

RECORDING CONVERSATIONS WITHOUT CONSENT

Introduction

Many of us find ourselves in precarious situations where we feel it is necessary to record conversations, mainly to be used as proof against the other person for various reasons. These could be in the family setting, or even in the workplace where you have recorded certain scenarios such as disciplinary proceedings. But are these recordings legal, without the other person's knowledge that they are being recorded? And can this be used at a later stage as evidence?

Right to Privacy

Section 14 of the Constitution provides the right to privacy and protection from having one's communications infringed.¹ However, the Constitution states that the rights provided therein may be limited in terms of Section 36 and thus are not absolute. The court in the case of *Bernstein v Bester*² discussed the extent to which the right to privacy can be limited. Known as the limitation clause, Section 36 provides that in order for a right to be lawfully limited the '*limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom*'. There must therefore be a legitimate expectation that the right to privacy may not be infringed upon in order to deem the infringement unlawful.³

Regulation and Interception of Communications Act

As previously mentioned, the general rule of RICA is that all intentional interceptions of any sort of communications during the course of its occurrence or transmission in the Republic are prohibited. Further, any recording of a conversation that has been done without the consent of a party thereto is deemed as unlawful. There are several exceptions that are applicable in the instance of a recording without consent, as contained in the RICA Act and listed below:

- Where you are a party to the communication;
- Where you have received the written consent from one of the parties to the communication; or

¹ The Constitution of the Republic of South Africa Act 108 of 1996.

² *Bernstein v Bester* 1996 (2) SA 751 (CC).

³ *Bernstein v Bester* 1996 (2) SA 751 (CC).

- Where the recording has been made for purposes of carrying on of business.

But how does this come into play when dealing with employers recording their employees, or vice versa?

The case of *Protea Technology Ltd v Wainer*⁴ followed the judgement in *Bernstein v Bester*, and is relevant as the court had to deal with the admissibility of the transcripts of tape recordings made of telephonic communications by the employee, the First Respondent. The court also had to deal with the right to privacy as well as employees' rights when dealing with interception and monitoring of communications. It was held that there had to have been a legitimate expectation of privacy by the employee, which was not evident in this case as he was aware of the telephone conversations being recorded. The court held further that in relation to the right to privacy contained in Section 14, this right had to be weighed up against the relevance of the evidence in the courts discretion in determining whether or not to admit the evidence.

Additionally, by virtue of the communications taking place in the workplace or even on the work resources (telephones or computers), it was argued that there could have been no legitimate expectation of privacy as the communications were being conducted during the business hours when the employee should have been conducting business. Employees are likewise entitled to record the communications with their employers, particularly when dealing with situations such as disciplinary proceedings, by virtue of them being a party to the communications itself. These recordings are thus admissible as evidence.

Conclusion

The recordal or interception of communications is a complex scenario to navigate as it is often of a highly sensitive nature. By ensuring that you comply with at least one of the exceptions as listed in the RICA Act will ensure your recording is admissible and can be used as evidence in your case. At SchoemanLaw, our experts will be able to guide you through the litigation or labour process and provide you with the necessary resources and advice to see you through your matter. For any of your legal needs, contact our experts at SchoemanLaw today.

⁴ *Protea Technology Limited v Wainer* (1997) 3 All SA 594 (W).