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Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

Office for Interception and Monitoring of Communications

Please quote our full reference number in all correspondence

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Enq: The Honourable Mr Justice J A M Khumalo

**REPORT TO JOINT STANDING COMMITTEE ON INTELLIGENCE
FOR THE PERIOD 1 APRIL 2010 TO 31 MARCH 2011**

Honourable Chairperson of the Joint Standing Committee on Intelligence, Honourable Members, ladies and gentlemen, it is an honour for me to present this report and my statistical information to you. I have not dealt with the merits of individual applications for the reason that these are top secrets which the Act protects from disclosure. These applications mostly involve difficulties experienced by agencies in the investigation of serious crimes such as:-

- Drug dealing and Drug trafficking,
- Vehicle thefts and car hijacks,
- Armed robberies,
- Corruption and Fraud,
- Assassinations, murder, terrorism, etc.

Interception involves the gathering of intelligence by secret surveillance; because of its nature it should never be allowed to become an end in itself. It should be used as a last resort in investigating crime. The Act regulates the making of applications for and, the issuing of, directions authorising the interception of communications and the provision of

communication-related information. The Act also regulates the execution of directions and entry warrants by law enforcement officers. It helps in combating the ever-present threat of serious crime including terrorism. The number of directions issued shows a slight increase in the period under review.

1. Constitutional Background

Section 14 of the Constitution of the Republic of South Africa guarantees as a fundamental right, the right of privacy which includes the right not to have the privacy of communication infringed. It stands to reason therefore, that the function of the designated Judge is also to protect innocent members of the public from unwarranted interception, and infringement of their right to privacy. A direction is therefore not easy to obtain because, as the courts have stated:-

"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."

Other democratic countries have similar provisions protecting privacy. Section 8 of the European Convention on Human Rights provides an example. In keeping with the constitutional right and the limitation clause the Regulation of Interception of Communications and Provision of Communication-Related Information Act No. 70 of 2002 was enacted as a law of general application. Section 2 thereof prohibits interception communications by third parties. Only stipulated state agents may apply to obtain a direction from a designated Judge to intercept a communication. The Act makes provision in sections 16, 17, 18, 20, 21 and 22 for various substantive applications and directions each with its own requirements. There is also provision for the monitoring of postal communications. The following directions may be issued by the designated Judge:-

- (i) *Interception direction in respect of a direct or indirect communication e.g. cell-phone. (Section 16).*
- (ii) *Real-time communication-related direction, (Section 17) i.e. information stored by a 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) i.e. information stored by a service provider for a period determined in a ministerial directive referred to in section 30(2) of the Act.*
- (v) *A direction authorising an entry warrant into premises for the purposes of:-*
 - (a) *Intercepting a posted article or communication, or*
 - (b) *Installing and maintaining an interception device on, and removing an interception device from the premises and this includes an oral warrant issued under section 23 of the Act.*

The duration of a direction and its extensions can only be three months. It is issued without any notice to the person or customer to whom it applies. For this reason a designated Judge has to be very careful when considering granting a direction.

2. Meetings with Office of Interception Centres, Service Providers and Law Enforcement Officers:

Whenever problems concerning any of the abovementioned instances arise meetings are held with responsible officers and problems are resolved. This helps to improve the quality of work. The timeous delivery of directions to the Office for Interception Control which is now being delivered by one of the Clerks attached to the designated Judge's office has taken

effect from 29/06/2011. From 18/01/2011 to 24/06/2011 the Office for Interception Centres came to fetch directions directly from our office, this arrangement was made between the designated Judge's office and Director Koopedi from the OIC to ensure that the correct directions reach the OIC and that the directions are triggered correctly before the Service Providers activate their triggers.

The Department of Defence have requested assistance to seek interception of communication in appropriate cases and my officials expressed their willingness to assist.

Two of the problems which have given rise to these meetings are:-

2.1 The submission of documents mentioned in section 8(5) of the Act. It appears that my predecessors did not insist on their submission or check compliance with the Act. Section 8 deals with interception of communication for purposes of determining location in cases of emergencies resulting mainly from threat to life and limb. The section requires the following to be submitted by the service provider concerned and the Law Enforcement Agencies:-

- “(a) a copy of a written confirmation of request made by the law enforcement officer to a service provider,*
- (b) an affidavit by the law enforcement officer setting forth the results of the request and information,*
- (c) an affidavit of the service provider setting forth the steps taken by the service provider in giving effect to the request of the law enforcement officer and the results and information obtained from such steps, and*
- (d) if such steps included the interception of an indirect communication, any recording of that indirect communication that has been obtained by means of that interception, any full or partial transcript of the recording and any notes*

made by the telecommunication service provider of that indirect communication.”

2.2 A designated Judge is required to keep this record for five years. It is important to note that the section allows this interception to take place without authorisation by the designated Judge, because of the emergency. If there is no emergency as contemplated by the Act the interception is unlawful. Hence my eagerness to check that such interceptions comply with the Act. At present the police are behind in their submission of these documents. I have in the meetings insisted on compliance. Some of the Service Providers have not submitted anything. It is anticipated that when compliance has been achieved these voluminous documents will be spot checked instead of them all being checked individually. What complicates the situation is that the section does not stipulate the simultaneous submission of documents by police and service providers to facilitate filing. I have suggested to police to submit these documents simultaneously including those from service providers to facilitate proper filing. Otherwise, the section if properly used is a useful weapon in combating serious crime.

Draft Directives in terms of Section 58(1) of the Act

These have been forwarded to the office of the late Advocate Labuschagne for consideration and approval by the Judges President of the Republic. Unfortunately Advocate Labuschagne passed away suddenly and I have not heard from his successor. Section 58(1) of the Act reads as follows:-

“A designated judge or, if there is more than one designated judge, all the designated judges jointly, may, after consultation with the respective Judges-President of the High Courts, issue directives to supplement the procedure for making applications for the issuing of directions or entry warrants in terms of this Act.”

3. Statistical information

My office has a manager, a legal assistant, a secretary and three clerks. It is a good and supportive staff. The designated Judge is required to keep his records for five years. For a reason I do not know, no files have been destroyed by previous designated Judges and I can foresee a time when there will be no space to keep further records.

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

There is no backlog in the applications dealt with. The incoming work is dealt with on a daily basis.

The National Intelligence Agency

Figures for the period are as follows:-

• Applications	36	
• Re-applications	17	
• Amendments	12	
• Extensions	17	
• Amendments and Extensions	21	
• Refusals		1
• Total	103	1(included in the 103)

The application indicated as refused was unsigned by the applicant. It was signed and subsequently granted. It is included in the 103.

The South African Police Force

Figures for the period are as follows:-

• Applications	243	
• Re-applications	43	
• Amendments	83	
• Extensions	32	
• Amendments and Extensions	43	
• Refusals		4
• Total	444	4

Of the four applications refused three were subsequently granted after compliance with the Act.

The one refused required an extra-territorial direction of a target residing in Mozambique.

The Act does not give me such powers.

The combined figures for the NIA and SAPS are as follows:-

• Applications	279	
• Re-applications	60	
• Amendments	95	
• Extensions	49	
• Amendments and Extensions	64	
• Refusals		1
• Total	548	1

On 1st April 2009 to 31st March 2010 there were 202 new files opened. On 1st April 2010 to 31st March 2011 there were 263 new files opened. The increase was 61 which in percentage terms is approximately 23.6%. There were amendments and extensions requested on existing files but these amounted to approximately 24%.

2502 requests were dealt with by the South African Police in terms of Section 8 of the Act.

A perusal of the above figures shows the following:-

- (a) Most of the work comes from the South African Police followed by the National Intelligence Agency.
- (b) The Department of Defence and the Independent Complaints Directorate have not submitted any applications during the period under review and I therefore submit a nil return in respect of the two instances,
- (c) The figure of 548 matters is reasonably small considering the large number of cell-phones and land line telephones currently in use in the country. This is in keeping with the notion that electronic surveillance is considered as the last resort in crime prevention and gathering of information to ensure the security of the state.

Forms prepared by my predecessor Mr Justice Swart, Advocate Labuschagne, Advocate Welch and the agencies have standardised the application process resulting in compliance by law enforcement agents with requirements of the Act.

Lastly I wish to take the opportunity to thank the NIA and the SAPS for being careful in supplying information required by the Act when preparing affidavits in support of applications submitted. I also thank the staff for assisting me in the preparation of this report.

J A M KHUMALO
DESIGNATED JUDGE