

**CONSTITUTIONAL COURT OF SOUTH AFRICA  
HELD AT BRAAMFONTEIN**

**CCT 278/19**

In the matter between:

**AMABHUNGANE CENTRE FOR  
INVESTIGATIVE JOURNALISM NPC**

First Applicant

**SOLE, STEPHEN PATRICK**

Second Applicant

and

**MINISTER OF JUSTICE AND CORRECTIONAL  
SERVICES**

First Respondent

**MINISTER OF STATE SECURITY**

Second Respondent

**MINISTER OF COMMUNICATIONS**

Third Respondent

**MINISTER OF DEFENCE**

Fourth Respondent

**MINISTER OF POLICE**

Fifth Respondent

**THE OFFICE OF THE INSPECTOR-GENERAL  
OF INTELLIGENCE**

Sixth Respondent

**THE OFFICE FOR INTERCEPTIONS CENTRES**

Seventh Respondent

**THE NATIONAL COMMUNICATIONS CENTRE**

Eighth Respondent

**THE JOINT STANDING COMMITTEE ON  
INTELLIGENCE**

Ninth Respondent

**THE STATE SECURITY AGENCY**

Tenth Respondent

**MINISTER OF TELECOMMUNICATIONS  
AND POSTAL SERVICES**

Eleventh Respondent

and

**MEDIA MONITORING AFRICA TRUST**

First Amicus Curiae

**RIGHT2KNOW CAMPAIGN**

Second Amicus Curiae

**PRIVACY INTERNATIONAL**

Third Amicus Curiae

In the matter between:

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Applicant

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Third Amicus Curiae

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**FILING SHEET**

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PRESENTED FOR SERVICE AND FILING:

1. First *Amicus Curiae*'s written submissions and practice note.

DATED AT JOHANNESBURG ON THIS THE 11<sup>TH</sup> DAY OF FEBRUARY 2020.



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**SOLE, STEPHEN PATRICK** Second Applicant

and

**MINISTER OF JUSTICE AND CORRECTIONAL  
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**MINISTER OF COMMUNICATIONS** Third Respondent

**MINISTER OF DEFENCE** Fourth Respondent

**MINISTER OF POLICE** Fifth Respondent

**THE OFFICE OF THE INSPECTOR-GENERAL  
OF INTELLIGENCE** Sixth Respondent

**THE OFFICE FOR INTERCEPTIONS CENTRES** Seventh Respondent

**THE NATIONAL COMMUNICATIONS CENTRE** Eighth Respondent

**THE JOINT STANDING COMMITTEE ON  
INTELLIGENCE** Ninth Respondent

**THE STATE SECURITY AGENCY** Tenth Respondent

**MINISTER OF TELECOMMUNICATIONS  
AND POSTAL SERVICES** Eleventh Respondent

and

**MEDIA MONITORING AFRICA TRUST** First Amicus Curiae

**RIGHT2KNOW CAMPAIGN** Second Amicus Curiae

**PRIVACY INTERNATIONAL** Third Amicus Curiae

In the matter between:

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Third Amicus Curiae

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**FIRST AMICUS CURIAE'S PRACTICE NOTE**

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**1. HEARING DATE**

1.1. 25 February 2020.



## **2. NAME OF THE PARTIES**

2.1. As above.

## **3. NATURE OF PROCEEDINGS**

3.1. This application pertains to a constitutionality challenge of the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (RICA). This matter raises important questions related to the current surveillance regime's chilling effect on the right to privacy and associated constitutional rights, including, among others, the best interests of the child, and freedom of expression.

3.2. The Applicants apply in terms of Rule 16 of the Constitutional Court Rules for confirmation of the judgment and Orders 1 – 5 of the High Court handed down on 16 September 2019. The Applicants further apply for leave to appeal against the High Court's costs order.

3.3. The First Respondent does not oppose the application for confirmation. The Second Respondent is appealing against the whole judgment and order of the High Court. The Fifth respondent only appeals against Order 1.

3.4. Media Monitoring Africa Trust has been admitted as the First *Amicus Curiae* before the Court.

## **4. ISSUES THAT WILL BE ARGUED BY THE FIRST AMICUS CURIAE**

4.1. The High Court was correct in finding the relevant sections of RICA unconstitutional. MMA aligns itself with the submissions of the Applicants.

4.2. Under the current surveillance regime, children and civil society actors are at risk of rights violations.

- 4.3. The principle of the best interests of the child must be read together with the right to privacy. The state is required to ensure that there are special protections to safeguard the best interests of the child, including the protection of children's privacy rights. Children are vulnerable to many of the harms of the current surveillance regime. The impugned provisions of RICA and the exercise of bulk surveillance are unconstitutional and unlawful when tested against section 28(2) of the Constitution and various international instruments to which South Africa is a signatory. The best interest of the child principle requires the consideration of appropriate child-sensitive safeguards that ensures the protection of the best interests of the child where any surveillance activity implicates the personal information of children.
- 4.4. The High Court was correct in its finding that practising lawyers and journalist fulfil important social roles and are therefore entitled to certain protections within the current surveillance regime. Civil society actors perform a similar public watchdog function to that performed by members of the media, and should also have the benefit of adequate safeguards to be free to impart information. Foreign jurisprudence has underscored the importance of this public watchdog function, and the interplay that this has with the right to freedom of expression and associated rights. Accordingly, the High Court order in respect of practising lawyers and journalists should similarly apply to civil society actors.
- 4.5. A child-sensitive remedy and an expansion of High Court Order 5(1) and (3) to include reference to civil society actors can safeguard the rights of children and civil society actors, as is required by the Constitution.

## **5. ESTIMATED DURATION OF ORAL ARGUMENT**

- 5.1. Ten (10) minutes for the First *Amicus Curiae*.

**6. LIST OF AUTHORITIES ON WHICH PARTICULAR RELIANCE WILL BE PLACED DURING ARGUMENT**

*Centre for Child Law v Media 24 Limited* [2019] ZACC 46

*S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC)

*Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC)

*Steel and Morris v United Kingdom*, Application No. 68416/01, European Court of Human Rights

*Társaság a Szabadságjogokért v Hungary*, Application No. 37374/05, European Court of Human Rights

**MICHAEL POWER**

**AVANI SINGH**

Attorneys with Right of Appearance

Rosebank, Johannesburg, 12 February 2020

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Third Amicus Curiae

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**FIRST AMICUS CURIAE'S WRITTEN SUBMISSIONS**

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## INTRODUCTION

1. South Africa's current surveillance regime unjustifiably infringes on the right to privacy and associated constitutional rights, including, among others, the best interests of the child,<sup>1</sup> freedom of religion, belief and opinion,<sup>2</sup> and freedom of expression.<sup>3</sup> This is particularly so in relation to children and civil society actors.<sup>4</sup>
2. Children fall prey to the current surveillance regime both through the impugned provisions of the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (RICA) and through the exercise of bulk surveillance.
3. Civil society actors may equally be the subject of surveillance due to their role as public watchdogs over the exercise of public and private power.<sup>5</sup> As regular critics

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<sup>1</sup> Section 28(2) of the Constitution of the Republic of South Africa, 1996 (Constitution) provides that: "The child's best interests are of paramount importance in every matter concerning the child."

<sup>2</sup> Section 15(1) of the Constitution provides: "Everyone has the right to freedom of conscience, religion, thought, belief and opinion."

<sup>3</sup> Section 16(1) of the Constitution provides:

"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."

<sup>4</sup> Civil society actors can be defined as "individuals and groups who voluntarily engage in forms of public participation and action around shared interests, purposes or values that are compatible with the goals of the UN: the maintenance of peace and security, the realization of development, and the promotion and respect of human rights." These individuals and groups may include: human rights defenders, including on-line activists; human rights organisations; coalitions and networks; persons with disabilities and their respective organisations; community-based groups; faith-based groups; unions; social movements; professionals contributing directly to the enjoyment of human rights; relatives and associations of victims of human rights violations; and public institutions that carry out activities aimed at promoting human rights", United Nations Office of the High Commissioner for Human Rights, *Civil Society Space and the United Nations Human Rights System* (2014), accessible here: [https://www.ohchr.org/Documents/AboutUs/CivilSociety/CS\\_space\\_UNHRSystem\\_Guide.pdf](https://www.ohchr.org/Documents/AboutUs/CivilSociety/CS_space_UNHRSystem_Guide.pdf).

<sup>5</sup> See, for example, *S v Mamabolo (E TV and Others Intervening)* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 28 where the Court states:

"The freedom to speak one's mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by the freedoms of conscience, expression, assembly, association and political participation protected by ss 15-19 of the Bill of Rights. It is the

of the government and powerful actors, civil society actors — including Media Monitoring Africa (MMA) — are particularly susceptible to being subjected to state surveillance in terms of RICA.

4. Submissions on these two constituent groups are dealt with in turn below. As a general proposition, MMA aligns itself with the findings of the High Court<sup>6</sup> and the submissions of the Applicants in these confirmatory proceedings (Applicants), but proposes the inclusion of a child-sensitive remedy that respects children’s rights, and reference to “civil society actors”, alongside practising lawyers and journalists, in Order 5(1) and (3) of the High Court.

## **I. PROTECTION OF THE RIGHTS OF CHILDREN**

5. While the current surveillance regime threatens the rights of all persons, it is all the more ubiquitous and dangerous when considered in respect of children,<sup>7</sup> taking into consideration the special protections afforded to children in our law, together with the vulnerability and evolving maturity that children bear.<sup>8</sup> This Court has

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right – idealists would say the duty – of every member of civil society to be interested in and concerned about public affairs.”

<sup>6</sup> *Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others* [2019] ZAGPPHC 384; 2020 (1) SA 90 (GP); [2019] 4 All SA 343 (GP) (High Court judgment).

<sup>7</sup> UNICEF, “Privacy, protection of personal information and reputation”, March 2017 a p 4. See, further, Vandenhoe, Türkelli, and Lembrechts, “Children’s rights: A commentary on the Convention on the Rights of the Child and its Protocols, Edward Elgar Publishing: Cheltenham, 2019, who state: “In some ways, considerations of children’s privacy right are similar to those of adults, for example regarding state surveillance, the storage of personal data, algorithms directing automated decisions and the confidentiality of certain relationships. However, in part, children’s rights and needs are different and require special protection.”

<sup>8</sup> Milkaite and Lievens, ‘Children’s right to privacy and data protection around the world: Challenges in the digital realm’, *EJLT*, vol 10, 2019, accessible at <http://ejlt.org/article/view/674/912>. It has been noted that: “Throughout their childhood, children share information, photographs and videos with peers, family or – sometimes – strangers online. What is disclosed is, at times, of a private or even intimate nature. When it comes to privacy, studies have revealed that children generally consider themselves as having a right to privacy online from their parents or peers (i.e. 'social privacy') but have a much less developed understanding about the fact that their privacy may also be infringed upon by State or commercial actors ... It is a well-established fact that, when children navigate the



recognised that: “Courts are now obliged to give consideration to the effect that their decisions will have on the rights and interests of the child. The legal and judicial processes must always be child sensitive.”<sup>9</sup> As such, this Court cannot ignore the impact of the current surveillance regime on the rights and interests of children.

### **The best interests of the child**

6. The principle of the best interests of the child is firmly entrenched in section 28(2) of the Constitution, section 9 of the Children’s Act 38 of 2005,<sup>10</sup> article 3(1) of the Convention of the Rights of the Child<sup>11</sup> (CRC) and article 4(1) of the African Charter on the Rights and Welfare of the Child<sup>12</sup> (ACRWC).<sup>13</sup> This Court has described this principle as the “benchmark for the treatment and protection of children”<sup>14</sup> that requires a child-sensitive approach in all matters involving the child.<sup>15</sup> Notably, it places an obligation on all decision-makers to “ensure that the best interests of the child enjoy paramount importance in their decisions”.<sup>16</sup>

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internet and use mobile apps and connected devices, data about them is collected both by public actors or governments and businesses, which often operate across the globe.”

<sup>9</sup> *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) at para 74.

<sup>10</sup> This provides that: “In all matters concerning the care, protection and well-being of a child the standard that the child’s best interest is of paramount importance, must be applied.”

<sup>11</sup> Article 3 of the CRC provides that: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

<sup>12</sup> Article 4(1) of the ACRWC provides that: “In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.”

<sup>13</sup> South African has signed and ratified both the CRC (signed: 29 January 1993, ratified: 16 June 1995) and the ACRWC (signed: 10 October 1997, ratified: 7 January 2000).

<sup>14</sup> Above n 9 at para 72.

<sup>15</sup> *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 15.

<sup>16</sup> Above n 9 at para 73.

7. The United Nations Committee on the Rights of the Child has explained that the principle of the best interests of the child is three-fold:<sup>17</sup>

7.1. Substantive right: It is a substantive right that creates intrinsic obligations on states.<sup>18</sup>

7.2. Interpretative legal principle: It is a fundamental, interpretative legal principle. Where there are multiple interpretations, a legal provision should be interpreted in a way that most effectively serves the best interests of the child.<sup>19</sup>

7.3. Rule of procedure: It is a rule of procedure, whereby all decisions affecting a child must be rooted in assessments, considerations, and determinations of their best interests.<sup>20</sup>

8. With the above in mind, there are three key considerations to be emphasised:

8.1. Children are rights-bearers: Both the Constitution and international human rights law firmly entrench the position of children as rights-bearers. Importantly, beyond the child-specific rights, children are also entitled to the full array of rights that are guaranteed to all persons, including the right to privacy. It is a fundamental tenet of our

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<sup>17</sup> United Nations Committee on the Rights of the Child, “General Comment No. 14 (2013) on the right of the children to have his or her best interests taken as a primary consideration (art. 3, para 1)”, CRC/C/GC/14, 29 May 2013.

<sup>18</sup> Id at para 6(a).

<sup>19</sup> Id at para 6(b).

<sup>20</sup> Id at para 6(c).

constitutional dispensation that the principle of the best interests of the child “advances the child’s equal worth and freedom”.<sup>21</sup>

8.2. The innate vulnerability of children: As noted by this Court, children do not have the same capacity as adults to protect themselves, and are therefore more in need of protection.<sup>22</sup> The protection of children therefore forms a fundamental component of ensuring the paramountcy of their best interests.<sup>23</sup> This Court has further noted that: “Children are precious members of our society and any law that affects them must have due regard to their vulnerability and their need for guidance . . . Indeed, this Court has recognised that children merit special protection through legislation that guards and enforces their rights and liberties”.<sup>24</sup>

8.3. The need to create conditions to protect children: There exists an obligation for the law to do all that it can to create conditions that protect children and expand their opportunities, so that they can lead productive and happy lives.<sup>25</sup> The principle of the best interests of the child captures the notion that children are developing.<sup>26</sup> The principle acknowledges that it is important for children to form opinions, participate in their communities, and learn as they grow about how to conduct themselves.<sup>27</sup>

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<sup>21</sup> Above n 9 at para 72.

<sup>22</sup> *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 63.

<sup>23</sup> *Centre for Child Law v Media 24 Limited* [2019] ZACC 46 at para 64.

<sup>24</sup> *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC) at para 1.

<sup>25</sup> Above n 15 at para 20.

<sup>26</sup> *J v National Director of Public Prosecutions* [2014] ZACC 13; 2014 (2) SACR 1 (CC); 2014 (7) BCLR 764 (CC) at para 36. See, also, *Le Roux v Dey* [2011] ZACC 4 (CC); 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) at para 212.

<sup>27</sup> Above n 15 at para 19.

9. The state is therefore required to apply the principle of the best interests of the child “by systematically considering how children’s rights and interests are or will be affected by their decisions and actions”.<sup>28</sup> Specifically in relation to the best interests of the child and the right to privacy, states are to “take all appropriate measures to strengthen and ensure respect for the confidentiality of data and the privacy of adolescents, consistent with their evolving capacities.”<sup>29</sup>

### **The privacy rights of children**

10. In the present matter, the principle of the best interests of the child must be read together with the right to privacy contained in section 14 of the Constitution. This Court has repeatedly taken note of the specific considerations that arise when assessing the privacy rights of children, and the special protections that are required to safeguard the best interests of the child in this context:

10.1. In *Johncom Media Investments Limited v M*, this Court dealt with privacy in the context of divorcing parties, and carved out a specific remedy in respect of reportage on children to safeguard their privacy.<sup>30</sup>

10.2. In *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*, this Court held that certain provisions relating to the criminalisation of consensual sexual conduct with children

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<sup>28</sup> United Nations Committee on the Rights of the Child, “General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child”, CRC/GC/2003/5, 27 November 2003 at 4.

<sup>29</sup> United Nations Committee on the Rights of the Child, “General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence”, CRC/C/GC/20, 6 December 2016 at para 1.

<sup>30</sup> *Johncom Media Investments Limited v M* [2009] ZACC 5; 2009 (4) SA 7 (CC); 2009 (8) BCLR 751 (CC) at para 29.

of a certain age infringed the principle of the best interests of the child, as well as the affected adolescent's rights to privacy and human dignity.<sup>31</sup>

10.3. In *Centre for Child Law v Media 24 Limited*, this Court held that the “analysis of the right to privacy is even more pressing when dealing with children” for two reasons: the first hinged on the importance of identity and the acceptance that a child's self-identity is still forming and dependent on the approval of others; the second emphasised that the “protection of the privacy of young persons fosters respect for dignity, personal integrity and autonomy”.<sup>32</sup>

11. The position that the privacy rights of children are deserving of special protection is also firmly entrenched under international law:

11.1. Article 16(1) of the CRC provides that: “No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.” Article 16(2) goes on to guarantee that: “The child has the right to the protection of the law against such attacks.”

11.2. Article 10 of the ACRWC guarantees that: “No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable

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<sup>31</sup> Above n 23 at paras 63-64.

<sup>32</sup> Above n 22 at para 49.

supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.”

12. In the domestic context — and in seeking to give effect to section 14 of the Constitution and the state’s international obligations — the most apparent example of the state’s acceptance of the special importance of the privacy rights of children has been through the enactment of the Protection of Personal Information Act 4 of 2013 (POPIA).<sup>33</sup> While POPIA provides for a general data protection framework for the processing of personal information, sections 34 to 35 of POPIA deal specifically with the rights of children. In this regard:

12.1. Prohibition on the processing of personal information of children:

Section 34 of POPIA proscribes the processing of personal information of children, subject to a narrow and finite list of exceptions set out in section 35 of the POPIA.

12.2. Finite list of exceptions: According to section 35 of POPIA, the only exceptions to the general proscription on the processing on personal information pertaining to children are where such processing is carried out with the prior consent of a competent person; necessary for the establishment, exercise or defence of a right or obligation in law; necessary to comply with an obligation of international public law; for historical, statistical or research purposes to the extent that the purpose

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<sup>33</sup> While the substantive provisions of POPIA are not yet in force, it has been signed into law. In this regard, POPIA was assented to by the President and published in GG NO. 37067 (26 November 2013). For an overview of POPIA, see ALT Advisory, ‘Complying with the South African Protection of Personal Information Act 4 of 2013’, accessible at <https://altadvisory.africa/popia/>.

serves a public interest; or of personal information which has deliberately been made public by the child with the consent of a competent person.

13. The General Data Protection Regulation of the European Union 2016/679 (GDPR) contains a similar provision, and notes that: “Children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data”.<sup>34</sup>
14. The exercise of the current surveillance regime may arguably be exempted from compliance with POPIA, to the extent that the processing of personal information is done by or on behalf of a public body which involves national security.<sup>35</sup> However, this exemption only applies “to the extent that adequate safeguards have been established in legislation for the protection of such personal information”.<sup>36</sup> The Court of Justice of the European Union (CJEU) has explained that “adequate safeguards” in the context of data protection law means that the safeguards must be “essentially equivalent” — both in law and in practice — to that guaranteed by the data protection law.<sup>37</sup>
15. It is apparent from the record in the present matter, as well as from the provisions of RICA, that no appropriate safeguards have been established within the current surveillance regime to protect the personal information of children in the context

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<sup>34</sup> Recital 38 of the GDPR.

<sup>35</sup> Section 6(1)(c) of POPIA.

<sup>36</sup> *Id.*

<sup>37</sup> *Maximillian Schrems v Data Protection Commission*, Case C-362/14, Court of Justice of the European Union (6 October 2015).

of surveillance. Sections 34 and 35 of POPIA make clear that the legislature has a stated intention to protect the privacy rights of children and ensure that their personal information is protected from intrusion, as well as to ensure that national security legislation — such as RICA — cannot trump the importance of data protection without catering for adequate safeguards.

### **The current surveillance regime violates the rights of children**

16. The current surveillance regime infringes the rights to privacy of children and the principle of the best interests of the child. This Court has explained that the principle of the best interests of the child should not only be applied where legislation is inflexible in a particular case, but also where a statutory provision conflicts with the best interests of children in general. In this regard, this Court has stated that: “The best-interests principle also applies in circumstances where a statutory provision is shown to be against the best interests of children in general, for whatever reason. As a matter of logic what is bad for all children will be bad for one child in a particular case.”<sup>38</sup>

17. In respect of the impugned provisions of RICA and the exercise of bulk surveillance, the rights and interests of children are impacted through the following:

17.1. Lack of notification if a child has been subjected to surveillance:<sup>39</sup> A child should have the right to be notified if they have been surveilled, at least

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<sup>38</sup> Above n 23 at para 74.

<sup>39</sup> Order no. 1 of the High Court judgment.



after the surveillance has ended, in order to, among others, be in a position to challenge the lawfulness of that surveillance or seek redress. However, RICA places no age limit for the persons against whom an interception direction may be obtained. In the current surveillance regime, a child may be subject to an interception direction, or be subjected to surveillance as part of a third-party communication, and never be alerted to this fact. This is a significant intrusion into the legitimate expectation of privacy that a child enjoys, in line with his or her constitutional rights and best interests, and is not rationally connected to the purpose which the provision seeks to achieve. Particularly where such communications are between parents and children, this is a severe encroachment into the inner sanctum of their private lives.

- 17.2. Lack of adversarial process when an interception direction has been granted involving a child:<sup>40</sup> MMA supports the contention that there needs to be some form of established adversarial process to ensure that the rights and interests of the subject of surveillance are properly protected before an order is granted.<sup>41</sup> This is all the more important and urgent where a child is either the subject of surveillance or where there is a reasonable likelihood that a child will become the subject through a third-party communication. This coheres with the state's obligations regarding the best interests of the child, which in terms of article 4(2) of the ACRWC

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<sup>40</sup> Order no. 3 of the High Court judgment.

<sup>41</sup> Applicants' heads of argument at paras 69-70.

includes that: “In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.”<sup>42</sup>

- 17.3. Lack of adequate safeguards when surveillance data is obtained regarding a child:<sup>43</sup> RICA draws no distinction amongst the types of communications obtained, whether it be for commercial or personal reasons, or for protecting the rights of third parties that feature in those communications, not even where the third parties are children. The current surveillance regime therefore provides for a widely invasive surveillance regime, that falls foul of the right to privacy, and in respect of children specifically, foul of the protections that the legislature has sought to guarantee through sections 34 and 35 of POPIA.
- 17.4. Retention of metadata:<sup>44</sup> As has been noted by the Applicants, the collection and analysis of metadata plainly involves a limitation to the right to privacy, as it can be used to track movements and be triangulated to disclose reams of information about a person.<sup>45</sup> The processing of that

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<sup>42</sup> Similarly, article 12(2) of the CRC provides that “the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law”.

<sup>43</sup> Orders no. 3 and 4 of the High Court judgment.

<sup>44</sup> Order no. 4 of the High Court judgment.

<sup>45</sup> Applicant’s heads of argument at para 24.2.

metadata — and accordingly the intrusion into the right to privacy — occurs at the point of first collection, and continues through the lifespan of that data until it is finally erased. Again, RICA draws no distinction between the metadata of children and that of adults, and the obligations on service providers to collect and retain such metadata (including of children) for an extensive period is a gross infringement of the right to privacy of children, particularly taking into account their vulnerability and evolving maturity.<sup>46</sup>

17.5. Exercise of bulk surveillance:<sup>47</sup> The exercise of bulk surveillance affects every person whose communications or other signals may be intercepted through the current regime. However, taking into account the rights of children, it bears particular emphasis that “[i]f governments are able to link individual profiles with data intercepted by mass surveillance, as many believe feasible, this would allow authorities to build and maintain records of children’s entire digital existence.”<sup>48</sup> At present, in the absence of any empowering framework for the state authorities to conduct bulk surveillance, there can be no child-sensitive safeguards in place.

18. This Court has recognised that “foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma.”<sup>49</sup> It

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<sup>46</sup> See above n 8.

<sup>47</sup> Order no. 6 of the High Court judgment.

<sup>48</sup> Above n 7 at 15.

<sup>49</sup> Above n 15 at para 19.

is submitted that the current surveillance regime does violence to the rights and interests of children, fails to respect, protect and promote their privacy rights, and violates the principle of the best interests of the child. There is therefore urgent and immediate need for this regime to be declared unconstitutional, and for the remedy crafted by this Court to be child-sensitive in its approach.

### **Interplay of RICA and POPIA: Proposed interim remedy**

19. In addition to the grounds raised by the Applicants, MMA submits that the impugned provisions of RICA and the exercise of bulk surveillance are unconstitutional for their violation of the privacy rights of children and the principle of the best interests of the child, and must therefore be declared unconstitutional and invalid. MMA supports the order of the High Court to afford the legislature a stipulated period to remedy these constitutional defects.
20. However, there remains a question as to the appropriate child-sensitive remedy to be implemented in the interim, pending the grace period afforded to the legislature. MMA urges this Court to draw guidance from sections 34 and 35 of POPIA, to put in place a regime that safeguards the best interests of the child where any surveillance activity implicates the personal information of children.
21. In this regard, MMA proposes the following wording for a child-sensitive remedy:

“In the interim, in respect of any child whose personal information or private communications are collected, retained or otherwise processed as part of any surveillance activity contemplated by the

impugned provisions of RICA or otherwise in terms of this order, the best interests of the child shall be considered as of paramount importance and such surveillance may only be carried out provided that appropriate safeguards are established, and only if it is:

- (a) with the prior consent of a competent person;
- (b) necessary for the establishment, exercise or defence of a right or obligation in law;
- (c) necessary to comply with an obligation of international public law;
- (d) for historical, statistical or research purposes to the extent that—
  - (i) the purpose serves a public interest and the processing is necessary for the purpose concerned; or
  - (ii) it appears to be impossible or would involve a disproportionate effort to ask for consent, and sufficient guarantees are provided for to ensure that the processing does not adversely affect the individual privacy of a child to a disproportionate extent; or
- (e) of personal information which has deliberately been made public by the child with the consent of a competent person.”

22. In developing an interim remedy, MMA is not asking this Court to directly enforce the presently inoperative provisions of POPIA. Rather — in a similar vein to that

which this Court has done in previous judgments<sup>50</sup> — MMA submits that this Court should provide interim guidance to the relevant authorities, and in doing, look to POPIA on how the processing of personal information relating to children can be circumscribed in a child-sensitive and constitutional manner in any circumstances where the surveillance activities being conducted implicate the rights of children.

## **II. PROTECTION OF THE RIGHTS OF CIVIL SOCIETY ACTORS**

### **Public watchdog role performed by civil society actors**

23. The second tenet of MMA's submissions relates to the protection from surveillance of civil society actors.<sup>51</sup> MMA supports the order made by the High Court that sections 16(5), 17(4), 19(4), 21(4)(a) and 22(4)(b) of RICA are inconsistent with the Constitution and invalid to the extent that they fail to expressly address the circumstances where a subject of surveillance is either a practising lawyer or journalist.<sup>52</sup> However, MMA urges this Court to extend this order to include protection for civil society actors, who are also bound to protect the confidentiality of their clients, sources or whistle-blowers who engage civil society actors.

24. Civil society actors perform a similar public watchdog function to that performed by members of the media. These individuals and groups must similarly be free to receive and impart information, as contemplated in section 16(1) of the

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<sup>50</sup> See, for example, *Mail and Guardian Media Ltd and Others v Chipu NO and Others* [2013] ZACC 32; 20113 (6) SA 367 (CC); 2013 (11) BCLR 1259 (CC) at para 115.6.

<sup>51</sup> See above n 4.

<sup>52</sup> Order no. 5 of the High Court judgment.

Constitution, in addition to a raft of other constitutional protections,<sup>53</sup> which include the constitutional freedoms of conscience,<sup>54</sup> expression,<sup>55</sup> assembly,<sup>56</sup> association<sup>57</sup> and political participation<sup>58</sup> protected in the Bill of Rights. As with journalists, if civil society actors are not able to enjoy a reasonable expectation of privacy, they would be left bereft of the rights which they ought to have, and consequently rights violations, corruption, maladministration and other wrongdoing would be left unexposed and unchallenged.

25. The importance of this public watchdog function, and the interplay that this has with the right to freedom of expression and associated rights, has been repeatedly emphasised by the European Court of Human Rights (ECtHR) in the context of the European Convention on Human Rights (European Convention). For example:<sup>59</sup>

25.1. In *Steel and Morris v United Kingdom*, the ECtHR noted “the legitimate and important role that campaign groups can play in stimulating public discussion”.<sup>60</sup>

25.2. In *Társaság a Szabadságjogokért v Hungary*, the ECtHR went further and considered the applicant organisation, which was involved in the

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<sup>53</sup> See above n 5.

<sup>54</sup> Section 15 of the Constitution.

<sup>55</sup> Section 16 of the Constitution.

<sup>56</sup> Section 17 of the Constitution.

<sup>57</sup> Section 18 of the Constitution.

<sup>58</sup> Section 19 of the Constitution.

<sup>59</sup> See ARTICLE 19, ‘ARTICLE 19 tells Strasbourg Court that mass surveillance is incompatible with the Convention’, 24 April 2019, accessible at <https://www.article19.org/resources/article-19-tells-strasbourg-court-that-mass-surveillance-is-incompatible-with-the-convention//>.

<sup>60</sup> Application No. 68416/01 at para 95.

protection of the right to information, “may therefore be characterised, like the press, as a social watchdog”.<sup>61</sup> The ECtHR went on to explain that: “In these circumstances, the Court is satisfied that its activities warrant similar [European] Convention protection to that afforded to the press.”<sup>62</sup>

26. As noted by ARTICLE 19, one of the important corollaries of the public watchdog function performed by civil society actors is that, like the media, they must be able to disclose facts in the public interest, comment on them and contribute to the transparency of activities of public authorities,<sup>63</sup> and should therefore benefit from the same legal protections as the media, such as source protection.<sup>64</sup> As has been noted by the ECtHR: “The function of the press includes the creation of forums for public debate. However, the realisation of this function is not limited to the media or professional journalists.”<sup>65</sup> MMA submits that this should be extended to civil society actors.

### **Safeguards for the protection of civil society actors**

27. As with the Applicants’ submissions in respect of the media, MMA does not submit that civil society actors should be immune from surveillance. Rather, MMA submits that the High Court order protecting practising lawyers and

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<sup>61</sup> Application No. 37374/05 at para 27.

<sup>62</sup> Id. The ECtHR has further recognised the important role of civil society actors specialising in environmental issues, animal rights groups and those working on ensuring respect for human rights, democracy and the rule of law. See above n 59 at para 4.

<sup>63</sup> Id.

<sup>64</sup> Id at para 5.

<sup>65</sup> Above n 61 at para 9.



journalists should be extended to protect civil society actors.<sup>66</sup> In this regard, this would practically require that — in line with sections 14 and 16(1) of the Constitution, read with the founding values of accountability, responsiveness and openness contained in section 1(d) of the Constitution — the following safeguards are implemented where an order is sought in terms of sections 16(5), 17(4), 19(4), 21(4)(a) or 22(4)(b) of RICA against a civil society actor:

- 27.1. Specific notice to the designated judge: The application for the order concerned must disclose and draw to the designated judge’s attention that the subject is a civil society actor.
  - 27.2. Necessary and appropriate: The designated judge shall only grant the order sought if satisfied that the order is necessary and appropriate, notwithstanding the fact that the subject is a civil society actor.
  - 27.3. Further limitations or conditions: If the designated judge grants the order sought, the designated judge may include such further limitations or conditions considered necessary in view of the fact that the subject is a civil society actor.
28. MMA submits that this is in line with the spirit and purport of the Constitution and the High Court judgment, in which the High Court expressly noted that the protection afforded to practising lawyers and journalists was not just because of the professional roles that they play, but also because of the “social roles which are part and parcel of the fabric of a society ordered upon the premise that the Rule

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<sup>66</sup> Order No. 5 of the High Court judgment.

of Law must prevail”.<sup>67</sup> It would further serve to safeguard civil society actors against unlawful and impermissible surveillance, and enable them to perform their roles as public watchdogs in an open and accountable democracy.

## CONCLUSION

29. In determining the appropriate relief in the present matter, MMA enjoins this Court to confirm the order of constitutional invalidity of RICA, and further to broaden the scope of application of the order to safeguard the rights of children and civil society actors, as is required by the Constitution.<sup>68</sup>

30. In the result, MMA submits that, in addition to confirming Orders 1 to 5 of the High Court, this Court should:

30.1. Include an interim child-sensitive remedy; and

30.2. Expand Order 5(1) and (3) of the High Court to include reference to civil society actors, alongside practising lawyers and journalists.

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Attorneys with Right of Appearance

Rosebank, Johannesburg, 11 February 2020

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<sup>67</sup> High Court judgment at para 112.

<sup>68</sup> *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 19. For an example of where this Court has gone beyond the scope of the court a quo's findings in confirmation proceedings based on the submissions of the amicus curiae, see, for example, *Print Media South Africa and Another v Minister of Home Affairs and Another* [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 (12) BCLR 1346 (CC) at paras 34-38 and 90.

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