Centre for
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SURVEILLANCE LAW UNDER SPOTLIGHT - THE LONG-AWAITED CONSTITUTIONAL CHALLENGE TO RICA

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Today, 4 June 2019, the Pretoria High Court is hearing a critical and long-awaited constitutional challenge to the *Regulation of Interception of Communications and Provision of Communication-Related Information Act* of 2002 (RICA) in *Amabhungane Centre for Investigative Journalism NPC and Another v the Minister of Justice and Correctional Services and Others*.

For the ordinary man on the street, RICA is synonymous with the tedious process of SIM card registration and the list of personal information that one needs to provide to a mobile service provider. However, many are not aware that this Act also regulates the interception of communication, such as phone calls and emails (and "communication-related information", also known as meta-data) by certain State agents. This aspect of RICA lies at the core of the constitutional challenge.

Briefly, the applicants' constitutional challenge to RICA is structured around two main categories. Firstly, the applicants argue that RICA provides too few safeguards in the interception process and unreasonably limits various inter-related constitutional rights - especially those to privacy and access to Courts. The applicants' second category relates more to RICA's failure to regulate the interception of foreign signals and the occurrence of "bulk surveillance" by the National Communication Centre - a major constitutional loophole - as all powers exercised by the State have to be exercised and prescribed in terms of the law.

The applicant's first category relating to RICA's lack of safeguards essentially concerns various separate challenges. A key challenge under this category is the lack of notification to the person whose communication is being intercepted. The impact of this lack of notification must be put into perspective. Currently, a State law enforcement agent has to make a court application for an "interception-direction" (interception order) to the "designated judge" (a retired judge appointed for this purpose) to allow for interception of the person's communication. In terms of RICA, various forms of interception exist. This court application however is made without notice to the party whose communication is being intercepted and therefore it will be based on the strength of the law enforcement officer's papers alone. The "designated judge", when granting such an interception order, must be satisfied that there are "reasonable grounds" to believe that the interception is necessary. The stipulated grounds include "actual threat to public health, safety or national security" for instance, and that the interception will provide such evidence; also that other investigative means are unable to do so.

Although lack of pre-notification of the court application can arguably be justified on the basis that it could jeopardise the investigation, one has to ask what risk there would be in

notifying the person after the interception order has lapsed and when there would be no risk to the investigation. Currently no notification - not even after the fact - is allowed. Electronic communication service providers are also compelled to comply with such an interception order and are also strictly prohibited from notifying their clients that there was ever such an order.

As the applicants point out - how can one ever challenge or review the legality of such an interception order (to determine if the limitation of the right to privacy was justified) if one was never notified of it? This, according to the applicants, unduly limits the constitutional right of access to Courts.

The above is not merely a hypothetical situation. The co-applicant to this legal challenge, journalist Sam Sole, provides detail on how he became aware that his communications were intercepted while investigating the Arms Deal in 2008. His suspicions were later confirmed when extracts of his intercepted conversations were attached to Court papers by Mr Zuma's personal attorney during the so-called Spy Tapes trial. Mr Sole states that despite countless attempts to find out why his communications were intercepted he was never provided with the initial interception order to analyse the legality thereof.

An important point the applicants raise in the constitutional challenge is the fact that the United Nations Human Rights Committee (UNHRC) in 2016 already raised various serious concerns about South Africa's surveillance regime. The UN report's concerns include the lack of proper safeguards, the low threshold for surveillance and the failure to provide remedies for unlawful interference with the right to privacy. This constitutional challenge to RICA therefore has long been in the making.

The Pretoria High Court will now have to test whether RICA's limitations to various constitutional rights - especially privacy and access to Courts - are reasonable in terms of the Constitution's limitation inquiry. This will require a keen analysis of various considerations, such as the relationship between the limitation and its purpose and especially whether less restrictive means exist to achieve RICA's purpose. The right to privacy and access to Courts must be strenuously protected in a constitutional democracy and any limitation thereto must be reasonable and constitutionally-aligned. This constitutional challenge to RICA is a crucial one to watch as it may very well change the landscape of State surveillance in South Africa.