

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

Case No: 2598/2017

In the matter between:

AMABHUNGANE CENTRE FOR  
INVESTIGATIVE JOURNALISM NPC  
SOLE, STEPHEN PATRICK

First Applicant

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

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**THE FIFTH RESPONDENT'S ANSWERING AFFIDAVIT**

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I, the undersigned,

**KING BHOYI NGCOBO**

declare under oath as follows:

**A. DEPONENT**

1. I am an adult male. I am the Acting Divisional Head of Crime Intelligence, holding the rank of Major-General in the South African Police Service. I am stationed at Crime Intelligence Head Quarters, Erasmuskloof, Pretoria, Gauteng Province.
  
2. I am the officer duly authorised in writing by the National Commissioner to grant approvals to applicants for directions as contemplated in the Regulation of Interception of Communications and the Provision of Communication-Related Information Act, 70 of 2002 (*"the RICA"*).

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3. I am duly authorised to depose to this affidavit on behalf of the Minister of Police (*"the Minister"*). The Minister is one of the four (4) *"relevant Ministers"* contemplated in the RICA.
4. 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.
5. Some of the factual averments in the founding affidavit relate to matters which fall firstly, outside the Minister's knowledge and area of competence and secondly, are matters which the South African Police Service (*"the SAPS"*) would not have knowledge of.
6. I intend to confine this affidavit largely to the SAPS' constitutional and other legislative rights, obligations and functions, how RICA assists the SAPS in discharging its constitutional obligations, the circumstances when and under which it invokes the provisions of the RICA and the utility and role of the RICA in crime intelligence.
7. I therefore do not intend dealing with each and every averment in the founding affidavit, save as specifically dealt with hereunder.
8. It is disputed that the applicants' attack on the RICA is well-founded and has merit. In this regard, I defer to the affidavits filed on behalf of the first,

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second, seventh, eighth and tenth respondents. I align myself with the arguments proffered and averments made on behalf of these respondents.

9. Legal submissions are on the advice of the Minister's legal representatives.

**B. INTRODUCTION**

Relief sought

10. The applicants seek to declare the RICA inconsistent with the Constitution of the Republic of South Africa, 1996 (*"the Constitution"*). The attack seems to be confined to the below mentioned provisions, although the relief in the notice of motion is crafted to suggest that all provisions of the RICA that are offensive in the manner contended are unconstitutional. The orders which the applicants seek are amongst others, that:

10.1. *"RICA, including, Sections 16(7), 17(6), 18(3)(a), 19(6), 20(6), 21(6) and 22(7), is inconsistent with the Constitution and accordingly invalid to the extent that it fails to prescribe procedure for notifying the subject of the interception direction;*

10.2. *"RICA including Section 37 thereof, is inconsistent with the Constitution and accordingly invalid to the extent that it fails to prescribe the proper procedure to be followed when state officials are*

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*examining, copying, sharing, sorting through, using, destroying and/or storing the data contained from the interceptions”;*

10.3. *“Section 30(2)(a)(iii) of RICA –is inconsistent with the Constitution and accordingly invalid”;*

10.4. *“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”;* and

10.5. *“Section 16(5), 17(4), 19(4), 21(4)(a), 22(4)(b) of RICA are inconsistent with the Constitution and accordingly invalid to the extent that they deal with an application related to a subject who is a journalist or a lawyer”.*

11. The applicants seek a further declaratory order that *“RICA and the National Strategic Intelligence Act 39 of 1994 are inconsistent with the Constitution and invalid to the extent that they fail to regulate properly or at all “bulk surveillance” and foreign signals interception undertaken by state officials including by the National Communications Centre”* and that *“[t]he bulk surveillance activities and foreign signals interception undertaken by the National Communication Centre are unlawful and invalid”.*

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12. The SAPS does not undertake “*bulk surveillance’ and foreign signals interception*”. I am hence unable to contribute to a discussion of these issues and therefore refrain from addressing the issues related to this, and defer to the other respondents.

*General remarks*

13. It is noteworthy 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*

14. 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 SAPS 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 South African Police Service Act, Act No 68 of 1995 (“*the SAPS Act*”).

*[ii] The Constitution of the Republic of South Africa read together with the South African Police Service Act*

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15. Section 205 of the Constitution provides for a National Police Service which is structured to function in the national, provincial and the local spheres of government. It further provides that National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively.
16. The objects of the police service are listed in Section 205(3). They are *“to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law”*.
17. The South African Police Service Act, Act No 68 of 1995 (*“the SAPS Act”*) is the national legislation contemplated in section 205(3) of the Constitution.
18. The preamble to the SAPS Act is an indication of the purpose of the Act and it is also an indication of the obligations which the SAPS owes to all individuals. It must combat crime, uphold and safeguard the fundamental rights of every person.
19. The legislature has enacted several pieces of legislation that create special investigative units. It is submitted that this is a recognition that the prevention of crime is in the public interest. The provisions of the RICA support this and give effect thereto.

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20. Section 12 of the Constitution, guarantees to every person the right to *inter alia* security of the person. This includes the right to be free from all forms of violence from either public or private sources. The SAPS has the constitutional obligation to ensure this.

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

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

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

[iii] *The RICA*

22. The RICA permits the interception and monitoring of communication related information under very specific circumstances, and for very specific reasons. These are specifically identified therein. I mention some:

22.1. To prevent serious bodily harm; (section 7);

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- 22.2. To determine the location in the case of an emergency relating to the security of an individual; (section 8).
- 22.3. Where a serious offence has been or is being or will probably be committed. The RICA defines what would constitute a serious offence. Amongst others, the following constitute serious offences:
- 22.3.1. an offence mentioned in the Schedule to the RICA e.g. high treason, sedition, any offence which could result in the loss of a person's life or serious risk of loss of a person's life;
- 22.3.2. any offence referred to in Chapter 2 (racketeering), Chapter 3 (money laundering) and Chapter 4 (criminal gang activities) of the Prevention of Organised Crime Act;
- 22.3.3. any offence referred to in paragraph (a) of the definition of '*specified offence*' namely, terrorism or an offence connected with terrorism (such as where doing anything which will, or is likely to, enhance the ability of any entity to engage in a terrorist activity, including to provide or offering to provide a skill or an expertise, providing, receiving or participating in training or instruction) in the

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Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004;

- 22.3.4. any offence referred to in Schedule 1 to the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act 27 of 2002) for instance, genocide and crimes against humanity;
- 22.3.5. any "*specified offence*" as defined in section 1 of the National Prosecuting Authority Act;
- 22.3.6. any offence referred to in section 13 (f) of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992);
- 22.3.7. any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament and the unlawful possession of such firearms, explosives or armament;
- 22.3.8. any offence under any law relating to the illicit dealing in or possession of precious metals or precious stones; any offence contemplated in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004;

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22.3.9. dealing in, being in possession of, or conveying endangered, scarce and protected game or plants or parts or remains thereof in contravention of any legislation;

22.3.10. any offence, the punishment for which may be imprisonment for life or a period of imprisonment prescribed by section 51 of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), or a period of imprisonment exceeding five years without the option of a fine, offence that is allegedly being or has allegedly been or will probably be committed by a person, group of persons or syndicate-

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

(ii) acting in the execution or furtherance of a common purpose or conspiracy or which could result in

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substantial financial gain for the person, group of persons or syndicate committing the offence, including any conspiracy, incitement or attempt to commit any of the above-mentioned offences.

22.3.11. to gather information which is necessary concerning an actual threat to the public health or safety, national security or compelling national economic interests of the Republic; (section 16(5)(a)(ii)).

22.3.12. to gather information which is necessary 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. (section 16(a)(v)).

23. It is submitted that the RICA recognises that the monitoring and interception of communications is a method for gathering crime intelligence, and for investigating and preventing crime.

#### **D. THE RICA: THE INTERCEPTION DIRECTION**

24. SAPS cannot invoke RICA for every offence. The instances under which it can do so are limited. These are:

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- 24.1. where reasonable grounds exist to believe that a **serious offence** has been, or is being or, will probably be committed. I have listed what these offences are earlier in this affidavit;
- 24.2. where there is a request to a party (or from a party) in an international mutual agreement or in the interests of South Africa's international relations or obligations for the provision 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.
25. In terms of section 1 of the RICA read together with section 33 of the SAPS Act only a commissioned officer may apply for a direction. The applicant officer must obtain in writing and in advance the approval of another officer in the Police Service with at least the rank of assistant-commissioner (this would be a person holding the rank of Major-General) and who in turn has been authorised in writing by the National Commissioner to grant such approval.
26. There are rigorous prerequisites to RICA being invoked. SAPS cannot resort to the RICA unless there are reasonable grounds to believe that-

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- 26.1. the interception of particular communications will be obtained by means of such an interception direction; and
- 26.2. the facilities from which, or the place at which, the communications are to be intercepted are being used, or are about to be used, are commonly used by the person or customer in respect of whom the application for the issuing of an interception direction is made.
27. In addition to this, an application for an interception direction concerning a serious offence (which has been or is being or will probably be committed) or an application where the grounds set out in section 16(5)(a)(iii), (iv) and (v) of RICA are present is only competent if (i) 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 (ii) the offence therefore cannot adequately be investigated, or the information therefore cannot adequately be obtained, in another appropriate manner.
28. Section 16(2)(e) of the RICA enjoins the applicant for an interception direction, to indicate whether other investigative procedures have been applied and have failed to produce the required evidence, or the applicant must indicate the reason why other investigative procedures are unlikely to succeed.

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29. It is therefore evident that the RICA is a last resort when all other methods of investigation have failed. The internal application form that SAPS uses provides therein a specific section for these reasons to be provided.

**E. UTILITY AND ROLE OF THE RICA IN CRIME INTELLIGENCE.**

*[i] General remarks*

30. The monitoring and interception of communications plays an important role in the fight against serious crime. The SAPS does not implement RICA at whim. The suggestion that the SAPS uses the RICA to pry into the private lives of ordinary citizens is not true.
31. Although effective, the monitoring and interception of communications is a labour intensive and expensive investigative tool. Firstly, the SAPS has neither the human resources nor the financial resources to expend on activities only to satisfy the curiosity of members of the SAPS. Secondly, any evidence that is gathered outside the constraints of RICA is tainted in legal proceedings. I am prepared to accept that there may be rogue elements, perhaps even within the SAPS, who unlawfully intercept and monitor communications. The abuse of the RICA by the SAPS will not be tolerated. The SAPS will act against those who use interception and monitoring for nefarious purposes and ulterior motives. This includes its own members.

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32. The interception and monitoring of communications is a measure of last resort. It is used only when the ordinary investigation methods have been ineffective or reasonably appears unlikely to succeed.
33. The interception and monitoring of communications is an investigative technique which is used world-wide. This is largely as a result of criminals, including international gangs and terrorists, taking advantage of modern forms of communications, not only to communicate in order to organize or conspire to commit crimes, but also to execute them. Economic offences and fraud are even more difficult to investigate if methods such as the interception and monitoring of communications are not available to investigation authorities such as the SAPS. There are very limited cases where there is a single target of economic crimes. This makes it even more difficult to investigate such crimes and prevent them. Even with interception and monitoring as an investigative tool, the SAPS is at a disadvantage when it comes to sophisticated crimes or well-planned crimes. Depending on the crime and the extent of the preparation the perpetrators use technology or a complex network of criminals to avoid detection or destroy real evidence. The public plays a crucial role in the investigation and prevention of crime. However, often witnesses are reluctant to come forward for fear of their lives. It is not uncommon in organised crime or gang-related crimes that witnesses are killed. In such circumstances, the monitoring and interception of

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communications has an important role to play if the SAPS is to discharge its constitutional obligation.

34. The recording of conversations of police agents for the corroboration of their evidence on entrapment and undercover operations are permissible and regulated by the section 252a of the Criminal Procedure Act, Act No 51 of 1977.
35. Up to now I have dealt with the interception and monitoring of calls as an investigative tool. This is not the only investigative tool provided in RICA. There is a less intrusive tool. In many instances call-related information is adequate. In such cases SAPS would not apply for interception direction but would rather apply for a communication-related information directive. Whether the application is for a real-time communication-related direction or an archived communication-related direction is dependent on the presence of the circumstances in the RICA relating to applications for such directions.

*[ii] Applications for directions by SAP*

36. The SAPS is divided into, amongst others 4 (four) main operational divisions, namely:

36.1. Crime Intelligence;

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- 36.2. Directorate for Priority Crimes Investigation (the "DPCI" or "the Hawks");
- 36.3. Visible Policing; and
- 36.4. Detective Services.
37. Only those divisions of the SAPS that investigate crimes, i.e. the Hawks, the Detective Services and Crime Intelligence use the RICA.
38. The Hawks and the Detective Services are crime investigation units. The Visible Policing unit's functions are crime prevention.
39. The functions of the Crime Intelligence division are amongst other things, to (i) conduct crime related intelligence collection; (ii) provide operational support to the investigation units and (ii) maintain the Crime Information Analysis and Management Centres.
40. The Crime Intelligence division only concerns itself with intelligence which relates to neutralising the threats of crime and not national security or compelling national economic interests of the Republic, unless such threats are criminal in nature, as contemplated in section 16(5)(a)(i). Threats to national security or national economic interests of the Republic of South Africa fall outside of SAPS' mandate.

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41. While to date the RICA has been a useful and important investigating tool in the investigation of crime, and remains so, Crime Intelligence has not found it necessary to resort to the use of interception of communications in carrying its daily functions. Thus far it has only occasionally implemented the RICA. Lest I am misunderstood-I am not suggesting that it is not necessary to invoke RICA for the gathering of crime intelligence and crime prevention. What I am saying is that thus far Crime Intelligence had a limited need for interception communication as much as the investigating units have. I submit that this demonstrates that RICA is a last resort when ordinary methods of crime prevention fail.
42. Crime Intelligence however plays a critical role in the implementation of RICA. It provides operational assistance to the crime investigating unit. No application may be made for a direction unless the officer who intends to apply has the authority to make such an application. The Head of Crime Intelligence is the only person within the SAPS who may authorise an application being made to the designated Judge. The entire process which leads up to a direction being issued is channelled through and controlled by Crime Intelligence. The various provincial offices for the control of interception and monitoring (*the POCIM*) and the National Office for the Control of Interception and Monitoring (*the NOCIM*) fall under SAPS' Crime Intelligence Unit.

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43. The SAPS has developed internal systems which regulate the procedure which any officer who needs to apply for an interception direction in terms of sections 16, 17, 18, 19, 20 and 22 of the RICA must follow. The procedure is adapted depending on the purpose for and type of direction applied. I summarise the procedure in general terms hereunder:

- 43.1. an officer, who in the course of his or her investigation requires evidence which cannot be obtained by using conventional (ordinary) evidence gathering methods, but knows that communication was used in the commission of the crime, must make a request to make an application to obtain a directive through the relevant Provincial Office for the Control of Interception and Monitoring (POCIM);
- 43.2. the applicant must as part of the investigation have first, obtained a duly issued subpoena in terms of section 205 of the Criminal Procedure Act, 57 of 1977. Section 205 allows a Judge or a Magistrate, upon the request of a Director of Public Prosecutions or a public prosecutor authorized thereto in writing by the DPP, to issue a subpoena requiring any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed, to produce such information. The SAPS, in the normal course of investigating general crime (that is not serious crime as contemplated in the RICA Act), may obtain communication related information in terms of section 205 of the CPA.

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- 43.3. It is this information which is used to establish the feasibility of information submitted for purposes of applying for an interception direction. This would assist, as it appears in the next paragraph, in determining whether the phone number exists, is in use (i.e. active) and belongs to the suspect (or "*subject*" as the case may be). Where the number does not belong to the suspect or the subject, the applicant must include a statement why the ownership of the number differs from the information required to obtain the direction;
- 43.4. the POCIM must then conduct a feasibility study firstly, to verify if the application is based on sound grounds, and is in accordance with the relevant provisions of the RICA and secondly, to ensure that the cellular/telephone numbers provided, indeed belong to, or were used by, the suspect or subject;
- 43.5. the application for the interception direction, the feasibility certificate from the POCIM, the supporting affidavit of the applicant and a letter from the Provincial Head of the SAPS, must then be submitted to the National Office for the Control of Interception and Monitoring ("*the NOCIM*");
- 43.6. although not legally required, the SAPS has introduced a further level of scrutiny of the application. The application is perused by a specially designated legal officer at NOCIM who must also verify

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- whether the application is consistent with the provisions and requirements of the RICA and has merit;
- 43.7. the application is then signed or approved by the duly delegated Major-General in the SAPS, which is the rank equivalent to assistant Commissioner referred to in terms of the RICA. I am currently the officer designated by the National Commissioner to grant approvals for interception applications;
- 43.8. after the application has been approved, a hard copy is delivered by a specially designated official from the SAPS to the designated Judge;
- 43.9. if the designated Judge issues the direction, the direction together with the file is sent back to the NOCIM. The judge keeps a copy of the file and the direction in his/her office for reporting purposes;
- 43.10. the NOCIM would serve the direction on the relevant service provider or service providers (in case the target numbers are serviced by different telecommunications service providers);
- 43.11. the telecommunication service provider would relay the requested communication and communication-related information to the Office for Interception Centres (OIC), where it is received and stored. Specially designated officials of the SAPS' Crime Intelligence

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stationed at that office, would receive a copy in an encrypted format and supply it to the applicant;

43.12. The applicant would receive the information, decrypt it and use it.

44. The above procedure is uniform and does not allow for deviations and discretions. It must be followed by all SAPS investigating officers who require an interception direction from the designated judge.

45. Of significance is that, although it is the applicant who initiates the process, after the validity of the information is verified at the Provincial level, the applicant will not have anything to do with the application in terms of processing it further or making any decisions regarding it, until he/she receives the information requested from the OIC for enforcement.

46. In the case of location based services contemplated in sections 17 and 18 of the RICA, the applicant - who already has an authorised real-time communication-related direction and in the course of an investigation, identifies the need for the activation of such location based services - would call the NOCIM, which would:

46.1. verify whether the direction is still active, the period of its validity, as well as intervals required for such location based services as per the direction;

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- 46.2. request an SMS from the applicant confirming receipt of the above information. The SMS would be recorded in the file as a record of the request from the applicant; and
  - 46.3. validate the SMS and then send it to the relevant electronic communications service provider and note the request in a register. The electronic communications service provider would then activate the location based service to provide the target location to the applicant.
47. The following is of importance:
- 47.1. the applications are centralised and approved by a designated officer within the NOCIM;
  - 47.2. no single application may be forwarded to the designated Judge without certification by the POCIM and the NOCIM, and the approval of the authorised Major-General;
  - 47.3. the applicant does not:
    - 37.3.1 send the application to the designated Judge;
    - 37.3.2 receive the direction, and

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37.3.3 serve the direction on the telecommunication service provider.

48. I have set out the above procedure to illustrate that the SAPS has employed stringent internal mechanisms to minimise abuse. The procedures leave very limited opportunity, if any, for an applicant to change the numbers, or insert numbers which do not form part of the direction. There is also very little room, if any, to manipulate the direction for a nefarious purpose. It will be no easy feat for an officer to obtain an interception direction for a purpose not countenanced by the RICA. An officer will not be able to do this on his own. He will firstly, have to obtain approval under false pretences (that is an offence), he will then need to obtain the co-operation of more than one other officer. The officers would have to conspire to defeat the stringent requirements imposed by the RICA and will also have to conspire to defeat SAPS' internal mechanisms.

*[iii] The role of RICA in crime prevention and intelligence*

49. With rapid technological advancement in communication methods, conventional crime prevention and investigation methods are becoming less effective. At the same time criminals are employing the ever-changing communication technology to advance and facilitate criminal activities.
50. Before invoking the RICA, the SAPS would employ conventional crime investigation and prevention methods such as for instance:

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- 50.1. Forensic evidence.
  - 50.2. Witnesses.
  - 50.3. Other real evidence.
  - 50.4. Informants to provide information or to participate in entrapment operations.
  - 50.5. The infiltration of criminal organisations, syndicates and gangs by members of the public or under cover policemen.
51. It is only when these methods fail, or are unlikely to succeed that the RICA is invoked. This happens when witnesses are not forthcoming or other sources of evidence are unreliable or unavailable.
52. Organised crime is rife worldwide and is difficult to prevent, combat and investigate. Many criminal organizations are difficult to infiltrate. Because the business of organised crime is usually conducted over the telephone and in meetings, there is a minimum of written communications that can be used to construct a paper trail of criminal transactions.
53. The use of cellular phones has become an essential implement in the commission of crimes. Prior to cellular phones criminals could not communicate with one another during the commission of a crime. The pursuit

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of suspected criminals before the commission of a crime was a conventional method of preventing and combatting crime. The effectiveness of this method is now drastically diminished.

54. Cell phones are invariably used when more than one person is involved in the commission of a crime. Invariably an accomplice is positioned to survey the area around the target of the crime before and during the commission of the crime to ensure that the criminals are not detected and if they are detected to alert them.
55. In the case of serious crimes such as drug trafficking, gang related crimes, corruption, money laundering, organised violent crimes, the mastermind eludes detection. It is often only *via* his or her electronic communications that his or her involvement and identity is revealed.
56. The SAPS, like police authorities world-wide, relies on informers and traps. The interception of communications between the informer (or trap) and the suspect can uncover material evidence in the investigation of a crime or crimes. In cases of on-going criminal investigations, the interception and monitoring of communications serves a useful purpose in identifying the identities of the perpetrators and the communications of suspects can reveal a *modus operandi* that is to be employed or has been employed. The scourge of crime can best be managed if it is prevented and combatted. This can only happen effectively if the police are able to employ proactive as opposed to

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reactive methods of investigation. The circumstances and details as to when the offences will be committed are unknown to the police. The monitoring of communications is one of the most effective proactive crime-fighting measures. Therefore, over and above the reactive need to use the RICA, where justified, the SAPS uses the RICA proactively in pursuance of its mandate to prevent crime.

57. As I have mentioned previously, the SAPS can obtain an interception direction in terms of the RICA only in the case of serious offences. Crimes such as drug trafficking, racketeering, money laundering, to mention a few have devastating effects throughout the world. It is submitted that the interception and monitoring of communications are aimed at fighting the scourge of violent crime as well as crimes such as money laundering and as drug trafficking.

58. Surveillance and as such the monitoring and the interception of communications by its very nature is covert. It is invoked to detect unlawful activity which is difficult to uncover. Unless secrecy is maintained the very object of the interception direction will be defeated. Obviously, a person who knows that his or her communications, such as telephone calls are going to be monitored, would hardly make or receive incriminating calls.

**F. BUILT-IN OVERSIGHT MECHANISMS**

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59. An interception direction may only be issued by a Judge after stringent requirements have been satisfied.
60. For purposes of the implementation of the RICA, which in itself is an intelligence gathering function, the SAPS is accountable to the Parliamentary Joint Standing Committee on Intelligence ("JSCI"), the ninth respondent in this matter, which exercises oversight over all intelligence activities of the State.
61. I submit therefore that the RICA has the necessary safeguard mechanisms to ensure that the rights of citizens are not arbitrarily infringed upon without any rational and proper legal basis. The above mentioned are but two examples. This issue is canvassed in other affidavits filed in opposition to this application.
62. In short:
- 62.1. 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, to monitor and intercept communications for any reason other than those specifically referred to therein; and

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- 62.2. 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;
- 62.3. the secrecy provisions in the RICA also ensure that information pertaining to interception of communications and access to communication-related information is not disclosed otherwise than for legitimate purposes for example the prosecution of crimes; and
- 62.4. most significantly, when a person is prosecuted the evidence emanating from interception of his or her private communications, or access to communication-related information, is placed before the Court.
63. Any dispensation can be abused. This is true of RICA too. It must be borne in mind that the RICA is legislation which regulates interception. Regulatory legislation of whatsoever nature is open to abuse and is abused.
64. Section 23 of the RICA provides for an oral application for a direction. SAPS' experience has been that the designated Judge will not consider an oral application and will insist on a written application bearing in mind that an application can be made on an urgent basis, if necessary.
65. The SAPS does not conduct any bulk surveillance, neither does it provide bulk storage of the intercepted material. The only intercepted material stored

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by SAPS, usually an electronic copy on a disc or a hard copy transcript, is that which relates to the directions previously obtained by it, which is then stored in the same way as all exhibits collected in a course of an investigation.

G. APPLICANTS' COMPLAINTS

66. The applicants' complaints against the constitutionality of the RICA are divided into two broad categories. The first consisting of the so-called "*flaws regarding the insufficient manner in which RICA regulates issues that are covered by the Act*" and the second which relates to "*aspects in which RICA is under-inclusive.*"
67. As a start, it is important to point out that the applicants concede in paragraph 12 of the founding affidavit that:
- 67.1. by their very nature, interception and surveillance of communications inevitably limit fundamental rights; and
- 67.2. the interception or surveillance of communications are not in all circumstances unconstitutional.
68. Furthermore, the applicants have based their complaints not on any facts or conduct affected by the application of the RICA, the legality of which requires the determination by this Court, but on facts which are cited as examples of how abuse may occur, as well as on opinions expressed in

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research elsewhere. In other words, the applicants point to these untested facts or incidents as examples to show why the RICA is unconstitutional. One cannot use these facts or any other facts as a measure of the unconstitutionality of the RICA. Firstly, most of the allegations are hearsay and secondly, the question whether legislation is inconsistent with the constitution or not is a legal question.

69. The main issue is whether the provisions and procedures contained in the RICA are adequate to ensure that its implementation does not straddle its constitutional limits. The applicants argue in this regard that the RICA is inadequate; I submit that it is not.
70. These complaints are addressed in the affidavit on behalf of the first respondent. They are also addressed in the affidavits made on behalf of the other respondents to whom I have referred earlier.
71. I must make it clear that the SAPS' implementation of the RICA is merely operational. The Minister of Justice and Correctional Services administers the RICA. The policy surrounding the RICA does not fall within the domain of the Minister. It lies in the exclusive domain of the Minister of Justice, the first respondent in this application. The policy issues and arguments why the RICA does pass constitutional muster are addressed in the affidavit which will be filed on behalf of the Minister of Justice and Correctional Services. I align

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myself with those arguments as well as the arguments set forth in the affidavits filed on behalf of the second, seventh, eighth and tenth respondents.

72. I wish to briefly respond to some of the applicants' arguments.

[i] *Failure to notify the subject of the interception:*

73. I wish to express myself very briefly on the SAPS view on notifying the subject of the interception. The applicants contend that given the so-called "*inherent infraction*" of section 16(7), which provides essentially that an interception direction, including an entry warrant may be issued without notice to the person to whom the application applies, such person should at least be notified after the interception direction has lapsed or the investigation has been concluded.<sup>1</sup>

74. The interception direction can only be granted to the SAPS (i) for the interception of a communication concerning a serious offence which has been, is being or will be committed; and (ii) for the interception of communications relating to organised crime or any offence relating to terrorism (section 16(3)(c)(i) read with 16(5)(a)(iv)). Notification of the application in these circumstances would defeat the object of the interception and compromise the investigation of serious crimes (organised crime and terrorism two examples of serious crimes). I have mentioned others earlier in this affidavit.

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<sup>1</sup> FA - pp.31 to 32, para 69

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75. Blanket secrecy is a necessity for the system to function effectively and yield the results which achieve law enforcement and promote the security of the Republic of South Africa and its people.
76. Whether to notify a target (or a person who was party to the communication) after the direction has lapsed or an investigation has been concluded, raises other questions such as:
- 76.1. What purpose is to be served by the notification;
- 76.2. Should notification be given in the case of every interception?
- 76.3. If not, then who would qualify for notification, and in this regard who would decide whether to give notification?
- 76.4. What would the parameters of the notification be?
- 76.5. What would have to be disclosed?
77. The following practical considerations come to mind:
- 77.1. Assuming that the subject must be notified after the fact, would the subject be entitled to the reasons for and other details of the interception? What if the reasons entail the identification of other individuals?

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- 77.2. An interception direction more often than not would involve more than one subject (suspect). Should all persons whose communications were the subject of an interception direction be notified?
- 77.3. It is not out of the ordinary that a communication between the subject of an interception direction and a third person has no relationship to the reason and object of the interception. In such a case should the third party be notified? Would the third party be notified regardless of whether the target can, or should, be notified?
- 77.4. In cases of organised crimes, syndicate crimes and terrorism, even though a direction has lapsed, there may be on-going investigations. Notifying the subject after the investigation direction has been issued (or for that matter after the direction has lapsed) may cause the handlers of the suspect to abandon that person and to recruit another person. This would cause the subject to fly under the radar of the SAPS or Security Agencies and the subject may be activated in future undetected. Syndicates often use sleeper agents (i.e. agents who are not active and may not be for an extended period but can be redeployed at some time in the near or far future). Notification in such a case will subvert the on-going investigation.

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- 77.5. Most importantly, notifying the subject would expose SAPS' investigation methods. This is inimical to combatting crime, which is a function of the SAPS.
78. It is clear from the above that notification of the subject cannot be achieved without exposing the methods and object of the investigation into a serious offence.
79. If the facts justify an interception and a case exists for an interception direction, the fact that the subject is a lawyer or a journalist should not change the standard of the measurement.<sup>2</sup>
80. The applicants cite two cases in which directions were apparently obtained on false information, namely, the one involving journalists, Afrika and Hofsätter in 2010<sup>3</sup> and the other involving a police officer, Scheepers, who was prosecuted in 2016.<sup>4</sup> I deny any suggestion that there is an established *modus operandi* of abuse of the interception procedures by the SAPS Crime Intelligence Division, and that the cases cited by the applicants justify the notification to a subject.

[ii] *Constitutional difficulties relating to the designated judge:*

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<sup>2</sup> FA - p.33, paras 73.3 and 73.4

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81. Under this heading the applicants have two complaints. The one is the "*lack of an adversarial process*" whereby the subject or target may be brought before the Judge to be heard, prior to the granting of the interception direction, and the other concerns the "*independence of the judge.*"

82. On these matters, I defer to the facts and arguments of the other respondents.

[iii] *Flaws in relation to Journalists and Lawyers:*

83. In this complaint, the applicants argue that section 16(5) in setting out the bases upon which an interception direction may be granted, fails to deal expressly with the manner in which such direction may be granted against subjects with a duty to protect the confidentiality of their communications with sources and/or clients, like journalists and lawyers.<sup>5</sup>

84. This issue is dealt with in the affidavits of the other respondents. I defer to the facts and arguments in their affidavits.

85. The Minister accepts that abuses can occur, but I submit that this does not render the RICA unconstitutional.

H. AD SERIATIM RESPONSE

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<sup>5</sup> FA - p.48, para 110

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86. I now turn to the allegations contained in the founding affidavit deposed to by STEPHEN PATRIC "SAM" SOLE on behalf of the applicants ("Sole") to the extent that I have knowledge of them or they relate to the SAPS.

87. To avoid repetition, I do not intend to repeat what I have stated above. My responses are to be read with and against the background of my evidence set out above, in particular only to the extent that such allegations relate to the operational aspects of the RICA employed by the SAPS.

88. Insofar as I do not deal expressly with each and every allegation contained in the founding affidavit, such allegations should be taken as denied, unless they accord with what is stated in the preceding paragraphs.

89. Ad paragraphs 1 and 2

Save to deny that the entire content of the affidavit deposed to by Mr Sole is true and correct; I admit the remainder of the content of these paragraphs.

90. Ad paragraph 3

90.1. I deny that the applicants are entitled to rely on facts which do not fall within the personal knowledge of Sole, on the basis of the provisions of the Law of Evidence Amendment Act, 45 of 1988.

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90.2. The applicants have failed to set out any facts that establish proper grounds for reliance on the Law of Evidence Amendment Act. I therefore submit that all information relied upon by the applicants which does not fall within the personal knowledge of Sole, should be struck out as inadmissible hearsay evidence.

90.3. I have been advised that this will be addressed in argument.

91. Ad paragraph 4

Save to deny that the provisions attacked by the applicants in their application are constitutionally wanting; the content of this paragraph is noted.

92. Ad paragraph 5 and sub-paragraphs thereof

I note the content of these paragraphs.

93. Paragraphs 6, 7, 8 and sub-paragraphs thereof

For the reasons set out above and elsewhere in this affidavit, I deny that there are grounds to find that any of the provisions of the RICA, in particular the ones listed in the Notice of Motion, do not pass constitutional muster.

94. Ad paragraphs 9, 10, 11, 12

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This is dealt with in the affidavits made on behalf of the second, seventh and eighth respondents. I align myself with what is stated in those affidavits.

95. Ad paragraph 13 and sub-paragraphs thereof

I note the content of these paragraphs.

96. Ad paragraphs 14, 15 and 16

96.1. I deny that the applicants represent the interests of a class of investigative journalists in terms of Section 38(c) of the Constitution or that of the public in terms of Section 38(d) of the Constitution.

96.2. The first and second applicants, either jointly or separately lack the necessary standing to bring this application and to obtain the relief they seek in terms of the aforementioned sections of the Constitution.

96.3. Save for the interception direction relating to the second applicant, the rest of the allegations relating to at least the factual incidents relied upon by the applicants to illustrate the insufficiencies of the RICA, bear no relationship to the first, the second or both applicants. The applicants are further not supported by any journalist, or established organisation representing journalists in support of these averments.

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- 96.4. I deny in particular that there can be no doubt that interceptions take place on a daily basis as alleged in paragraph 16.3.1 of the founding affidavit.
- 96.5. Given the statistics of interception provided in the yearly JSCI reports attached to the founding affidavit, these allegations are obvious exaggerations of the facts.
- 96.6. Both applicants or Mr Sole insinuate that the bulk of the interceptions that are made by the law enforcement agencies, including the SAPS, are illegal and outside the provisions set out in the RICA. The applicants do this without furnishing any supporting evidence whatsoever.<sup>6</sup>
- 96.7. I deny that SAPS acts illegally and outside of the RICA.
- 96.8. Save for the citation of the applicants, the content of these paragraphs is therefore denied.
97. Ad paragraphs 17, 18, 19 and sub-paragraphs thereof
- The content of these paragraphs is admitted.
98. Ad paragraphs 20 and 20.1

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<sup>6</sup> FA - p.10, para 16.3.2

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The content of these paragraphs is admitted.

99. Ad paragraphs 20.2 and 20.3

99.1. I note as at the date of deposing to this affidavit that the applicants have filed an application to join the Minister of Telecommunications who is the Minister responsible for the issuing of directives to the Telecommunications Service Providers in terms of section 30 of the RICA.

99.2. Save as aforesaid, the content of these paragraphs is noted.

100. Ad paragraphs 21, 22, 23, 24, 25, 26, and 27

The content of these paragraphs is admitted.

101. Ad paragraphs 28 to and including paragraph 33 and sub-paragraphs thereof

The content of these paragraphs is admitted.

102. Ad paragraph 34

102.1. As stated earlier, as a matter of fact and course, the designated Judge does not allow the SAPS to intercept a subject's communication without prior authorisation. More significantly, the designated Judge will not authorise such an interception without a written application.

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102.2. The applicants have not provided evidence that the number of interceptions carried out under the emergency provisions in the RICA greatly exceeds the number of standard applications for interceptions.

102.3. The content of this paragraph is therefore denied.

103. Ad paragraph 35 to and including paragraphs 63

Neither I nor the Minister of Police has knowledge of these averments. We do not however admit their truth and correctness.

104. Ad paragraph 64 and sub-paragraphs thereof

I deny the content of these paragraphs.

105. Ad paragraphs 66, 67, 68, 69 and paragraphs thereof

105.1. I repeat my averments in paragraphs 64 to 69 above.

105.2. Consequently, I deny the content of these paragraphs.

106. Ad paragraphs 70, 71 to and including paragraphs 73 and sub-paragraphs thereof

This is dealt with in the affidavits of other respondents. I defer to them. I have been advised that this will be addressed in argument.

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107. Ad paragraphs 74, 75 and 76

107.1. I have already dealt with the issue of notification.

107.2. Insofar as the content of annexures SPS13 attached to the founding affidavit which contains the so-called necessary and proportionate principles adopted by the Human Rights Commission 2013, I defer to the submissions made on behalf of the first respondent.

108. Ad paragraphs 77, 78 to and including paragraph 85

I defer in this regard to the affidavits filed on behalf of the first and the second respondents.

109. Ad paragraphs 86 to and including paragraphs 90

I defer in this regard to the affidavit filed on behalf of the first respondent.

110. Ad paragraphs 91, 92, 93 and 94

I am advised that these issues will be dealt with in the affidavit filed on behalf of the first respondent.

111. Ad paragraph 95

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111.1. I deny in light of the above that section 16(7) is unconstitutional, in particular that it is arbitrary and irrational and thus in violation of the rule of law enshrined in Section 1 of the constitution.

111.2. I deny further that Section 16(7) violates the subject's right of access to the Courts under Section 34.

111.3. Interception is an investigation tool. This investigation tool can however only be used if a Judge is satisfied that a proper case has been made out for an interception direction.

111.4. To suggest that the fact that a subject of an interception may not be heard prior to the granting of such a direction limits the subject's rights of access to the Courts is ill-conceived.

111.5. As to the remaining averments I defer to the other respondents.

112. Ad paragraphs 98 to and including paragraph 109

112.1. I defer in this regard to the affidavits filed on behalf of the first and the second respondents.

112.2. Save as above, I state that the remarks made by the JSCI report, dated 2011 were intended at addressing a different issue other than the one raised by the applicants in these paragraphs.

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112.3. In this regard, the JSCI was lamenting the short period of the appointment of the designated judge as not giving the particular Judge enough time to prepare reports. What was expressed was that the term of just a year was insufficient and disruptive and not that this creates an opportunity for undue influence as suggested by the applicants in these paragraphs.

112.4. I reject the suggestion that because a member of the executive selects the Judge, this in itself undermines public confidence in the designated Judge's independence. This contention is, with respect, ill-advised. Such a charge is contrary to the public's wide and long held confidence in the judiciary. South African judges have always been considered strong and independent.

112.5. To suggest that if a Minister or a member of the Executive selects a judge then that the Judge is capable of being unduly influenced, not only impugns the integrity of South African Judges, but it is a slight against a constitutionally mandated body who selects and recommends Judges for appointment by the Executive after thorough and extensive scrutiny in an open and transparent manner.

112.6. The content of these paragraphs is rejected as baseless and unfounded.

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112.7. I have been advised that this will be addressed in argument.

113. Ad paragraphs 110 to 114

I am advised that these issues will be dealt with in the affidavit filed on behalf of the first respondent.

114. Ad paragraph 115 and 116

114.1. I admit that the importance of the free flow of information, particularly information in the public interest, has been widely acknowledged by the Courts.

114.2. I also admit that the constitutional Court has held that freedom of expression and freedom of information lie at the very heart of a democracy as individuals in society need to be able to hear, form and express views freely on a wide range of matters and I admit that the media is the watchdog of society keeping the public informed of matters of interest.

114.3. This however does not mean that a media practitioner such as a journalist should be excluded from the provisions of the RICA.

114.4. I have been advised that this will be addressed in argument.

115. Ad paragraph 117 to and including paragraph 136

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I am advised that these issues will be dealt with in the affidavit filed on behalf of the first respondent.

116. Ad paragraphs 137 to 162

I defer to the first, second, seventh and eighth respondents' responses to these paragraphs.

117. Ad paragraphs 163 to 168

117.1. I admit the content of these paragraphs insofar as they accord with the relevant JSCI in annexure "SPS 17" to "SPS 21".

117.2. I deny however that the number of interceptions directions reported in those reports is an "*extremely high percentage of interception directions that are granted*"<sup>7</sup> and that the percentage of applications granted versus the applications made is overwhelming.<sup>8</sup>

117.3. What can be inferred on the other hand from these reports is that the figures show that the majority of applications comply with the provisions of RICA. This can mean that only deserving cases warrant an application for, and the granting of, an interception direction.

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<sup>7</sup> FA - p.69, para 163

<sup>8</sup> FA - p.70, para 167

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117.4. The high number of cases reported by SAPS relates to section 8 interceptions, which are to determine location in case of an emergency. No direct communication is accessed in this regard. What this shows that the RICA is strictly used in the investigation of crimes where conventional methods have failed.

117.5. Save as aforesaid, the remainder of the allegations in these paragraphs are denied.

118. Ad paragraph 169 to 171

118.1. I admit that a high number of directions were obtained by the SAPS in terms of section 8 of the RICA.

118.2. I also admit that the designated Judge granted all applications for directions. There is nothing untoward about this. The designated Judge was clearly satisfied that the applications complied with the RICA.

118.3. I submit that there is nothing peculiar about these figures. Five thousand (5 000) interceptions over a period of approximately 3 years is hardly alarming in a Country with a population of approximately 55 million people, with exceedingly high levels of crime. I have no knowledge of the reported 3 million interceptions over a period of

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three years since the RICA was promulgated. I do deny that this is so. Even if it was, it does not mean that the RICA is unconstitutional.

118.4. I reject any insinuation of impropriety on the part of SAPS.

119. Ad paragraphs 172 to 175

These are matters of policy. In this regard, I defer to the first respondent.

120. Ad paragraph 176 to 178

120.1. I deny that the examples cited by the applicants illustrate rampant abuse. Any system can be abused. The fact that these cases are known and the perpetrators prosecuted, means that those who attempt to abuse the RICA processes will be exposed and prosecuted.

120.2. I deny further that the few instances of abuse constitute evidence that the RICA is unconstitutional.

121. Ad paragraphs 179 to 195

In this regard, I defer to the affidavit filed on behalf of the first respondent.

122. Ad paragraphs 196 to 202

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I am advised that these issues will be dealt with in the affidavit filed on behalf of the first respondent. It has been addressed in the affidavits filed on behalf of the second, seventh, eighth and tenth respondents.

**I. CONCLUSION**

123. In light of the above, I submit that the applicants have failed to make out a case for the relief sought.
124. In the premises, the Minister prays that the application is dismissed with costs, including the costs of two counsel.

 MAJOR G. B. M. K. B. C. B. D.  
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 28<sup>th</sup> day of September 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.

  
COMMISSIONER OF OATHS  
LIZELLE WAGENER  
COMMISSIONER OF OATHS  
CONVEYANCING PARALEGAL  
ETIENNE BEDEKER INC  
EAST BLOCK, MENLYN SQUARE, PRETORIA  
TEL: 012 366 3412