ANNUAL REPORT ON INTERCEPTION

OF

PRIVATE COMMUNICATIONS

(In terms of the Regulation of Interception of Communication and Provision of Communication-Related Information Act 70 of 2002, RICA)

Period: 01 November 2018 to 28 February 2021

To: Chairpersion: Hon. JJ Maake, MP

Joint Standing Committee on Intelligence: Parliament

By Justice B E Nkabinde

Designated Judge

Date: 17th March 2021

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A. Introduction

[1] This report is submitted in terms of section 3(a)(iii) of the Intelligence Services Oversight Act[1] (ISOA), read with the relevant provisions of the Regulation of Interception of Communication and Provision of Communication-Related Information Act[2] (RICA or Act). As explained below, the report covers the period from 01 November 2018 to 28 February 2021.

[2] The term of office of the erstwhile designated Judge, Justice H M T Musi, came to an end during August 2019. My appointment took effect from 10 September 2019. Ordinarily, this report should cover a period from the date of my appointment. However, for expediency and completeness, I considered it appropriate also to gather information and report over the period in respect of which there was no reporting. The last report, according to the records in my office, was submitted on 31 October 2018. The 2019 report was supposed to be presented beginning of 2020. It was during this period that the hard lock down came into effect. The delayed reporting is regretted.

[3] The insightful input by the Director of the Office of Interception Centre (OIC) involved in the chain of interception of communication, for which I remain thankful, has been considered in the preparation of this report. I deal later with the IOC report. The report by the Crime Intelligence Division of the South African Police Services (SAPS) was filed on 12 March 2012. Neither the State Security Agency (SSA) nor the Financial Intelligence Centre (FIC), which are also involved in the chain of such interception have submitted reports.

[4] The report of the former designated Judge dealt with the legal framework applicable in respect of applications for the issuance of directions and entry warrants. For brevity, I will not replicate the legal framework in detail, particularly in the light of the recent judgment of the Constitutional Court declaring RICA unconstitutional.

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[1] 40 of 1994.
[2] 70 of 2002.

[5] It goes without saying that the year 2020 was marked by worldwide disruptions occasioned by the COVID scourge. The work of this office was not spared by such concomitant disruptions. The repairs including restoration of air-conditioning in our office during 2020 also contributed to the interruption of work in the interception chain.

[6] The better part of 2019 was marked, among other things, by litigation in which the validity of RICA was impugned in the High Court and later the Constitutional Court. As will be noticed, I dedicate much of the reporting below – under the rubric of "[D]eclaration of constitutional invalidity of RICA" – on the judgment of the Constitutional Court which is focal point of this report to provide insight into the pronouncement of the Court on RICA. This is so because the judgment reveals a deep and better understanding of the intrusive nature of that Act.

[7] On my assumption of office I was presented with the judgment of the High Court (Pretoria) in the matter of *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister for Justice and Correctional Services and Others (Amabhungane)* in which the court declared RICA unconstitutional and made certain consequential relief, including a relief by reading-in a substantive provision for post surveillance notification subject to exceptional circumstances. I deal, in a short while, with the judgment of the Constitutional Court in the confirmatory proceedings. Apart from the fact that the decision of the Court impacts directly on the chain of interception of communication, it also serves as a point of reference for Parliament (and possibly for the draftsmen and draftswomen in the Department of Justice) on the legislative role and review function of RICA, respectively, when correcting the deficiencies identified by the Courts in the impugned Act.

B. Overview of the constitutional and legal framework

[8] The right to privacy, which is entrenched in section 14 of the Constitution[3] embraces the right to be free from intrusions and interferences by the state and others in the

[3] Section 14 of the Constitution reads:
"Everyone has the right to privacy, which includes the right not to have—
(a) their person or home searched;
(b) their property searched;

personal life of the citizenry. This right, like any other, is not absolute. However, the limitation of the right to privacy must be reasonable and justifiable.[4] The right to freedom of expression entrenched in section 16 of the Constitution[5] is also relevant for the purpose of this report. Further rights which are implicated but not as self-standing as the privacy right in the implementation of RICA include the rights to a fair hearing and trial, respectively, as guaranteed in terms of sections 34[6] and 35(3)[7] of the Constitution.

(c) their possessions seized; or
(d) the privacy of their communications infringed."

[4] Section 36 of the Constitution provides:
"**Limitation of rights**

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

a. the nature of the right;

b. the importance of the purpose of the limitation;

c. the nature and extent of the limitation;

d. the relation between the limitation and its purpose; and

e. less restrictive means to achieve the purpose.

2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

[5] Section 16 of the Constitution reads:
"Everyone has the right to freedom of expression, which includes—
(a) freedom of the press and other media;
(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research."

[6] Section 34 of the Constitution reads:
"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

7 Section 35(3) of the Constitution provides:
"Every accused person has a right to a fair trial, which includes the right—
(a) to be informed of the charge with sufficient detail to answer it;
(b) to have adequate time and facilities to prepare a defence;
(c) to a public trial before an ordinary court;
(d) to have their trial begin and conclude without unreasonable delay;
(e) to be present when being tried;
(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
(g) to have a legal practitioner assigned to the accused person by the state and

[9] State intrusions into individuals' privacy may occur in various ways. Here, are concerned with the surveillance of individuals through interception of private communications as regulated under RICA.[8] This may take place, for example, under an interception direction,[9] with the consent of a party to communication,[10] of an indirect communication in connection with carrying on of business,[11] to prevent serious bodily harm,[12] for purposes of determining location in case of emergency[13] and if authorised by other Acts.[14]

[10] Interception of any communication is prohibited in section 2, "subject to this Act".[15] Section 16 of RICA makes provision for the procedure to be followed when an interception direction is sought: An applicant may apply in writing (ordinarily by way of affidavit) to a designated Judge for the issuance of an interception direction, indicating the identity of the applicant and the law enforcement officer who will execute the interception direction; the identity of person/customer (if known) whose communication is required to be intercepted and the postal service provider or telecommunication service provider to whom the direction must be addressed and

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at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
(i) to adduce and challenge evidence;
(j) not to be compelled to give self-incriminating evidence;
(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
(o) of appeal to, or review by, a higher court,"

[8] The Regulation of Interception of Communications and Provision of Communication–Related Information Act 70 of 2002 (Interchangeably referred to as RICA or Act). This Act replaces the Interception and Monitoring Act.

[9] Section 3 of RICA.

[10] Section 5 of RICA.

[11] Section 6 of RICA.

[12] Section 7 of RICA.

[13] Section 8 of RICA.

[14] Section 9 of RICA.

[15] Section 2 provides that: "Subject to this Act, no person may intentionally intercept or attempt to intercept, or authorise or procure any other person to intercept or attempt to intercept, at any place in the Republic, any communication in the course of its occurrence or transmission."

specifying the grounds[16] on which the application is made; setting all the facts and circumstances alleged by the applicant and, if applicable, indicating whether conventional methods have been exhausted as well as whether any previous applications have been made.

[11] In terms of section 16(5) an interception direction may only be issued if an interception Judge is satisfied, on the facts alleged under oath by an enforcement official, that (and I paraphrase) there are reasonable grounds to believe, among other things, that a serious offence has been or is being or will probably be committed; the gathering of information concerns an actual threat to the public health or safety, national security or compelling national economic interest of the Republic is necessary and – where organised crime is involved or any offence relating to terrorism or gathering of information relating to organised crime or terrorism or the gathering of information concerning property which is or could probably be an instrumentality of serious offence, is being or is likely to be committed.

[12] Section 16(7)(a) of RICA, couched in peremptory terms, disallows notification to the subject of the interception direction.

[13] Certain provisions of RICA, for example sections 42, also prohibit disclosure of information obtained in the performance of duties in terms of that Act.

C. Declaration of constitutional invalidity of RICA (*Amabhunghane)*

[14] The judgment and order in *Amabhunghane* is important and, as mentioned earlier, is instructive for the ultimate legislative amendment of the Act and the implementation thereof. Although the declaration of invalidity has no immediate effect it does have an impact on the work of the agencies and my function as an interception Judge. The Constitutional Court order in detailed. I mentioned relevant parts thereof for this purpose. It reads:

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[16] Set out in section 16 (5).

"....

6. The declaration of unconstitutionality by the High Court is confirmed only to the extent that the [RICA] fails to –

(a) provide for safeguards to ensure that a Judge designated in terms of section 1 is sufficiently independent;

(b) provide for notifying the subject of surveillance of the fact of her or his surveillance as soon as notification can be given without jeopardising the purpose of surveillance after surveillance has been terminated;

(c) adequately provide safeguards to address the fact that interception direction are sought and obtained *ex parte*;

(d) adequately prescribe procedures to ensure that data obtained pursuant to the interception of communication is managed lawfully and not used or interfered with unlawfully, including prescribing procedures to be followed gor examining, copying, sharing, sorting through, using, storing or destroying the data; and

(e) provide safeguards where the subject of surveillance is a practising lawyer or journalist.

7. The declaration of unconstitutionality in paragraph 6 takes effect from the date of this judgment and is suspended for 36 months to afford Parliament an opportunity to cure the defect causing the invalidity.

8. During the period of suspension referred to in paragraph 7, RICA shall be deemed to include the following additional sections:

> 'Section 23A **Disclosure that the person in respect of whom a direction, extension of a direction or entry warrant is sought is a journalist or practising lawyer**
>
> (1) Where the person in respect of whom a direction, extension of a direction or entry warrant is sought in terms of section 16, 17, 18, 20, 21, 22 or 23, whichever is applicable, is a journalist or a practising lawyer, the applicant must disclose to the designated Judge the fact that the intended subject of the direction, extension of a direction or entry warrant is a journalist or practising lawyer.
>
> (2) The designated Judge must grant the direction, extension of a direction or entry warrant referred to in subsection (1) only is satisfied that it is necessary to do so, notwithstanding the fact that the subject is a journalist or practising lawyer.

(3) If the designated Judge issues the direction, extension of a direction or entry warrant, she or he may do so subject to such conditions as may be necessary, in the case of a journalist, to protect the confidentiality of her or his sources, or, in the case of a practising lawyer, to protect the legal professional privilege enjoyed by her of his clients.'

'Section 25A**Post-surveillance notification**

(1) Within 90 days of the date of expiry of a direction or extension thereof issued in terms of sections 16, 17,18, 20, 21 or 23, whichever is applicable, the applicant that obtained the direction or, if not applicable, any other law enforcement officer within the law enforcement agency concerned *must* notify in writing the person who was the subject of the direction and, within 15 days of doing so certify in writing to the designated Judge, Judge of the High Court, Regional Court Magistrate or Magistrate that the person has been so notified.

(2) If the notification referred to in subsection (1) cannot be given without jeopardising the purpose of the surveillance, the designated Judge, Judge of the High Court, Regional Court Magistrate or Magistrate may, upon application by a law enforcement officer, direct that the giving of notification in that subsection be withheld for a period which shall not exceed 90 days at a time or two years in aggregate.'

...."

[16] RICA is declared unconstitutional and the declaration is suspended for 36 months to enable Parliament to cure the defects.

[17] The factual matrix were said not to be central to the issues before the Court, i.e. whether (a) RICA unreasonably and unjustifiably fails to protect the right to privacy and is thus unconstitutional to the extent of that failure and (b) there was a legal basis for the state to conduct bulk surveillance.

[18] The facts, briefly stated, were that a certain Mr Sole narrated his first-hand experience of the abuse of RICA by state authorities. He suspected that his communications were being monitored and intercepted. He took steps to obtain disclosure of the details relating to the monitoring and interception of his communication from the office of the Inspector-General of Intelligence but his efforts were in vain as he was told in a letter that the Inspector-General had found no wrongdoing by NIA and SAPS

Intelligence Division. He was further told that RICA prohibits disclosure of information relating to surveillance. It later transpired, as is evident from the judgment, that a communication between him and a state prosecutor, Mr Downer, had been intercepted.

[19] Proceedings were launched in the High Court challenging the constitutionality of RICA on various grounds including that it failed to provide adequate safeguards to protect the right to privacy, ensure the independence of the designated judge and that the subject of surveillance is not protected in the *ex parte* application process (for the issuance of an interception direction by the designated judge).

[20] In the High Court there was no evidence to gainsay the allegation that the surveillance limited the privacy rights of all concerned. The Court thus focussed on whether the limitation was justifiable in terms of section 36(1) of the Constitution. In holding that it was, the Court declared RICA invalid to the extent of its inconsistency with the Constitution. The declaration of invalidity was suspended for two years and certain interim provisions/words, which are to apply in the interim before the defects are cured by Parliament, were read-in into the Act.

[21] In confirming the declaration of invalidity the Constitutional Court stressed that the invasion of individual's privacy infringes his/her cognate right to dignity. As the Ministers for Justice and Police had submitted, the Court recognised the need for the state to secure the nation, ensure that the public is safe and to prevent crime but remarked that some of the communications do not, in the least have anything to do with the reason for the surveillance and that some communication with the subject of surveillance are collateral victims. It found that whilst RICA serves an important purpose, it does not do enough to reduce the risk of unnecessary intrusion, i.e. to ensure that the interceptions and surveillance are generally within constitutionally compliant limits.[17]

[22] The Court referred to two examples of journalists whose communications had been intercepted. The first related to journalists who investigated the alleged corruption

[17] Paragraphs 32 and 33 of the Constitutional Court judgment.

scandals in the SAPS. It appears that a police official had, in the affidavit supporting the application for an interception directive, misrepresented information to the designated Judge. He lied that the phone numbers to be tapped were those of suspected ATM bombers.

[23] The real-time interception of the calls, text messages and metadata of the said journalists was directed by the interception Judge. Undisputed evidence was before Court that in certain instances the agencies can obtain fictional intelligence report about an individual. They would produce a report of that nature even where they have conducted surveillance that did not yield the desired result.

[24] The next example related to the report by the Inspector-General on the surveillance that had been conducted by the NIA operatives on a prominent South African businessman, Mr Sakumzi Macozoma (Macozoma). Seemingly, the Inspector-General had been requested to look into the matter of Macozoma by the Minister of Intelligence Services in terms of section 7 (7) (c) of the ISOA.[18] Macozoma was alleged to have been linked to a foreign intelligence services inimical to national security[19] and his emails, allegedly revealing various conspiracies, had been intercepted. That, in turn, resulted in the electronic and physical surveillance of certain individuals and political parties. In the report's conclusion, the judgment reveals, that the emails had been fabricated by the NIA team.

[25] After giving these examples the Court remarked:

> "It would be naive to think that these examples are odd ones out and that in all other instances state agencies responsible for surveillance have always acted lawfully. The fact that it is now said that the document on the basis of which Mr Sole was subjected to surveillance cannot be found is quite curious ...I deliberately put it no higher.
>
> The last examples show us that blatant mendacity may be the basis of an approach to the designated Judge . . . [who] has no means meaningfully to verify the information placed before

[18] See fn 1 above.
[19] Apparent from the reading of the Constitutional Court judgment this was in terms of the "Executive Summary of the Final Report on the findings of an Investigation into the Legality of the Surveillance Operations Carried Out by NIA on Mr S Macozoma" Media Briefing, 23 March 2006.

> her or him. As a result, she or he is left none the wiser. Also, by its very nature – in particular because it takes place in complete secrecy [because section 16 (7) (a) of RICA expressly forbids disclosure of any kind to the subject of the surveillance] on the understanding that the subject of surveillance who is best placed to identify an abuse will never know – surveillance under RICA is susceptible to abuse. A key factor which likely emboldens those who conduct surveillance to abuse the process is thus a sense of impunity. The question then is whether lesser restriction on secrecy in the form of notification would thwart the realisation of what RICA interceptions are meant to achieve."[20]

[26] The Court also referred to sections 42(1) and 51 of RICA that respectively prohibit and criminalise the disclosure of the fact that an interception direction, granted and implemented in secrecy unlike the search and seizure warrant which do come to the notice of the subject even is sought and granted in secrecy, was issued. It said that an individual, whose privacy has been violated in the most intrusive, egregious and unconstitutional manner, never becomes aware of this and is thus denied an opportunity to seek legal redress for the violation of her or his right to privacy. The right in section 38, the Court remarked, then becomes illusory.

[27] Before concluding that post-surveillance notification should be the default position which should be departed from only where, on the facts of each case, the state organ persuades the designated Judge that such departure is justified, the Court mentioned that:

> "...[P]ost-surveillance notification will go a long way towards eradicating the sense of impunity which certainly exists. The concomitant will be a reduction in the numbers of unmeritorious intrusions into the privacy of individuals. ...In a sense, post-surveillance notification functions as less restrictive ... less intrusive means and serves at least two purposes. First, the subject of surveillance is afforded an opportunity to assess whether the interception direction applied for and issued is in accordance with the Constitution and RICA. If need be she or he may seek an effective remedy for the unlawful violation of privacy. Second, because there will be challenges to illegality sought and obtained interception directions, that will help disincentivise abuse of the process and reduce violations of the privacy of individuals... ."[21]

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[20] Paragraphs 40 -1 of the Constitutional Court judgment.
[21] Paragraph 39 of the Constitutional Court judgment.

[28] The Court also remarked about the possibility of a process of automatic review, if Parliament so decides, to cater for the vast majority of people who cannot, as a result of financial want, afford to litigate when they have suffered the infringement of their rights at the hands of the state. Properly understood, this will impact directly of the work of the designated Judge if Parliament finds favour with the proposed automatic review process. The Court said that this could be in the form of automatic review by a designated Judge in an informal, mainly paper-based non-court process where a designated Judge may call for whatever information she or he might require from whomsoever to yield a summary but effective process.[22] This will reduce abuse which, as the examples demonstrate, is a shocking reality.

[29] Regarding the independence of a designated Judge, in relation to the safeguards on the appointment and the Ministerial power to designate, the Court – using the definition section as an interpretive tool – concluded that the Minister does have the power to designate. The Minority held otherwise.[23] It held that there is no substantive provision in the entire RICA that empowers the Minister to designate a Judge for the purposes of determining applications for authorisation to intercept private communications and perform other functions.[24]

[30] Although this is a matter that falls entirely within the province of the legislative authority of Parliament, I think that it will be instructive, to obviate any doubt in the future, to include a substantive provision in the Act that deals with the Ministerial power to designate.

[31] The Majority judgment dealt, in relation to the question of independence, with a number of protective processes when a Judge is appointed and remarked that none of those processes and structures are in place for the designated Judge under RICA.[25]

[32] Additionally, the Court said that the lack of specificity on the manner of appointment and extensions of terms raises independence concerns. The lack of structural

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[22] Paragraph 49 of the Constitutional Court judgment.
[23] See for example paragraph 79 of the Constitutional Court judgment.
[24] Para 159 of the Constitutional Court judgment (Minority).
[25] Paragraphs 91 and 92 of the Constitutional Court judgment are instructive in this regard.

independence in the RICA, the Court remarked, may also lead to a reasonable perception of lack of independence. That, it was said, is something Parliament may address with relative ease.

[33] With regard to the *ex parte* nature of the application[26] for directions the Court mentioned that the applicants did not challenge the section permitting this. It remarked that the rationale for the *ex parte* process is obvious: the surveillance would be futile if the subject were to be aware of it.[27]

[34] The Court was, however, not oblivious to the risks of abuse of the *ex parte* process which highlights the general deficiencies in RICA. It did not comment on the suggestion by the applicant regarding the involvement of the "public advocate" as one such safeguards but left it to Parliament to address the inadequacies resulting from the *ex parte*-nature of the process under RICA.

[35] The issue regarding the management of the information by the IOC was also considered by the Constitutional Court. Section 35(1)(g) of RICA enjoins the Director of the OIC to prescribe which information and the manner in which such information will be kept. The Court said that whether the important information will be part of what is prescribed to be kept is left to the unbound discretion of the Director. It said that there ought to be clear parameters on the exercise of such discretion.

[36] Further, the Court said that the sections do not give clarity and detail on: what must be stored; how and where it mut be stored; the security of such storage; precautions around to the stored data (who may have access and who may not; the purposes of accessing and how and at what point the data may be destroyed. The Court held that there is a real risk of the private information landing in wrong hands and, even if in the rights hands, may end up being used for purposes other than those envisaged in RICA thus exacerbating the risk of unnecessary intrusions into the privacy of

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[26] In terms of section 16(7)(a) of RICA.
[27] Paragraph 95 of the Constitutional Court judgment.

individuals. All of these brought to question the safeguards put in place by the Centre to guarantee lesser invasion of privacy.[28]

[37] Regarding the rights to freedom of expression, fair hearing and trial which were raised not as distinct constitutional challenges but rather to be considered within the scope of the section 36 limitation enquiry (that the limitation of the right to privacy was not reasonable and justifiable) the Court made it clear that it cannot be suggested that journalists and practising lawyers who may claim client – attorney privileged information cannot be subjected to surveillance which includes the interception of their information as they, like other members of the society, are not immune from being monitored. It said that there may be reasonable grounds for suspecting them of being involved in serious criminality or of conduct that places the security of the Republic at serious risk.

[38] However, the Court said, the confidentiality of lawyer-client communication and journalists' sources is significant in our constitutional dispensation. It found that RICA is unconstitutional to the extent that it fails to provide for additional safeguards calculated at minimising the risk of infringement of the confidentiality of practising lawyers and client communication and journalists' sources.[29]

D. OIC Report

[39] This report (annexed hereto as **annexure "A"**) gives account on the effectiveness of the lawful interception chain and success of the implementation of RICA. It highlights safeguards put in place to ensure compliance. It also seeks to highlight some of the successes in the combating of crime through lawful interception. Correctly, the Director mentions that reporting by all role players in the lawful interception value chain is important because such reports provide a complete picture on the efficacy of the RICA processes.

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[28] Paragraph 107 of the Constitutional Court judgment.
[29] Paragraph 119 of the Constitutional Court judgment.

[40] The Director reports that the Centre has put in place measures in the form of Standard Operating Procedures (SOP) to be followed by all employees when dealing with interception directions. He mentions, among other things, the security measures on the interception data. Apart from documenting the statistics for the relevant period and assessment of impact he refers, more importantly in my view, to the following challenges experienced by the OIC:

- Not receiving all interception directions issued by the Interception Judge resulting in failure to reconcile figures reported to be received and provisioned by the OIC and those from the interception judge's office. The answer provided by the staff of the Interception Judge is that there are other law enforcement agencies (LEAs) that apply for interception directions but not using the OIC services: All Interception Directions issued by the designated Judge are forwarded to the OIC save for those issued under Section 22 (entry warrant). Such directions are forwarded to the relevant Law enforcement agency for execution. Statistics from my office covers the period from the last reporting date to the current reporting date which is different from that of the OIC.

- The manual application and lack of electronic or automated capacity in the Interception Judge's office thus resulting in errors in identifying whether a number in the application is new of existing. The staff in my office explained that this is occasioned by the fact that the classification from the Office of the Designated Judge is not based on specific numbers intercepted as is the case in the OIC. A number that already exist on the OIC records may still be registered as a new application received, The suspect may be under investigation for several unrelated cases. The OIC will pick up that number as an existing number whereas in the office of the designated Judge it will be recorded as a new application depending on the case to which it relates.

- The assessment of the truthfulness of the affidavits presented to the designated Judge by the LEAs. Indeed, the mendacity of most of the deponents to the affidavits submitted in support of the interception direction are, as we have

seen from the matter of Macozoma), a matter of serious concern as the interception Judge is unable to verify the truthfulness of the statements made.

- Development of standards and processes for the implementation of data protection measures between various entities such as service providers, LEAs, OIC and the designated Judge's office to promote confidentiality and integrity of the interception value chain.

- The director mentions, correctly in my view, that the interconnectedness of the various stakeholders in the interception process calls is necessary.

- The Director refers to the pronouncements of the Constitutional Court regarding the importance of adequate procedures to secure data received including procedures used for examining, copying, sharing, sorting through, using, storing or destroying the data. These are some of the matters to be taken into account when RICA is reviewed by Parliament.

E. Law Enforcement Agencies' reports

[41] The report by the acting Divisional Commissioner: Crime Intelligence, Lieutenant General Y Mokgabudi, dated 12 March 2021, was send to my office on Friday 12 March 2021. The report deals with the status of certain directions but does not comprehensively elaborate on the status of matters referred to in the summary of applications and extensions. The report also mentions challenges encountered in the implementation of directions. It is not clear whether the challenges are in relation to all directions issued or in relation to specific ones. I can do no better than recapping what is stated in the report:

"The OIC system is outdated, regularly collapses resulting in the loss of interception communication products;

The fact that interception at OIC is limited to Voice and SMS data means that approximately 99% of the target's communication is lost;

Inability of the OIC to intercept other forms of communication like WhatsApp including WhatsApp voice calls, skype, emails, facebook and other social media platforms;

Inability of OIC systems to provide images, GIS and GPS; and

Lack of decentralised connectivity (Provincial OIC's) affects the implementation of Directions especially hot monitoring."

[42] Mention of the loss of intercepted communication and targets' communication support the view that there are no safeguards in place to minimise intrusions into the privacy of the targeted individuals. The SSA, and FIC did not submit the reports. This is regrettable because the agencies' reports are, as mentioned by the OIC Director, important as they provide a complete picture on the efficacy (supposedly, including the inadequacies) of the RICA processes.

F. Statistics as compiled by the Office of the designated Judge

[43] (a) **SAPS Applications**

NEW-350

RE-APPLICATION-88

EXTENSION-30

EXTENSION AND AMENDMEND-119

AMENDMEND-26

ORAL-2

DECLINED-7

TOTAL-622

[44] (b) **SSA Applications**

NEW-8

RE-APPLICATION-24

AMENDMEND-8

EXTENSION AND AMENDMEND-5

ORAL-1

SECTION 11-5

EXTENSION-3

DECLINED-7

TOTAL-61

[45] (c) FIC (under FICA) Applications

NEW-3

EXTENSION AND AMENDMEND-1

G. Comments on the statistics

[46] Analysis of the statistics for the reporting period has revealed the following: Of the 622 applications received from SAPS for this reporting period, 208 are cases relating to drugs and drug trafficking, an indication of how much the scourge has permeated our societies. Gauteng is leading at 32.7% followed by the Western Cape at 31.7%, Eastern Cape 13.94%, Southern Cape 8.65%, KZN 4.8%, Limpopo 4.8%, Northern Cape 1.92% and lastly NW standing at 1.44%. 63 applications were received in relation to Cash in Transit Heist. Western Cape is at 29.3%, KZN 25.39%, Gauteng 20.63%, Eastern Cape 15.87%, Mpumalanga 6.35%, Northern Cape 1.58%.

The remaining percentage of applications is spread between other crimes such as Corruption, Carjacking, Murder, Smuggling of Motor Vehicles, ATM bombings, Rhino horn smuggling, Rape murder, kidnapping and armed Robbery.

[47] SSA has submitted sixty one (61) applications of which seven (7) was declined. Their applications are mostly for terrorism, espionage and other related crimes such as information peddling.

[48] FIC submits applications in terms of the Financial Intelligence Centre Act, Act 38 of 2001. Their applications are mostly more financial monitoring to combat illegal activities such as money laundering and detect proceeds from unlawful activities.

H. Observations

[49] During October 2020 I visited the OIC. The Director mentioned techhnical deficiencies. Mention was made of the outdated infrastructure and budgetary constraints. Mentions was also made of the fact that the Centre has not been invited to make input in the process of reviewing RICA and the delay in the review which impacts on the Centre's efficiency and effectiveness. These ongoing challenges or some of them seem to have been reported to the previous designated Judge. In his report, the Judge said:

> "The infrastructure needs to be upgraded as since the current version is no longer supported and hardware infrastructure has already reached its end of life. The technical capacity of the system continues to decline amid the developments and infrastructure upgrades from the service providers that are creating technical challenges with the OIC."

[50] It is important for the optimal efficacy of the interception processes in terms of the Constitution and RICA to ensure that all infrastructure is up-to-date for the Centre to function efficiently and effectively.

[51] The Director made mention of the need for the Centre to be independent and to change the reporting lines to Parliament. He suggested that a comparable study to this effect may be done to determine the efficacy of the proposed model. The Director raised the issue of the safety of the OIC personnel. In my view, this matter should be prioritised.

[52] I suggested that the OIC should identify areas in respect of which the Judge's staff could assist in simplifying the work between the OIC and LEAs. I also suggested that a mechanism be defined to demonstrate vale derived from the interception done by the OIC. Furthermore, because of alleged failures by the OIC allegedly because of the technical deficiencies alleged by certain LEA, I adopted a system whereby applicants should motivate their allegations and support same with confirmatory sworn statements from OCI. This would minimise hearsay. Additionally, I proposed that frequent meetings should take place between my Office and the OIC to discuss areas of common concern.

[53] This office has received enquiries, one from the office of the Minister of State Security, complaining that her private communication has been unlawfully intercepted. The Office confirmed that no lawful interception direction was issued in relation to the Minister. I thus requested my office to advise that a complaint be formalised to enable my office to make a follow up but no formal complaint was received.

[54] Recently, I was copied a letter which addressed to Lt-Gen Mokgabudi by Willem de Klerk Attorneys and subsequently sent by an Instigative Journalist, Ms Karrim regarding the alleged surveillance of News24 Journalists – specifically the editor-in-chief of News24, Mr Adriaan Basson – by the Crime Intelligence division of SAPS in that their communications are intercepted with the use of the so-called "grabber devise". The letter is attached as **annexure "B".** I undertook to respond after verifying with the staff in my office whether any lawful direction permitting any such interception has been issued. The Office checked and responded in the negative. The letters attached and marked **annexure C1 and C2** were then addressed to Ms Karrim and De Klerk Attorneys. My office was also copied of the response by Major General F Khan of the Divisional Commissioner Crime Intelligence (Head Office) Pretoria. His letter is annexed **as annexure D.**

[55] Sadly, the Ms Karrim has since sent a message (sms directly to my mobile phone) that her team asked her to alert me "to the possibility that their colleague's number could have been slipped into legitimate applications and could have been included among legitimate numbers – a trick used sometimes." This emboldens the Constitutional Court's remarks about the mendacity of some of the applicants seeking interception directions from the interception Judge.

[56] It needs to be stressed that there is no interception that is conducted unlawfully by my office unless undetected underhand methods are used to hide information using other people's numbers. This is so because my office conduct a thorough check of information provided before directions are issued. The observation deducted is that if the interception has been done lawfully, it is rear that the number can pass by the Judge's table unnoticed, those numbers are checked thoroughly before the direction is issued bearing in mind the intrusive nature of interception methods. The challenge, however, is with RICA itself. Where information is sought regarding ownership of the cell phone number, we are often told that the number belongs, for instance, to A but is being used by B for criminal activities or we find a rare combination of the owner's details which make no sense at all. In some instances, the service provider does not change the details if the number is being used by a new user. It may be helpful to take these considerations into account during the review processes.

[57] It bears mentioning that there are many instances when I decline to grant directions, for example, when numbers do not tally. I would direct queries to the relevant agency to explain or rectify the whatever errors that might have been detected. It follows that the issues raised by Ms Karrim and Attorney De Klerk are not far-fetched.

[58] It is indeed matter of great concern that there seem to be unceasing unlawful interception of communication of private and public officials. These matters are, in the light of the constitutional imperatives and the rule of law, most disturbing and cannot be left unchecked by the relevant Ministry/Department of agency implicated. Lying under oath is a criminal offence. Appropriate steps need to be taken against officers with such proclivity whose conduct result in violation of the privacy right of others without reasonable justification, whatsoever.

[59] I was advised by the Official in the Department of Justice, Mr Sarel Robberts, that the review of RICA, which is extensive, is underway. The ongoing review might include a complete overhaul of the legislation especially following the comprehensive judgment by the Constitutional Court in *Amabhungane*.

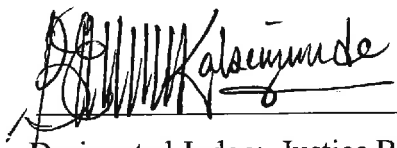
[60] On matters of administration, the support staff remain the same as previously reported. The office is suitably furnished and, following the maintenance that took place over several months in 2020, air conditioned.

I. Concluding remarks

[61] The pronouncement of Constitutional Court highlighting inadequacies in RICA that manifestly gave rise to disconcerting invasions in the privacy of individuals mentioned and possibly many others will greatly, it is expected, transmute the manner in which all concerned, including the affected Members of the Executive, law enforcement agencies, FIC, OIC and the designate Judge, will perform their functions when Parliament has considered the judgment and cured the deficiencies in RICA as identified by the Constitutional Court in *Amabhungane*. I am hopeful that within the

next 36 months the defects in RICA would be cured to minimise the invasions currently experienced through its unconstitutionality.

[62] I am thankful to the Department of Justice for providing the support staff and additional assistance to me. I am thankful also to the Senior Official (Ms Juanita Lugela and her Team for the assistance and support throughout the said period and in the preparation of this report. The report by the Director of OIC, for which I am thankful, has also been useful.



Designated Judge: Justice BE Nkabinde