CONSTITUTIONAL COURT OF SOUTH AFRICA

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

CCT 278/19 and CCT 279/19

Date of hearing: 25 February 2020
Date of Judgment: 4 February 2021

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 4 February 2021 at 10h00 the Constitutional Court handed down judgment in an application to confirm the declaration by the High Court of South Africa, Gauteng Division, Pretoria (High Court) that the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (RICA) is unconstitutional, to the extent that it fails to provide adequate safeguards to protect the right to privacy, as buttressed by the rights of access to courts, freedom of expression and the media, and legal privilege.

The applicants, AmaBhungane Centre for Investigative Journalism NPC and Mr Stephen Sole – a journalist who had been the subject of state surveillance – approached the High Court on the basis of a number of constitutional challenges to RICA. The High Court upheld the following challenges: (i) RICA makes no provision for a subject of surveillance ever to be notified that she or he has been subjected to surveillance (notification issue); (ii) 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 commnications), and thus fails to ensure the independence of the designated Judge (independence issue); (iii) 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); (iv) RICA lacks

adequate safeguards for examining, copying, sharing, sorting through, using, destroying and/or storing the surveillance data (management of information issue); and (v) RICA fails to provide any special circumstances where the subject of surveillance is a journalist or practising lawyer (practising lawyers and journalists issue). RICA was accordingly declared unconstitutional to the extent of these failures. The declaration of invalidity was suspended for two years to allow Parliament to cure the defects. Interim relief, in the form of reading-in, was granted in respect of the notification issue, the independence issue and the practising lawyers and journalists issue.

The applicants supported the bulk of the reasoning and findings of the High Court, save for that relating to costs, which they appealed. The Minister of Police partially appealed the judgment and orders of the High Court; and the Minister of State Security appealed the whole judgment and orders of the High Court. The Minister of Justice did not appeal the High Court's declaration of invalidity or oppose the application for confirmation, but made submissions to assist the Court. The rest of the respondents did not participate in the Constitutional Court.

In a majority judgment penned by Madlanga J (Khampepe J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring), the Constitutional Court held that interception and surveillance of an individual's communications under RICA is a highly invasive violation of privacy, and thus infringes section 14 of the Constitution. The Court accordingly considered whether this limitation is reasonable and justifiable under section 36(1) of the Constitution.

The Court acknowledged the constitutional importance of the right to privacy, which is tied to dignity. It further accepted the importance of the purpose of state surveillance, which is to investigate and combat serious crime, guarantee national security, maintain public order and thereby ensure the safety of the Republic and its people. However, in light of the egregiously intrusive nature of the limitation, the Court held that the question to answer is: is RICA doing enough to reduce the risk of unnecessary intrusions? In other words, are there safeguards that acceptably minimise the trampling of the privacy right, and thus meet the reasonableness and justifiability standard?

On the notification issue, the Minister of Police, who appealed the High Court's order in this regard, argued for the continued prohibition of all post-surveillance notification. The Constitutional Court held that such a blanket prohibition facilitates the abuse of interception directions, which are applied for, granted and implemented in complete secrecy. Even if 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 infringement of the right to privacy illusory, and promotes impunity. 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.

Before adjudicating the independence issue, the 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. This constitutional issue was not pleaded, but raised by the Court of its own accord. The Court drew a distinction between a primary implied power and an ancillary implied power. While the latter is necessary for, and implied by, an unquestionably existing power to be exercised, the former is a power to do something required to be done in terms of an Act, and which does not owe its existence to some other power. Reverting to RICA, the Court held that, reading the definition and the provisions on the functions of a designated Judge together, and considering that the main purpose of RICA cannot be achieved without a properly designated Judge, the Minister's power to designate a Judge was implied in the definition of "designated Judge".

The 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. The Court held that the open-ended discretion in respect of appointments and their renewal could raise a reasonable apprehension that the independence of the designated Judge may be undermined by external interference by the Executive. As a result, RICA does not allow the designated Judge an adequate level of structural, operational or perceived autonomy. The Court declared RICA unconstitutional to the extent that it fails to ensure adequate safeguards for an independent judicial authorisation of interception.

On the ex parte issue, the Court held that means to temper the effects of the clandestine, one-sided nature of the process do exist, and constitute less restrictive means to achieve the purpose of surveillance. RICA was thus found to be unconstitutional to the extent that it lacks sufficient safeguards to address the fact that interception directions are sought and obtained ex parte. The Court left the choice of what measures are most suitable to Parliament.

The Court then considered the management of information issue. The applicants' concern was that the lack of regulation of how intercepted information is handled, stored and eventually destroyed exposes subjects of interceptions to even more aggravated intrusions into their privacy. The Court considered various provisions that the Minister of State Security argued fulfil this role. The Court held that these provisions do not prescribe the relevant procedures, and that they allow the Director of the Office for Interception Centres an unacceptably unbounded discretion to regulate the management of information. This results in unnecessarily egregious intrusions into the privacy of the subjects of interceptions. The Court thus declared RICA 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.

In dealing with the lawyers and journalists' issue, the 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 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, in order to minimise the risk of infringement of this confidentiality. RICA's failure to do so rendered it unconstitutional.

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.

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 Parliament adequate time to proceed with its investigations and develop suitable remedial legislation. Since the infringement of the privacy right is egregiously intrusive, and the period of suspension is relatively long, the Court deemed it necessary to grant interim relief in respect of the notification issue, and the lawyers and journalists issue.

Finally, the Court considered the applicants' appeal on costs. Despite their success, the High Court had denied the applicants their costs. It decided that there should be no order as to costs. The Constitutional Court acknowledged that costs awards of courts below should be interfered with only in exceptional circumstances. However, since the High Court had failed to apply established principles on costs in constitutional litigation, these were exceptional circumstances. The applicants – private parties – had been successful in constitutional litigation against the state. They were thus entitled to their costs both in the High Court and Constitutional Court.

The second judgment penned by Jafta J (Mogoeng CJ concurring) agreed with the first judgment save for the finding in the first judgment that RICA empowers the Minister to designate a judge for the purposes of determining applications for authorisation to intercept private communications and also to perform other functions. The second judgment held that the definition in section 1 of RICA does not include a provision that the Minister has the power to designate but merely defines the meaning of the term "designated judge".

In addition to the reasons set out in the first judgment regarding the unconstitutionality of Chapter 3 of RICA, the second judgment held that the limitation to the right to privacy is unjustifiable and unreasonable, absent a lawful and valid designation of a Judge.

Consequent upon the finding that RICA does not empower the Minister to designate a judge, the second judgment held that the suspension of the declaration of invalidity proposed as a remedy in the first judgment is inappropriate as it will not cure the problem of the lack of power to designate. This kind of problem can only be remedied by Parliament granting the Minister the relevant power. As a result, the second judgment concluded that the appropriate remedy should have been to simply declare the impugned provisions invalid with no additional remedies.