IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 2598/2017

In the matter between:

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

and

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

THE STATE SECURITY AGENCY **Tenth Respondent**

FIRST RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned

JOHN JEFFERY

declare under oath as follows:

A. DEPONENT

1. I am an adult male. I am the Deputy Minister of Justice.

2. The Minister of Justice and Correctional Services ("*the Minister*") is the Cabinet member responsible for the administration of justice. As such he has the duty to administer the Regulation of Interception of Communications and the Provision of Communication-Related Information Act, 70 of 2002 ("*the RICA*"). He is also one of the four (4) "*relevant Ministers*" defined in the RICA.

3. As the Deputy Minister I am authorised to oppose this application.

4. The contents of this affidavit fall within my personal knowledge, unless the contrary emerges from the context, and are both true and correct. Legal submissions are on the advice of the Minister's legal representatives.

5. In this affidavit I touch on some features of the applicants' case and the Minister's opposition. These are expanded upon in the affidavit of Mr Sarel Robbertse, a Senior State Law Advisor in the Department of Justice, whose affidavit is relied on in support of my opposition.

6. Mr Robbertse's affidavit contains a detailed discussion of the basis for opposing the application. I have read his affidavit. The policy issues discussed therein reflect the State's position. Mr Robbertse's affidavit is attached hereto marked "**JJ-1**".

B. INTRODUCTION

7. The RICA was enacted more than fifteen (15) years ago. It was the result of an investigation by the South African Law Reform Commission which adopted a public participation process. The authority which was given the power to issue directions was a judge. This was ground-breaking at the time and put the RICA above most of its counter-parts in other countries at the time. The issuing authority in most countries was a member of the Executive and this position prevails.

8. We have always considered the RICA to be constitutional and we still consider it to be so.

9. That been said, I accept that with technological advances, legislation such as the RICA should be revised from time to time, amongst others, because of the rapidly evolving electronic communications technology. We now have communication tools such as whatsapp, twitter, snapchats, SHAREit, Facebook messenger and so forth. All of these did not exist when the RICA was adopted.

10. I am advised that other countries in the world share this view. The Minister accepts that the review of the RICA, in general, is necessary to assess whether there are possible areas of improvement given the benefit of its track record of implementation.

11. Over the period of 15 years since its promulgation, the balance between using the RICA as an effective tool to fight crime, and the related limitation on a person's right to privacy, may very well have shifted unfavourably towards the limitation of a person's privacy. This balance has to be found and maintained.

12. It is for these reasons that the Minister accepts that the RICA has to be reviewed. However, as I submit later in this affidavit, the determination of the scope and the extent thereof is thus a matter of policy, which is the role of

government, working together with its stakeholder civic formations and Parliament, as the legislature - and with respect, not the Courts.

C. GROUNDS FOR OPPOSING THE ORDER DECLARING THAT PROVISIONS OF THE RICA ARE UNCONSTITUTIONAL

13. The above introductory remarks in essence, are the reason why the Minister is opposing the application. In this regard, the Minister relies on the following broad grounds:

13.1 Firstly, the provisions of the RICA do not constitute a violation of the Bill of Rights nor of any other constitutional imperatives. To put it simply: No constitutional rights issue arises in this application;

13.2 Alternatively, if this court finds that there is a limitation of a constitutional right, the limitation is reasonable and justifiable, as contemplated in section 36 of the Constitution;

13.3 Lastly, the golden thread that runs through all of the above issues is the fundamental Constitutional principle of the separation of powers.

D. THE CORE SUBMISSIONS

[i] *No rights issue arises*

14. The complaints - the basis of which the constitutionality of the RICA is being attacked by the applicants - are not based on constitutional rights that exist. For example:

14.1 The Constitution does not confer upon a subject a right to notification;

14.2 The Constitution does not (i) place an obligation on the State to give notification to the subject of an interception measure and (ii) prescribe the circumstances under which notification must take place; and

14.3 The Constitution does not impose upon the State (i) who the authority to consider and grant the interception should be, (ii) how he or she should be appointed and for how long, and (iii) what procedure must be followed when considering an application for an interception direction.

15. These are not rights issues, but are policy - laden polycentric issues which, with respect, fall outside the ambit of this honourable court's powers. As the honourable Court held in *DPP Transvaal v Minister of Justice and Constitutional Development [2009] ZACC 8, 2009 (4) SA 222 (CC)* where Ngcobo J repeated the proposition that it is the executive's duty to develop policy and to determine what should be incorporated in a policy:

"It is not ordinarily the function of [courts]'... 'to tell the executive how to formulate policy. To do so is to interfere in the functioning of the executive. The function of the courts is to ensure that the executive observes the limits on the exercise of its power."

16. When the Legislature makes laws, it makes a policy choice to address certain issues. The Legislature has identified that the efficacy of the RICA rests, amongst others, on the subject not being aware of the interception as this would defeat the purpose of an interception. Notification regardless of whether it is prior to the interception direction or at any time thereafter is inimical to this.

17. The authority of the Executive and the Legislature as to whether notice of the interception must be given, who the authorising authority should be, how it comes to be appointed, the procedural aspects relating to the adjudication of an application for an interception direction, how the intercepted information must be stored and for how long it must be retained, is regulated by the RICA and must be applied within the confines of the Constitution.

18. In other words, the constitution has left these matters for the Executive who must, firstly, initiate legislation based on a policy position and then, secondly, the Legislature to make the policy choices, to conceptualise, design and formulate and, ultimately, pass the legislation.

[ii] ***If this court finds that the above issues give rise to sights issues, and there is a limitation of a constitutional right, the limitation is reasonable and justifiable***:

19. The Minister accepts, as do the applicants that by its very nature, the interception of a communication is a limitation on a person's right to privacy. It is submitted however, that public policy demands that measures are adopted to resist the increasing crime rate. It is also submitted that this honourable court can take judicial notice that South Africa is plagued by serious and violent crime, which is unfortunately on an upward trend. There can be no denying that Government has a duty to protect persons and communities from crime and therefore various policies are implemented to further this purpose.

20. Government will be derelict in its duty towards its inhabitants if it does not formulate and develop strict anti-crime measures for the benefit of its country and its inhabitants. To achieve this, it must exercise its legislative and policing functions boldly.

21. Measures to fight crime require an integrated and comprehensive response. The Legislature and the Executive have identified the interception and monitoring of communications as a measure to advance the policy of preventing and investigating crime. Many cases of crime have either been prevented or successfully prosecuted by virtue of evidence collected via the interception and monitoring of communications.

22. The RICA is one of the methods of implementing this policy. But RICA does not bring with it a "free-for-all". It sets defined parameters or boundaries, within which is must be used. It regulates the intrusion into a person's privacy and in so doing it makes provision for necessary safeguards in order to prevent arbitrariness and abuse. Significantly, an intrusion in terms of the RICA is only permissible under certain **exceptional circumstances** which are specifically listed and defined.

23. These are the important inbuilt safeguards that make the limitation of the right, reasonable and justifiable.

24. I accept, however, that there is room to improve these safeguards, which may include: (i) public participation in the appointment of the Judge, (ii) a JSC nominated panel of Judges instead of only one Judge, and/or (iii) increasing the period of tenure of such a Judge.

25. With regards to notification, consideration may be given to granting notification of the subject of an interception direction post an investigation, after the lapse of a certain period and under certain circumstances or conditions.

26. All of these are, however, policy considerations, and are thus not appropriate for determination by the honourable Court.

27. Therefore the RICA is steeped in the Executive's, as well as the Legislature's, powers relating to its policy and law-making roles with respect to the prevention and prosecution of crime. Ultimately RICA is directed at giving effect to the Executive's policies on the issue.

28. The issues which the applicants raise in this case are therefore policy-laden polycentric issues which the Executive and the Legislature must address. They are not issues which the Courts must or should grapple with. They fall outside of the Judiciary's area of competence.

[iii] ***Separation of powers***

29. The RICA governs several policy laden polycentric issues. This is a fundamental reason why this application should not be entertained by this court.

30. It is settled law that the powers and functions of the three branches of government are distinct and that one cannot trespass on the terrain of another. As the honourable Court held in *Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11*:

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

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

32. The process of initiating legislation by the Executive as well as the process leading up to the enactment of legislation by the Legislature is the product of different processes. The Executive engages in a rigorous exercise of gathering facts and opinions, as well as extensive research, on the subject matter of the proposed legislation. This includes, but is not limited to considering other related domestic legislation as well as examining legislation in other countries related to the same subject matter. Very often the views of stakeholders are sought and taken on board, and sometimes draft legislation is made available for public comment. All of these steps are often required to ensure a good piece of legislation.

33. A considerable amount of research is necessary. Empirical data which bears on the issue may have to be gathered or commissioned, if necessary. In the context of the RICA, empirical data concerning the prevalence of crime, the nature of the crimes, the resources, both financial and human resources available to investigate and prevent crime are relevant. Needless to say, like in many pieces of legislation on many different subjects, there is almost always conflicting interests at stake. How these conflicting interest should be balanced or resolved, is a question of policy.

34. The further preparation of a Bill will then involve a number of steps, among others, the investigation and evaluation of legislative proposals (which can either be proposed amendments to existing legislation or proposed new legislation), further consultation with interested parties, followed by the finalisation of a Bill which is submitted to Cabinet for approval before it is introduced in Parliament for the processing thereof.

35. It is then the responsibility of the Legislature to take the Bill further. The Legislature makes laws and in doing so, will often embark on a further consultation process. The more interest there is in a Bill the more rigorous the process of consultation. Consultation can take many forms, such as the form of publication, a call for comments and/or public hearings to be conducted by the relevant Parliamentary Committee. The scrutiny of draft laws involves not only the majority party in Parliament, but all political parties so represented. The deliberation process delves into all the relevant background details of why a particular piece of legislation is being proposed. Our constitutional order firmly places the role of legislation-making in the hands of Parliament.

36. There are many different considerations that must be taken into account by the Executive and the Legislature in the formulation of legislation relating to the prevention, investigation and successful prosecution of crime. The interception and monitoring of communications are important aspects in the fight against crime. It further relates to the question of the storage of data and the period for which call-related information should be stored. These are not

always easy questions to answer, but are nonetheless all aspects that the Executive and the Legislature must apply its minds to and make an appropriate decision.

37. It is the function of the Executive and Legislature to interrogate and explore these issues and make a policy choice.

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

39. The legislative process is not arbitrary, but follows constitutional and democratic guidelines and procedures. Ultimately, legislation is the manifestation of the will of the people.

E. POSSIBLE AREAS OF REVIEW

40. On 19 May 2017, the Member of Parliament for the Democratic Alliance put two questions to the Minister. The Minister responded in writing to these questions. It is evident from the Minister's answers that firstly, the

Department is in the process of reviewing the RICA with a view to the possible amendment thereof and secondly, a public consultation process will be embarked upon after a draft Bill has been prepared. A copy of the questions posed to the Minister, and his answers thereto, are attached hereto marked **"JJ-2"** and **"JJ-3"** respectively.

41. Therefore, it is public knowledge that the RICA is in the process of being reviewed.

42. The review was not initiated because the Department has reservations on the constitutionality of the RICA, or any of its provisions. Nor, was the review precipitated by this application.

43. The Department had commenced exploratory and investigative work a while ago to evaluate the RICA as a whole in order to identify provisions that may require amendments. Whether the provisions of the RICA require amendment are subjects for discussion and thorough consideration. Further research and consultation with relevant role-players and stakeholders are necessary. This can only be done by the Department and the Executive and, once the Bill has been introduced in Parliament, by Parliament itself.

44. The Department has taken cognisance of the concerns and views raised by the applicants in this application. Other interested persons have raised their concerns with the Department. One interest group has engaged with me on

issues that concern them and which they would want to have revisited when the RICA is being reviewed.

45. The public concerns and questions around the RICA have not been, and are not being, ignored by the Department. The Department has every intention of inviting public participation in the formulation of the proposed amendment to the RICA. This would have happened regardless of this application. This is also already public knowledge and thus in the public domain as the Minister has committed the Department to this process in his reply to the Parliamentary question, referred to above.

46. I would therefore submit that the applicants are being overly hasty and one is slightly bemused that, in the face of this, they are nonetheless pursuing this application.

47. Without appearing to water down the Department's commitment to the overall review of RICA, it is important to highlight that the alleged events on which the applicants base their application are only three and occurred over a 10-year period. This is by no means to be construed as an indication of abuse of the RICA. One wonders why the applicants have waited until now to challenge the constitutionality of certain provisions of the RICA, despite it being on the statute books for more than a decade.

48. I am always open to discussing issues relating to access to justice, legislation and other matters of public concern. I meet with various stakeholders and

interest groups very frequently and have always maintained an "open door" policy to discussions and debates around any justice-related issue.

49. I proposed in the recent past that a review of the RICA should be referred to the South African Law Reform Commission ("*SALRC*"). I am of the considered view that this is the appropriate platform to consider a review of the RICA. The function of the SALRC is to investigate legislation in order to make recommendations for the development, improvement modernization or reform thereof. The SALRC can appoint a task team to undertake the review. The SALRC has the resources and the know how to explore various options and review legislation. The task team can research and investigate whether the RICA needs to be revised, and if so to what extent. At the end of its work it will make recommendations.

50. In my view it is worth exploring this process. I am prepared to give consideration to the nomination of a representative of an interest group to the task team that will be responsible for the review of the RICA.

F. THE RELIEF CLAIMED BY THE APPLICANTS

51. I want to respond to the appropriate relief the applicants contend should be granted in this case.

52. In paragraph 200 of the founding affidavit, the applicants address the suspension of the order of invalidity to enable the Department to craft suitable

amendments. However, pending this, they are requesting this honourable court to trespass on Parliament's territory and to "legislate" interim measures. This, with respect, is inappropriate. It violates the principle of the separation of powers. It is noted that the applicants have refrained from indicating what the "appropriate reading-in" entails. I reserve the right to address this in an affidavit in future if the need there for arises.

53. The challenge to the constitutionality of the RICA falls into two compartments. The one is the breach of fundamental rights and the other relates to procedural issues around the issuing of interception directions.

54. The applicants concede that the RICA is itself not inconsistent with the Constitution but argue that the interception of communications should take place in accordance with the Constitution. As I have stated earlier there is no constitutional issue in this case.

55. To the extent that the applicants aver that the RICA intrudes on a person's right to privacy, I do not contend otherwise. However, in my view the intrusion on the right to privacy is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

56. I deny that the RICA limits any of the other rights contended for by the applicants. However, in the event of this honourable court finding that the other rights contended for by the applicants are limited, it is submitted that the

limitation/s is/are reasonable and justifiable and fall within the scope of section 36 of the Constitution and are therefore consistent with it.

G. APPROPRIATE REMEDY

57. In the event of this honourable court finding that the impugned provisions do not withstand constitutional scrutiny, then it is submitted that bearing in mind that there are weighty policy issues at stake, the Department should be given an adequate opportunity to draft suitable legislation to remedy the deficiencies.

H. THE TIME REQUIRED TO ENACT REMEDIAL LEGISLATION

58. I digress to point out that interception legislation is regularly reviewed throughout the world because of the on-going innovations in technology, the ever- increasing levels of serious crime, that includes organised crimes and the use of electronic communications to facilitate such crimes. Law enforcement will be hamstrung to fulfil their constitutional obligations if sufficient measures are not at their disposal to investigate such crimes that are facilitated by electronic communications. It may also hamper or prejudice existing investigations or crime prevention initiaves.

59. As indicated, the Department has commenced with a process to review the RICA. It is unfortunate that the applicants have decided to institute these

proceedings in the light of this process, instead of engaging the Department prior thereto.

60. Be that as it may, I respectfully request that if this honourable court were to find that the RICA does not pass constitutional muster, that a finding of constitutional invalidity should be suspended for 3 years to enable the Department to draft suitable remedial legislation.

61. It is submitted that 3 years is not inordinately long when the following is taken into account:

58.1 the technical and specialist nature of the legislation;

58.2 the extensive technology innovations since the RICA was first enacted;

58.3 consideration of developments in other countries and the current international views on the subject of the interception of communications by the Department;

58.4 the consultation process to be undertaken by SALRC with the public and experts in this field, which on its own will span a considerable period;

58.5 collation and compilation of comments received, in particular from knowledgeable persons in the applicable field.

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62. These preparatory steps together with the necessary research can take at least 12-18 months. Only after this can steps be taken to introduce a revision of the RICA into Parliament.

63. Apart from this, the Department is in the process of reviewing various other laws and new legislation is in the process of being promoted. This places a constraint on already overstretched human resources available that may be allocated to deal with the review of the RICA. Without such constraints the review of legislation would be able to progress more speedily. Though this is regrettable, it is a reality.

64. I am doubtful whether remedial legislation, particularly, in this case can be enacted within less than 36 months. Furthermore national elections, such as the upcoming one in 2019, have significant consequences for government Departments, the Executive and Parliament and this must be factored in when considering a possible timeframe for new legislation.

65. This honourable court is given the assurance that the Department will do everything reasonably possible to ensure that amendments which may become necessary following on a finding of unconstitutionality, are dealt with expeditiously.

I. RELIEF

66. In light of the above, I submit that the applicants have failed to make out a case for the relief sought in the notice of motion.

67. In the premises, I pray that the application is dismissed with costs, including those occasioned by the employment of two counsel.

JOHN JEFFERY

THUS SIGNED AND SWORN TO BEFORE ME ON THIS 8th DAY OF MARCH 2018 THE DEPONENT HAVING 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 THE OATH TO BE BINDING ON HIS CONSCIENCE.

SOUTH AFRICAN POLICE SERVICE
COMMISSIONER OF OATHS
2018 -03- 08
SOUTH AFRICAN POLICE SERVICE

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THE STATE SECURITY AGENCY	Tenth Respondent

FILING SHEET: SECOND, SEVENTH, EIGHTH AND TENTH RESPONDENT'S ANWERING AFFIDAVIT

SIGNED at Rosebank on the 18th day of July 2017

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DATE: 19 JUL 2017
SIGNATURE:
WITHOUT PREJUDICE / SONDER BENADELING VAN REGTE

SERVICE PER EMAIL ADDRESS AS AGREED

AND TO: **OFFICE OF THE STATE ATTORNEY**
ATTORNEYS FOR THE 1st, 3rd, 4th, 5th, 6th & 9th RESPONDENTS
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