IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 25978/17

In the matter between:

AMABHUNGANE CETRE 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 OF INTERCEPTION CENTRES	Seventh Respondent
THE NATIONAL COMMUNICATIONS CENTRE	Eighth Respondent
THE JOINT STANDING COMMITTEE ON INTELLIGENCE	Ninth Respondent
THE STATE SECURITY AGENCY	Tenth Respondent
MINISTER OF TELECOMMUNICATIONS AND POSTAL SERVICES	Eleventh Respondent

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COURT ADDRESS: 2ND, 7TH, 8TH & 10TH RESPONDENTS

A. THE ISSUES ADDRESSED

1. The first issue we address is the prematurity of this application.

2. Second, we address the judicial deference issue.

3. Thirdly, we address the applicants' **fourth challenge** in relation to lawyers and journalists. In doing so, we show that the applicants' proposed solution is in any event already built into the provisions they seek to impugn. They just don't recognise it.

4. Fourthly, we address the impugned independence and impartiality of the designated judge – the applicants' **second challenge**.

5. Fifthly, we address the bulk surveillance challenge.

6. Finally, we propose an appropriate remedy and costs.

7. We confine ourselves to these issues not signalling our abandonment of the other issues that we address in our heads of argument and in the pleadings. We do so because those other issues are sufficiently dealt with on behalf of the first respondent and others.

B. PREMATURITY

8. On 2 June 2017, less than 2 years before the applicants launched this application to have RICA declared unconstitutional, a member of the main opposition in the National Assembly submitted a Parliamentary Question to the Minister of Justice and Correctional Service.

9. The question was whether the department was in the process of revising RICA and any other interception legislation, what progress has been made in that regard, and whether that revision includes a revision of section 205 of the Criminal Procedure Act.

    - **907-909**

10. The answer to that question was in the affirmative. The Minister of Justice said the revision of RICA comes about as a result of concerns raised in respect of, among other things, **"governance, transparency and accountability mechanisms"**.

    - **908**

11. We submit that those factors cover the field as regards what the applicants are complaining about.

12. The Deputy Minister of Justice acknowledges that, with the advent of technological advances since the promulgation of RICA more than 15 years ago, RICA should be revised. He acknowledges, too, that 15 years since promulgation of RICA

> "the balance between using RICA as an effective tool to fight crime [on the one hand], and the related limitation on a person's right to privacy [on the other], may very well have shifted unfavourably towards the limitation of a person's privacy".

- **734F / 9 & 11**

13. The RICA revision of which the Deputy Minister spake, is now a reality. The person who is tasked with that revision of RICA tells this Court that a draft amendment Bill is scheduled to be finalised by the end of August 2019. It should then be submitted to cabinet after an extensive public consultation process. The Minister himself, as long ago as June 2017, told us the specific issues that the draft Bill will address: **"governance, transparency and accountability mechanisms"**. (**908**)

14. What does this mean for the applicants' challenge?

    14.1. Amendment in relation to **Governance, Transparency and Accountability Mechanisms** may conceivably address the applicants' first challenge: failure to notify.
    14.2. Amendment in relation to **Governance** may conceivably address the applicants' second challenge: the attack on the Designated Judge process.
    14.3. **Governance, Transparency and Accountability Mechanisms** may conceivably address the applicants' third challenge: inadequate safeguards for the use, storage and disposal of data.
    14.4. **Governance** may conceivably address the applicants' fourth challenge: interception of lawyers' and journalists' communications.
    14.5. The **Accountability Mechanisms** factor may conceivably address the applicants' fifth challenge: bulk and foreign signals surveillance.

15. Only once the amendment Bill has been released for public comment can we all know whether the amendments, in fact and in law, address all the five challenges. It is inappropriate, and with respect rather presumptuous of the applicants to pre-empt the Bill by dictating their own amendments, thereby avoiding the public consultation process that forms part of the Legislative Programme. The applicants do not have the right to opt out of the Legislative Programme and impose their own amendments outside that programme. We ask that this Court resist that usurpation of legislative power.

16. This case is different from **Mazibuko v Sisulu 2013 (6) SA 249 (CC)** and so the applicants' reliance on that judgment is misplaced.

16.1. First, **Mazibuko** was concerned with the rules of the National Assembly and there was a dispute between the main opposition and other minority parties in Parliament (as represented by the main opposition's parliamentary leader), on the one hand, and the ruling party (in the form and shape of the Speaker and Chief Whip) on the other, about whether those rules in relation to the scheduling of a motion of no confidence in the President were constitutionally deficient or not. The Court was with respect correct in resolving that dispute because the dispute was between parties who would ultimately have to pass the amendments to the rules. If the one party still believes that the rules are constitutionally compliant, while the other is of the view that they are deficient, deferring the matter to a time when the National Assembly considers those rules in due course would not address the dispute between those two members of the National Assembly and the dispute would soon be back in the Constitutional Court.

16.2. Second, in **Mazibuko** there was no indication in what respects the rules would be amended.

16.3. Third, in **Mazibuko** the court was merely requested to make a declaratory order of unconstitutionality and not to formulate rules for the National Assembly.

16.4. Fourth, neither the Speaker nor the Chief Whip sought to persuade the Court not to hear the appeal. In fact, the Speaker and the Chief Whip filed applications of their own for leave to appeal and so the Court found it to be in the interest of justice that leave to appeal directly to that Court should be granted.

16.5. The facts here are different.

16.6. First, the dispute is not between parties who are charged ultimately with effecting legislative amendments. It is between a journalist and the State. The journalist wants legislation that provides blanket preferential treatment for journalists in matters of national security despite safeguards against abuse that are built into the legislation implemented by a Judge.

16.7. Second, the Minister of Justice has made it quite plain in what respects the revision will be made to the legislation, namely, **"governance, transparency and accountability mechanisms"**.

16.8. Third, the journalist wants this Court to do more than just make a declaration of constitutional invalidity; he wants this Court to formulate

(dictate) law in precise terms for the National Assembly in circumstances where there is already a draft law being prepared by a body that is constitutionally mandated to do so.

16.9. Fourth, the security cluster respondents are adamant that this application is premature in light of the Legislative Programme that is already in place to produce the amendment Bill conceivably on the very issues about which the applicants complain: **Governance, Transparency, Accountability Mechanisms**.

17. **Mazibuko v Sisulu** does not assist the applicants in this case.

18. There are two other issues raised by the applicants for resisting the prematurity argument. They say the respondents have not pleaded or adequately explained the basis upon which RICA is being reviewed. This is not correct. The bases are set out in the Minister's reply to a Parliamentary Question.

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- **907-909**

19. That the applicant does not like that reply does not mean it is not there.

20. The second issue raised by the applicants is that since the launching of this application in April 2017, there have not been any new Bills published in relation to RICA. There are at least two answers to this criticism. Firstly, the applicants have not pleaded unreasonable delay as a ground for their challenge. They cannot now make that an issue in heads of argument. Secondly, in any event, the Parliamentary Question was submitted in June 2017, two months after these proceedings were launched – which seems to suggest some collaboration by the journalist in political matters with the main opposition in the National Assembly which raised the question. Considering that the country has just emerged from a national election, the period that has lapsed is not unreasonable.

21. In any event, the State has now given an estimated timeline for the (1) finalisation of the first draft Bill (end of August 2019) and (2) an extensive public consultation process (probably September and October 2019). There should then be submission of the Bill to cabinet and the introduction of the Bill in Parliament (December 2019). The applicants must await the public consultation process. There is no dispute about the need for revision of RICA. But the applicants should not be allowed to dictate the content and the timing of that revision outside the Legislative Programme.

22. We ask that this Court be slow to legislate from the bench on State policy-laden issues the content of which is dictated by the media, especially in circumstances where a draft Bill is already in the offing. A decision of this Court that resists that temptation will be unpopular with the media and it may write all sorts of

insalubrious things about the judgment. (The South African National Editors Forum has already issued a statement supporting this application.) But Judges are not in the business of pleasing the media for favourable media coverage or for being extolled as Champions of Media Freedom.

23. It is in any event impermissible for a Court to enter the policy fray as that sets its face against the jurisprudence of the Constitutional Court in these matters.

- **Minister of Defence and Military Veterans v Motau NO and Others 2014 (5) SA 69 (CC)**

24. In that case, the Constitutional Court said (**at para 43**)

> "administrative-law review is not appropriate where the power under consideration: is legislative in nature and influenced by political considerations for which public officials are accountable to the electorate ... or involves the balancing of complex factors and sensitive subject matter relating to judicial independence."

25. Matters of national security involve the balancing of complex factors, namely, using RICA as an effective tool to fight crime, on the one hand, and the related limitation on a person's right to privacy, on the other. This is precisely the balance to which the Deputy Minister adverted.

- **734F / 11**

26. What is more, what we have here is a **Legislative Power** that is influenced by **political considerations** for which public officials are accountable to the electorate. The high serious and violent crime rate in this country has been an election issue, and a political hot potato, for successive elections, and this most recent election was no exception. The Constitutional Court has placed such power beyond the reach of the Court's review. The applicants, and the media in general, are not the ones who are accountable for the high crime rates. They merely report on them and sometimes apportion blame. They should not get to dictate to elected representatives in the National Assembly what the content of laws aimed at crime fighting should be, and that outside the Legislative Programme.

27. That brings us to a related subject of judicial deference in matter such as those with which this case is concerned.

C. JUDICIAL DEFERRENCE ON POLICY-LADEN ISSUES

28. In **Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and**

Others v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA) the Court, in a review setting, made the need for judicial deference on matters outside judicial proficiency quite clear when it said (at para 53):

> "Judicial deference is particularly appropriate where the subject-matter of an administrative action is very technical or of a kind in which a Court has no particular proficiency."

29. National security matters are, of necessity, esoteric matters; a science known only to officials who play in that space. Only they know the dangers that journalists may pose in the dissemination of national security information. Think Weakileaks and a man named Julian Asange. Only they know how lawyers' trust accounts may be used to launder money that is proceeds of crime. This was acknowledged in the official attorneys' publication, *De Rebus*, published in the January/February 2018 edition at page 18. Money laundering is one of the serious offences listed in schedule to RICA that meets the definition of **"serious offence"**.

30. On appeal to the Constitutional Court, in **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others** 2004 (4) SA 290 (CC), the principle of judicial deference was endorsed in these words (at para 46):

> "The use of the word 'deference' may give rise to misunderstanding as to the true function of a review Court. This can be avoided if it is realised that the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself."

31. The Constitutional Court continued (at para 48):

> "In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts . . ."

32. National security, and the intelligence function designed for that purpose, is a policy-centric matter. While its implementation may be reviewed by courts at

the instance of those who feel aggrieved by the effects of its implementation, it is not the role of Courts to decide matters that involve the balancing of complex factors and sensitive subject matter relating to national security and intelligence services.

33. What the applicants are seeking is not the review and setting aside of the conduct of officials in the implementation of RICA. They want this Court to second-guess government on policy matters that inform policy framework by which RICA is underpinned for purposes of national security. This they are not entitled to do, and the Court is not empowered to entertain.

34. The Minister of Justice has told Parliament that RICA is under revision and appropriate amendments are being explored. He also told Parliament that

> "[p]ublic consultation will follow once the [Justice] Department has processed the draft Bill through the required internal processes".

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35. The applicants will have their opportunity to make representations during that public consultation process once the draft Bill has gone through internal processes. It is not appropriate for them to pre-empt that process and use this Court to ram through their preferred wording of the amendments.

36. This Court should not allow itself to be used as a conduit for what will effectively be the capture of government policy and legislative power by the media.

D. <u>THE FOURTH CHALLENGE IS MISCONCEIVED</u>

37. Not since the dark days of repression in South Africa has legislation of general application been enacted to give special privileges to a section of society. There is no rational basis for the special privileges that the applicants want this Court to confer upon journalists and lawyers as there are sufficient safeguards in RICA and other laws to protect privileged and confidential information. The designated judge will be aware of these laws and can be expected to ask the appropriate questions (as s/he is entitled to do under **section 16(7)(b)**) in order to ascertain their applicability.

38. The applicants challenge **sections 16(5), 17(4), 19(4), 21(4)(a), 22(4)(b) of RICA** as being inconsistent with the Constitution and accordingly invalid insofar as interception applies to journalists and lawyers. They say this impacts on legal privilege and the confidentiality of journalists' sources.

39. But legal privilege and confidentiality are about the protection of the right to privacy. This challenge fails to appreciate not only that the privacy right is not

absolute but also that the limitations that apply to other rights in the Bill of Rights also apply to the rights exercised by lawyers and journalists.

40. There is no rational basis for the contention that journalists and lawyers, as a distinct group of professionals, ought to be treated differently and with less vigilance in matters of national security and the protection of citizens from threats of terrorism and other dangers. Not all journalists are driven by considerations of good ethics and public interest. The State does not legislate for the good ones; it legislates for the bad ones.

- **Example, Hefer Commission**

41. The jurisdictional fact that an applicant for interception is required to meet in order to secure the exercise of a direction by the designated judge in his favour is sufficiently high to serve as adequate safeguard against abuse of the powers provided for in RICA.

42. Counsel for the applicants on Tuesday dismissed the discussion on jurisdictional facts as **"neither here nor there"**. It is an extraordinary dismissal because the threshold the applicants want to be applied in respect of the provisions that they impugn under their fourth challenge is not materially different from the threshold that is currently in place.

43. The legal position as regards jurisdictional facts or administrative triggers for the exercise of public power is clear. The *locus classicus* on jurisdictional facts in our law in the sphere of Administrative Law, which has now become infused into our supreme law, remains **South African Defence and Aid Fund and Another v Minister of Justice** 1967 (1) SA 31 (C) (**"the Defence and Aid Fund case"**) where the Court said:

> "Upon a proper construction of the legislation concerned, a jurisdictional fact may fall into one or other of two broad categories. It may consist of a fact, or state of affairs, which, objectively speaking, must have existed before the statutory power could validly be exercised. In such a case, the objective existence of the jurisdictional fact as a prelude to the exercise of that power in a particular case is justiciable in a Court of law. If the Court finds that objectively the fact did not exist, it may then declare invalid the purported exercise of the power (see e.g. *Kellerman v Minister of Interior,* 1945 T.P.D. 179; *Tefu v Minister of Justice and Another*, 1953 (2) SA 61 (T)) [eg, **"reason to believe"; "reasonable grounds for believing"**]. On the other hand, it may fall into the category comprised by instances where the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the pre-requisite fact, or state of affairs, existed prior to the exercise of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact, or state of affairs, existed in an objective sense [eg, whether <u>the reason</u> existed for

believing] but whether, subjectively speaking, the repository of the power had decided that it did [eg, "if in his opinion" or "if he is satisfied that" the prelude to the exercise of the power exists]. In cases falling into this category [the subjective jurisdictional fact] the objective existence of the fact, or state of affairs, is not justiciable in a Court of law. The Court can interfere and declare the exercise of the power invalid on the ground of a non-observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding that the pre-requisite fact or state of affairs existed, acted mala fide or from ulterior motive or failed to apply his mind to the matter."

44. In short, objective jurisdictional facts (**"reason to believe"** or **"reasonable grounds to believe"**) are justiciable in a Court. In other words, Courts may inquire into the existence of the **"reason"** or **"reasonable grounds"** for the belief that actuated the exercise of the power by the functionary. But subjective jurisdictional facts (**"if in his opinion"** or **"if he is satisfied that"** the prelude to the exercise of the power exists) are not justiciable in a Court. In other words, Courts may not peer behind the reason for the opinion or satisfaction. A Court may consider the validity of the exercise of a power that has a subjective jurisdictional fact as a plank only with reference to whether the functionary acted in bad faith or with an ulterior motive or failed to apply his mind to the matter at hand.

45. In **President of the Republic of South Africa and Others v South African Rugby Football Union and Others** 2000 (1) SA 1 (CC) (**"SARFU"**) the Constitutional Court said **the Defence and Aid Fund case** remains the leading authority on jurisdictional facts in our law.

- **Para 168, footnote 132**

46. Some 10 years after **SARFU**, in **Kimberley Junior School and Another v Head, Northern Cape Education Department and Others** 2010 (1) SA 217 (SCA) at paras [12]-[13] the Supreme Court of Appeal said:

"[12] … . As was pointed out by the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* … the judgment of Corbett J in *South African Defence and Aid Fund and Another v Minister of Justice* 1967 (1) SA 31 (C) remains the leading authority on jurisdictional facts in our law. In that judgment Corbett J … identified two categories of jurisdictional facts that can be encountered in empowering legislation. The first category, described as 'objective jurisdictional facts', includes the type of fact or state of affairs that must exist in an objective sense before the power can validly be exercised. Here the objective existence of the fact or state of affairs is justiciable in a court of law. If the court finds that objectively the fact or state of affairs did not exist, it will declare invalid the purported exercise of the power.

> [13] In the second category, that of subjective jurisdictional facts, the empowering statute has entrusted the repository of the power itself with the function to determine whether in its subjective view the prerequisite fact or state of affairs existed or not. Expressions often used by the legislature to express this intent are, eg 'in his or her opinion' or 'if he or she is satisfied that' the particular fact or state of affairs exists. In this event the question is not whether the prescribed fact or state of affairs existed in an objective sense. The court can only interfere where it is shown that the repository of the power, in forming the opinion that the fact or state of affairs existed, had failed to apply its mind to the matter. Whether a particular jurisdictional fact can be said to fall within the one category or the other, will depend on the interpretation of the empowering statute."

47. In **Democratic Alliance v President of the RSA and Others** 2012 (1) SA 417 (SCA), the Supreme Court of Appeal acknowledged the distinction between subjective and objective jurisdictional facts, and the proper approach in relation to each, and found the clause there in issue to be of the objective variety.

- **Para 118**

48. Thus, the distinction between subjective and objective discretionary clauses is still very much part of our law on jurisdictional facts. The plain language of the impugned provisions connotes an **objective discretionary power** the exercise of which can be set aside on review if the aggrieved party (such the applicants) can show that the designated judge's grounds for granting surveillance orders are unreasonable or irrational or otherwise unlawful. These jurisdictional facts carry a higher standard of proof or a higher threshold in order for the exercise of the power to stand as valid, the functionary must show the reasonable grounds by which his belief is informed. So, for example

48.1. In section 16(5) the jurisdictional fact is **"satisfied . . . that there are reasonable grounds to believe"** that the antecedent facts exist for the granting of an interception direction;

48.2. In section 17(4) the jurisdictional fact is **"it appears that . . . there are reasonable grounds to believe"** that the antecedent facts exist for the granting of a real-time communication-related direction;

48.3. In section 19(4) the jurisdictional fact is **"it appears that . . . there are reasonable grounds to believe"** that the antecedent facts exist for the granting of an archived communication-related direction;

48.4. In section 21(4) the jurisdictional fact is **"satisfied . . . that there are reasonable grounds to believe"** that the antecedent facts exist for the granting of a decryption direction;

48.5. In section 22(4) the jurisdictional fact is **"satisfied . . . that there are reasonable grounds to believe"** that the antecedent facts exist for the granting of an entry warrant;

48.6. In section 23(4)(a)(i) the jurisdictional fact is **"satisfied . . . that there are reasonable grounds to believe"** that the antecedent facts exist for the granting of an oral direction or oral entry warrant in urgent circumstances.

49. These are all provisions attacked by the applicants under the fourth challenge. They carry a higher threshold or standard of proof than **subjective discretionary power** denoted by phrases like **"in his or her opinion"** or **"if he or she is satisfied"** or **"if he or she believes"** which can only be set aside on grounds that the decision-maker was actuated by bad faith or by an ulterior motive or failed to apply his or her mind to the matter.

50. Examples of these **subjective discretionary power** jurisdictional facts are found in

50.1. section 20(4) where the jurisdictional fact is **"if the designated judge concerned is satisfied"** that the antecedent facts exist for the granting of an amendment of an existing direction; and

50.2. section 25(1)(b) where the jurisdictional fact is **"if [the designated judge concerned] is satisfied"** that the antecedent facts exist for the cancellation of a direction or entry warrant.

51. The applicants want the standard to be **"high degree of probability"** that the particular ground for the granting of a direction exists (**HOA, para 195**). Yet, in their proposed order, they say the designated judge shall grant the order **"if satisfied that the order is necessary"** (**HOA, para 221**).

52. But the **"reasonable grounds to believe"** standard that is currently in use is not a lower threshold for the exercise of discretion by the designated judge than the **"high degree of probability"** standard. The **"if satisfied"** threshold is lower than **"reasonable grounds to believe"**. In other words, the provisions that the applicants seek to impugn provide a stronger safeguard than the amendment that they seek to introduce. This is because **"reasonable grounds to believe"** requires for its validity that the designated judge provides evidence of grounds for his belief that actuate the exercise of his power. Not so the **"if satisfied"** standard that the applicants want to introduce because a decision that is made on the basis of the decision-maker's satisfaction can only be undone if he acted in bad faith or with ulterior motive or without applying his mind.

53. We submit that the applicants' demand in this regard probably stems from their lack of appreciation of the current South African jurisprudence in relation to jurisdictional facts.

54. Strikingly, the threshold for the cancellation of a direction or entry warrant is lower than the threshold for the granting thereof. This is not fortuitous. It is deliberate because the legislature appreciates acutely the invasive nature of these instruments. That is why the granting of a new direction or entry warrant requires a higher standard (**"reasonable grounds to believe"**) than the amendment of an existing direction (**"satisfied that"**) or cancellation of a direction or entry warrant (**"satisfied that"**).

55. There are other provisions in RICA that provides safeguards against abuse. For example,

55.1. The designated judge may cancel a direction or entry warrant if the person at whose instance it was granted fails to submit a report detailing the progress that has been made towards achieving the objectives of the direction or entry warrant concerned and any other matter which the designated judge considers necessary to report on, or (on the date of expiry of the entry warrant concerned) on whether the interception device has been removed from the premises concerned and, if so, the date of such removal.

- **section 25(1)(a)**

55.2. The designated judge may cancel a directive or entry warrant if he or she is satisfied, upon receiving a progress report, that the objectives of the direction or entry warrant have been achieved, or that the purpose for which the direction or entry warrant had been issued has ceased to exist.

- **section 25(1)(b)**

55.3. If an entry warrant has been cancelled, the person at whose instance it had been issued must, as soon as practicable after having been informed of such cancellation, remove any interception device which had been installed under the entry warrant.

- **section 25(4)**

55.4. If a direction is cancelled, the contents of any communication intercepted under that direction will be inadmissible as evidence in any criminal proceedings or civil proceedings as contemplated in Chapter 5 or 6 of the Prevention of Organised Crime Act, 121 of 1998, unless the court is of the opinion that the admission of such evidence would not render the trial unfair or otherwise be detrimental to the administration of justice.

- **section 25(5)(a)**

56. Clear from these provisions is that

56.1. the designated judge not only issues directions and entry warrants but also monitors that they are used for the purpose for which they had been sought;

56.2. once the purpose for which the direction or entry warrant had been issued has been achieved, it is cancelled and does not require the target's application for cancellation or setting aside;

56.3. the designated judge ensures removal of the interception device when the entry warrant has reached its expiry date without the need for the target to approach him or her on application;

56.4. by the monitoring powers conferred upon him or her, the designated judge ensures that the directions and/or entry warrants are not abused thus making it unnecessary for the target to run to court for the review and setting aside of the direction or entry warrant;

56.5. the fact that information gathered under direction cannot be used in evidence in any court proceedings after cancellation is yet another safeguard in the protection of the target's rights.

57. All these point to the fact that notice of the issue of a direction or entry warrant – both before and after issue – is self-evidently unnecessary under the scheme of RICA as it guards against abuse and wanton invasion.

58. The applicants, with respect, fail to appreciate the nature of the jurisdictional fact by which their rights are safeguarded in RICA.

59. The fourth challenge relating to lawyers and journalists is thus misconceived.

E. <u>INDEPENDENCE OF THE DESIGNATED JUDGE</u>

60. The applicants raise two issues under this rubric. First, they allege that RICA fails to secure the independence of the designated judge (**"the independence argument"**). Second, they allege that there is no adversarial process before the designated judge and that the other side of the case is never presented (**"the audi argument"**).

61. In respect of the independence argument, the applicants hinge their proposition on two pegs:

61.1. They say there is no term specified under RICA. The present term for a designated judge is one year, with the option for renewal. But they are unhappy that there is no restriction as regards the number of renewals of the designated judge's term there can be.

61.2. They say the designated judge is appointed at the instance of a member of the executive, the Minister.

- **Applicants' Heads, para 134**

62. Counsel for the amicus introduced a third factor, financial incentive.

63. We submit that RICA is consistent with the core values of judicial independence.

64. RICA defines a **'designated judge'** as

> "any judge of a High Court discharged from active service under section 3(2) of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act 47 of 2001), or any retired judge, who is designated by the Minister to perform the functions of a designated judge for purposes of this Act"

65. Section 174 of the Constitution provides for the appointment of judicial officers. Section 174(1) provides that:

> "Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen"

66. Section 174(8) provides that:

> "Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution."

67. The process of applying for an interception direction is therefore validated by the **institutional independence** of the designated judge. The designated judge performs a quasi-judicial function, is independent and impartial in his or her application of the law and is appropriately qualified for such appointment.

68. The applicants have failed to set out why a Judge cannot be trusted to perform this function without the assistance of a public advocate. There is absolutely no explanation why a designated judge alone is a threat to accountability or will not be able to ensure compliance with constitutional prescripts.

69. Counsel for the applicants told this Court on Tuesday that Judges work best when presented with competing arguments. Generally, that is true. But there are no competing arguments before a judge in applications for restraint orders or preservation orders under one of the most invasive pieces of legislation in South Africa called the Prevention of Organised Crime Act, 121 of 1998. And those are not interim orders. They are final in effect.

70. In respect of the second issue, the fault line that runs through the applicants' support for an adversarial process is inappropriate to the environment within which intelligence services operate.

71. RICA provides sufficient safeguards:

    71.1. The designated judge must have before him or her an application that complies with the requirements detailed in section 16, 17, 18 or 19.

    71.2. The designated judge has the right to call for any information which s/he considers necessary (**section 16(7) & (8)**). That includes inquiring after the profession or line of work in which the target of the direction is engaged. That the designated judge may require **"such further information as he or she deems necessary"** is a very broad discretion. There is no warrant for supposing that s/he may not ask whether the person involved is a journalist or a lawyer, so that s/he may order certain safeguards s/he may consider appropriate.

    71.3. Regardless of whether the application complies with the requirements, the designated judge has a discretion whether to issue the direction or not (**section 16(4)**).

    71.4. The designated judge has an obligation not to issue a direction unless s/he is satisfied that **there are objective grounds to believe** that the prevailing circumstances warrant an interception direction (**section 16(5)**). This is high threshold.

    71.5. The designated judge is called upon to make an independent evaluation and determine whether there are reasonable grounds for believing that the necessary conditions for an interception direction are present (**section 16(5)**).

    71.6. The designated judge may cancel a direction or entry warrant if the person at whose instance it was granted fails to submit a report detailing the progress that has been made towards achieving the objectives of the direction or entry warrant concerned and any other matter which the designated judge considers necessary to report on, or (on the date of expiry of the entry warrant concerned) on whether the interception

device has been removed from the premises concerned and, if so, the date of such removal (**section 25(1)(a)**).

71.7. The designated judge may cancel a directive or entry warrant if he or she is satisfied, upon receiving a progress report, that the objectives of the direction or entry warrant have been achieved, or that the purpose for which the direction or entry warrant had been issued has ceased to exist (**section 25(1)(b)**).

71.8. If an entry warrant has been cancelled, the person at whose instance it had been issued must, as soon as practicable after having been informed of such cancellation, remove any interception device which had been installed under the entry warrant (**section 25(4)**).

71.9. If a direction is cancelled, the contents of any communication intercepted under that direction will be inadmissible as evidence in any criminal proceedings or civil proceedings as contemplated in Chapter 5 or 6 of the Prevention of Organised Crime Act, 121 of 1998, unless the court is of the opinion that the admission of such evidence would not render the trial unfair or otherwise be detrimental to the administration of justice (**section 25(5)(a)**).

71.10. Interception is an intervention of last resort (**section 16(5)(c)**).

71.11. A direction can be granted for up to 3 months. It is not indefinite (**section 16(6)(d)**).

72. In reply the applicants demonstrate amply that the suggestion of a public advocate would indeed add another layer, thus constituting delay that could compromise the very purpose of the interception sought. The applicants propose that there should be a **"return date"** after a rule nisi has been granted.

- **1015/85**

73. In the replying affidavit, the applicants only state that **"…tasking a singular designated judge with all the applications will necessarily constrain the amount of independent inquiry that singular designated judge can undertake"** (**1016/86**). This bold assertion is made without any reference to evidence that a designated judge is inundated with applications that are beyond his or her time and capacity.

74. There is absolutely no evidence to suggest that a designated judge's independence will be diminished by the volume of applications. In any event, there is no evidence that such applications are so voluminous as to impair the independence of the designated judge.

75. What the applicants fail to appreciate, with respect, is that the process of applying for an interception direction is not presided over by an overzealous clerk in a government office armed with a rubber stamp and a political party membership card. It is a rigorous process that is validated by the institutional independence of the designated judge who performs a quasi-judicial function, is independent and impartial in his or her application of the law, and is appropriately qualified for such appointment.

76. The fact that the designated judge is appointed by the Minister without a Judicial Service Commission process does not detract from his or her independence and impartiality. Judges are often appointed to head Commissions of Inquiry (e.g, the "State Capture" Commission of Inquiry or the Marikana Commission of Inquiry) , or to preside over Inquiries (e.g, the Justice Mokgoro Inquiry), private arbitrations and disciplinary proceedings over members of the Bar without undergoing the JSC process. That does not detract from their impartiality or independence.

77. Our courts have been presided over by judges appointed before the advent of the Judicial Service Commission for many years. This did not detract from their independence. One thinks of judges like Justice Didcott, Justice Corbett, Justice Howie, Justice Schreiner (rumoured to be the best Chief CJ South Africa never had).

78. Then others were appointed by the President in consultation with cabinet. These were Justice Madala, Justice Ackermann, Justice Goldstone, Justice Mahomed, Justice Chaskalson. Justice Ngoepe is the Tax Ombudsman. He was not appointed through the JSC process. He was appointed by the President. Justice Louis Harms chaired the FSB Appeal Board which deals with important financial services appeals from the Council for Medical Schemes (dealing with medical schemes) and appeals from the Fais Ombud (dealing with the conduct of financial services providers). He was appointed by the Minister of Finance in terms of **section 26A(5)(b) of the FSB Act**. There is no suggestion that he lacks independence because of that. So was Justice Howie before him.

79. But there are judges appointed through the JSC process who have demonstrated lack of independence and impartiality. One of them was not so long ago forced to resign, following a JSC hearing, for making racist remarks about black people on social media with reference to cases over which she presided.

80. So, being appointed through the JSC process does not guarantee independence or impartiality anymore than being appointed by the executive guarantees lack of independence and impartiality.

81. Being remunerated for performing a judicial or quasi-judicial function does not guarantee lack of independence in a Judge either. Members of the Bar are remunerated, ultimately by their clients albeit through the instructing attorney,

for advancing their clients' case before Court. But that is no incentive deliberately to mislead the court in order to secure a win for the client at all costs.

82. Judges, including retired judges, are generally steeped (one would think) in the tradition of the rule of law and ethics. To assume otherwise in the case of a designated judge in RICA is to have a dangerously jaundiced view of, and low regard for, the judiciary in this country. The suggestion that financial incentive would move a judge to subvert the rule of law is, with respect, a frightening proposition.

83. On Tuesday this Court was referred to international authorities for the proposition that South Africa is behind the international law curve in the development of its surveillance laws because RICA makes no provision for a public advocate or *amicus curiae* to provide a competing argument with that of an applicant before the designated judge. We were pointed to the United States as being an example of where an *amicus curiae* was introduced in 2015.

84. But on closer inspection it appears that the appointment of an *amicus curiae* is a discretionary power of the designated judge under the so-called Freedom Act. The participation of an *amicus curiae* is not a standard requirement. According to the 2018 Report of the Director of the Administrative Office of the US Courts on the Activities of the Foreign Intelligence Surveillance Courts, an *amicus* was appointed on 9 occasions (out of 1,318 applications considered by the Court). In 2017 it appears that no *amicus* was appointed and in 2016 an *amicus* was appointed on one occasion. It appears that *amici* are appointed only when, in the opinion of the Court, a novel or significant point of law arises.

85. In this regard we provide the 2016, 2017 and 2018 annual reports of the Director of the Administrative Office of the US Courts on the Activities of the Foreign Intelligence Surveillance Courts.

86. We respectfully submit that the definition of "designated judge" in section 1 of RICA is consistent with the Constitution. The challenge in this regard has no merit.

87. The fault line that runs through the applicants' support for an adversarial process is inappropriate for the environment within which intelligence services operate. If there should be irregularities resulting in prejudice or infringement of constitutional rights, there are remedies for that in law. But the applicants do not identify any specific right that has <u>in fact</u> been violated by any of the RICA provisions that they seek to impugn.

F. <u>BULK AND FOREIGN SIGNALS SURVEILLANCE</u>

88. The applicants contend that there is no statutory basis for the carrying out of bulk surveillance in South Africa.

89. This is incorrect. Bulk surveillance is done under the National Strategic Intelligence Act, 39 of 1994. Section 2 deals with the gathering, correlation, evaluation and analysis of **"domestic and foreign intelligence"**. The definition of, for example, **"direct communication"** in RICA includes oral communication **"between two or more persons"**.

90. That disposes of the applicants' contention that bulk surveillance is being done *ultra vires*.

91. The applicants pounce on a proviso to section 2A(5) of NSIA that requires that interception and monitoring relating to personal information must be done in terms of RICA, for the proposition that RICA cannot be the empowering statute for bulk surveillance because RICA was designed for individual surveillance not bulk surveillance.

92. This argument ignores the fact that under section 2A(5) of NSIA the interception and monitoring of information in relation to "criminal records" and "financial records" does not require to be done under RICA. So, it does not require regulation under RICA.

93. As we understand it, the European Court on Human Rights in the case of **Big Brother and Others v The United Kingdom** approved of the bulk surveillance regime in the UK despite there being lack of oversight of the entire selection process, including the selection of bearers for interception, the selectors and search criteria for filtering intercepted communications, and the selection of material for examination by an analyst; and secondly, the absence of any real safeguards applicable to the selection of related communications data for examination.

94. Counsel for the *amicus* suggests that the question of the unconstitutionality of bulk foreign signal surveillance be left open. We do not disagree.

G. APPROPRIATE RELIEF AND COSTS

95. The prematurity of this application warrants an adverse costs orders against the applicants should they be unsuccessful. They should know better than pre-empt a legislative process that is already underway, and the broad aim of which they know: **Governance, Transparency, Accountability Mechanisms**.

96. If this Court should find that the applicants are entitled to the relief they seek, we ask that each party bear its own costs because the security cluster of government

could not possibly have been expected to be supine in the face of an application such as this when there is already a legislative process underway.

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