CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 278/19

In the matter between:

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
BESS NKABINDE N.O.	Second Respondent
AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	Third Respondent
STEPHEN PATRICK SOLE	Fourth Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fifth Respondent
MINISTER IN THE PRESIDENCY: STATE SECURITY	Sixth Respondent
MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES	Seventh Respondent
MINISTER OF DEFENCE AND MILITARY VETERANS	Eighth Respondent
MINISTER OF POLICE	Ninth Respondent
OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE	Tenth Respondent
OFFICE FOR INTERCEPTION CENTRES	Eleventh Respondent

NATIONAL COMMUNICATIONS CENTRE Twelfth Respondent

JOINT STANDING COMMITTEE ON INTELLIGENCE Thirteenth Respondent

STATE SECURITY AGENCY Fourteenth Respondent

Neutral citation: *President of the Republic of South Africa v Speaker of the National Assembly and Others* [2025] ZACC 12

Coram: Maya CJ, Madlanga ADCJ, Dambuza AJ, Goosen AJ, Kollapen J, Majiedt J, Mhlantla J, Opperman AJ, Rogers J, Theron J and Tshiqi J

Judgment: Madlanga ADCJ (unanimous)

Decided on: 25 July 2025

ORDER

On application for direct access for supplementary just and equitable relief, the following order is made:

1. Pending the coming into effect of legislation that cures the defects causing the constitutional invalidity identified in *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services* [2021] ZACC 3:
   (a) Section 1 of the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (RICA) shall be deemed to include the following definition of "designated Judge"—

   "designated Judge" means any one of three Judges of the High Court who is retired or discharged from active service under section 3(2) of the Judges' Remuneration and Conditions of

Employment Act 47 of 2001, who is nominated by the Chief Justice, and upon which nomination is, and must be, appointed by the Minister, for a non-renewable term of 24 months, to perform the functions of a designated Judge for purposes of this Act."

(b) 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 sections 16, 17, 18, 20, 21, 22 or 23, whichever is applicable, is a journalist or practising lawyer, the application 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 if 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 their sources, or, in the case of a practising lawyer, to protect the legal professional privilege enjoyed by their 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 available, 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 a 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 a 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."

2. In the event that the legislation envisaged in paragraph 1 does not come into effect, the orders in paragraphs 1(a) and (b) will continue to apply.

JUDGMENT

MADLANGA ADCJ (Maya CJ, Dambuza AJ, Goosen AJ, Kollapen J, Majiedt J, Mhlantla J, Opperman AJ, Rogers J, Theron J and Tshiqi J concurring):

[1] This is an application for supplementary just and equitable relief in terms of section 172(1)(b) of the Constitution.[1] We are determining it without an oral hearing.

[1] Section 172(1)(b) of the Constitution provides:

"When deciding a constitutional matter within its power, a court—

. . .

The relief is sought in the context of a period of suspension of constitutional invalidity which expired without corrective legislation having been passed. An interim remedy that was ordered to operate during the period of suspension expired simultaneously with the expiry of the period of suspension. The applicant, the President of the Republic of South Africa, is yet to decide finally whether to give his assent to the Bill[2] in terms of which Parliament seeks to address the constitutional defect. He is yet to decide whether to sign the Bill as is or after amendment. What is pending is Parliament's response to the President's query raised in a referral of the Bill back to Parliament in terms of section 79(1) of the Constitution.[3] Crucially, in this application the President is not seeking a revival of the expired period of suspension. He only seeks supplementary just and equitable relief in terms of section 172(1)(b). So, at issue is whether that relief should be granted.

[2] Here is how all this arose. On 4 February 2021 this Court confirmed a declaration made by the High Court of South Africa, Gauteng Division, Pretoria that the Regulation of Interception of Communications and Provision of Communication-Related Information Act[4] (RICA) was constitutionally invalid to the extent that it fails to—

> (a) provide for safeguards to ensure that a Judge designated in terms of section 1 to authorise interceptions of communications, issue warrants and perform any other ancillary or incidental functions is sufficiently independent;

> (b) may make an order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity, and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[2] Regulation of Interception of Communications and Provision of Communication-Related Information Amendment Bill.

[3] Section 79(1) of the Constitution provides:

> "The President must either assent to and sign a Bill in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration."

[4] 70 of 2002.

(b) provide for notifying the subject of surveillance under RICA of the fact of their 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 directions for the interception of communications are sought and obtained ex parte;

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

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

[3] This was in *AmaBhungane*.[5] The Court ordered that the declaration of constitutional invalidity would take effect from the date of the judgment, but that it be suspended for 36 months to afford Parliament an opportunity to cure the defects causing the invalidity. It also granted an interim remedy that was to apply during the period of suspension. In this regard the order decreed that during the period of suspension, 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 sections 16, 17, 18, 20, 21, 22 or 23, whichever is applicable, is a journalist or practising lawyer, the application 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.

[5] *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services* [2021] ZACC 3; 2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC).

(2) The designated Judge must grant the direction, extension of a direction or entry warrant referred to in subsection (1) only if 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 or 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 available, 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 a 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 a 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."

[4] The directions referred to in the sections added by the Court are directions issued under RICA by a designated Judge for the surveillance of individuals or interceptions of communications for purposes of law enforcement and national security.

[5] The 36-month period of suspension was due to end on 3 February 2024.[6]

[6] After what appears (and I use "appears" advisedly) to have been a thoroughgoing process, Parliament passed the Bill on 6 December 2023. This was just under two

[6] I say this despite the fact that the President and the Minister of Police say, respectively, that the expiry date was 4 February 2024 and 5 February 2024.

months before the date of expiry of the period of suspension. The Bill was immediately forwarded to the President for signature and promulgation.

[7] Although aware of the impending expiry of the period of suspension, the President says that he was unaware that the interim remedy was linked to the period of suspension. He thought that the interim remedy was to endure until the Bill had been passed into law. That is what his legal advisors told him. In the event, the date of expiry of the period of suspension passed without the President having signed the Bill. On 30 August 2024 the Director-General of the Department of Justice and Constitutional Development wrote a letter to the Director-General in the Presidency expressing concern that the Bill was yet to be signed. He also drew attention to the fact that the term of the designated Judge was to expire on 10 September 2024. The Director-General also said:

> "Without the new RICA Act, the designated Judge is already constrained in performing her functions as they are not grounded on any legislation. Any function that she may perform at this juncture may lead to an illegality which does not augur well for national security. It is therefore my humble request that you please advise the President to consider signing the RICA Bill into law urgently."

[8] It is through this letter that the President's legal advisors became aware of the fact that the interim remedy had lapsed when the period of suspension expired. The President explains that, for a variety of reasons, it took him a long time to take a decision on whether to sign the Bill into law. First, his legal advisors have to do research on each Bill that lands on his table. There is a large number of such Bills. After the research, the advisors then advise the President on the course to take with regard to each Bill. What exacerbated the situation around the time the President received the Bill in issue here is that, since its term was to come to an end leading up to the 2024 elections, Parliament pushed for the enactment of all Bills that were close to fruition on its side by finalising them and forwarding them to the President for signature. That resulted in an unusually high number of bills requiring the President's assent. In turn, that meant

that the President's advisors had a huge number of bills in respect of which to conduct research.

[9] The President himself says that he had a number of engagements that he could not get out of, including international travel and paying particular attention to the crisis that involved the widely publicised deaths of children as a result of ingesting foods purchased from "spaza shops". All of this meant that it was only during October 2024 that the President was able to apply his mind to the memorandum of advice that had since been received from his legal advisors. Based on the advice, he concluded that the Bill was unconstitutional as it did not adequately address the defects identified by this Court in *AmaBhungane*. According to the President, this was so particularly in relation to post-surveillance notification. In November 2024 the President advised the first respondent, the Speaker of the National Assembly, in terms of section 79(1) of the Constitution, of his decision.

[10] Still in November 2024, the State Attorney was instructed to brief counsel to prepare an application that would seek supplementary just and equitable relief in view of the fact that, with an expired term of the designated Judge, RICA had become inoperable. Indeed, a large number of requests for directions and warrants remain unissued as a result of the fact that there is no designated Judge.

[11] After further delays from November 2024, this application was only brought on 13 December 2024.

[12] The application is unopposed. Pursuant to this Court's directions of 14 January 2025, the sixth respondent, the Minister in the Presidency: State Security, and the ninth respondent, the Minister of Police, filed written submissions. Both Ministers support the President's request for supplementary just and equitable relief. They submit briefly that if the relief is granted, it will ensure RICA's operability.

[13] Both Ministers apply for condonation of the late filing of their written submissions. Condonation is not opposed, the delay in filing the written submissions is minimal, the explanation for the delay is adequate and there is no prejudice to the President. Condonation is granted.

[14] The President is well aware of the fact that our jurisprudence does not admit of the extension of a period of suspension of a declaration of constitutional invalidity which has already lapsed.[7] So, he is not asking for that. What he is asking for, instead, is supplementary just and equitable relief in terms of section 172(1)(b) of the Constitution, which is to apply pending the coming into effect of the amended RICA. As it held in *Ex parte Minister of Home Affairs*, this Court does have the power to grant such relief.[8]

[15] Effectively, what the President is asking for is a variation of the *AmaBhungane* order. Such a variation engages this Court's jurisdiction.[9] Indeed, that much is plain as the applicant founds the relief sought on a constitutional provision, section 172(1)(b) of the Constitution.[10]

[16] In terms of sections 16, 17, 18, 20, 21 or 23 of RICA, directions for the interception of communications are issued by a designated Judge. As indicated, the term of the then designated Judge has expired and, as a result of the declaration of constitutional invalidity which affected the appointment of a designated Judge, no other

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[7] See *Ex parte Minister of Home Affairs; In re Lawyers for Human Rights v Minister of Home Affairs* [2023] ZACC 34; 2024 (1) BCLR 70 (CC); 2024 (2) SA 58 (CC) (*Ex parte Minister of Home Affairs*) and *Ex parte Minister of Social Development* [2006] ZACC 3; 2006 (4) SA 309 (CC); 2006 (5) BCLR 604 (CC) at para 38.

[8] *Ex parte Minister of Home Affairs* id at para 40 reads:

> "Read in its own terms and properly understood, the judicial decree in para 4 continues to operate despite the lapsing of section 34(1)(b) and (d). This Court has the power, through section 172(1)(b), to order supplementary just and equitable relief to provide certainty on the current status and effect of section 34(1)(b) and (d). As stated, this Court cannot revive statutory provisions after the lapsing of the period of suspension. But there is nothing in our law that precludes us from ordering amplified just and equitable relief to supplement the 2017 order."

[9] See *Zondi v MEC, Traditional and Local Government Affairs* [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC) at para 37.

[10] Also see the quotation from *Ex parte Minister of Home Affairs* above n 8.

designated Judge was appointed. The effect is that no interception directions can be, or are being, issued. So, what RICA seeks to achieve has come to a standstill. Put differently, RICA has been rendered inoperable. About the importance of RICA, here is what this Court held in *AmaBhungane*:

> "[L]et me render a collection of the purposes for which interception directions may be issued. They may be issued if there are reasonable grounds to believe that: 'a serious offence has been or is being or will probably be committed'; it is necessary to gather information concerning an actual threat to the public health or safety, national security or compelling national economic interests; it is necessary to gather information concerning a potential threat to the public health or safety or national security; the rendering of assistance to a foreign country in connection with or in the form of interception of communications is in accordance with an international mutual assistance agreement or is in the interests of South Africa's international relations or obligations; or, lastly, it is necessary to gather information concerning property which is or could probably be an instrumentality of a serious offence or is or could probably be the proceeds of unlawful activities. So, the dislocation of our surveillance system would have a grave impact on matters that are important to the country and its people."[11]

[17] That being the case, it is axiomatic that we cannot allow RICA to continue being inoperable. A just and equitable interim remedy must be granted in terms of section 172(1)(b) of the Constitution. In my view, RICA will become immediately operable if an interim remedy addressing the unconstitutionality of the appointment of a designated Judge is put in place. The President is not content with only that interim remedy and seeks, instead, additional relief.[12] I do not see the need for this additional

[11] *AmaBhungane* above n 5 at para 138.

[12] The additional relief requested by the President is as listed below.

> 1. Applications in terms of sections 16, 17, 18, 20, 21, 22 or 23 of RICA to a designated Judge shall be heard by a panel consisting of three designated Judges appointed in accordance with the definition of a designated Judge.
>
> 2. RICA shall be deemed to include the following sections:
>
> "**Section 37A Management of data**
>
> (1) The procedures to be followed for the processing, examining, copying, sharing, disclosing, sorting through, using, storing or destroying of any data obtained pursuant to, and resulting from the interception of communications

relief. The real reason the President has approached this Court is to get it to address the problem of the inoperability of RICA. With the grant of just and equitable relief that will render RICA operable, the other relief is not necessary at this stage. This should not be understood to mean that under no circumstances will this Court grant additional supplementary relief that is not necessary. That is something to be determined in accordance with the facts and circumstances of each case in the Court's exercise of its remedial power under section 172(1)(b). In the present case, I do not find the circumstances to warrant the grant of the additional relief.

[18] What I see as just and equitable relief is the extension of the interim remedy that was granted in *AmaBhungane*. In addition, it is necessary to address the issue of the appointment of a designated Judge. I believe that the unconstitutionality, which arose

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in terms of this Act and section 205 of the Criminal Procedure Act 1977, must be in the prescribed manner and on the prescribed conditions.

(2) The development of procedures in terms of subsection (1) must take into account the principles for the safeguarding of data, including—

(a) accountability, together with conditions for lawful processing, examining, copying, sharing, disclosing, sorting through, using, storing or destroying;

(b) processing limitations, including processing in a lawful and reasonable manner and not processing more data than what is required in respect of the purpose;

(c) purpose–specific processing of data, including processing for a lawful purpose which is explicit, not retaining data for longer than is necessary in connection with the purpose for which it was obtained and reviewing compliance with destruction instructions;

(d) limitation of the use of data for lawful purpose, including restricting access to data on certain conditions, conditions for sharing and disclosing data and limitations on the copying of data including the keeping of relevant records;

(e) openness and transparency;

(f) conditions for the storage of data, including the type of data stored and the manner of storage;

(g) securing safeguards, including controlled access to data, processes to prevent unlawful modification and unauthorised disclosure, procedures to identify any foreseeable internal and external risks, and policies and procedures to safeguard information; and

(h) participation of the data subject, though post–surveillance notification."

"**Section 62D Regulations**

The Minister may make regulations necessary to give effect to section 37A of the Act."

from the fact that appointments were made by the Minister responsible for the administration of RICA (namely the Minister of Justice and Constitutional Development) and that their periods of appointment could be extended by the Minister for any number of times, can be adequately addressed by interposing the participation of the Chief Justice in the appointment process. The idea is for the Chief Justice to nominate a Judge who is to be appointed as a designated Judge. And the Minister must appoint the nominee.

[19] As alluded to in the President's affidavit, there has since been an accumulation of applications brought in terms of sections 16, 17, 18, 20, 21, 22 and 23 of RICA for directions or entry warrants that require a nod by the designated Judge. The President asked that three designated Judges be appointed to consider applications for directions jointly. While I agree that provision must be made for the appointment of three designated Judges, I take the view that an application should be considered and decided by a single designated Judge. That will be beneficial in working through the backlog. Even when there is no longer a backlog, the designated Judges will each not bear a heavy load and the process will go much quicker.

[20] The President did not ask for costs and it is fitting in this matter that there be no award of costs.

[21] The following order is made:

1. Pending the coming into effect of legislation that cures the defects causing the constitutional invalidity identified in *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services* [2021] ZACC 3:
    (a) Section 1 of the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (RICA) shall be deemed to include the following definition of "designated Judge"—

"designated Judge" means any one of three Judges of the High Court who is retired or discharged from active service under section 3(2) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001, who is nominated by the Chief Justice, and upon which nomination is, and must be, appointed by the Minister, for a non-renewable term of 24 months, to perform the functions of a designated Judge for purposes of this Act."

(b) 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 sections 16, 17, 18, 20, 21, 22 or 23, whichever is applicable, is a journalist or practising lawyer, the application 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 if 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 their sources, or, in the case of a practising lawyer, to protect the legal professional privilege enjoyed by their 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 available, 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 a 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 a 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."

2. In the event that the legislation envisaged in paragraph 1 does not come into effect, the orders in paragraphs 1(a) and (b) will continue to apply.

For the Applicant:	G Marcus SC and K Perumalsamy instructed by Office of the State Attorney, Pretoria
For the Sixth Respondent:	F J Nalane SC and N Seme instructed by Office of the State Attorney, Pretoria
For the Ninth Respondent:	M S Phaswane and M Moropa instructed by Office of the State Attorney, Pretoria