Can the government intercept my communications?

The Regulation of Inception of Commination and Provision of Communication-Related Information Act 70 of 2002, otherwise known as RICA, came into effect on 30 September 2005. The purpose of this piece of legislation is, *inter alia,* to regulate the surveillance of people's communications and the issuing of directions authorising the surveillance.

Many people have encountered RICA when purchasing a new cell phone, and never thought much of it. The Act, however, has far-reaching implications. RICA recently made headlines when the South Gauteng High Court declared certain provisions relating to the interception of people's communications unconstitutional: Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others (25978/2017) [2019] ZAGPPHC 384. The Court held that the interception violated *inter alia* the rights to privacy, freedom of speech and access to the courts.

Issues before the court were, firstly, a challenge to the constitutionality of certain provisions in the Act. The relevant provisions permit the surveillance of a person's communications by authorised state official, subject to certain conditions. Secondly, there was a challenge to the accepted practice of bulk interceptions on the basis that no lawful authority exists for such practice.

The court held that, in several respects, the Act falls short of meeting the threshold required by section 36 of the Constitution to justify a deviation from the Constitution, in so far as it related to the rights in sections 14, 16(1), 34, and 35(5).

The Court based its decision on the following:

In the first instance, RICA does not make provision for a person to be notified that he or she has been subjected to surveillance. This opens doors to abuse by zealous and / or corrupt officials. The absence of notification means that a person, who had his privacy wrongfully violated, is then deprived of the opportunity to initiate steps in a court of law to seek relief in respect of the intrusion. This results in their right to access to the courts being compromised. As such,

notification of surveillance is critical in observing an individual's section 34 rights. The Court held that the need for protection from abuse through accountability before a court could be achieved by the notification after the interception.

Secondly, the independence and efficiency of the designated judge, tasked with authorising the surveillance, is compromised by the selection process and the unlimited duration of the appointment. The Court held that the appointment should continue to be made by the Minister, but that the Chief Justice should make nominations on who should be appointed.

Thirdly, RICA is mute on the appropriate injunctions on how archived data and past communications are to be managed and used, as well as by whom it may be used.

Fourthly, there is a need to protect communications a lawyer has with his or her client and those that a journalist has with his or her sources. This is not adequately addressed by the Act. The Court held that heightened protection must be applied when either a lawyer or a journalist is to be placed under surveillance.

Lastly, there is no lawful authority that has been appointed to encroach the privacy or freedom of expression rights of anyone whose communications crisscross the world by means of bulk communication. This was found to be unlawful.

The court as such found that the provisions relating to surveillance failed to meet the threshold required by section 36 of the Constitution to justify a violation of the rights in sections 14, 16(1), 34 and 35(5) of the Constitution.

In the meantime, sections were added and amended to remedy the violations complained about. However, the declarations made were suspended for two years to enable Parliament to effect the series of amendments to bring the Act in line with the Constitution.

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