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Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

Office for Interception and Monitoring of Communications

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Enq: The Honourable Mr Justice J A M Khumalo

**REPORT OF THE DESIGNATED JUDGE DESIGNATED AS ENVISAGED
IN TERMS OF SECTION 1(1) OF THE REGULATION OF INTERCEPTION OF
COMMUNICATIONS AND PROVISION OF COMMUNICATION-RELATED INFORMATION
ACT, 2002 (ACT NO.70 OF 2002) FOR THE PERIOD 2009/2010**

The Honourable Chairperson and Honourable members of the Joint Standing Committee on Intelligence, It is an honour for me to present this report to the committee. I will first give a brief resume of my functions before I deal with the statistical data. My appointment is for the period commencing 1st November 2009 and ending 31st October 2010.

Section 14 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) guarantees as a fundamental right, the right to privacy, which includes the right not to have "the privacy of communication infringed". The limitations clause in the Constitution provides that the rights in the Bill of Rights (in which section 14 is included), "may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors...."

Other democratic countries have accepted the right to privacy of communications. In general, Article 8 of the European Convention on Human Rights is an example. The Article reads as follows:

- i. Everyone has the right to respect for his private and family life, his home and his correspondence,*
- ii. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for*

the protection of health or morals, or for the protection of the rights and freedom of others”.

The prevailing legislation in South Africa which governs interception and monitoring of communications is the Regulation of Interception of Communications and Provision of Communication-Related Information Act, 2002 (Act No. 70 of 2002). The main purpose of the Act is to balance society's interest in the detection of serious crime, particularly organised crime, with an individual's right to personal privacy. The Act imposes a general ban on the interception of private communication in the absence of prior authorisation by a designated Judge appointed in terms of the Act. The extensive use of cellular phones by the members of the community results in some of the organised crime being planned through the use of these electronic devices. Like its predecessor, the Act prohibits only “third party surveillance” and not “participant surveillance”. **S v Du Toit and Another**(1), 2005(2) SACR 367(T).

Only the following persons (who are state agents) may apply to intercept any private communication:-

- (a) an officer referred to in section 33 of the South African Police Service Act and, if the officer concerned obtained in writing the approval in advance of another officer in the Police Service with at least the rank of assistant-commissioner who has been authorised in writing by the National Commissioner to grant such approval;
- (b) an officer as defined in section 1 of the Defence Act, if the officer concerned obtained in writing the approval in advance of another officer in the Defence Force with at least the rank of major-general who has been authorised in writing by the Chief of the Defence Force to grant such approval;
- (c) a member as defined in section 1 of the Intelligence Services Act, if the member concerned obtained in writing the approval in advance of another member of the

Agency or the Service, as the case may be, holding a post of at least general manager;

- (d) the head of the Directorate or an Investigating Director of the Directorate as defined in section 1 of Act 70 of 2002 authorised thereto in writing by the head of the Directorate;
- (e) a member of a component referred to in paragraph (e) of the definition of "law enforcement agency" authorised thereto in writing by the National Director;
- (f) a member of the Independent Complaints Directorate, if the member concerned obtained in writing the approval in advance of the Executive Director as defined in Act 70 of 2002;

Application must, except as provided in section 23 of the Act, be in writing and contain full particulars of why the application is sought. It must be supported by an affidavit of the applicant. Where the application is based on an offence committed or about to be committed the offence must be a serious offence as defined in the Act i.e. a Scheduled offence in terms of the Criminal Procedure Act or organised crime committed by a syndicate. The direction must be obtained on the basis of information which is not false or misleading, otherwise it would be invalid. See S v Naidoo and Another 1998(1) SACR 479(N) where McCall J said the following at p. 507 a – b:-

"If the monitoring of a conversation is not authorised by a direction properly and lawfully issued by a Judge in terms of section 3, then not only would such monitoring constitute a criminal offence in terms of the Monitoring Act, it would also, in my

judgement, constitute an infringement of the right to privacy, which includes the right not to be subject to the violation of private communications”.

As Heher J commented in **Protea Technology LTD and Another v Wainer and Others**, 1997(9) BCLR 1225 (W) at p. 1237 G – H:-

“The potential to obtain such a direction is very strictly controlled. It could, for example, hardly be issued on mere suspicion unsupported by hard facts”.

A designated Judge may require further information from applicant.

The applicant must also state why other investigative methods will not succeed or the other methods are too dangerous. The designated Judge may issue a direction if he or she is satisfied that there are reasonable grounds to believe that the circumstances mentioned in the application exist. See section 16(5)(a) and (b) of Act 70 of 2002. The Act makes provision in section 16, 17, 18, 20, 21 and 22 for various substantive applications and directions each with its own requirements. The Act also provides for the interception and monitoring of postal communications. The aforementioned sections authorise a designated Judge to issue the following directions:-

- (i) Interception direction in respect of direct and/or indirect communications (section 16) e.g. cell-phone.
- (ii) Real-time communication-related direction, (section 17). Information stored by service provider for 90 days.
- (iii) Interception direction combining real-time and archived communication-related information (section 18).
- (iv) Archived communication-related direction (section 19). Information stored by service provider for the period determined in a directive referred to in section 30(2) of the Act.

Section 20 deals with the amendment or extension of an existing direction. An amendment cannot, however, introduce a different direction which requires a substantive application under one of the other sections.

A direction can only be of three months duration and similarly with an extension. It is issued without any notice to the person or customer to whom the application applies and without hearing such person or customer. For this reason it is important that sufficient information must be given in the applicant's affidavit to justify the granting of a direction.

In terms of section 23 of the Act, an application referred to in section 16(1), 17(1), 18(1), 21(1) and 22(1) may be made orally by an applicant who is entitled to make such an application if he or she is of the opinion that it is not reasonably practicable, having regard to the urgency of the case or the existence of exceptional circumstances, to make a written application. Such an application must -

- (a) contain the information referred to in section 16(2), 17(2), 21(2) or 22(2), whichever is applicable;
- (b) indicate the particulars of the urgency of the case or the other exceptional circumstances which, in the opinion of the applicant, justify the making of an oral application; and
- (c) comply with any supplementary directives relating to oral applications issued under section 58.

A designated Judge may upon an oral application made to him or her, issue the direction or entry warrant orally or in writing if he or she is satisfied, on the fact alleged in the oral application that -

- (i) there are reasonable grounds to believe that the direction or entry warrant applied for could be issued;
- (ii) a direction is immediately necessary on a ground referred to in section 16(5)(a), 17(4) or 21(4)(a), whichever is applicable, or an entry warrant is immediately necessary on a ground referred to in section 22(4); and
- (iii) it is not reasonably practicable, having regard to the urgency of the case or the existence of exceptional circumstances, to make a written application for the issuing of the direction or entry warrant applied for; and
- (iv) on condition that the applicant concerned must submit a written application to the designated Judge concerned within 48 hours after the issuing of the oral or written direction or oral or written entry warrant.

An oral direction or oral entry warrant may only be issued under subsection (7) of section 23-

- (a) if the designated Judge concerned is satisfied on the facts alleged in the oral application that-
 - (i) it is not reasonably practicable, having regard to the urgency of the case or the existence of exceptional circumstances to issue the direction or entry warrant applied for in writing; or
 - (ii) any other exceptional circumstances exist which justify the issuing of an oral direction or oral entry warrant; and
- (b) on condition that the applicant concerned must submit a written application to the designated Judge concerned within 48 hours after the issuing of the oral direction or oral entry warrant under subsection (7).

A designated Judge who issues an oral direction or oral entry warrant in terms of subsection (7) of section 23 must-

- (a) immediately after the issuing thereof inform the applicant and, if applicable, the postal service provider or telecommunication service provider to whom it is addressed, orally of such an oral direction or oral entry warrant, including the-
 - (i) contents thereof; and
 - (ii) period for which it has been issued; and
- (c) confirm the oral direction or oral entry warrant in writing within 12 hours after the issuing thereof.

● A designated Judge who issued-

- (a) a direction or entry warrant in writing; or
- (b) an oral direction or oral entry warrant,

or if he or she is not available any other designated Judge who would have been entitled to issue such direction, entry warrant, oral direction or oral entry warrant must, upon receipt of a written application submitted to him or her, reconsider that application whereupon he or she may confirm amend or cancel the direction, entry warrant, oral direction or oral entry warrant.

● If a direction, entry warrant, oral direction or oral entry warrant is-

- (a) confirmed or amended the designated Judge concerned must forthwith in writing inform-
 - (i) the applicant concerned; and
 - (ii) if applicable, the postal service provider, telecommunication service provider or decryption key holder concerned, or such confirmation or amendment; or
- (b) it may be cancelled (section 25(3), (4), (5) of the Act applies with the necessary changes).

As appears in the case law information obtained from a wire-tapping may be used in evidence if its admissibility is not challenged on some just ground such as for instance in the Naidu case *supra*. In **S v Pillay and Others**, 2004(2) SACR 419 (SCA) at p. 434g the Court stated as follows:-

"in our view, to allow the impugned evidence derived as a result of a serious breach of accused 10's constitutional right, to privacy might create an incentive for law enforcement agents to disregard accused person's constitutional rights since, even in the case of an infringement of constitutional rights, the end result might be the admission of evidence that, ordinarily, the State would not have been able to locate..... That result – of creating an incentive for the police to disregard accused person's constitutional rights, particularly in cases like the present, where a judicial officer is misled – is highly undesirable and would, in our view do more harm to the administration of justice than enhance".

In daily practice I have not noticed any abuses by law enforcement officers and wire-tapping is applied for as a last resort.

What now follows is statistical data pertaining to the work done during the period under review.

The **South African Police Force** generates most of the work because they deal with serious crime including organised crime. During the period under review there were:-

- 135 new applications,
- 39 re-applications where agencies allowed directions to lapse,
- 33 amendments,
- 43 amendments and extensions,

- 3 extensions without any amendments,
- 3 Entry warrants.

Total: 256

All these applications were granted and there were none refused. This resulted from the fact that the affidavits and application forms were meticulously done. The forms prepared by former designated judge Mr Justice Swart standardised the process. The same can be said of other Law Enforcement Agencies. Interception is a last resort and considering the levels of crime a figure of 256 matters considered during the period is reasonable. It must be borne in mind that the figures reflect interceptions for the whole country.

The Department of Defence have submitted no applications. There is therefore no statistical data available.

NIA and SASS also submitted the following well motivated applications:-

- 21 new applications
- 26 Re-applications
- 8 amendments
- 9 extensions
- 19 amendments and extensions

Total: 83

Again this figure is reasonable and shows that interception is not lightly resorted to. The work is properly carried out and I am thankful to these officials. I have not dealt with individual applications for the reason that these are to secrets which must be respected.

I take the opportunity to thank the Department of Justice and Constitutional Development for providing me with an efficient and enthusiastic staff which assisted me in making this report available.

I also wish to thank Advocate B Koopedi, Director of the Office for Interception Centre who assisted with the checking of this report. When we met at his office he made several suggestions pertaining to our modus operandi which I am taking up with the Department of Justice and Constitutional Development.

When I assumed office I met quite a number of role players such as: the OIC, MTN, Police and members of the Defence Force as a familiarisation process and this will continue. I am also busy formulating supplementary directives under section 58 of the Act for approval by Judges – President of the High Courts to replace the old ones. I shall remain committed to the Constitution of the Republic in the performance of my duties,

Thank you Chairperson

DESIGNATED JUDGE