

# LONDA 2023

DIGITAL RIGHTS AND INCLUSION IN AFRICA REPORT



## SOUTH AFRICA

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Published in April 2024

Report produced by Paradigm Initiative

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# South Africa

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## EXECUTIVE SUMMARY

South Africa has one of the highest numbers of internet users on the continent.<sup>795</sup> This, coupled with the country heading into a critical general election in 2024, has informed key trends concerning digital rights in 2023. There have been a few court decisions that, at their core, concern the tension between freedom of expression and other rights. Pushback on the Prevention and Combating of Hate Crimes and Hate Speech Bill, the Regulation of Interception of Communications and Provision of Communication-related Information Amendment Bill, and the General Intelligence Laws Amendment Bill indicate concerns around law reform and public participation. Structural changes to the Universal Access and

Service Fund are underway, following government measures to streamline the Fund's administration. These are some of the topics covered in this report. In its conclusion, the report presents high-level recommendations for government stakeholders, the private sector and/or industry, the civil society and the media.

<sup>795</sup> Statista 'Number of internet users in selected countries in Africa as of January 2023, by country (in millions)' (2023) <https://www.statista.com/statistics/505883/number-of-internet-users-in-african-countries/> (accessed on 11 December 2023).

# Introduction

South Africa has been described as a country where strong institutions and massive inequalities collide.<sup>796</sup> Its Constitution provides a plethora of rights that enable, for example, public participation, freedom of expression, and access to information. Nevertheless, some challenges have cropped up this year, which, if unresolved, may undermine the hard-fought gains. The upcoming general elections have been described as a watershed moment for South Africa’s democracy, and perhaps they provide some context for the legislative changes discussed throughout this report. The population is estimated to be 60,6 million people.<sup>797</sup> A significant portion of the population is online. As of January 2023, there were 43.4 million users.<sup>798</sup> However, the rural-urban digital divide continues to exacerbate inequality.<sup>799</sup> Persistent power outages pose a serious barrier to consistent, meaningful access to the Internet.<sup>800</sup> On a more positive note, civil society actors, media practitioners, and activists continue to champion digital rights even under trying circumstances.

796 B Levy et al “South Africa: When Strong Institutions and Massive Inequalities Collide” (2021) <https://carnegieendowment.org/2021/03/18/south-africa-when-strong-institutions-and-massive-inequalities-collide-pub-84063> (accessed on 14 December 2023).

797 StatsSA ‘60.6 million people in South Africa’ (2022) <https://www.statssa.gov.za/?p=15601> (accessed on 14 December 2023).

798 Above n 1.

799 Wyrzykowski ‘Rural-urban digital divide still poses a challenge in South Africa’ Open Signal <https://www.opensignal.com/2023/12/13/rural-urban-digital-divide-still-poses-a-challenge-in-south-africa> (accessed on 15 December 2023).

800 P Colmer ‘The power crisis is widening South Africa’s digital divide’ TechCentral (2023) <https://techcentral.co.za/the-power-crisis-is-widening-south-africas-digital-divide/221637/> (accessed on 15 December 2023).

## ▶ Country Analysis

### Online Freedom of Expression

The right to freedom of expression, enshrined in the Constitution,<sup>801</sup> consists of two parts. The first part, section 16(1), safeguards the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research. The second part, section 16(2), notes that the right does not extend to propaganda for war, incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender, or religion and that constitutes incitement to cause harm.<sup>802</sup> One would be remiss to discuss freedom of expression in South Africa without acknowledging its complex history of segregation, the remnants of which are still felt today.<sup>803</sup> Unsurprisingly, this is evident from engagements on- and offline. Some key jurisprudential and legislative developments are highlighted below.

### Jurisprudential developments

In recent years, several seminal judgments relating to freedom of expression and hate speech have been handed down by the South African judiciary, including South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another,<sup>804</sup> Qwelane v South African Human Rights Commission and Another,<sup>805</sup> and Afriforum v Economic Freedom Fighters and Others.<sup>806</sup> While elements of these judgments provide some guidance on the parameters of lawfully protected free speech, other aspects raise further questions regarding, for example, the test for liability in such matters.<sup>807</sup>

In 2023, the South African Human Rights Commission (SAHRC) reached an out-of-court settlement with Afrikaans singer, Steve Hofmeyr, following his remarks made on Facebook.<sup>808</sup> Hofmeyr remarked that the LGBTQIA+ community engaged in bestiality following Disney's efforts to create more inclusive characters. Following a complaint by an LGBTQIA+ non-profit organisation (NPO), OUT LGBT Well-being, the SAHRC instituted proceedings at the Equality Court and sought an order declaring that the cause of action arose where the impugned content is accessed and read; a written apology from Hofmeyr; that R500,000 to be paid to an LGBTQIA+ NPO, 20 hours of community service at a centre assisting and promoting the rights of the LGBTQIA+ community, and

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801 Constitution of the Republic of South Africa, 1996 (the Constitution).

802 Id. A further limitation may be conducted in accordance with section 36.

803 Freedom House 'Freedom in the World 2023: South Africa' (2023) <https://freedomhouse.org/country/south-africa/freedom-world/2023> (accessed on 11 December 2023).

804 South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another (CCT 14/19) [2022] ZACC 5 (accessed on 12 December 2023).

805 Qwelane v South African Human Rights Commission and Another (CCT 13/20) [2021] ZACC 22 <https://www.saflii.org/za/cases/ZACC/2021/22.html> (accessed on 12 December 2023).

806 Afriforum v Economic Freedom Fighters and Others (EQ 04/2020) 2022 (6) SA 357 (GJ) <https://www.saflii.org/za/cases/ZAGPJHC/2022/599.html> (accessed on 12 December 2023).

807 See, for example, B Winks 'Hate Hurts: Qwelane and the Lingering Obscurity in South Africa's Hate Speech Law' Constitutional Court Review Vol. 13 No. 1 (2023) <https://doi.org/10.2989/CCR.2023.0005> (accessed on 12 December 2023).

808 South African Human Rights Commission, 'South African Human Rights Commission Reaches Out of Court Settlement Agreement with Steve Hofmeyr on Hate Speech Matter' (2023) <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/3469-south-african-human-rights-commission-reaches-out-of-court-settlement-agreement-with-steve-hofmeyr-on-hate-speech-matter> (accessed on 26 January 2024).

that Hofmeyr participates in a diversity and inclusivity workshop.<sup>809</sup> The terms of the settlement agreement are not publicly accessible. However, Hofmeyr’s apology has been shared online.<sup>810</sup>

A further significant case, pending before the Constitutional Court, is Botha v Smuts.<sup>811</sup> The key issue in the case is the balance between the right to freedom of expression and the right to privacy. Briefly, the case relates to Facebook posts by Bool Smuts,<sup>812</sup> a wildlife conservationist, about animal trapping practices used by Herman Botha on his farm. The posts shared Botha’s personal information, such as the location of the farm, his contact details, his home address, and an image of his six-month-old daughter. In response, Botha filed an urgent application for an interdict prohibiting Smuts and Landmark Leopard from publishing defamatory statements about him. The High Court ruled that while Smuts and Landmark Leopard were entitled to publish photographs and comment on them, they were not entitled to share Botha’s personal information given his right to privacy. The matter proceeded to the Supreme Court of Appeal (SCA), which set aside the High Court’s order. According to the SCA, the posts constituted fair comment and were shared in the public interest. Consequently, Botha has filed an appeal to the Constitutional Court to set aside the SCA’s order. The matter was heard by the Constitutional Court on 9 November; judgment is yet to be handed down.

## Legislative developments

From a legislative standpoint, a key point of contention has been the re-introduction and acceleration of the Prevention and Combating of Hate Crimes and Hate Speech Bill towards becoming law. Commonly referred to as the Hate Speech Bill, it criminalises certain conduct which constitutes hate speech or hate crime. Notably, the Hate Speech Bill has received mixed responses from different stakeholders – some regard it as a significant step forward in tackling hate speech;<sup>813</sup> others have described it as a regressive measure that will breed censorship.<sup>814</sup> One of the overarching concerns is the Bill’s broad definition of hate speech. Under section 4(1), a person is guilty of hate speech if they intentionally publish, propagate, advocate, make available, or communicate anything to one or more persons in a manner that could be reasonably constructed to demonstrate a clear intention to (1) be harmful or to incite harm and (2) promote or propagate hatred based on a protected characteristic.<sup>815</sup> Despite a high influx of submissions opposing the Bill,<sup>816</sup> in March 2023, it was passed by the National Assembly and in November, passed by the

809 South African Human Rights Commission, ‘SA Human Rights Commission wants R500k from Steve Hofmeyr for LGBTQ+ comments’ (2022) [https://www.sahrc.org.za/index.php/sahrc-media/speeches/itemlist/user/557-sahrc?start=670#:~:text=SA%20Human%20Rights%20Commission%20wants%20R500k%20from%20Steve%20Hofmeyr%20for%20LGBTIQ%2B%20comments&text=The%20SA%20Human%20Rights%20Commission%20\(SAHRC\)%20is%20investigating%20Afrikaans%20singer,comments%20about%20the%20LGBTIQ%2B%20community](https://www.sahrc.org.za/index.php/sahrc-media/speeches/itemlist/user/557-sahrc?start=670#:~:text=SA%20Human%20Rights%20Commission%20wants%20R500k%20from%20Steve%20Hofmeyr%20for%20LGBTIQ%2B%20comments&text=The%20SA%20Human%20Rights%20Commission%20(SAHRC)%20is%20investigating%20Afrikaans%20singer,comments%20about%20the%20LGBTIQ%2B%20community) (accessed on 11 December 2023).

810 U Nkanjeni ‘Steve Hofmeyr apologises for LGBTQIA+ remarks’ TimesLive (2023) <https://www.timeslive.co.za/tshisa-live/tshisa-live/2023-03-13-steve-hofmeyr-apologises-for-lgbtqia-remarks/> (accessed on 11 December 2023).

811 Herman Botha v Bool Smuts and Another CCT 40/22 <http://hdl.handle.net/20.500.12144/38290> (accessed on 12 December 2023).

812 The posts were made on a Facebook page belonging to the Landmark Leopaard, a conversation non-governmental organisation.

813 Centre for Human Rights ‘CHR supports the National Assembly’s passing of the Prevention and Combatting of Hate Crimes and Hate Speech Bill’ (2023) <https://www.chr.up.ac.za/latest-news/3262-chr-supports-the-national-assembly-s-passing-of-the-prevention-and-combating-of-hate-crimes-and-hate-speech-bill> (accessed on 6 December 2023).

814 T Ngema ‘Human Rights Commission and Steve Hofmeyr reach out-of-court settlement agreement over LGGBTIA+ matter’ IOL (2023) <https://www.iol.co.za/dailynews/news/human-rights-commission-and-steve-hofmeyr-reach-out-of-court-settlement-agreement-over-lgbtiq-matter-a521f01e-8ae1-409a-9a67-6d4cb95f07d1> (accessed on 11 December 2023).

815 The protected characteristics listed in the Bill are: age; albinism; birth; colour; culture; disability; ethnic or social origin; gender or gender identity; HIV status; language; nationality, migrant or refugee status; occupation or trade; political affiliation or conviction; race; religion; sex, which includes intersex; or sexual orientation.

816 Parliamentary Monitoring Group ‘Meeting Summary: Prevention and Combatting of Hate Crimes and Hate Speech Bill & International Crimes Bill: briefing with Minister and Deputy Minister’ (2023) <https://pmg.org.za/page/Prevention%20and%20>

National Council of the Provinces (NCOP) as well.<sup>817</sup> At the time of writing, it was awaiting signature by President Cyril Ramaphosa.

## Emergent concerns about media freedom

Media freedom in South Africa is protected. In fact, in 2023, it received an improved ranking of 25 out of 180 countries in the 2023 World Freedom Index (in 2022, it was ranked 35).<sup>818</sup> The Index describes the media landscape as “sturdy, diverse, and dynamic”. Nonetheless, some challenges have arisen. President Ramaphosa has acknowledged the difficulties faced by some media institutions in transitioning to digital platforms, a shift in the way members of the public engage with the media, and the lingering effects of COVID-19.<sup>819</sup>

In line with global trends, in 2023, the Competition Commission began its Media and Digital Platforms Market Inquiry (MDPMI), which assesses the distribution of media content on digital platforms, including search, social media, and news aggregation platforms.<sup>820</sup> Google and Meta are identified in the final terms of reference as dominant players in the advertising technology (ad tech) stack. These platforms, amongst others, participate in practices that allow them to benefit from the copyright content of South African news publishers. Ultimately, the MDPMI will dissect the impact of digital platforms on the domestic news media sector. Several stakeholders filed submissions in response to the statement of issues and scope of the MDPMI.<sup>821</sup>

Legal attacks and gendered disinformation campaigns were prevalent in 2023, most notably in the matter of Maughan v Zuma in terms of which former South African President Jacob Zuma sought to silence journalist Karyn Maughan by trying to have her criminally charged. This was found to be a strategic lawsuit against public participation (SLAPP) suit.<sup>822</sup> This case highlighted that it was not just weaponisation of the courts that sought to silence and intimidate Maughan, but the case itself fuelled online bullying and attacks against her.<sup>823</sup> This was further evidenced by social posts that intended to dehumanise and insult her and to incite physical violence.<sup>824</sup>

A further emergent issue is the attack on members of civil society. A pertinent example is the online harassment of Nicole Fritz, a director of the Helen Suzman Foundation (HSF). HSF, along with the Consortium for Refugees and Migrants in South Africa, has been leading litigation pertaining to the Zimbabwean Exemption Permit (ZEP)<sup>825</sup> following the Department of Home Affairs’ decision to

Combating%20of%20Hate%20Crimes%20and%20Hate%20Speech%20Bill%20&%20International%20Crimes%20Bill:%20briefing,%20with%20Minister%20and%20Deputy%20Minister (accessed on 6 December 2023).

817 See Media Release by Parliament of the Republic of South Africa ‘National Council of Provinces passes the Prevention and Combatting of Hate Crimes and Hate Speech Bill’ (2023) <https://www.parliament.gov.za/press-releases/media-release-national-council-provinces-passes-prevention-and-combating-hate-crimes-and-hate-speech-bill> (accessed on 6 December 2023).

818 Reporters without Border ‘World Press Freedom Index 2023: South Africa’ (2023) <https://rsf.org/en/country/south-africa> (accessed on 6 December 2023).

819 Media Release by President Cyril Ramaphosa ‘A thriving democracy needs a free media’ (2023) <https://www.gov.za/blog/thriving-democracy-needs-free-media> (accessed on 14 December 2023).

820 Competition Commission ‘Final Terms of Reference: Media and Digital Platforms Market Inquiry’ (2023) [https://www.compcom.co.za/wp-content/uploads/2023/09/Media-and-Digital-Platforms-Market-Inquiry\\_FinalTOR\\_Sep2023.pdf](https://www.compcom.co.za/wp-content/uploads/2023/09/Media-and-Digital-Platforms-Market-Inquiry_FinalTOR_Sep2023.pdf) (accessed on 14 December 2023).

821 Competition Commission ‘Media and Digital Platforms Market Inquiry: Stakeholder Submissions on Statement of Issues’ (2023) <https://www.compcom.co.za/stakeholder-submissions-on-statement-of-issues/> (accessed on 14 December 2023).

822 Maughan v Zuma and Others [2023] ZAKZPHC 59, accessible here.

823 Bird, ‘Moti vs amaBhungane ruling – there is much to celebrate, but we need more’ Daily Maverick (4 July 2023) accessible here.

824 Former political spokesperson posted about Maughan, that “we must keep on kicking this dog harder so that her owner who pays her comes out.” The Tweet is accessible here.

825 The Zimbabwean Exemption Permit (ZEP) was created by the Department of Home Affairs in 2017 to enable amnesty to undocumented Zimbabwean nationals and allow them to live and work in South Africa as a result of economic and political instability in Zimbabwe. The ZEP replaced the Dispensation of Zimbabwean Project (DZP) and the Zimbabwean Special Dispensation Permit (ZSP).



terminate these permits. The decision has been declared unlawful, unconstitutional, and invalid by the High Court. Be that as it may, the proceedings have sustained conversations about xenophobic rhetoric in South Africa.<sup>826</sup> Concerningly, Fritz has been the subject of abuse and harassment online – mostly on X.<sup>827</sup> In an opinion piece penned by a colleague of Fritz, Ezekiel Kekana writes, “Through Fritz’s experience, we need to not only see online harassment and abuse against women for what it is, but we must also hold X to account for remaining a platform that continues to be a haven of abusers and a fertile ground for gender-based violence in our society.”<sup>828</sup>

## Privacy and Surveillance

### Legislative developments

In 2023 two new Bills were tabled before South Africa’s Parliament that would alter the legal framework for state surveillance: the Regulation of Interception of Communications and Provision of Communication-related Information Amendment Bill (the RICA amendment bill) and the General Intelligence Laws Amendment Bill (the GILAB).

The RICA amendment Bill emanates from the Department of Justice and Correctional Services. Its purpose is to amend South Africa’s existing interception law, the Regulation of Interception of Communications and Provision of Communication-related Information Act (RICA), following the Constitutional Court’s declaration in 2021 that key aspects of RICA were unconstitutional, and that Parliament should enact reforms by February 2024. The grounds for these reforms were: (1) that RICA should provide for post-surveillance notification; (2) that the appointment of judges to oversee surveillance discussions should ensure their independence; (3) that there should be safeguards to address the fact that surveillance hearings are necessarily *ex parte* (one party is absent); (4) that RICA should provide for standards and guidelines for the handling, storage, and deletion of any data acquired through surveillance; (5) that RICA should provide additional protections where the subject of surveillance is a lawyer or journalist. The Court also ruled that any ‘bulk interception’ by the state – mass surveillance capabilities that involve generalised monitoring of communications networks – are not enabled by RICA and are, therefore unlawful.

Though the amendment Bill largely meets the minimum requirements of the court order, it has been criticised for not undertaking other long-promised reforms to surveillance law.<sup>829</sup> The State had convinced the Court to suspend its declaration of unconstitutionality for three years to allow for a comprehensive reform process that would address a broader range of problems with RICA beyond those put before the Court. These include the need to close off parallel surveillance powers that exist in other laws, generally with even lower oversight and safeguards than exist in RICA, the need for more institutional capacity for oversight judges, and the need for higher standards for oversight and reporting.<sup>830</sup> Due to the late tabling of the Bill – just a few months ahead of the Court’s deadline – the Department of Justice and Constitutional Development has pledged to defer these issues to a later policy review. Even so, critics have questioned whether the Bill as it stands meets the Court’s order: for example, the Bill attempts to resolve the ‘*ex parte*’ issue by providing for a

826 AlJazeera ‘South Africa’s Operation Dudula vigilantes usher in new wave of xenophobia’ (2023) <https://www.aljazeera.com/features/2023/9/26/south-africas-operation-dudula-vigilantes-usher-in-new-wave-of-xenophobia> (accessed on 14 December 2023).

827 GroundUP ‘Twitter threats to litigants in Zimbabwe Exemption Permit court case’ (2023) <https://www.groundup.org.za/article/twitter-threats-to-litigants-in-zimbabwean-exemption-permit-court-case/> (accessed on 14 December 2023).

828 E Kekana ‘Disagree with Helen Suzman Foundation if you want, but stop attacking its director’ News 24 (2023) <https://www.news24.com/news24/opinions/columnists/guestcolumn/opinion-disagree-with-helen-suzman-foundation-if-you-want-but-stop-attacking-its-director-20230920> (accessed on 14 December 2023).

829 M Hunter ‘RICA bill misses the chance for real reform’ (2023) <https://www.groundup.org.za/article/rica-bill-misses-chance-for-real-reform/> (accessed 29 November 2023).

830 Intelwatch ‘Comment on the RICA Bill’ (2023) <https://intelwatch.org.za/2023/10/06/intelwatch-submission-rica-bill/> (accessed 29 November 2023).

second oversight judge to review all surveillance decisions of the first judge – but it is unclear how this addresses the ex parte issue identified by the Court, as it remains a one-sided process based on the same limited set of facts.<sup>831</sup> Parliament, facing a looming deadline to enact reforms meeting the minimum requirements of the court order, appears likely to pass the Bill largely as received; it passed through the National Assembly with only one change in October 2023 and through the National Council of Provinces without any changes in November 2023.

Separately, the Presidency, which now oversees South Africa’s State Security Agency (SSA), tabled the GILAB. The stated purpose of the GILAB is to enact recommendations of two previous inquiries – a judicial commission of inquiry into systemic ‘state capture’, including within the intelligence agencies, and an expert panel appointed by the President to assess dysfunction and unlawful conduct in the State Security Agency specifically – and to address the Constitutional Court’s findings on mass surveillance.

While there is a clear need for reform to the intelligence agencies’ powers and mandate, the GILAB has also been roundly criticised on the basis that it fails to address nearly any of the recommendations of the above-mentioned inquiries which would introduce safeguards against future abuses of power, and instead significantly expands the powers and mandate of the intelligence agencies.<sup>832</sup> Its provisions relating to mass surveillance are especially concerning, as these effectively serve to legalise the bulk interception powers that the Constitutional Court shut down in the amaBhungane judgment without providing for meaningful protections for privacy and freedom of expression.<sup>833</sup> The Bill would establish a parallel surveillance framework to that of RICA, specifically for the state to conduct ‘bulk interception’ or mass surveillance.<sup>834</sup> The Bill would establish a judge with nominal oversight powers but fall short of all of the standards that the Court said should apply to RICA: the judge is appointed by the Executive rather than the Judiciary; there is little guidance on the judge’s powers; there is no provision for post-surveillance notification, or procedures or safeguards on the appropriate management, storage, or destruction of any data collected through surveillance operations; and no clear requirement that protections for privacy, freedom of expression, and other rights should be taken into account in mass surveillance operations.<sup>835</sup> As a separate issue relating to privacy and freedom of expression and association, the Bill would also mandate the state security structures to conduct vetting of any “person or institution of national security interest”.<sup>836</sup> Given that earlier versions of the Bill suggest that this provision would be directed specifically at NGOs and religious organisations, nearly 50 civic groups have called for the Bill to be withdrawn in its entirety.<sup>837</sup> The National Assembly is expected to hold public hearings on the Bill in early 2024 and to vote on whether to pass it by March 2024.

## Surveillance policy

Some state policymaking on surveillance has been more promising. In May 2023, the Department of Justice issued a license for police to acquire and make use of IMSI catchers, which can mimic

831 J Duncan ‘Comments on RICA Amendment Bill’ (2023) [https://intelwatch.org.za/wp-content/uploads/2023/11/231013Jane\\_Duncan.pdf](https://intelwatch.org.za/wp-content/uploads/2023/11/231013Jane_Duncan.pdf) (Accessed 29 November 2023).

832 Intelwatch ‘Briefing note: General Intelligence Laws Amendment Bill (GILAB)’ (2023) <https://intelwatch.org.za/2023/11/17/briefing-note-general-intelligence-laws-amendment-bill-gilab/> (accessed 4 December 2023).

833 Mass surveillance, as opposed to targeted surveillance, is any form of interception of data which is not directed at a specific person who is subject to an investigation, but which collects large amounts of information in bulk from telecommunications or internet networks relating to whole populations of people. In the AmaBhungane judgment, the court ruled that the state’s existing mass surveillance practices were not provided for or regulated by RICA or any other law and were therefore unlawful.

834 General Intelligence Laws Amendment Bill 2023, section 2(b) (accessed on 4 December 2023).

835 Above n 39.

836 Above n 40 at section 3(a).

837 ‘Civil society joint statement on the General Intelligence Laws Amendment Bill’ (2023) <https://intelwatch.org.za/2023/12/06/endorse-gilab-statement/> (accessed 13 December 2023).

a cellular tower in order to track and monitor cellular devices in a particular area.<sup>838</sup> While initial coverage framed this as an expansion of police spying powers,<sup>839</sup> the development arguably represents a more nuanced initiative to develop better oversight over existing surveillance powers. Police have made extensive use of IMSI catchers in the past, seemingly outside of the procedures and safeguards provided for in RICA.<sup>840</sup> The license issued by the Department of Justice introduced for the first time a set of safeguards and oversight and transparency measures to the use of this technology, including that the technology may only be used in terms of RICA, and with the prior authorisation of a RICA oversight judge, and there must be a detailed paper trail and record-keeping of any such devices the police acquire, where they are stored, which officials have accessed them, and when and for what purposes the devices are used.<sup>841</sup>

## Data Governance

### Data Protection and relevant decisions by the Information Regulator

While South Africa's data protection law, the Protection of Personal Information Act (POPIA), still faces implementation challenges, the Information Regulator continued to develop and advance as the agency charged with the implementation and enforcement of the Act in 2023. This included significant improvements in meeting its own performance targets, from 68% of targets met in 2022/23 to 91% in 2022/2023.<sup>842</sup> More substantively, the Regulator announced a series of investigations and decisions relating to government bodies and high-profile businesses which demonstrated its independence as a regulatory body and willingness to act on non-compliance. Notably, this included issuing an enforcement decision, and later a R5-million fine, to the Department of Justice & Constitutional Development for contravening POPIA and failing to comply with the Regulator's findings.<sup>843</sup> As the Department has administrative responsibility for the Information Regulator, the decision signalled the Regulator's intention to act without fear or favour. Other decisions include launching an inquiry into the Department of Health's compliance with POPIA in its COVID-era data collection policies,<sup>844</sup> and a range of findings relating to private businesses.<sup>845</sup>

838 Department of Justice and Constitutional Development, 'Certificate of Exemption' Government Gazette No. 48627 (2023) [https://www.gov.za/sites/default/files/gcis\\_document/202305/48627rg11584gon3424.pdf](https://www.gov.za/sites/default/files/gcis_document/202305/48627rg11584gon3424.pdf) (accessed 13 December 2023).

839 P de Wet 'After 13 years of trying, SAPS can now legally use mass-surveillance cellphone grabbers' News24 (2023) <https://www.news24.com/news24/southafrica/news/after-13-years-of-trying-saps-can-now-legally-use-mass-surveillance-cellphone-grabbers-20230523> (accessed 13 December 2023).

840 S Swinger 'Meet the Grabber: How government and criminals can spy on you (and how to protect yourself)' Daily Maverick (2016) <https://www.dailymaverick.co.za/article/2016-09-01-meet-the-grabber-how-government-and-criminals-can-spy-on-you-and-how-to-protect-yourself/#.V8fhVJN96Hp> (accessed 13 December 2023).

841 H Swart 'State surveillance in SA just got a legal boost, but it's not an unrestricted licence to intercept' Daily Maverick (2023) <https://www.dailymaverick.co.za/article/2023-05-30-state-surveillance-in-sa-just-got-a-legal-boost-but-its-not-an-unrestricted-licence-to-intercept/> (accessed 13 December 2023)

842 Information Regulator of South Africa 'Annual Report 2022/2023' (2023) [https://static.pmg.org.za/Information\\_Regulator\\_Annual\\_Report\\_2023.pdf](https://static.pmg.org.za/Information_Regulator_Annual_Report_2023.pdf) (accessed 13 December 2023)

843 Information Regulator of South Africa 'Media Statement: Infringement notice and R5 million administrative fine issued' (2023) <https://infoeregulator.org.za/wp-content/uploads/2020/07/MEDIA-STATEMENT-INFRINGEMENT-NOTICE-ISSUED-TO-THE-DEPARTMENT-OF-JUSTICE-AND-CONSTITUTIONAL.pdf> (accessed 13 December 2023)

844 Information Regulator of South Africa 'Media Statement: Information Regulator refers national Department of Health to the Enforcement Committee regarding personal information collected during COVID-19' (2023) [https://infoeregulator.org.za/wp-content/uploads/2020/07/Media-Statement\\_Information-Regulator-Refers-NDOH-to-the-Enforcement-Committee.pdf](https://infoeregulator.org.za/wp-content/uploads/2020/07/Media-Statement_Information-Regulator-Refers-NDOH-to-the-Enforcement-Committee.pdf) (accessed on 15 December 2023)

845 Information Reguator of South Africa 'Media Statement: Information Regulator shares outcomes of complaints investigated and assessments conducted in relation to PAIA and POPIA' (2023) [https://infoeregulator.org.za/wp-content/uploads/2020/07/pdf-Final-Version\\_MEDIA-BRIEFING-OF-INFORMATION-REGULATOR-ON-OUTCOMES-OF-RECEIVED-COMPLAINTS-003.pdf](https://infoeregulator.org.za/wp-content/uploads/2020/07/pdf-Final-Version_MEDIA-BRIEFING-OF-INFORMATION-REGULATOR-ON-OUTCOMES-OF-RECEIVED-COMPLAINTS-003.pdf) (accessed on 13 December 2023).

## Cybercrime and cybersecurity

Broadly, reports indicate that cyber-attacks are on the rise.<sup>846</sup> South Africa was not spared from this trend as state institutions reportedly experience data breaches and cyber-attacks – although these do not appear to have been officially confirmed or disclosed, suggesting both a lack of adequate security and a worrying lack of transparency. By way of example, in August 2023, the South African Defence Force’s (SANDF) computer systems were breached and the personal data of several officials was leaked.<sup>847</sup> In response to the incident, the Department of Defence (DoD) released a statement declaring that its, “...preliminary investigations confirm it had not been hacked.”<sup>848</sup> By happenstance, the State Security Agency (SSA) was also hacked in August prior to the BRICS summit.<sup>849</sup> The Minister in the Presidency Khumbudzo Ntshavheni declined to comment on the incident.<sup>850</sup>

## The Universal Service And Access Fund

### Overview and administration of the fund

The Universal Service and Access Fund (USAF) is overseen by the Universal Service and Access Agency of South Africa (USAASA), which forms part of the Department of Communications and Digital Technologies (DCDT). While the USAASA was initially established in terms of the now-repealed Telecommunications Act,<sup>851</sup> its authority presently lies in the Electronic Communications Act. From a management perspective, a board of up to seven individuals is meant to provide oversight of and guidance to the agency.<sup>852</sup> The Chairperson is Daphne Kula-Rantho with Chwayita Madikizela as the Acting Chief Executive Officer.<sup>853</sup> The purpose of the fund is to, through levies from individuals and Electronic Communications Network Service (ECNS), Electronic Communications Service (ECS), and Broadcasting Service (BS) licensees, generate income for the construction and extension of ICT infrastructure in under-serviced communities and to promote universal access to electronic communications and broadcasting services.<sup>854</sup> The collection of levies is administered with the assistance of the Independent Communications Authority of South Africa (ICASA). Expenditure for the USAF is expected to decrease significantly from R2.9 billion in 2022/23 to R67.4 million in 2023/24. This is reportedly due to the retention of funds from previous years. From a legal standpoint, Selloane Motloug, a former secretary at USAASA who allegedly made protected disclosures against Madikizela was dismissed.<sup>855</sup> In August 2023, Motloug challenged

846 See, for example, Sophos ‘State of Ransomware Report 2023’ (2023) <https://assets.sophos.com/X24WTUEQ/at/c949g7693gsnjh9rb9gr8/sophos-state-of-ransomware-2023-wp.pdf> (accessed on 15 December 2023).

847 Daily Maverick ‘SNATCHed – SANDF data leaked in cyberattack appears to be authentic, says cybersecurity analysts’ (2023) <https://www.dailymaverick.co.za/article/2023-09-06-snatched-sandf-data-leaked-in-cyberattack-appears-to-be-authentic-say-cyber-security-analysts/> (accessed on 15 December 2023).

848 DefenceWeb ‘SA Defence Dept not hacked – DoD spokesman’ (2023) <https://www.defenceweb.co.za/featured/sa-defence-dept-not-hacked-dod-spokesma> (accessed on 15 December 2023).

849 Laurence SSA hacked? South Africa’s ‘top secret security breach’ TechCentral <https://techcentral.co.za/ssa-hacked-south-africa-security-breach/232774/> (accessed on 13 December 2023).

850 Id.

851 Act no. 103 of 1996 [https://www.gov.za/sites/default/files/gcis\\_document/201409/act103of1996s.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/act103of1996s.pdf) (accessed on 14 December 2023).

852 Act no. 36 of 2005 <https://www.gov.za/documents/electronic-communications-act> (accessed on 14 December 2023).

853 A list of the Agency’s Ex-Co Members may be found here <http://www.usaasa.org.za/about/exco-members.html> (accessed on 14 December 2023).

854 See National Government of South Africa ‘Public Entities: Universal Service and Access Agency of South Africa’ webpage (undated) <https://nationalgovernment.co.za/units/view/193/universal-service-and-access-agency-of-south-africa-usaasa> (accessed on 14 December 2023).

855 Bhengu ‘Former USAASA employee who made protected disclosures against CEO to challenge dismissal at CCMA’ News24 (2023) <https://www.news24.com/news24/southafrica/news/former-usaasa-employee-who-made-protected-disclosures-against-ceo-to-challenge-dismissal-at-ccma-20230814> (accessed on 26 January 2024).

the dismissal at the Commission for Conciliation, Mediation, and Arbitration (CCMA), a regulatory body which oversees labour disputes. It is unclear whether the matter has been finalised. This is perhaps reflective of the various concerns regarding the administration of the fund.

## Annual performance

There are a couple of notable highlights from the USAF Annual Performance Plan for the 2023/24 financial year. First, the USAF's strategic focus is confirmed as being three-fold: (1) to provide connectivity to primary health facilities, educational institutions, and communities in need (2) to incentivise network licensees to construct, operate and maintain networks in under-served areas and (3) to broaden access to digital broadcasting services by qualifying households.<sup>856</sup> Further, an overarching focus of the USAF appears to be the Broadcasting Digital Migration (BDM). The USAF appears to be providing subsidies to support the roll-out of BDM, following a Constitutional Court decision regarding the switch-off of the analogue signal in the country.<sup>857</sup> Lastly, the USAF has seen improvement with respect to its targets, although further details are not provided. In the second quarter of 2022/23, it achieved a 75% performance level compared to 61% in the second quarter of 2021/22.<sup>858</sup> Inadequate financial and human resources have been identified as key challenges at the Fund.<sup>859</sup> Further, the USAF has seemingly received a disclaimed audit due to substantial regulatory non-compliance.<sup>860</sup>

## Disestablishment of the USAASA

To streamline roles and responsibilities at the DCDT, the USAASA is in the process of being disestablished; a process that is expected to conclude by 2025/25.<sup>861</sup> The process is reportedly being completed on the basis of the National Integrated ICT Policy White Papers of 2016 and the National Treasury's Estimates of National Expenditure (ENE) document. This was confirmed during a Parliamentary session in May 2023, where the Minister advised that the USAASA, "...is in the process of being dissolved due to a duplication of roles". Additionally, the transfer of the USAASA functions to the DCDT is, on the face of it, an interim measure while the government formalises the corporatisation of the South African Postbank.<sup>862</sup>

856 'The Universal Service and Access Fund: 2023/24 Annual Performance Plan' (2023) [https://pmg.org.za/files/USAF\\_-\\_2023-24\\_Annual\\_Performance\\_Plan\\_-\\_\\_.pdf](https://pmg.org.za/files/USAF_-_2023-24_Annual_Performance_Plan_-__.pdf) (accessed on 14 December 2023).

857 e.tv (Pty) Limited v Minister of Communications and Digital Technologies and Others; Media Monitoring Africa and Another v e.tv (Pty) Limited and Others [2022] ZACC 22 <https://www.saflii.org/za/cases/ZACC/2022/22.html> (accessed on 14 December 2023).

858 Above n 62.

859 Above n 62.

860 Above n 62.

861 S Mzekandaba 'USAASA to be 'disestablished' ITWeb (2023) <https://www.itweb.co.za/content/raYAyMorbVg7J38N> (accessed on 11 December 2023).

862 See Parliamentary Monitoring Group 'Questions to the Minister of Communication and Digital Technologies' (2023) <https://pmg.org.za/committee-question/22137/> (accessed on 11 December 2023).

# ▶ Conclusion & Recommendations

## Conclusion

This report reflects that 2023 has been marked by several important cases and law reform processes that have a bearing on digital rights. In closing, the following recommendations are proposed for various actors who have the power to safeguard democratic principles.

## Recommendations

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### Government

- » Decidedly, effective and meaningful public participation includes the consideration of the public's views before a public decision is made. The report demonstrates instances in which concerns have been raised about the proposed law and the continued failure to address recommendations by different voices. Therefore, the government should strengthen its public participatory processes to sustain active citizenry.
- » In creating laws such as the Prevention and Combating of Hate Crimes and Hate Speech Bill, the government must consider international best practices in, for example, establishing a threshold for expressions which may be considered as criminal offences. Further, and of equal importance, vague definitions which may result in legal uncertainty should be avoided.
- » There is a clear need for more transparent processes, particularly on cybersecurity matters. There is a duty on government stakeholders to provide accurate information to members of the public and not to be seen as above the law in matters concerning personal information leaks.
- » While the USAF's Annual Reporting provides a glimpse into the workings of the Fund, it is not fully clear what its impact has been and how ongoing structural changes may affect targeted communities. Thus, the USAAS should take measures to improve its reporting to the public and update, for example, its website as a port of first call.

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### The private sector / industry

- » Mindful of the forthcoming elections, social media platforms must exert their efforts in curbing online harms whether they manifest as hate speech, online harassment, and/or mis- and disinformation. This is especially important when one considers actors who may be at risk for such attacks, such as female journalists and members of civil society.
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- » In terms of the latest annual report by the USAF, it does not have public-private partnerships. This may present an opportunity for private sector actors in the ICT sector to support the Fund's mandate.

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**Civil society  
and the media**

- » The significant legislative changes highlighted in the report speak to the importance of continued public participation and dissent where necessary. The work of CSOs in championing rights-based causes and media practitioners in disseminating information to the public continue to be powerful tools for accountability.
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