESPONDENT
THE OFFICE FOR INTERCEPTION CENTRES	7TH RESPONDENT
THE NATIONAL COMMUNICATIONS CENTRE	8TH RESPONDENT
THE JOINT STANDING COMMITTEE ON INTELLIGENCE	9TH RESPONDENT
THE STATE SECURITY AGENCY	10TH RESPONDENT

FILING SHEET

DOCUMENTS: **4TH RESPONDENT'S ANSWERING AFFIDAVIT**

ON THE ROLL:

FILED BY:



ATTORNEY FOR 4TH RESPONDENT'S

STATE ATTORNEY PRETORIA

SALU BUILDING

316 THABO SEHUME STREET

PRIVATE BAG X 91

PRETORIA, 0001

Ref: 2937/2017/Z52/MC

Tel: (012) 309-1630

Fax: 086 640 1943

Dx: 298 PRETORIA

Enq: M MAKHUBELA

TO: THE REGISTRAR OF THE HIGH COURT
PRETORIA

AND TO: **APPLICANT'S ATTORNEYS**
WEBBER WENTZEL ATTORNEYS
90 RIVONIA ROAD, SANDTON
JOHANNESBURG, 2196
Tel: (011) 530 5232
Fax: (011) 530 6232
E-mail: dario.milo@webberwentzel.com
Ref: Dario Milo / Makhotsa Lengane/ 3000547

AND TO: **ATTORNEYS FOR 1ST, 7TH, 8TH & 10TH RESPONDENTS**
KGOROeadIRA MUDAU INC
OFFICE 26, 3RD FLOOR
158 JAN SMUTS BUILDING
9 WALTERS STREET
Tel: 2017
Fax: 086 519 4846
E-mail: rapulane@kgoroeadiramudauinc.co.za
Ref: M Kgoroeadira/MK0002