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DISPUTE RESOLUTION ALERT

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The Constitutional Court's intervention vindicates the right to a basic education at the 11th hour

In November 2020, while many were preparing for the festive season, a high school learner's hopes to complete matric were suspended. Johannes Moko's experience is detailed in *Moko v Acting Principal of Malusi Secondary School and Others* (CCT 297/20) [2020] ZACC 30 – a judgment that centres on the right to a basic education protected by Section 29(1) of the Constitution.

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In the present case, the court was called upon to consider intrusions in the context of surveillance of individuals, including the interception of their private communications.

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In the present case, the court was called upon to consider intrusions in the context of surveillance of individuals, including the interception of their private communications. RICA regulates the interception of both direct and indirect communications, which are defined broadly to include oral conversations, email and mobile phone communications that are transmitted through a postal service or telecommunication system.

The Applicants in the High Court were AmaBhungane Centre for Investigative Journalism NPC and Mr Sole, a journalist who has been subject to state surveillance. Mr Sole suspected his communications were being intercepted. After an inquest into the reasons for the surveillance, Mr Sole could not obtain any information regarding the reason for and lawfulness of the interception. The Applicants accordingly approached the High Court alleging that RICA is unconstitutional to the extent that it fails to provide adequate safeguards to protect the right to privacy.

The High Court declared RICA unconstitutional to the extent of the following failures:

- (i) No provision is made in RICA for a subject of surveillance to be notified that she or he has been subject to surveillance;
- (ii) A member of the Executive (in this instance, the Minister of Justice) is given an unfettered discretion in terms of RICA to renew the term of a designated Judge and therefore fails to ensure the designated judge's independence;
- (iii) RICA does not contain an adversarial process or other mechanism to ensure protection of the subject of state surveillance in the *ex parte* process;
- (iv) RICA lacks safeguards concerning custody and management of information gathered by surveillance;
- (v) RICA fails to provide any special circumstances where the subject of surveillance is a practising lawyer or a journalist.

The Constitutional Court (CC) had to consider whether or not to confirm the order of constitutional invalidity of certain provisions of RICA based on the aforementioned grounds. The CC explained that "*the country's apartheid history was characterised by the wanton invasion of privacy of people by the state through searches and seizures, the*

An end to secret state surveillance under RICA...continued

RICA was held to be unconstitutional insofar as it failed to provide for notification to the subject of surveillance as soon as it can be given without jeopardising the purpose of the surveillance.

interception of their communications and generally by spying on them in all manner of forms". The CC held that the constitutionally-protected right to privacy seeks to be one of the guarantees that South Africa will not again act like the police state that was under apartheid. As the surveillance and interception of a person's communications under RICA is a "highly invasive violation of privacy", it infringed section 14 of the Constitution. The CC then considered whether the limitation of this right was reasonable and justifiable and whether RICA contained sufficient safeguards to reduce the risk of unnecessary intrusions.

In respect of the notification issue, the CC found that a blanket prohibition on notification facilitates abuse of interception directions, which are granted in complete secrecy. In the event that such direction ought not to be granted, it would never be challenged as the subject of surveillance would never know of such direction. The court held that "an individual whose privacy has been violated in the most intrusive, egregious and unconstitutional manner never becomes aware of this and is thus denied an opportunity to seek legal redress for the violation of his or her right to privacy". The lack of notification facilitates the abuse of the process under the cloak of secrecy.

The CC held that post-surveillance notification would serve a purpose comparable to less restrictive means and should therefore be the default position.

Accordingly:

- RICA was held to be unconstitutional insofar as it failed to provide for notification to the subject of surveillance as soon as it can be given without jeopardising the purpose of the surveillance.

The open-ended discretion in respect of appointments of the designated Judges and their renewal raised concern for the CC and it held that a reasonable apprehension that the independence of the designated Judge may be undermined by external interference by the Executive could be raised. RICA does not provide the designated Judge with an adequate level of structural, operational or perceived autonomy. Therefore, the CC held that:

- RICA was unconstitutional to the extent that it fails to ensure adequate safeguards for an independent judicial authorisation of interception.

Regarding the fact that interception directions were applied for and granted on an *ex parte* basis, the CC held that means to temper the effects of the clandestine, one-sided nature of the process do exist,

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An end to secret state surveillance under RICA...*continued*

The CC accordingly dismissed the appeal, with costs and the declaration of unconstitutionality of the High Court was confirmed.

and that such means constitute less restrictive means to achieve the purpose of surveillance. The choice of what measures would be the most suitable was left to Parliament to decide. Accordingly:

- RICA was unconstitutional to the extent that it lacks sufficient safeguards to address the fact that interception directions are sought and obtained on an *ex parte* basis.

The next issue which the CC considered was the custody and management of information obtained through surveillance. The Applicants argued that there is insufficient regulation in RICA regarding the storage, handling and destruction of the intercepted information and that intrusions into the privacy of subjects of state surveillance may be severe due to this lack of regulation. The CC held that:

- RICA was unconstitutional to the extent that it fails to adequately prescribe procedures which ensure that data obtained from the interception of communications is managed and used lawfully and is not unlawfully interfered with.

On the practising lawyers and journalists issue, the CC acknowledged firstly, that the confidentiality of journalists sources are protected by the rights to freedom of expression and the media and secondly, that legal professional privilege is an essential part of the rights to a fair hearing and a fair trial. The weight of these rights justified special consideration

being given to the importance of the confidentiality of both journalists' sources, as well as lawyer-client communications. Accordingly:

- RICA's failure to provide special consideration for practising lawyers and journalists, was unconstitutional.

Lastly, the CC addressed bulk surveillance, which involves, *inter alia*, the interception of all internet traffic that enters or leaves South Africa, including the most personal information such as emails, video calls, location, and browsing history. Bulk surveillance must have a legal basis, i.e. must be authorised in terms of legislation. The Applicants argued that bulk surveillance is not authorised by RICA or any other law. The CC agreed on this point and therefore held that:

- The practice of bulk surveillance is unlawful and invalid, as there is no law that authorises it.

The CC accordingly dismissed the appeal, with costs and the declaration of unconstitutionality of the High Court was confirmed, as set out above. The declaration of unconstitutionality took effect from the date of the judgment, suspended for 36 months. However, in the interim suspension period, the Court held that RICA shall be deemed to include additional sections which deal with disclosure that the person in respect of whom a direction, extension of a direction or entry warrant is sought, is a journalist and practicing lawyer and post-surveillance notification.

An end to secret state surveillance under RICA...*continued*

In line with our constitutional values of transparency and accountability, unfettered secret state surveillance has been brought to an end.

In respect of the disclosure relating to a journalist or practicing lawyer, additional provisions have been included which provide the designated Judge with a discretion to issue the direction or entry warrant subject to conditions as may be necessary to protect the confidentiality of a journalist's source or to protect the legal professional privilege enjoyed by a practising lawyer's clients.

Further, in respect of the new provision regarding post-surveillance notification, an applicant for the direction or any other law enforcement officer, must notify the subject of the surveillance within 90 days of the date of expiry of the direction and within 15 days of doing so, must certify in writing to the designated Judge that the person has been notified. In the event that the notification cannot be given without jeopardising the purpose of the surveillance, the designated Judge 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.

This judgment provides much-needed protection for subjects of state surveillance, as persons now have a right to be notified of their surveillance and to challenge such surveillance in the event of privacy infringement. Furthermore, proper procedures will be put in place for management and storage of the information to restrict the extent of access to and use of the stored information in order to limit the infringement of a person's privacy. Sources to journalists and clients of attorneys are now offered special protection as an interception direction will be more challenging to obtain or granted subject to conditions in light of the new provisions read-in by the Constitutional Court.

In line with our constitutional values of transparency and accountability, unfettered secret state surveillance has been brought to an end.

Anja Hofmeyr and Ashleigh Gordon



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The Constitutional Court's intervention vindicates the right to a basic education at the 11th hour

Khampepe's words ring true - especially in a country where denial of education was core to the apartheid system.

In November 2020, while many were preparing for the festive season, a high school learner's hopes to complete matric were suspended. Johannes Moko's experience is detailed in *Moko v Acting Principal of Malusi Secondary School and Others (CCT 297/20) [2020] ZACC 30* – a judgment that centres on the right to a basic education protected by Section 29(1) of the Constitution.

Khampepe J penned the judgment and opened with the following statement, *"There are few things as important for the flourishing of a society and its people as education. Through education, doors are opened to opportunities that were only before ever dreamt of."*

Khampepe's words ring true - especially in a country where denial of education was core to the apartheid system.

This judgment is noteworthy for two reasons: First, the Constitutional Court (court) found the case to be sufficiently exceptional to grant the applicant, Mr Moko, direct urgent access to the court. Second, while the High Court dismissed the matter for lack of urgency, the court disagreed and found that it was of extreme importance to the future of the applicant and should be heard urgently.

Johannes Moko, a matric pupil at Malusi Secondary School in Limpopo, was set to write his Business Studies Paper 2 examination on 25 November 2020, with the rest of the matric pupils in the country. However, when he arrived at school, he was barred from writing the examination by the acting principal, on the basis that

he had not attended certain extra lessons and was requested to return with his guardian to discuss the matter. None of Mr Moko's guardians were at home, so he rushed back to the examination venue. By this time, the examination session had commenced, and Mr Moko was precluded from writing the examination.

The court was gravely concerned with this conduct since the acting principal failed to provide the court with a valid explanation for his actions. Upon escalating the matter to the Limpopo Department of Education, Mr Moko was informed that he would only be able to write the supplementary examination in May 2021. Aggrieved by this decision, and the delay that it would cause in pursuing his future aspirations, Mr Moko approached the High Court on an urgent basis for an order that he be permitted to write the Business Studies Paper 2 examination immediately.

For those who are fortunate enough to be given the opportunity, writing matric exams is probably one of the most stressful – and important – experiences a young person's life. Unfortunately, the High Court dismissed Mr Moko's application for lack of urgency, arguing that he would have the opportunity to write the examination in May 2021. Mr Moko then approached the court on an urgent basis. The court, in contrast to the High Court, deemed the matter to be sufficiently urgent. The court's reasoning was that without this relief, Mr Moko would only be able to begin higher education studies in 2022, which could cause a significant adverse effect on his future.

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Consequently, Mr Moko was afforded the opportunity to write his examination at the beginning of January 2021, with his results being released simultaneously with the rest of the 2020 matric class.

It is, however, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, but this case presented exceptional circumstances. The High Court would normally be better suited to determine urgent matters, but as stated by Khampepe J, *'for reasons beyond any feasible comprehension, the High Court struck this matter off the urgent roll'*, hence the need to grant direct access. The court concluded that the acting principal had infringed Mr Moko's right to a basic education as he not only had a negative obligation to not infringe on Mr Moko's right to a basic education, but also a positive obligation to ensure that this right would be fulfilled, which he failed to do.

Consequently, Mr Moko was afforded the opportunity to write his examination at the beginning of January 2021, with his results being released simultaneously with the rest of the 2020 matric class. The court's intervention at the eleventh hour vindicated Mr Moko's right to a basic education and placed him back on his path of pursuing studies at a higher education institution.

*Tiffany Jegels, Yana Van Leeve,
Lisa de Waal and Nicola Stipinovich*

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OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:



Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com



Thabile Fuhrmann
Chairperson
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Tobie Jordaan
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Mongezi Mpahlwa
Director
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

Kgosi Nkaiseng
Director
T +27 (0)11 562 1864
E kgosi.nkaiseng@cdhlegal.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhodie@cdhlegal.com

Clive Rumsey
Director
T +27 (0)11 562 1924
E clive.rumsey@cdhlegal.com

Belinda Scriba
Director
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Tim Smit
Director
T +27 (0)11 562 1085
E tim.smit@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Roy Barendse
Executive Consultant
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@cdhlegal.com

Nick Muller
Executive Consultant
T +27 (0)21 481 6385
E nick.muller@cdhlegal.com

Jonathan Witts-Hewinson
Executive Consultant
T +27 (0)11 562 1146
E witts@cdhlegal.com

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhst Stellenbosch@cdhlegal.com

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