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Conversations recorded without your consent can be used against you

by Samantha Bonato

It is becoming increasingly easy for employees in the workplace to record conversations, meetings and disciplinary enquiries without the consent of the employer to do so. The advancement of cell phone technology makes it easy for employees to do so without anyone knowing simply by placing their cell phone in their jacket or trouser pocket or on a table in a meeting. Cell phone applications have become so advanced that incoming and outgoing phone calls can be automatically recorded and stored on a cell phone with little to no effort. Employers then find themselves in a position where they are confronted with audio recordings of their conversations with employees without even knowing that such recording had been made. These recordings may be introduced by employees as evidence in disciplinary hearings, dispute resolution proceedings at the Commission for Conciliation, Mediation and Arbitration ("**CCMA**") and even in court. Similarly, employers may also wish to utilise recordings of this nature.

It is not illegal for a person to record or intercept conversations that they are party to. Section 4 of the Regulation of Interception of Communications and Provision of Communication-Related Information Act, 2002 ("**RICA**") provides that any person, other than a law enforcement officer, may intercept any communication if he or she is a party to the communication, unless such communication is intercepted by such person for purposes of committing an offence.

But what is the position where audio recordings are illegally obtained? How does this affect their admissibility as evidence in disciplinary hearings or legal proceedings? Can an employer use audio recordings (legally or illegally obtained) as evidence against an employee, specifically considering their right to privacy?

Section 35(5) of the Constitution of South Africa provides that evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence renders the trial unfair or will otherwise be detrimental to the administration of justice. This would of course mean that if evidence (such as audio recordings) is obtained in a manner that violates an employee's right to privacy, it would not be admissible. However, section 35(5) of the Constitution qualifies this to essentially provide that such evidence would be admissible if it is in the interests of justice to do so.

In the case of ***Protea Technology v Wainer***, the employee argued that the transcripts of telephone calls recorded by a surveillance device utilised by an employer were inadmissible. The court held that in respect of telephonic conversations pertaining to the employer's affairs and at the employer's business, there was no legitimate expectation of privacy and the employer was entitled to utilise recordings of such conversations. With regard to RICA, the court highlighted that the Act does not render evidence inadmissible when it is obtained in contravention of its provisions.

Importantly, the court considered the fact that the employee was employed in a position of trust and that his right to privacy was therefore marginal in the circumstances. The telephone conversations which were recorded were also made from the employer's business premises and within business hours. The employer was therefore entitled to require the employee to account for his activities during this time

The court also placed emphasis on the balancing of interests, specifically in relation to matters that do not involve a criminal onus. It held that:

"The process of balancing interests can seldom be mathematically quantified. That is especially the case where one has to apply the *boni mores* of the community to the facts ... Such persons would, I think, feel, with justification, that a trusted employee who behaves in the manner attributed to the first respondent should be exposed, and that, given the circumstances, the legitimacy of his expectation of privacy was marginal. This is not a case where the State bears a criminal onus. The accused is not presumed innocent. This is a civil dispute where each party accuses the other of dishonesty and improper motives. It would be quite wrong to allow one party to damage and malign the other while depriving the latter of relevant material at its disposal to disprove such allegations, all for the sake of upholding a right which, in all the circumstances, should not need to be invoked at all unless there is something to hide."

In ***Harvey v Niland and others***, evidence was obtained by hacking into the respondent's Facebook account. He argued that the accessing of his Facebook communications was an infringement of his fundamental right to privacy and constituted a criminal offence. The court held that privacy rights are not absolute, and in this case, were trumped by other factors. The relevant evidence was ruled admissible and the court confirmed the common law principle that all relevant evidence that is not rendered inadmissible by an exclusionary rule is admissible in a civil court, irrespective of how it was obtained.

The court in this case also confirmed that South African courts retain a discretion to admit tape recordings into evidence notwithstanding the commission of an offence or the infringement of a constitutional right in obtaining the recording.

It is clear from the above that, regardless of how audio recordings are obtained, they may be admissible notwithstanding the infringement on constitutional rights and especially when in the interests of justice.

Employers would be well advised to be wary of the fact that their employees may present evidence in various forums in the form of recorded conversations which the employer has no knowledge of. However, employers can also utilise the information obtained from recordings to their advantage. Given that the admissibility of audio recordings goes beyond the realm of employment law, and more into the interpretation of RICA and law of evidence spheres, the Labour Court has made it clear that employers may, in appropriate circumstances, utilise recorded conversations in disciplinary hearings and legal proceedings as evidence against an employee, taking into account the relevant facts of each case and the balancing of the respective interests involved. This is regardless of how such recordings are obtained, although it would be in an employer's best interests to obtain such evidence legally.

It is trite that the use of a criminal standard is not applicable to internal disciplinary proceedings convened by an employer or at

subsequent arbitration proceedings. What is required is that a fair process is followed. Before dismissing an employee, an employer is required to conduct an investigation, give the employee or his or her representative an opportunity to respond to the allegation after a reasonable period, take a decision and give the employee notice of that decision.

Accordingly, while it is clear from the above that an employer can present evidence in disciplinary hearings or arbitrations in the form of audio recordings (legally or illegally obtained), if doing so would be in the interests of justice and even if obtaining them infringes on an employee's right to privacy, employers are still required to follow a fair process and provide the employee with a fair opportunity to state his case and to respond to the evidence presented against him.

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