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Section 79(1) referral of the Regulation of Interception of Communications and Provision of Communication-Related Information Amendment Bill [B28-2023]

Presentation prepared by: Z Zenani
CLCO
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Introduction

- This opinion is intended to provide legal guidance to this Portfolio Committee with regard to the processing of the RICA Amendment Bill, pursuant to a referral by the President in terms of s79 of the Constitution.

- The presentation will also give an update on the status of the court application in the matter of ***The President of the Republic of South Africa v The Speaker of the National Assembly and Others*** which is currently serving before the Constitutional Court

Background to the amendment

- The amendment to RICA is informed by the Constitutional Court judgement in the matter 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 ("AmaBhungane")***[2021] ZACC 3]
- In that matter the Court declared ***RICA*** unconstitutional, to the extent that it failed to—

- put in place safeguards to ensure the independence of a Judge designated in terms of ***RICA***;
- make a provision for notification of the subject of surveillance as soon as such can be given without jeopardising the purpose of surveillance after it has been terminated;
- provide safeguards which are adequate to address the fact that the interception directions are sought and obtained *ex parte*;
- provide adequate procedures regulating the handling of data obtained pursuant to the interception of communications; and
- provide adequate safeguards where the subject of surveillance is a practising lawyer or journalist.

Background (continued)

- The declaration of unconstitutionality was suspended for a period of 36 months from the date of the judgement, to afford Parliament an opportunity to cure the constitutional defect
- The judgement was handed down on 4 February 2021, therefore Parliament was granted until 4 February 2024 to cure the constitutional defect
- In the interim, the Court ordered that the following provisions were deemed to be included in ***RICA*** to address the unconstitutionality during the 36 months period of suspension:

- a read-in relating to disclosure that the subject in respect of whom a direction, extension or entry warrant is sought, is a journalist or a practising lawyer
- a read-in relating to a requirement for post-surveillance notification, where such notification will not jeopardise the purpose of the surveillance

INITIAL PROCESS UNDERTAKEN BY PARLIAMENT TO COMPLY WITH THE AMABHUNGANE JUDGEMENT

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- Bill introduced to Parliament in August 2023
- Classified as a Bill in terms of section 75 of the Constitution
- Referred to the Portfolio Committee for consideration and reporting
- Committee invited public comments and held public hearings
- The Bill, as amended by the Committee, was thereafter adopted by the National Assembly and referred to the NCoP for consideration.
- The Select Committee on Security and Justice similarly called for public comments, conducted public hearings, deliberated and reported on the Bill to the NCoP which also adopted the Bill
- Parliament's legislative process culminated in the following amendments being passed:

INITIAL PROCESS UNDERTAKEN BY PARLIAMENT TO COMPLY WITH THE AMABHUNGANE JUDGEMENT

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- A designated judge is appointed by the Minister in consultation with the Chief Justice
- Allowance is made for the appointment of a review judge, who is mandated to review the directions issued by a designated judge. This is aimed at addressing the concerns relating to the issue of the independence of a designated judge and *the ex parte* sought surveillance directions
- Provision is made for the notification of the subject of surveillance within a period of 90 days after the expiry of a surveillance direction.
- The agency responsible for such surveillance is required to certify to a judicial officer of such compliance within a period of 15 days after notification.
- If such notification cannot be given within the 90 days post-surveillance period, provision is made for an extension of such for a period not exceeding 90 days, or 2 years in aggregate.
- In the event that the notification has a potential to impact negatively on national security, the designated judge may direct that the notification be withheld for such period as may be determined by the designated judge

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- Provision is made for adequate procedures regulating the handling of data obtained pursuant to the interception of communications, as well as for the processing and handling of data obtained pursuant to surveillance

- Where the subject of surveillance is a practising lawyer or journalist, provision is made for such information to be disclosed in the application. In such circumstances, the designated judge may issue the directions subject to necessary conditions to either protect the confidentiality of the journalist's sources or protect the practicing lawyer's legal professional privilege, as dictated by the relevant facts

- On 13 December 2023, the RICA Amendment Bill was submitted to the President for assent in terms of section 79(1) of the Constitution, which empowers the President to either assent to and sign it into law, or, if the President has reservations about its constitutionality, to refer the Bill back to the National Assembly for reconsideration

LEGAL OPINION SCOPE

- On 15 November 2024, the President addressed a letter to the Speaker of the National Assembly, referring the Bill to the National Assembly for reconsideration in terms of section 79(1) of the Constitution. The correspondence was referred to the Committee for processing and reporting back to the National Assembly

- Section 79(1) of the Constitution empowers the President not to assent to a bill, but rather to refer it back to the National Assembly for reconsideration, if the President has reservations about the constitutionality of that bill

- The President’s section 79 referral raises the following reservations:

LEGAL OPINION SCOPE (continued)

a. A significant element of the *AmaBhungane* finding, namely that the designated judge has no meaningful means by which to verify the information placed before them, has not been addressed. This relates to the *ex parte* nature of the applications for directions. The President is of the view that the safeguards which the Bill purports to put in place are inadequate

b. The Bill does not make provision for the review of a decision by a designated judge in terms of Clause 25A(2)(b) of the Bill, which empowers a designated judge to withhold notification for any period as they may determine – in circumstances where it is alleged that notifying the subject of surveillance may negatively impact national security . His concern is that the subject of surveillance may never know about their surveillance, as the postponement of the notification may be indefinite.

- Accordingly, this legal opinion considers each of the constitutionality reservations raised by the President in relation to the RICA Amendment Bill – and it is within that context that the opinion must be interpreted.

LEGAL FRAMEWORK

- In addition to section 79(1) of the Constitution, section 79(2) further determines as follows:

"(2) The joint rules and orders must provide for the procedure for the reconsideration of a Bill by the National Assembly and the participation of the National Council of Provinces in the process."

- The applicable Joint Rules are the following:

"235. Referral to Assembly committee

(1) On receipt of a remitted Bill the Speaker must refer the Bill and the President's reservations to an Assembly committee.

LEGAL FRAMEWORK (continued)

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(2) The committee—

(a) subject to subrule (3), must consider, and confine itself to the President's reservations;

(b) may request, where the referred Bill must be considered by—

(i) the Assembly only, the Speaker

(ii) …;

….to request clarification from the President on the President's reservations;

Legal Framework (Continued)

(c) …

(d) must report to the Assembly on the President's reservations in accordance with subrule (4).

(3)(a)The Committee may make consequential amendments or amendments that do not affect the substance of the Bill to clauses that are not the subject of the President's reservations.

(b)The committee's report referred to in subrule (4) must clearly identify consequential and non-substantive amendments

Legal Framework (Continued)

(4) If the committee agrees with the President's reservations, the committee must—

(a) indicate the steps taken by the Committee to correct any procedural defect;

(b) present with its report an amended Bill correcting any constitutional defect in the substance of the Bill, or resulting from the steps to correct the procedural defect;

(c) make a recommendation that any procedural defect can only be corrected by the Council; or

(d) recommend that the Assembly rescind its decision to pass the Bill and reject the Bill, if it regards the Bill as being procedurally or substantively so defective that it cannot be corrected.

Legal Framework

JR 238. Substantive defects

(1) The Bill must be returned to the President where the Assembly has considered and decided whether to accommodate the President's reservations raised in respect of the substance of the Bill or not, and the Bill was classified as—

(a)…

(b) a section 75 Bill".

Legal Framework (continued)

- In addition to the Constitution and the Joint Rules, consideration must also be given to the wording of section 16(7) of RICA:

> *"(a) An application must be considered and an interception direction issued without any notice to the person or customer to whom the application applies and without hearing such person or customer.*
>
> *(b) A designated judge considering an application may require the applicant to furnish such further information as he or she deems necessary."*

- These provisions also apply to other applications for directions brought in terms RICA.

COURT APPLICATION

- Parliament submitted the RICA Amendment Bill to the President on 13 December 2023 for him to exercise his powers in terms of section 79(1) of the Constitution. Parliament was notified of the constitutional reservations in November 2024, and by then, the 36 months the Court granted in *AmaBhungane* had already lapsed

- In light of the expiry of the extension, there is currently —

    1. no interim measure to guide the appointment of a designated judge;

    2. no requirement for the post-surveillance notification of the subject of surveillance, once surveillance has come to an end; and

    3. no safeguards in relation to instances where the subject of the surveillance is a journalist or a practising lawyer.

Court application – continued

- In January 2025, Parliament was served with papers in the matter of the *President of the Republic of South Africa v The Speaker of the National Assembly and Others* (Constitutional Court, CCT: 278/19). In this application, the President is seeking orders re-instating the interim measures that were put in place by the Constitutional Court in *AmaBhungane*, pending the outcome of the section 79 process.

- Over and above this, the President makes a proposition in his papers that in the interim, applications for directions for purposes of RICA be heard by a panel consisting of three judges appointed in the manner set out in the RICA Amendment Bill.

Court application – continued

- The application—

    1. highlights the uncertainty in respect of the implementation and administration of RICA resulting from the fact that the interim read-in granted by the Constitutional Court in *AmaBhungane* lapsed in February 2024; and

    2. explains that the delay in bringing the application was occasioned by a lapse in internal controls within the Office of the President.

- The Constitutional Court has already issued directions calling on the President, the Minister of Justice and Constitutional Development, Minister of Police and the Minister in the Presidency: State Security ("the Respondent Departments") to file their submissions. The President and the Minister of Police have filed, and SSA and Justice remain outstanding.

Court application – continued

- In his submissions to the Constitutional Court, the President proposes that judicial control on the directions that were granted by the designated judge between the period 5 February 2024 until 24 June 2024 (latter being the date from which the designated judge declined to issue further directions because there was no legislation in place that permitted her to do so), be exercised to manage all challenges to the validity of such directions, and that such matters be dealt with on a case by case basis with due regard to the interests of justice

- Minister of Police supports the President's urgent application on the basis that the absence of an interim order will negatively affect the crime prevention strategy and hamper criminal investigations. At the time of the submissions, Police could not provide confirmation on whether there are any directions of their own that may have been granted after the date of expiry of the extension – but support that should they exist, they be dealt with through a judicial process and on a case-by-case basis

- Further directions are awaited once all the parties have filed their submissions.

Legal Analysis

- **The *Ex-Parte* issue**

1. RICA provides for applications for directions to be considered, and for directions to be issued without any hearing or notice to the subject of surveillance. *AmaBhungane* confirms this principle and states that pre-interception disclosure would defeat the very purpose of surveillance. The Court found the *ex parte* nature of these processes to be rational, because the surveillance would be futile if the subject were to be alerted or made aware of it.

2. The shortcoming to the *ex parte* nature of these processes is that a designated judge has no other version against which to measure the veracity of the facts supporting the application. The Court pointed out that the designated judge is not in a position to meaningfully interrogate the information, and that further and better safeguards could minimise chances of unlawful intrusions into the subject of surveillance's privacy.

3. Furthermore, the *court a quo* in *AmaBhungane* linked the declaration of unconstitutionality to failure by RICA to provide for a system for a public advocate, or other appropriate safeguards to address the fact that the applications for directions are dealt with *ex parte*.

Legal analysis contitued

4. The Constitutional Court however, refrained from prescribing a public advocate as a safeguard to address the issue, and left it to Parliament to make a determination on the appropriate safeguards to address the inadequacies resulting from the *ex parte* nature of the process. The Court warned in this regard that the safeguards need not be an adversarial process.

5. In response to *AmaBhungane*, the Bill makes provision for an immediate review of a designated judge's decision to issue directions. Clause 15B of the RICA Amendment Bill introduces a review judge. Clause 15A of the RICA Amendment Bill states that a designated judge must, within 5 days of the directions' application outcome, refer the information or documentation informing the directions decision, together with a copy of the decision, to the review judge.

6. Clause 15C of the Bill empowers the review judge to either confirm, vary or set aside any decision made by a designated judge in terms of RICA and in respect of applications in terms of RICA. This, the review judge, must perform within 5 days of receipt of the information or documents from a designated judge.

7. The President submits that what the Bill makes provision for in this regard is not sufficient on the basis that it does not address the Court's reservations that a designated Judge is not in a position meaningfully to interrogate the information supporting an application for directions.

Legal Analysis (continued)

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9. In the urgent application to the Constitutional Court, the President seeks an interim order that three designated judges be appointed to process applications for directions, pending the outcome of the section 79 process. It is unclear in this regard whether the President is in favour of three designated judges appointed in accordance to Clause 15A of the Bill.

10. From this, a question arises whether the introduction of a review judge is sufficient to mitigate the risks of abuse of process occasioned by the *ex parte* nature of these applications, or whether a panel of designated judges, as intimated in the President's urgent application to the Constitutional Court, would be more appropriate in the circumstances.

11. *Ex parte* applications are characterised by the fact that any judge presiding over such, is called to make a determination based on just one version before them. Over and above the tool provided by section 16(7)(b) of RICA – which empowers a designated judge to require an applicant to submit further information in support of an application for directions, it is the qualities and skills of a judicial officer Mogoeng J made reference to in the matter of *Minister for Safety and Security v Van der Merwe and Others* stating that, "*The judicious exercise of this power by them enhances protection against unnecessary infringement. They possess qualities and skills essential for the proper exercise of this power, like independence and the ability to evaluate relevant information so as to make an informed decision*", that a designated judge is required to employ in order to discharge their duty in a manner acceptable in law and RICA in particular.

Legal analysis

12. It is not immediately apparent from the President's reservations in this regard, why the appointment of a designated judge in the manner set out in the RICA Amendment Bill, and that of review judge, are not adequate to safeguard the fact that the applications are on an *ex parte* basis.

13. To mitigate the abuse of process, the safeguards that the Bill introduces are the following:

- a process of appointment of a designated judge to ensure independence;
- an additional review judge whose function is to review the directions decisions; and
- the post surveillance notification clauses

14. In our view, a panel of three judges would still be confronted with the same challenge of having to make a determination based on one the version of the case presented by the agency bringing the application for directions. However, nothing prevents the Portfolio Committee from considering the possible amendment of relevant provisions of the Bill to allow for three designated judges. If the Portfolio Committee wishes to consider such an alternative, it would need to take into account whether such appointment would be cost effective, pragmatic, and rights-focused to allow for the redeployment of state resources to capacitate the implementation of RICA.

Legal Analysis

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- **The Post-Surveillance Notification Issue**

1. The reservation in this regard is that Clause **15C** of the Bill does not make provision for the review of the designated judge's decision taken in terms of **Clause 25A(2)(b)** of the RICA Amendment Bill, namely that the giving of notification to the surveillance subject may be withheld if such a step would potentially impact negatively on national security.

2. The President submits that this may result in scenarios where the subject of surveillance is never made aware of such, as the postponement of notice may be indefinite. For this reason, the President submits that the Bill may not pass the constitutional muster.

3. The Bill currently sets out timelines within post-surveillance notifications should be made.

4. The exception to these fixed timelines is when the notification has a potential to impact negatively on national security. In such circumstances, a designated judge may upon application by a law enforcement officer, direct that notification be withheld for such a period as may be determined by the designated judge.

Legal Analysis

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5. The SSA is one on the state institutions directly affected by the amendment of RICA. They are in favour of the retention of Clause 25A(2)(b) on the basis that national security is a constitutional imperative. They argued that national security is a human rights issue as it impacts on the rights in terms of sections 9, 11, 12(1)(c) and 14 of the Constitution.

6. SSA submitted that the due to the nature of their investigations, the aggregate of two years that Clause 25A(2)(a) of the RICA Amendment Bill imposes, would not be sufficient in the kind of investigations conducted by SSA, due to the fact that recruitment of sources and infiltration of assets into criminal and terrorist networks take several years to cultivate. SSA submitted that notification to such subjects of surveillance even after the fact, would not only compromise the efficacy of counter measures in South Africa, but also compromise the efficacy of the work of foreign agencies which may have taken years to cultivate.

7. SSA argued further that the disclosure is likely to compromise the lives of assets and their families, as well as law enforcement and intelligence agents. In espionage cases in South Africa, the post-surveillance notification to a foreign agent would compromise international relations and diplomacy.

8. SSA is of the view that the requirement for post-surveillance notification to targets involved in contraventions of national security annuls the Agency’s execution of its legislative mandate

Legal Analysis

9. The Department of Justice confirmed that a decision in terms of Clause 25A(2)(b) was indeed subject to review by a review judge, as Clause 15C of the RICA Amendment Bill empowers the review judge to consider, confirm, vary or set aside any decision made by a designated judge. As a way forward, the Department proposes a consequential amendment to Clause 15C, to make specific reference to reviews in terms of Clause 25A(2)(b).

10 To address the issue of the indefinite postponement of the notification, the Department's proposition is that the Bill may be amended to make provision for mandatory periodic re-application for the continued withholding of the notification to the designated judge every 12 months.

11. There is a consensus that surveillance in terms of RICA violates more than just the right to privacy. It further negatively impacts on the right to dignity, and the right of access to courts (in that the *audi alteram partem* principle is not adhered to *ex parte* applications). The Court in *AmaBhungane* stated that, "*[i]f there ever was a highly and disturbingly invasive violation of privacy, this is*".

Legal Analysis

11. In dealing with the nature and extent of the limitation of the aforesaid infringed rights, Madlanga J stated as follows:

> "*[T]he indiscriminate tentacles of interceptions reach communications of whatever nature, including the most private and intimate. Some of the communications do not in the least have anything to do with the reason for the surveillance. And some of those communicating with the subject of surveillance are collateral victims. I cannot but conclude that the limitation of the right is egregiously intrusive*".

12. The Court warned that absent a post surveillance notification, the affected individuals would never become aware of the surveillance, thus, denied an opportunity to seek legal redress for the violation of their right to privacy.

13. One of the examples of abuse the Court highlighted on this issue was a matter where surveillance had been conducted by National Intelligence Agency ("NIA") operatives on prominent South African businessman, Macozoma. The motivation presented by NIA for the surveillance was said to be the subject's links with a foreign intelligence service, which were inimical to national security. An investigation initiated by the Inspector-General in terms of section 7(7) of the Intelligence Services Oversight Act, 40 of 1994 revealed that the evidence purportedly obtained against the subject had been fabricated by NIA

Legal analysis

14. In its findings, the Court stated that it sees no reason why notification could not be made as soon as possible after the termination of the surveillance, if same did not jeopardise the purpose of the surveillance. The latter reflects an appreciation by the Court that there may be instances where it would not be practical to give post surveillance notification as soon as possible –the Court identifies these instances as those where the notification would jeopardise the purpose of the surveillance. In this regard, the Court stated: "*This, of course, is not about those instances where – for a while perhaps – the state may be able to justify why it would be injurious to its interest prematurely to give notification*". In concluding this point, the Court stated that, "*I am thus led to the conclusion that post-surveillance notification should be the default position, which should be departed from only where, on the facts of that case, the state organ persuades the designated Judge that such departure is justified*"

15. The above demonstrates that whilst the Court called for post-surveillance notification to be a default position due to the egregious nature of the violation of rights by RICA, it also concluded that a departure would not necessarily be rendered unconstitutional if a designated judge is persuaded that such departure is justified.

16. Clause 15C takes into consideration instances where it would not be practical for notification to be given within 90 days of completion of surveillance. The Bill further caps the period of extension of the notification to an aggregate of two years

Legal analysis

16. However, the Bill makes no provision for fixed timelines in respect of postponements of notification where there is a potential risk to national security. This is left in the discretion of a designated judge. This is the basis for the President's constitutionality reservation.

17. The views expressed by SSA paint a picture of surveillance in perpetuity, due to the reasons set out above. However, regard being had to the Sakhi Macozoma example, SSA surveillance directions are not immune from abuse. It is our view that SSA's submission in this regard does not appear to strike a balance between the severity of the violation the Court expressed in *AmaBhungane*, and the dangers associated with post-surveillance notifications in matters concerning national security.

18. In our view, the postponement of post-surveillance notification where there is a potential that same would impact negatively on national security, does not on its own render the Bill unconstitutional. This view is informed the fact that the Court in *AmaBhungane* appeared to express an appreciation of instances where departure from the notification standard could be justifiable on a case-by-case basis. However, the judgement does not envisage perpetual postponement of the notification. In our view, the mandatory periodic re-application proposed by the Department may be considered to mitigate the apparent open-ended postponement of notifications in terms of Clause 25A(2)(b) of the RICA Amendment Bill

Joint Rules on section 79 Referral

- Joint Rule 235 envisages that where the Committee agrees with the reservations expressed by the President, it will present with its report an amended Bill correcting the identified constitutional defect in the substance of the Bill. Such amendments during committee deliberations will have to be subject to the constitutional obligation to facilitate public participation, as the possible amendments in question would amount to material changes Underlining added for emphasis.

CONCLUSION

- As there seems to have been some developments in between the date of the section 79(1) referral by the President and the filing of the pending Constitutional Court application, it is advisable for the Committee (through the Office of the Speaker as the head of the National Assembly) requests clarity on the scope of the constitutional reservations in terms of Joint Rule 235(2)(b)(i).

- In the event that the Committee agrees with the President in his assertion that the two issues addressed above may render the RICA Amendment Bill unconstitutional and wishes to amend the Bill as proposed, it is our view that such amendments would be material and therefore suggest that the Committee errs on the side of caution and call for public inputs before effecting the amendments to the Bill