A Win for Privacy!

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On 04 February 2021 our apex Court confirmed the declaration of unconstitutionality handed down by the High Court of South Africa, Gauteng Division: Pretoria, relating to certain portions of the Regulation of Interception of Communications and Provision of Communication-Related Information, Act 70 of 2002 (hereinafter referred to as "RICA").

The importance of the judgment in the case of ***AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others***[1] (the "***AmaBhungane*** Case") cannot be overstated, more especially during a time where the need for discourse surrounding the protection of personal information is greatly desired.

In the Constitutional Court, in its opening remarks, it drew an interesting parallel between the States' use of surveillance in a pre-and post-democratic era. The court emphasised the very real propensity for law enforcement to subvert the dignity of citizens by way of surveillance on citizens.[2] However, this article does not seek to delve into the current institutional flaws surrounding the protection of one's right to privacy. I state this merely to indicate the importance of the court's decision.

The Constitutional Court confirmed that RICA which, *inter alia*, regulates the interception and monitoring of certain communications, signals, frequency spectrums and communication-related information[3] failed to adequately safeguard the right to privacy, right of access to courts, freedom of expression and the media, and legal privilege.

To make sense of the Constitutional Court's decision, one must first understand the effect of RICA and the application thereof.

In essence, RICA prevents the interception of direct or indirect communications such as oral conversations, e-mails mobile phone communications, including text messages, data and visual images, which are transmitted through postal services or telecommunications systems.[4] The reason for such prohibition, self-evidently, is in order to protect an individual's inherent right to privacy.

Recognising an apparent need for the interception of communications, in certain limited instances, for the purpose's national security, RICA provides exceptions to this prohibition thereby attempting to place a reasonable and justifiable limitation on the right to privacy.

The AmaBhungane Centre for Investigative Journalism (a Non-Profit Company) together with its managing director Mr. Stephen Patrick Sole, approached the High Court on the basis of a number of constitutional challenges to RICA.

The facts of the matter are largely irrelevant but lend credence to how the constitutional complications came to light through the application of RICA.

In 2008 Mr. Sole became suspicious that his communications were being intercepted and monitored by an external third party, prompting him to obtain full disclosure of the details surrounding the monitoring and interception of his communications from the relevant authorities.[5]

Mr. Sole was informed that the provisions of RICA prevent the disclosure of any information relating to the surveillance of subjects.[6] However, as luck would have it, Mr. Sole finally received the answers he was searching for, albeit some six years later.

In 2015, Mr. Sole became aware that his communications were indeed subjected to surveillance, through the introduction of transcripts of a telephonic conversation between himself and a state prosecutor as evidence in court proceedings under litigation to which he was not even a party to.[7]

After this discovery, Mr Sole sought to obtain further details regarding the interception and monitoring of his communications, however he was not met with much reprieve. Mr. Sole was never provided with the reasons for the interception in the first instance.[8]

Mr. Sole consequently approached the High Court for an order declaring the provisions of RICA to be unconstitutional on the following basis:

1. That RICA makes no provision for a subject of surveillance ever to be notified that she or he has been subjected to surveillance either pre- or post-surveillance. (notification issue).

2. That RICA permits a member of the Executive unfettered discretion to appoint and renew the term of the designated Judge (the functionary responsible for issuing directions for the interception of private communications), and therefore fails to safeguard the independence of the designated Judge (independence issue);

3. That RICA lacks any form of adversarial process or other mechanism to ensure that the intended subject of surveillance is protected in the *ex parte* application process (*ex parte* issue);[9]

4. That RICA lacks adequate safeguards, processes and procedures for examining, copying, sharing, sorting through, using, destroying and/or

storing the surveillance data (management of information issue);

5. That RICA fails to provide any special circumstances where the subject of surveillance is a journalist or practising lawyer (practising lawyers and journalists issue); and
6. That the use of "bulk interception" currently applied by the National Communication Centre is not authorised by RICA or any other law.[10]

The High Court found legitimacy in the claims of constitutional invalidity, as brought by AmaBhungane Centre for Investigative Journalism NPC and Mr. Sole; and accordingly declared RICA unconstitutional to the extent of the abovementioned failures.

The following provisions were read into RICA to bring the Act in line with constitutional imperatives:

1. Provisions which allow for post-surveillance notification within 90 days of the expiration of an interception direction;
2. Designated Judges, in terms of the Act, must be appointed for 2- year non-renewable terms by the Minister of Justice, after being nominated by the Chief Justice through an transparent process;
3. Journalists and practising lawyers alike are deserving of specific protection to the extent that the designated Judge must, in the very least, be notified if the subject of any interception or monitoring is a practicing lawyer or journalist.

The remainder of the constitutional issues surrounding RICA were not immediately redressed in the High Court's judgment, however, the court, in making its declaration, provided Parliament with a period of 2 years in which to cure the defects.

The High Court's declaration of constitutional invalidity was accordingly placed before the Constitutional Court for confirmation of its finding.

The Constitutional Court:

In confirming the High Court's declaration of constitutional invalidity, the Constitutional Court held the view that the interception and surveillance of an individual's communications in accordance with RICA is highly invasive and is further tantamount to a violation of a person's Section 14 right to privacy.[11]

The question, however, was whether this violation could amount to a permissible limitation, which is reasonable and justifiable.[12]

In doing so the Constitutional Court recognised the importance of the intercepting and monitoring of communications and role this plays in ensuring the security of the state, public safety and the prevention of criminal offences.[13]

Despite this, the effect of RICA is such that it fails to differentiate between intercepted communications which are intimate and irrelevant to the purpose of the interception as oppose to those which are relevant and unintimate. It further negates the right to privacy of those individuals who are not the subject of the interception but are nonetheless a party to the communications.[14]

Constitutional Court further took issue with the fact that RICA allows for directions to intercept and monitor communications to be obtained by way of *ex parte* applications which are further not subject to any legal redress by the subject of interception and monitoring. The Court left the choice of what measures are most suitable to Parliament.[15]

By barring any and all notification to a subject of interception and monitoring, the potential for abuse of interception directions, which are applied for, granted and implemented in complete secrecy, is high. Even where a direction ought not to have been granted, the subject will never know and is thus denied the opportunity to seek legal redress for the violation of her or his right to privacy.

This renders the rights guaranteed by sections 34 and 38 of the Constitution to approach a court to seek appropriate relief for the alleged infringement of the right to privacy illusory, and promotes impunity of those in power.

Post-surveillance notification would serve a purpose comparable to less restrictive means. The Court concluded that post-surveillance notification should be the default position. RICA was held to be unconstitutional to the extent that it fails to provide for notifying the subject of surveillance of her or his surveillance, as soon as notification can be given without jeopardising the purpose of surveillance after it has been terminated.[16]

Before adjudicating the independence issue, the Constitutional Court considered whether RICA empowers the Minister of Justice to appoint the designated Judge at all. RICA has as its centrepiece this designated Judge, who may authorise surveillance of communications in limited circumstances. However, aside from the definition of "designated Judge", which refers to a judge "designated by the Minister of Justice for the purposes of [RICA]", there is no provision expressly empowering the Minister to appoint the designated Judge. However, the Constitutional Court found that Minister's power to designate a Judge was implied in the definition of "designated Judge".[17]

The Constitutional Court then turned to the independence issue, which was founded on the grounds that: RICA failed to prescribe or limit the

designated Judge's term of office, making it possible for the Minister to make indefinite reappointments (each term was for a duration determined at the whim of the Minister; and appointments of designated Judges were exclusively made by a member of the executive in a non-transparent manner, in that there was no role for the Judicial Service Commission, Parliament or the Chief Justice).[18]

The Constitutional Court held that the open-ended discretion in respect of appointments and their renewal could potentially impact the independence of the judiciary and may be undermined by external interference by the executive. As a result, RICA does not allow a designated Judge an adequate level of autonomy and impartiality. The Constitutional Court declared RICA unconstitutional to the extent that it fails to ensure adequate safeguards for an independent judicial authorisation of interception.[19]

On the management of information issue the Constitutional Court held that the provisions of RICA do not prescribe procedures. The Court accordingly declared RICA to be unconstitutional to the extent that it fails adequately to prescribe procedures to ensure that data obtained pursuant to the interception of communications is managed lawfully and not used or interfered with unlawfully.[20]

In dealing with the lawyers and journalists' issue, the Constitutional Court acknowledged that the confidentiality of journalists' sources is protected by the rights to freedom of expression and the media. In relation to the confidentiality of lawyers' communications, the Constitutional Court accepted that legal professional privilege is an essential part of the rights to a fair trial and fair hearing.

These rights were found to weigh in favour of special consideration being given to the importance of the confidentiality of lawyer-client communications and journalists' sources, to minimise the risk of infringement of this confidentiality. These rights were found to weigh in favour of special consideration being given to the importance of the confidentiality of lawyer-client communications and journalists' sources, to minimise the risk of infringement of this confidentiality. RICA's failure to do so rendered it unconstitutional.[21]

The Court then dealt with the Minister of State Security's appeal regarding the legality of the bulk communications surveillance. The High Court had declared bulk surveillance unlawful. The Constitutional Court dismissed the appeal. It held that section 2 of the National Strategic Intelligence Act 39 of 1994 is ambiguous and should thus be interpreted in a manner that best promotes the right to privacy and does not contradict RICA's prohibition of communication interceptions without interception directions. The broad terms of section 2 thus do not authorise the practice of bulk surveillance. The practice was declared unlawful and invalid.[22]

Having declared RICA unconstitutional, the Court limited the retrospectivity of its declaration of invalidity. It further suspended its declaration of invalidity for three years, as requested by the Minister of Justice, to allow for Parliament to adequately address the deficiencies.

All things considered, the AmaBhungane case is a prime indication of the paradigms in relation to the intersectionality of privacy and the competing national state security. The judgment comes at a crucial time which the Constitutional Court has so eloquently described as "our age of mass data surveillance".[23]

What is clear to us is that never before have issues pertaining data protection and privacy been more relevant and controversial than in the modern era of heightened public awareness. We are certain that further mass reforms to the way in which the law approaches these contemporary issues are fast approaching.

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[1] AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others [2021] ZACC 3.

[2] *Ibid* at Par [1].

[3] The Preamble to the Regulation of Interception of Communications and Provision of Communication Related Information, Act 70 of 2002.

[4] AmaBhungane case at Par [7].

[5] *Ibid* at Par [13].

[6] *Ibid.* This prohibition is specifically provided for in terms of Section 42(1) of RICA.

[7] *Ibid.*

[8] *Ibid* at Par [14].

[9] An *ex parte* application refers to an application before a forum which is brought without serving notice upon any other party, including a party who may have a vested interest in such application.

[10] AmaBhungane case at Paras [16] – [22].

[11] Section 14 of the Constitution of the Republic of South Africa, Act 108 of 1996.

[12] *Ibid* at Par [25]. See also Section 36(1) of the Constitution of the Republic of South Africa, Act 108 of 1996.

[13] *Ibid* at Par [30].

[14] *Ibid* at Par [30].

[15] *Ibid* at Paras [95] – [100]

[16] *Ibid* at Paras [146] – [149].

[17] *Ibid* at Paras [159] – [183].

[18] *Ibid* at Paras [92] – [94].

[19] *Ibid.*

[20] *Ibid* at Paras [107] – [108].

[21] *Ibid* at Paras [115] – [119].

[22] *Ibid* at Par [135]

[23] *Ibid* at Par [111].