

Rica not entirely constitutional - ConCourt

By [Rui Lopes](#) and [Kirsty Gibson](#)

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South Africa's highest court, the Constitutional Court, handed down a significant judgment yesterday, 4 February 2021, declaring that certain provisions of the infamous Regulation of Interception of Communications Act (Rica) are unconstitutional.



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In this ground-breaking judgment, the Constitutional Court held that certain provisions of Rica are unconstitutional in so far as Rica fails to provide appropriate safeguards and adequately prescribe procedures in many respects when it comes to undertaking surveillance.

This case brought about by the amaBhugane Centre for Investigative Journalism having approached the Constitutional Court for confirmation of the declaration of unconstitutionality in the 2017 High Court decision.

To this end, the Constitutional Court noted that various provisions of Rica were inadequate and thus unconstitutional in so far as they failed to:

- Provide for safeguards ensuring that a Judge designated in terms of section 1 of the Act is sufficiently independent;
- Provide for notifying the subject of surveillance of the fact of their surveillance as soon as such may be given without jeopardising the purpose of surveillance after such surveillance has been terminated;
- Adequately providing safeguards to address the fact that interception directions are sought to be obtained *ex parte*;
- 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
- Provide adequate safeguards where the subject of surveillance is a practising lawyer or journalist.

The Constitutional Court ordered that the declaration of unconstitutionality is to take effect immediately and is suspended for a period of 36 months in order to afford Parliament an opportunity to cure the defect causing the invalidity. During this period of suspension, however, the Constitutional Court has read in certain provisions giving effect to the gaps contained in Rica as it currently stands.

In a democratic society founded on the democratic values of human dignity, equality and freedom, it is vital to ensure that persons be free from intrusions and interference by the State in one's personal life, and this decision by the Constitutional Court goes a long way to enforce this.

ABOUT THE AUTHOR

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About Lopes Attorneys Inc. Founded by the Firm's Managing Director, Rui Lopes, Lopes Attorneys Inc. was established in order to provide cutting edge and cost effective legal services within South Africa and across the African market.

Rui has been recognised as one of the leading young lawyers in Africa by Africa Legal Week, as well as a Legal Influencer for the Middle East and Africa region by Lexology on two separate occasions and his opinion pieces have been featured in leading media platforms across both South Africa and Africa.

Prior to founding Lopes Attorneys Inc., Rui was a practising attorney at Baker McKenzie, one of the largest global law firms.

Rui is an admitted Attorney of the High Court of South Africa, is enrolled with the Legal Practice Council.

Lopes Attorneys Inc. has access to more than 40 jurisdictions across the African continent, making it capable of assisting clients both nationally and internationally.

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