

A BREAKDOWN OF THE RICA BILL

Category: Infrastructure and Telecommunications
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Introduction

The much-anticipated [Regulation of Interception of Communications and Provision of Communications-Related Information Amendment Bill](#) ("**RICA Bill**") has been tabled before Parliament. The RICA Bill seeks to bring the Regulation of Interception of Communications and Provision of Communications-Related Information Act[\[1\]](#) ("**RICA**") in line with the Constitutional Court judgement of *Amabhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services and Others*[\[2\]](#) ("**Amabhungane Judgement**").

The Amabhungane Judgement declared sections of RICA unconstitutional in that it fails to:

1. provide safeguards to ensure that a designated judge[\[3\]](#) is sufficiently independent;
2. adequately notify the subjects of surveillance[\[4\]](#) as soon as notification can be given without jeopardising the purpose of the surveillance and after surveillance has been terminated;
3. adequately provide safeguards for interception directions that are sought and obtained *ex parte*;
4. adequately prescribe procedures to ensure that data obtained pursuant to surveillance or interception is managed and not used unlawfully, including a lack of procedures for the processing of the data; and
5. provide adequate safeguards where the subject of surveillance is a practising lawyer or journalist.

The Court suspended the declaration of unconstitutionality for a period of 36 months to allow for Parliament to cure the defects. During the suspension, the Court ordered that certain sections of RICA shall be deemed to include the following sections:

1. where the surveillance subject is a practising lawyer or journalist, applications brought for surveillance or entry warrants must be disclosed to the designated judge. The designated judge can only grant the application if he/she is satisfied that it is necessary to do so, and subject to conditions, such as the protection of a journalist's sources or to protect the legal professional privilege enjoyed by a lawyer's clients; and
2. a surveillance subject must be notified in writing that they were a subject of surveillance within 90 days of the surveillance expiring. Proof to that effect must be submitted to the designated judge. If notification cannot be given without jeopardising the purpose of surveillance, the designated judge may direct that the notification be withheld for a period which does not exceed 90 days at a time or two years in aggregate.

The RICA Bill: The Proposed Amendments

The amendments listed below substantially changes RICA's provisions.

1. Amendment to the definition of "designated judge" and addition of "review judge" to the definitions section

Under both RICA and the RICA Bill, a designated judge means a judge discharged from active service or a judge who is retired, who is designated by the Minister to perform the functions under RICA. The RICA Bill further adds to the definition to provide that the Minister must designate a judge in consultation with the Chief Justice by notice in the Gazette. The judge must perform his or her functions independently, and without fear, favour or prejudice. The RICA Bill makes provision for a review judge that reviews the decisions of the designated judge. The review judge is appointed in a similar manner as the designated judge.

Where the designated judge decides on an application, he/she must submit the documents used to arrive at his/her decision to the review judge. This includes directions made orally in respect of section 23.^[5] Upon receipt of such directions or applications, the review judge must consider and confirm any decision made by the designated judge within five days. The powers of the review judge include confirming, varying or setting aside of any decision made by the designated judge in terms of RICA. A decision made by the review judge must then be served or delivered to the designated judge, who must then inform the applicant of the decision of the review judge. Such a decision must be executed immediately by the applicant. Records of the exercise of any power or performance of any function must be kept by the review judge.

• Disclosures where the subject of surveillance is a practising lawyer or journalist

The provisions relating to disclosures where the surveillance subject is a practising lawyer or journalist has been incorporated in the RICA Bill. Notably, however, it omits the provision that such applications may only be granted if the designated judge is satisfied it is necessary to do so,

notwithstanding the fact that the subject is a practising lawyer or journalist.

- **Post surveillance notification**

The post surveillance notifications provided for in the Amabhungane Judgement has been incorporated into the RICA Bill, however, it further provides that where post surveillance notification has the potential to impact negatively on national security, the designated judge may, upon application by a law enforcement officer, direct that the giving of notification be withheld for a period as may be determined by the designated judge.

- **Office for Interception Centres**

The Director of the Office for Interception Centres no longer prescribes the requirements for the keeping of information in respect of applications issued under RICA. These requirements are now prescribed in the proposed section 37A.

- **Management of data**

Additional provisions relating to the management of records is prescribed with the addition of section 37A. Such provisions include the developing of procedures to take into account principles for the safeguarding of data. It is important to note that the principles mentioned in this section are substantially similar to the principles for the protection of personal information as prescribed by the *Protection of Personal Information Act* 4 of 2013. Importantly, the participation of the data subject must be provided for through post-surveillance notification.

- **Regulations**

The inclusion of section 62D provides that the Minister may make regulations prescribing any matter in respect of RICA. Where a regulation is made that has a bearing on the designated or review judge, such regulations must be made in consultation with the Chief Justice.

Conclusion

The above amendments are positive steps towards rectifying RICA's problematic provisions as outlined in the Amabhungane Judgement. However, the above amendments do not address all that is wrong with RICA. Any prescribed regulation enacted in future should consider some of the following questions/points which the RICA Bill currently fails to consider:

1. surveillance subjects still do not have proper right of access to the court or special remedies that can be exercised where surveillance is conducted unlawfully;
2. the RICA Bill does not prescribe the type of notification that is given to subjects' post surveillance. Exactly what information should the notification contain? Is it enough to simply notify the subjects of the fact of surveillance?

3. sensitive information may be discovered during surveillance. Should a subject take issue with surveillance by approaching the courts, such information may fall into the public domain;
4. what happens to information obtained unlawfully?
5. the appointment of a review judge for the designated judge implies a measure of accountability, however, it may not be enough to ensure independence. Additional mechanisms may be required to ensure transparency and accountability, such as judicial oversight over RICA directions; and
6. lastly, the data management provisions do not prescribe how access to information obtained through surveillance is limited. Specific provisions relating to access to information must be incorporated, given the sensitive nature of the information.

Although the RICA Bill seeks to correct the deficiencies raised in the Amabhungane Judgement, further consideration is necessary to align the provisions to accord with the right to privacy, a constitutionally protected right which is fundamental to our democracy.

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[1] 70 of 2002.

[2] 2021 (3) SA 246.

[3] A designated judge is an independent judge that is appointed to perform certain functions under RICA, such as applications for surveillance, interception or entry warrants.

[4] In the context of this article alone, the term “surveillance” broadly includes a direction for interception or application for entry warrant that is granted.

[5] Section 23 relates to oral applications for, and issuing of directions, entry warrant, oral directions or oral entry warrants.