

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

Case Number: CCT 278/19
CCT 279/19

In the application of:

MEDIA MONITORING AFRICA TRUST

Applicant for admission
as an *amicus curiae*

In the matter between:

**AMABHUNGANE CENTRE FOR
INVESTIGATIVE JOURNALISM NPC**

SOLE, STEPHEN PATRICK

and

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

MINISTER OF STATE SECURITY

MINISTER OF COMMUNICATIONS

MINISTER OF DEFENCE AND MILITARY VETERANS

MINISTER OF POLICE

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

THE OFFICE FOR INTERCEPTIONS CENTRES

THE NATIONAL COMMUNICATIONS CENTRE

**THE JOINT STANDING COMMITTEE ON
INTELLIGENCE**

THE STATE SECURITY AGENCY

**MINISTER OF TELECOMMUNICATIONS
AND POSTAL SERVICES**



First Applicant

Second Applicant

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

Seventh Respondent

Eighth Respondent

Ninth Respondent

Tenth Respondent

Eleventh Respondent

**NOTICE OF APPLICATION FOR ADMISSION AS AN *AMICUS CURIAE* IN
TERMS OF RULE 10(4)**

KINDLY TAKE NOTICE THAT the Applicant for admission as an *amicus curiae* applies to this Court for an order in the following terms:

1. Condoning the late filing of this Application, to the extent that it is necessary.
2. Admitting the Applicant as an *amicus curiae* in the Main Application;
3. Granting the Applicant—
 - 3.1. the right to file written submissions in the Main Application; and
 - 3.2. to the extent the Court requires, granting the Applicant the right to present oral argument at the hearing of the Main Application,

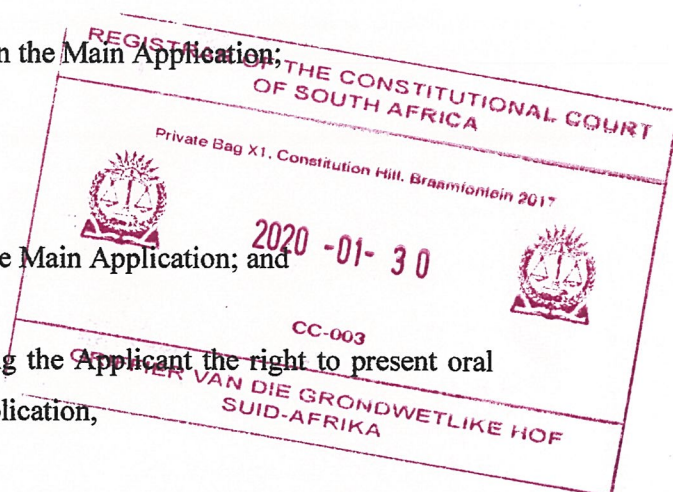
provided that such argument does not repeat matters set forth in the arguments of the parties and raises new contentions which may be useful to the Court.

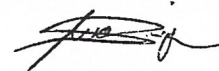
4. Further and/or alternative relief.

TAKE FURTHER NOTICE that the affidavit of **WILLIAM ROBERT BIRD** and the annexures thereto will be used in support of this Application.

TAKE FURTHER NOTICE that the Applicant has appointed the address of its attorneys, Power Singh Inc. at 20 Baker Street, Rosebank, as the address at which it will accept notice and service of all process in these proceedings. The Applicant's attorneys will also accept electronic service at the following email addresses: avani@powersingh.africa, michael@powersingh.africa and tina@powersingh.africa.

DATED JOHANNESBURG ON THIS THE 29th DAY OF JANUARY 2020.




POWER SINGH INC.

Attorneys for the Applicant for
admission as an *amicus curiae*
First Floor, 20 Baker Street
Rosebank
JOHANNESBURG
2196

Tel: 011 268 6811

Fax: 086 614 5818

E-mail: avani@powersingh.africa

michael@powersingh.africa

tina@powersingh.africa

Ref.: PSIMM-202002

REGISTRAR OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA	
Private Bag X1, Constitution Hill, Braamfontein 2017	
	
2020 -01- 30	
TO: THE REGISTRAR OF THE CONSTITUTIONAL COURT	
CC-003	
AND TO: WEBBER WENTZEL	
GRIFPIER VAN DIE GRONDWETLIKE HOF	

Attorneys for the Applicants in the Main Application

90 Rivonia Road

SANDTON

2196

Tel: 011 530 5232

Fax: 011 530 6232

Email: dario.milo@webberwentzel.com / lavanya.pillay@webberwentzel.com

Ref.: Dario Milo / L Pillay / 3034325

AND TO: STATE ATTORNEY, PRETORIA

Attorneys for the First Respondent

SALU Building

316 Thabo Sehume Street

PRETORIA

0001

Tel: 012 309 1630

Fax: 086 640 1943

Email: memakhubela@justice.gov.za / conkuna@justice.gov.za

Ref: 2937/2017/Z52/MC

c/o STATE ATTORNEY, JOHANNESBURG12th Floor, North State Building

95 Albertina Sisulu Street, Corner Kruis Street

JOHANNESBURG

2001

Tel: 011 330 7663

Fax: 011 333 1683 / 086 507 2005

Email: HMaponya@justice.gov.za / memakhubela@justice.gov.za

Ref: H Maponya / M Makhubela

AND TO: STATE ATTORNEY, PRETORIA
Attorneys for the Second Respondent
SALU Building
316 Thabo Sehume Street
PRETORIA
0001
Tel: 012 309 1543
Fax: 012 309 1649/50
Email: PSeleka@justice.gov.za
Ref: 5928/2019/Z65/MM
c/o STATE ATTORNEY, JOHANNESBURG
12th Floor, North State Building
95 Albertina Sisulu Street, Corner Kruis Street
JOHANNESBURG
2001
Tel: 011 330 7663
Fax: 011 333 1683 / 086 507 2005
Email: HMaponya@justice.gov.za / memakhubela@justice.gov.za
Ref: H Maponya / M Makhubela

AND TO: STATE ATTORNEY, PRETORIA
Attorneys for the Third, Fourth, Sixth, Seventh, Eighth, Tenth and Eleventh
Respondents
SALU Building
316 Thabo Sehume Street
PRETORIA
0001
Tel: 012 309 1630
Fax: 086 640 1943
Email: memakhubela@justice.gov.za / conkuna@justice.gov.za /
PSeleka@justice.gov.za
Ref: 2937/2017/Z52/MC / 5928/2019/Z65/MM
c/o STATE ATTORNEY, JOHANNESBURG
12th Floor, North State Building
95 Albertina Sisulu Street, Corner Kruis Street
JOHANNESBURG
2001
Tel: 011 330 7663
Fax: 011 333 1683 / 086 507 2005
Email: HMaponya@justice.gov.za / memakhubela@justice.gov.za
Ref: H Maponya / M Makhubela

AND TO: STATE ATTORNEY, PRETORIA
Attorneys for the Fifth Respondent

SALU Building
316 Thabo Sehume Street
PRETORIA
0001
Tel: 012 309 1630
Fax: 086 640 1943
E-mail: memakhubela@justice.gov.za / conkuna@justice.gov.za
Ref: 2937/2017/Z52/MC
c/o STATE ATTORNEY, JOHANNESBURG
12th Floor, North State Building
95 Albertina Sisulu Street, Corner Kruis Street
JOHANNESBURG
2001
Tel: 011 330 7663
Fax: 011 333 1683 / 086 507 2005
Email: HMaponya@justice.gov.za / memakhubela@justice.gov.za
Ref: H Maponya / M Makhubela

AND TO: KGOROEADIRE MUDAU INCORPORATED
Attorneys for the Seventh, Eighth, and Tenth Respondents
Office 26, Third Floor
158 Jan Smuts Building
9 Walters Street
Rosebank
JOHANNESBURG
2196
Tel: 011 268 5407
Email: rapulane@kgoroeadiramudaunic.co.za /
info@kgoroeadiramudaunic.co.za

AND TO: STATE ATTORNEY, CAPE TOWN
Attorneys for the Ninth Respondent
4th Floor, Liberty Life Centre
22 Long Street
CAPE TOWN
8001
Tel: 021 441 9200
Fax: 021 421 9364
Email: schetty@justive.gov.za
Ref: S Chetty
c/o STATE ATTORNEY, JOHANNESBURG
12th Floor, North State Building
95 Albertina Sisulu Street, Corner Kruis Street
JOHANNESBURG
2001
Tel: 011 330 7663

Fax: 011 333 168 / 086 507 2005

Email: HMaponya@justice.gov.za / memakhubela@justice.gov.za

Ref: H Maponya / M Makhubela

CONSTITUTIONAL COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

Case Number: CCT 278/19
CCT 279/19

In the application of:

MEDIA MONITORING AFRICA TRUST

Applicant for admission
as an *amicus curiae*

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 AND MILITARY VETERANS

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

FOUNDING AFFIDAVIT



I, the undersigned,

WILLIAM ROBERT BIRD

hereby make oath and state:

INTRODUCTION

1. I am an adult male, and the Director of Media Monitoring Africa (“MMA”), a not-for-profit organisation with registered offices at Suite No. 2, Art Centre, 22 6th Street, Parkhurst, Johannesburg.
2. I am duly authorised to bring this application and to depose to this affidavit on behalf of the MMA Trust.
3. The facts to which I depose are true and correct and are within my personal knowledge, except where it is apparent from the context that they are not. Where I make submissions of law, I do so on the advice of MMA’s legal representatives.
4. This is an application in terms of Rule 10(4) of the Rules of the Constitutional Court (“the Rules”), in terms of which MMA seeks leave to be admitted as an *amicus curiae* in this matter.
5. In line with MMA’s particular areas of interest and expertise, and cognisant not to repeat any of the submissions that have already been canvassed by the parties, MMA’s proposed submissions are narrowly-tailored to two key issues of relevance to the present matter:
 - 5.1. **First**, the harmful impact that the impugned provisions of the Regulation of the Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (“RICA”) and the exercise of bulk surveillance have on the rights of children when applied in line with section 28(2) of the Constitution

of the Republic of South Africa, 1996 (“**Constitution**”) and the “best interests of the child” principle.

- 5.2. **Second**, the harmful impact that the impugned provisions of RICA and the exercise of bulk surveillance have on the ability of non-governmental organisations (“NGOs”), acting in the public interest, to perform their monitoring and oversight functions and act as a public watchdog.
6. In line with these proposed submissions and Rule 10 of the Rules, this affidavit is structured as follows:
 - 6.1. **First**, the interest that MMA has in this matter;
 - 6.2. **Second**, a brief overview of the position that MMA proposes to adopt in this matter;
 - 6.3. **Third**, an outline of the submissions that MMA proposes to advance, including their relevance, novelty and utility to the Court, and how they differ from the submissions already advanced in the present matter;
 - 6.4. **Fourth**, MMA’s compliance with the relevant procedural aspects of the Rules;
 - 6.5. **Fifth**, MMA’s proposed timeframes for the filing of written submissions in these proceedings; and
 - 6.6. **Sixth**, MMA’s request for condonation for the late-filing of this application.
7. Each aspect is dealt with in turn below.

I. RELEVANT INTEREST IN THIS MATTER

8. MMA is a not-for-profit organisation that operates in the public interest to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. In the last 27 years, MMA’s work has consistently related to key human

✓
WB

rights issues, always with the objective of promoting democracy, human rights, and encouraging a just and fair society.

9. MMA is an active member within the South African civil society space, and works alongside an array of NGOs to promote a culture of human rights. MMA also engages in a range of legislative and litigious processes relating to the triad of information rights, which include the rights to privacy, freedom of expression and access to information. In this regard, MMA has dealt with issues pertaining to data protection, online content regulation, cybercrimes and cybersecurity, copyright, public broadcasting, and various other matters relevant to the exercise of rights, both on- and offline. With specific reference to issues pertaining to privacy, MMA has had a number of engagements with the Information Regulator established in terms of the Protection of Personal Information Act 4 of 2013 (“POPIA”), and has made submissions on the draft regulations published in terms of section 112(2) of POPIA.
10. In respect of litigation, MMA has engaged in various matters before this Court pertaining to freedom of expression, privacy, children’s rights and other issues that fall within MMA’s mandate. This has included, for instance, the following:
 - 10.1. In 2019, MMA participated as an *amicus curiae* in *South African Human Rights Commission on behalf of South African Jewish Board of Deputies v Masuku*,¹ which engaged the balancing of the rights to free expression, dignity and equality in the context of hate speech legislation.
 - 10.2. MMA also participated as an applicant in the recent matter of *Centre for Child Law and Others v Media 24 Limited and Others*,² in which this Court found that the right to privacy is even more pressing when children are involved.
11. MMA has a specific focus on the rights of children. Notably, children’s rights have played a central role in MMA’s work, ranging from empowering children through media literacy workshops, providing editorial guidelines and principles for the reporting of

¹ CCT 14/19.

² [2019] ZACC 46.

children in the media, and making submissions to the Department of Justice and Constitutional Development on behalf of children. MMA believes that children's privacy rights are essential in our digitally transforming society. In order to enable the safety of children online and ensure their data privacy, MMA has established a digital literacy project designed to allow young people to gain critical skills and knowledge around online safety.

12. In the present matter, this case raises important questions related to privacy and the current surveillance regime's chilling effect on various rights. MMA submits that the rights implicated include the best interests of the child, read with the right to privacy, and the importance of additional safeguards for children and NGOs.
13. Accordingly, the nature of the matter falls within MMA's particular areas of interest and the work that it pursues. MMA has a clear interest in this matter, and is well-placed to be of assistance to this Court.

II. OVERVIEW OF THE POSITION TO BE ADOPTED

14. MMA supports the relief sought by the Applicants, and submits that the current surveillance regime – in particular, the impugned provisions of RICA and the exercise of bulk surveillance – are unconstitutional.
15. If admitted as an *amicus curiae*, MMA seeks to make submissions on the following two issues:
 - 15.1. **First**, MMA submits that, in addition to the grounds of unconstitutionality raised by the Applicants, the impugned provisions of RICA and the exercise of bulk surveillance are further unconstitutional when considered in the light of section 28(2) of the Constitution. MMA therefore proposes to address the need for the provision of additional safeguards to protect the best interests of children, to the extent that the communications and personal information of children are rendered subject to the current surveillance regime.

A
MB

15.2. **Second**, MMA submits that the current surveillance regime has a chilling effect on the ability of NGOs, acting in the public interest, to perform their role as a public watchdog, and to seek public and private sector accountability. MMA will argue that, in line with the jurisprudence of the European Court of Human Rights (“ECtHR”), NGOs perform a function similar to that of the media, and proposes to address the need for the provision of additional safeguards to enable NGOs to perform their monitoring and oversight functions.

16. These submissions are set out in further detail below. MMA submits that these issues are of relevance to the present matter. In this regard, given the importance of the present matter, it is imperative that all relevant issues be fully ventilated before this Court. Additionally, the issues that MMA proposes to raise have not been canvassed by any of the parties to the proceedings, and should be considered by the Court in making an appropriate determination in this matter.

III. OUTLINE OF THE PROPOSED SUBMISSIONS

Protection of the rights of children

17. The best interests of the child principle, enshrined in section 28(2) of the Constitution, requires that a “child’s best interests are of paramount importance in every matter concerning the child.” This Court has on several occasions acknowledged the innate vulnerability of children, as well the idea that children are developing individuals, learning to form opinions and make choices.³ This Court has also underscored the importance of children’s rights to privacy.⁴
18. The “best interests of the child” principle is also provided for in various international instruments to which South Africa is a state party, including article 3(1) of the United Nations Convention on the Rights of the Child (“CRC”) and article 4(1) of the African Charter on the Rights and Welfare of the Child (“ACRWC”). These instruments also address the need for the protection of the privacy rights of children. Notably:

³ Id at para 64; *J v National Director of Public Prosecutions* [2014] ZACC 13 (CC) at para 36; *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18 (CC) at para 19; *Le Roux v Dey* [2011] ZACC 4 (CC) at para 212.

⁴ *Centre for Child Law* id at para 49.

WB

18.1. Article 16 of the CRC provides as follows:

“(1) 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.

(2) The child has the right to the protection of the law against such interference or attacks.”

18.2. In similar terms, article 10 of the ACRWC provides as follows:

“No child shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.”

19. MMA submits that 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 the abovementioned international obligations.

20. MMA notes that there are several key ways in which the communications and personal information of children can be engaged:

20.1. By a child being rendered subject to an interception direction in terms of section 16 of RICA, as RICA does not carve out any exceptions or provide any protections against a direction being issued against a child.

20.2. Through third party communications, in terms of which a child may be communicating with a person who is subject to a surveillance direction.

M
WB

- 20.3. Through the mass retention of data required in terms of RICA, in terms of which every child who makes use of telecommunications or mobile services in the country is rendered subject to the mass retention requirements.
- 20.4. Through the exercise of bulk interception, which impacts the privacy rights of both children who are South African nationals and those who are foreign nationals.
21. The harmful impacts of the failure of the current surveillance regime to provide for adequate safeguards – particularly the lack of notification, the absence of any adversarial process, the treatment and handling of communications and personal information, the mandatory retention of data and the exercise of bulk surveillance in the absence of a regulatory framework – are all exacerbated when considered through the lens of the rights of children, their vulnerability, and the requirement to treat their best interests – including their privacy interests – as a matter of paramount importance. MMA will argue that the current surveillance regime violates section 28(2) of the Constitution, as well as South Africa’s international obligations specifically relating to children in this respect.
22. MMA shall further argue that, in determining the appropriate remedy in this matter, a suitable dispensation should be carved out to cater for the rights of children. It is noted that the privacy rights of children are implicated from the point of first collection of their data, and continues throughout the chain of processing.
23. In determining appropriate safeguards, MMA intends to present submissions on the interplay between RICA and POPIA, particularly sections 34 and 35 of POPIA, read with section 6(1)(c)(i) thereof, and the special dispensation that POPIA and other data protection frameworks, including the General Data Protection Regulation of the European Union 2016/679, create for the privacy rights of children.

Protection of NGOs

24. MMA submits that the current surveillance regime has a chilling effect on the ability of NGOs, acting in the public interest, to perform their role as a public watchdog, and to seek public and private sector accountability. This includes the ability to engage with,

MS



among others, activists, social movements and whistle-blowers and to investigate matters of public and corporate accountability, without fear of retaliation or reprisals.

25. In the present matter, the High Court recognised that a special dispensation should be created for lawyers and journalists, noting that “[b]oth lawyers and journalists perform not merely professional roles, but social roles which are part and parcel of the fabric of a society ordered upon the premise that the Rule of Law must prevail.”⁵
26. Accordingly, MMA will submit that this finding applies equally to NGOs as well. NGOs fulfil an important role as public watchdogs, which, in many ways, is comparable to that of journalists, and therefore share the need for source protection and other appropriate safeguards. Openness and accountability are foundational values in our constitutional democracy, and NGOs play an important part in ensuring these values are upheld, be it through disclosing facts that are in the public interest or ensuring there is transparency in the activities of public and private sector actors.
27. Drawing on the comparative jurisprudence of the European Court of Human Rights, MMA intends to argue that the role performed by NGOs is akin to that of the media, and that NGOs should therefore be subject to the same additional safeguards that are deemed appropriate for journalists and lawyers. As will be expanded upon in written submissions, MMA does not propose that NGOs should be immune from surveillance; rather, in the event of an interception direction being sought in terms of section 16 of RICA, the same safeguards that the High Court ordered in respect of lawyers and journalists should also apply to members of NGOs.

IV. COMPLIANCE WITH THE RELEVANT PROCEDURAL ASPECTS OF THE RULES

28. MMA has considered the papers filed in the main application and is of the view that it has a substantial interest in the proceedings and can make a valuable contribution to the determination of the issues before this Court.

⁵ *Amabhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services* 2020 (1) SA 90 (GP) at para 112.

29. To facilitate MMA's involvement in this matter, and in with Rule 10(2) of the Rules of this Court, on 27 January 2020 MMA's attorneys addressed a letter to the attorneys for the applicants and respondents seeking their consent for MMA to be admitted *as amicus curiae* in the main application. A copy of this letter is attached hereto and marked as annexure "WB1".
30. As at the time of filing this application, MMA has received consent from the Applicants for admission as an *amicus curiae*. A copy of this letter is attached hereto and marked as annexure "WB2".
31. MMA has further received consent from the First and Fifth Respondents for admission as an *amicus curiae*. A copy of this letter is attached hereto and marked as annexure "WB3". MMA has not received responses from any of the other Respondents in this matter.
32. MMA has therefore considered it prudent to file this application at this stage, to afford the Court a sufficient opportunity to consider the application and determine appropriate time frames.

V. PROPOSED TIMEFRAMES FOR THE FILING OF WRITTEN SUBMISSIONS

33. In the letter requesting consent for admission as an *amicus curiae*, MMA proposed the following timeframes for the following of written submissions:
 - 33.1. MMA will file its written submissions by Friday, 7 February 2020; and
 - 33.2. To the extent that any of the parties wish to file written submissions in response to MMA's written submissions, such written submissions are filed by Monday, 17 February 2020.

R

WB

34. MMA submits that, in the light of the narrowly-tailored submissions that are proposed, the filing of written submissions should suffice in this matter. However, at the discretion of this Court, and should it be considered necessary and appropriate to do so, MMA is available to present oral submissions at the hearing of this matter.

VI. REQUEST FOR CONDONATION

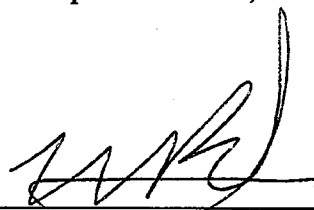
35. I am advised that, in terms of Rule 10(5) of the Rules, an application for admission as an *amicus curiae* must be filed not later than five days after the lodging of the Respondents' written submissions.
36. It is my understanding that the First Respondent's written submissions were filed on or about 21 January 2020, and the Fifth Respondent's written submissions were filed on or about 21 January 2020. I am further advised that certain of the Respondents have not yet filed their heads of argument.
37. MMA had considered it prudent to wait until all of the participating Respondents had filed heads of argument, in an effort to ensure that the proposed submissions would be relevant to the present matter. In the light of certain of the Respondents being delayed in the filing of their heads of argument, MMA has similarly occasioned a minor delay in filing this application.
38. MMA therefore requests condonation for the late-filing of this application. In this regard, MMA submits that no prejudice has been suffered by any of the parties, and that, within the discretion of the Court, the timeframes proposed above are adequate to afford all the parties and the Court adequate time to engage with the proposed submissions.

CONCLUSION

39. MMA reiterates that the proposed submissions are relevant, novel and of utility to this Court in determining the constitutionality of the impugned provisions of RICA and the exercise of bulk surveillance. Additionally, the issues that MMA proposes to raise have
- D
mb

not been canvassed by any of the parties to the proceedings, and should be considered by the Court in making an appropriate determination in this matter.

40. In the light of the submissions above, MMA requests that this Court grant MMA's application for intervention as an *amicus curiae* in the present matter, as well as condonation for the late-filing of this application.



WILLIAM ROBERT BIRD

I hereby certify that the deponent stated that he knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at Rosebank on this the 2nd day of January 2020. The Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.



COMMISSIONER OF OATHS

Alessia Lucia Ryan

Commissioner of Oaths

Practising Attorney

2nd Floor, 20 Baker Street, Rosebank

Tel: 011 550 4000 Fax: 011 550 4040

"WB1"
19

// POWER SINGH INCORPORATED

LCP Reg. No: F18433 | CIPC Reg. No: 2018/071686/21

Public Interest Law.

a. 20 Baker Street, Rosebank, South Africa, 2196

t. +2711 268 6881

f. +2786 614 5818

e. connect@powersingh.africa

w. powersingh.africa

POWER
SINGH

This message contains information which is confidential and/or legally privileged. It is intended for the addressee only. If you are not the addressee and you have received this message in error, you may not read, use, disseminate, distribute, or copy its information. Please notify us immediately and we shall arrange for the return of this message at our own cost.

Date: 27 January 2020

Your ref: CCT 278/19

Our ref: PSIMM-202002

TO: WEBBER WENTZEL
Attorneys for the Applicants
c/o D Milo / L Pillay
E-mail: dario.milo@webberwentzel.com / lavanya.pillay@webberwentzel.com

AND TO: STATE ATTORNEY, PRETORIA
Attorneys for the First Respondent
c/o M Makhubela / H Maponya
Email: memakhubela@justice.gov.za / conkuna@justice.gov.za / hmaponya@justice.gov.za

AND TO: STATE ATTORNEY, PRETORIA
Attorneys for the Second, Seventh, Eighth and Tenth Respondents
c/o GP Seleka / H Maponya
Email: pseleka@justice.gov.za / hmaponya@justice.gov.za

AND TO: STATE ATTORNEY, PRETORIA
Attorneys for the Third and Fourth Respondents
c/o M Makhubela
Email: memakhubela@justice.gov.za

// Directors: A Singh B.Comm., LL.B. (UP), Mj Power B.A., LL.B., LL.M. (Wits) | Associate (designate): T Power B.A., LL.B., LL.M. (Wits) |
Office Manager: J Rashid | Technology Officer: K Nwana. Power Singh Incorporated is a law firm registered with the Legal Practice Council
(F18433) and a personal liability company registered in the Republic of South Africa (2018/071686/21).

A
WB

AND TO: STATE ATTORNEY, PRETORIA
Attorneys for the Fifth Respondent
c/o M Makhubela / H Maponya
Email: memakhubela@justice.gov.za / conkuna@justice.gov.za /
hmaponya@justice.gov.za

To whom it may concern,

AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM AND ANOTHER V MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS (CCT 278/19): REQUEST FOR CONSENT TO BE ADMITTED AS AN AMICUS CURIAE

1. We act for the Media Monitoring Africa Trust ("MMA" or "our client"), a not-for-profit organisation that operates in the public interest to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. In the last 27 years, MMA's work has consistently related to key human rights issues, always with the objective of promoting human rights and democracy.
2. MMA has engaged in a range of legislative and litigious processes relating to the triad of information rights, which include the rights to privacy, freedom of expression and access to information. This has included, for instance, on issues pertaining to data protection, online content regulation, cybercrimes, copyright, public broadcasting, and various other matters relevant to the exercise of these rights, both on- and offline. MMA further has a specific focus on the rights of children, most recently having participated as an applicant in the matter of *Centre for Child Law and Others v Media 24 Limited and Others* [2019] ZACC 46.
3. In line with MMA's particular areas of interest and the work that it pursues, MMA has a clear interest in this matter, and wishes to participate in the abovementioned confirmation proceedings as an *amicus curiae* as contemplated in Rule 10 of the Constitutional Court Rules ("Rules"). Accordingly, we hereby request your client's consent that our client be admitted as an *amicus curiae* with the opportunity to file an application and make written submissions, as well as to present oral argument should it be deemed necessary to do so.
4. MMA does not intend to repeat any matter set forth in the argument of the other parties and seeks only to raise new contentions which may be useful to the Constitutional Court. In doing so, MMA intends to canvass the following issues, which it submits are relevant to the proceedings and different from those of the other parties to the litigation:



R

MB

4.1. ***Appropriate safeguards for the protection of the rights of children:***

- 4.1.1. The first aspect of MMA's proposed submission relates to the impact that the impugned provisions of the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 ("RICA") and the exercise of bulk surveillance have on the rights of children when applied in line with section 28(2) of the Constitution of the Republic of South Africa, 1996 ("Constitution") and the "best interests of the child" principle.
- 4.1.2. In particular, MMA intends to argue that the current surveillance regime does not consider the best interests of the child, and is therefore rendered unconstitutional for its failure to protect the rights of children as demanded by section 28(2) of the Constitution, read with international law.
- 4.1.3. MMA therefore intends to argue that safeguards need to be put in place to protect the best interests of the child, to the extent that the communications and personal information relating to children are rendered subject to the current surveillance regime.
- 4.1.4. In determining appropriate safeguards, MMA intends to present submissions on the interplay between RICA and the Protection of Personal Information Act 4 of 2013 ("POPIA"), particularly sections 34 and 35 of POPIA, read with section 6(1)(c)(i) thereof, and the special dispensation that POPIA and other data protection frameworks, including the General Data Protection Regulation of the European Union 2016/679, create for the privacy rights of children.

4.2. ***Appropriate safeguards for the protection of NGOs:***

- 4.2.1. The second aspect of MMA's proposed submission relates to the impact that the impugned provisions of RICA and the exercise of bulk surveillance have on the ability of non-governmental organisations ("NGOs"), acting in the public interest, to perform their monitoring and oversight functions. This includes the ability to engage with, among others, activists, social movements and whistle-blowers and to investigate matters of public and corporate accountability, without fear of retaliation or reprisals.
- 4.2.2. MMA intends to submit that, in this regard, the current surveillance regime has a chilling effect on the ability of NGOs domestically and abroad to engage in sensitive matters of public importance in South Africa.

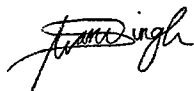


R

WB

- 4.2.3. Drawing on the comparative jurisprudence of the European Court of Human Rights, MMA intends to argue that the role performed by NGOs is akin to that of the media, including the need for source protection, and that NGOs should therefore be subject to the same additional safeguards that are deemed appropriate for journalists and lawyers.
5. Based on the foregoing, these issues are relevant to the proceedings in that the best interests of the child, read with the right to privacy, and the importance of additional safeguards for children and NGOs are important considerations for the Constitutional Court in its full consideration of this matter. Additionally, we note that these matters have not been dealt with, in the terms detailed above, in the submissions of other parties.
6. It is our understanding that the Applicant's written submissions were filed on 14 January 2020, and that the Fifth Respondent's written submissions were filed on or about 23 January 2020. As such, and in accordance with Rule 10 of the Rules, should your client agree to MMA's request for consent, MMA undertakes to file its application for admission as an *amicus curiae* at the Constitutional Court by Thursday, 30 January 2020, and to file its written submissions by Friday, 7 February 2020. To the extent that any of the parties wish to file written submissions in response to MMA's written submissions, we suggest that such written submissions are filed by Monday, 17 February 2020.
7. In order to enable MMA to properly prepare its application, we request that you advise, in writing, whether your client consents to MMA's intervention as an *amicus curiae* and to the proposed timeframes for the filing of written submissions by no later than **12h00 on Wednesday, 29 January 2020**.
8. We look forward to hearing from you.




Yours faithfully,



POWER SINGH INC.

Per: Avani Singh / Michael Power

E-mail: avani@powersingh.africa / michael@powersingh.africa



WEBBER WENTZEL

in alliance with > Linklaters

Ms Avani Singh
Power Singh Inc

By email: avani@powersingh.africa;
michael@powersingh.africa; tina@powersingh.africa

90 Rivonia Road, Sandton
Johannesburg, 2196
PO Box 61771, Marshalltown
Johannesburg, 2107, South Africa
Docex 26 Johannesburg
T +27 11 530 5000
F +27 11 530 5111
www.webberwentzel.com

Your reference

Our reference
D Milo / L Pillay / D Naidoo
3034325

Date
29 January 2020

Dear Madam

amaBhungane Centre for Investigative Journalism NPC and Another // Minister of Justice and Correctional Services and Others (CCT 278/19)

1. We act for the applicants in the above matter.
2. We refer to your letter dated 27 January 2020 ("your letter"). Our clients hereby consent to your client's request to be admitted as *amicus curiae* in the above matter on the basis set out in your letter.

Yours faithfully

WEBBER WENTZEL

Dario Milo

Partner

Direct tel: +27 11 530 5232

Direct fax: +27 11 530 6232

Email: dario.milo@webberwentzel.com

Letter sent electronically.

Senior Partner: JC Eis Managing Partner: SJ Hutton Partners: BW Abraham RB Africa M Adderley NG Alp RL Appelbaum DC Bayman
KL Bellings AE Bennett AP Blair DHL Booysen AR Bowley MS Burger RI Carrim T Cassim SJ Chong KL Collier KM Colman KE Coster K Couzyn
DB Cron PA Crosland JH Davies PM Daya L de Bruyn PU Dela M Denenga DW de Villiers BEC Dickinson MA Diemont DA Dingley G Driver W Drue
HJ du Preez CP du Toit SK Edmundson KH Eiser AE Esterhuizen MJR Evans K Fazel AA Felekis G Fitzmaurice JB Forman C Gabriel CP Gaul
KL Gawith OH Geldenhuys MM Gibson CI Gouws PD Grealy S Haroun JM Harvey MH Hathorn JS Henning KR Hillis S Hockey CM Hofeld
PM Holloway AV Ismail ME Jarvis CA Jennings CM Jonker S Jooste LA Kahn ACR Katzke M Kennedy A Keyser MD Kota JC Kraamwinkel M Kyle
J Lamb E Louw M Mahlangu L Marais S McCafferty MC McIntosh SJ McKenzie CS Meyer AJ Mills D Milo NP Mngomezulu M Moloi LE Mostert
VM Movshovich RA Nelson G Niven ZN Ntshona M Nxumalo AN Nyatumba L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel
GR Penfold SE Phajane M Philippides BA Phillips MA Phillips D Ramjetan GI Rapson Z Rawoot K Rew SA Ritchie NJA Robb DC Rudman G Sader
M Sader H Samsodien JW Scholtz KE Shepherd AJ Simpson N Singh N Singh-Nogueira P Singh S Sithole J Smit RS Smith MP Spalding PS Stein
MW Straeuli LJ Swaine Z Swanepoel A Thakor TK Thekiso C Theodosiou R Thavani PZ Vanda SE van der Meulen JP van der Poel CS Vanmali
JE Veeran B Versfeld MG Versfeld TA Versfeld DM Visagie EME Warmington J Watson AWR Westwood RH Wilson M Yudaken **Chief Operating
Officer: SA Boyd**

"WB3"
24



**Office of the State Attorney
Pretoria**

Private Bag X 91
PRETORIA
0001

SALU Building
316 Andries Street
PRETORIA

Tel: (Switchboard): (012) 309 1500
(Direct Line): (012) 309 1630
(Secretary): (012) 309 1570

Fax: (General) (012) 309 1649/50
(Direct) 086 640 1943

29th January 2020

Enquires: M Makhubela
Email: memakhubela@justice.gov.za

My ref: /2937/2017/Z52/mc
Your ref: PSIMM-202002

TEL: (011) 268 6881

FAX: 086 614 5818

ATT: AVANI SINGH / MICHAEL POWER

20 Baker Street
Rosebank
South Africa
2196

Email: avani@powersingh.africa / Michael@powersingh.africa

ATT: DARIO MILO

Webber Wentzel

Email: Dario.milo@webberwentzel.com
Lavanya.pillay@webberwentzel.com

Sir / Madam

**Re: AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC
AND OTHERS V MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES AND OTHERS (Case No. CCT 278/19)**

1. We refer to the above matter and in particular your letter dated 27 January 2020 requesting consent for your client Media Monitoring Africa Trust to be admitted as *amici curiae*.
2. Having read your letter our clients Minister of Police and the Minister of Justice and Correctional Services hereby grants

Access to Justice for All

Always quote my reference number

WB
A

consent for your client to be admitted as *amici curiae* in regard to the above mentioned Case.

Yours faithfully



M MAKHUBELA
FOR: STATE ATTORNEY (PRETORIA)

