

**‘Privacy in the workplace’: Striking a balance
between the privacy concerns of employees and
the operational requirements of employers.**



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DECLARATION

In submitting this dissertation, I declare that the entirety of the work is my own original work, and that where other sources have been consulted, they have been properly referenced.

Sarisha Shanel Kondiah

November 2012.

ABSTRACT

The value underlying privacy lies in the fact that it mirrors the very idea of human dignity and the protection of the personal realm. However operational requirements of employers and advancements in science and technology continuously challenge the notion of privacy in the workplace. Employees all over the world are victims of a number of privacy invasive measures including, but not limited to drug testing, background checks, HIV/AIDS testing and polygraph testing. Present day advancements in technology and science make the recognition and protection of the right to privacy even more urgent. The concept of privacy in the workplace has grown in importance as technology has enabled sophisticated forms of testing and monitoring of employees. As a result of these advancements a deep tension has arisen between two conflicting sets of principles. Consequently the rationale for this study is to strike a balance between the employee's right to privacy and the employers right to conduct his or her business as he or she deems fit. This will be done through an analysis of a number of practices adopted by the employer in the workplace of which contribute to the infringement. Further the admissibility of such evidence procured by the employer through these practices will be interrogated. This is a significant issue as scientific and technological advancements have a very tangible impact on the wellbeing of employees.

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CHAPTER ONE

PRIVACY IN THE WORKPLACE: STRIKING A BALANCE BETWEEN THE RIGHT TO PRIVACY OF EMPLOYEES AND THE OPERATIONAL REQUIREMENTS OF EMPLOYERS

BACKGROUND & STATEMENT OF PURPOSE:

The value underlying privacy lies in the fact that it mirrors the very idea of human dignity and the protection of the inner sanctum. Despite such inherent value operational requirements of employers continuously challenge the notion of privacy in the workplace.

The right to privacy is one of the fundamental rights contained in the Bill of Rights in section 14 of the South African Constitution. This right extends and protects not only the right to physical privacy, but also the privacy of personal data which the employer may have access to by way of the employment relationship. Our courts have interpreted the application of section 14 as an important but not an absolute fundamental right. Hence this right has to be balanced with other rights. In particular an employee's right to privacy must be balanced with the employer's business necessity or operational requirements.

Despite this constitutional protection, employees all over the world are victims of a number of privacy invasive measures including, but not limited to drug testing, background checks, HIV/Aids testing, polygraph testing and interception of email and internet communications.

The purpose of this research is to determine to what extent privacy is protected in the workplace in light of the advancements in technology which enable easy access and monitoring of the communications of employees and the statutory and common law limitations of the right to privacy.

RATIONALE FOR THE STUDY:

The rationale for this study is to examine the impact of the law on the employee's right to privacy and the employers right to conduct his or her business as he or she deems fit. This is a

significant issue as technological advancements in the employment sphere have a very tangible impact on the wellbeing of employees.

It is hoped that this research can be of practical value and enable employers to establish principles and guidelines for dealing with the issue of privacy in the workplace.

LITERATURE REVIEW:

It is apparent that even though the courts and legislators have an idea of what privacy is, they cannot adequately define it with some clarity. As a result of this uncertainty the concept of privacy remains difficult to define, resulting in much debate and confusion amongst critics.

Thompson for example states that ‘perhaps the most striking thing about the right to privacy is that nobody seems to have any clear idea what privacy is’.¹ Similarly Michael states that ‘of all human rights in the international catalogue, privacy is perhaps the most difficult to circumscribe and define.’²

An interesting observation however, is that by Gross who claims that ‘it is not the function of the law to determine what privacy is.’³ The function of the law, according to Gross, is to identify ‘situations of privacy that will be afforded legal protection or will be made private by virtue of legal protection’, because ‘privacy is a creature of life in a human community and not the contrivance of a legal system concerned with its protection’. This statement is ironical because if it not the function of the law to determine what privacy is, then whose function is it.

McQuoid Mason provides some insight into the nature and significance of the right to privacy where he states that ‘it is recognised by social scientists as essential for the preservation of an individual’s human dignity including his or her physical, psychological and spiritual well-being’.⁴

¹ Thompson ‘*The Right to Privacy*’ *Philosophy and Public Affairs* 1975 (2) 95.

² Michael ‘Privacy and Human Rights: An International and Comparative Study, with Special Reference to Developments in Information Technology’ (1994).

³ Gross ‘The Concept of Privacy’ (1977) 42 *New York University Law Review* 36.

⁴ McQuoid Mason ‘*The Law of Privacy in South Africa*’ (1978) 98.

On an evaluation of these different critics it seems difficult to identify or define a single doctrine of what privacy is.

RESEARCH METHODOLOGY:

Information will be gathered primarily from the case law and legislation. Literature in the form of journal articles and books will also be used to gather a more overall perspective.

CONCEPTUAL FRAMEWORK:

The concept of privacy in the workplace will provide a framework for the study. Privacy will be seen as a constitutional right afforded to all human beings, but which can be legitimately limited in terms of the limitation clause in the Constitution. This limitation will be addressed in the employment sphere particularly, a sphere where many employees spend most of their lives.

Privacy is considered as a basic human need, essential for the development and maintenance of a free society and for the preservation of the inner sanctum.⁵ McQuoid Mason comments that social scientists perceive the right to privacy as the right to have control over one's "information preserve", and to maintain a "a status of personal dignity", while invasion of privacy is "an immoral affront to human dignity."⁶ It is thus evident that the right to privacy is an important value in individuals as it preserves and maintains their autonomy and human dignity. It presents individuals with a choice to decide when and how much of their personal affairs they wish to divulge to others and as a result they possess control over their personal life.

⁵ A Devenish 'A Commentary On The Bill Of Rights' (1999) 135.

⁶ Note 4 above, 39.

LEGAL FRAMEWORK OF PRIVACY:

In South Africa the right to privacy is protected in section 14 of the Constitution⁷ which provides:

“Everyone has the right to privacy, which shall include the right not to have;

- a) their person or home searched;
- b) their property searched;
- c) their possessions seized; or
- d) the privacy of their communications infringed”.

It is important however to acknowledge that the right to privacy as enumerated in the Constitution is not an absolute right and as a result has to be balanced with other rights. “In particular, the employee’s right to privacy must be balanced with the employer’s business necessity or operational requirements”.⁸ Our courts have interpreted the application of section 14 as an important but not an absolute fundamental right and hence in certain circumstances this right can be limited in terms of the Limitation clause provided for in terms of section 36 of the Constitution.⁹ The section reads as follows:

“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

⁷ Section 14 of the Constitution of the Republic of South Africa, 1996 (1996 Constitution).

⁸ M McGregor ‘The Right To Privacy In The Workplace: General Case Law and Guidelines for Using The Internet and e-Mail’ *Mercantile Law Journal* 2004 638, 639.

⁹ Note 7 above, section 36.

From this it is evident that a right can only be limited if the limitation is authorized by “a law” and the law itself must be of general application. Whether or not such limitation is justifiable depends on the criteria set out in subsections 36(1) (a)-(e). In interpreting this limitation clause it is interesting to note that the Constitutional Court stated that that “the protection accorded to the right of privacy is broad but it can also be limited in appropriate circumstances”¹⁰ and that the scope of a person’s privacy should extend only to those areas where he/she would have a *legitimate expectation* of privacy.¹¹ This concept of legitimate expectation will be interrogated in my dissertation and further to what extent the privacy rights of employees diminish in the workplace will be challenged.

INTERNATIONAL RECOGNITION:

The right to privacy has also been given international recognition in various declarations. It is expressly guaranteed in the Universal Declaration of Human Rights¹²:

Article 12 of the Declaration provides:

1. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor attacks on honour or reputation.
2. Everyone has the right to the protection of law against such interference or attacks.¹³

It is also fleshed out in the International Covenant on Civil and Political Rights¹⁴:

Article 17 states that:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor attacks on honour or reputation.
2. Everyone has the right to the protection of law against such interference or attacks.¹⁵

Aside from international protection, the right to privacy has also been given regional protection in the European Convention on Human Rights¹⁶:

Article 8 of the ECHR provides that:

1. Everyone has the right to respect for his private and family life, his home and

¹⁰ *Case v Minister of Safety and Security* 1996 3 SA 617 (CC), para106.

¹¹ *Ibid.*

¹² Universal Declaration of Human Rights, 10 December 1948.

¹³ *Ibid.*, article 12.

¹⁴ International Covenant on Civil and Political Rights.

¹⁵ *Ibid.*, article 17.

¹⁶ European Convention on Human Rights.

his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.¹⁷

Having explained the importance of the right to privacy and the protection that various legal instruments afford to it the question that arises, which is the heart of my dissertation, is to what extent is this right protected in a workplace environment where employees move away from their private sphere and into a public domain. This is a contentious issue and involves the balancing of two competing interests, on the one hand due consideration must be given to an employee's right to privacy, as employees do not waive their privacy rights when entering into an employment relationship and on the other hand, "there is the right of the employer to enjoy its property and exercise its managerial powers of command to protect its property against abuse that might cause direct or indirect damage to the employer's business".¹⁸ In this regard striking a balance accordingly becomes important.

The Constitutional Court has held that "privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction the scope of personal space shrinks accordingly"¹⁹ Despite such "shrinkage" it would however be unreasonable to hold that an employee has no expectation whatsoever to privacy in the workplace. This is because although an employee might be under the "control" of the employer that control should not be exercised in a manner that infringes substantially the privacy rights of employees.

¹⁷ Ibid, article 8.

¹⁸ Reinhard "Information Technology and Workers' Privacy: A Comparative Study: Part III: Recurring Questions of Comparative Law; Information Technology and Worker's Privacy: Information Technology and Worker's Privacy: Enforcement" (2002) 23 *Comparative Labour Law & Policy*.

¹⁹ *Bernstein v Bester NO 1996 (2) SA 751 (CC)*, para 759.

THEORETICAL ARGUMENTS FOR AND AGAINST THE RIGHT TO PRIVACY IN THE WORKPLACE:

A number of arguments have been made for and against the protection of privacy in the workplace. Firstly in dealing with the arguments for the protection of privacy many employees argue that the protection of the right to privacy in the workplace preserves their right to autonomy and as a result thereof any infringement would impact on their dignity, health and well being.²⁰ Secondly employees argue that privacy breeds diversity and its protection not only works against conformist pressures, but also nurtures the development of fresh ideas, beliefs and attitudes.²¹ Thirdly employees feel that if they do not have privacy in the workplace they will feel that their employer does not trust them and as a result of this perceived lack of trust this might lower employee morale and erode the mutual respect between an employer and employee that needs to exist in order for a healthy and productive working relationship to continue.²² Lastly another reason which is quite important is that “employers provide employees with certain technologically advanced tools such as a telephone, voicemail, email, and Internet access, all of which allow employees to accomplish more work in less time. Employees contend that the increased productivity demands of the workplace, and increased demand on the amount of time that employees spend at work, require employees to mingle their personal and professional lives. This is especially so when it comes to such items as email usage. Employees need to take care of personal business in the office, and if the employee can most quickly resolve personal matters by using workplace resources, it is in the employer's best interest to allow the employee to do so. The only way for the employee to feel comfortable conducting their personal business at work is by ensuring that private business will remain private. In such an environment, where employees' handling of private matters results in a benefit to the employer in terms of higher morale, increased productivity, and more time spent at work, employees arguably should not be forced to sacrifice their privacy rights”.²³

²⁰ Craig ‘Privacy and Employment Law’ (1999) 20-26.

²¹ Ibid.

²² M S Hornung ‘*Think Before You Type: A look at Email Privacy In The Workplace*’ *Fordham Journal of Corporate and Financial Law* 115 2005-2006, 123.

²³ M Echols, Striking a Balance Between Employer Business Interests and Employee Privacy: Using Respondeat Superior to Justify the Monitoring of Web-Based, Personal Electronic Mail Accounts of Employees in the Workplace, *Comparative Law Review & Technological Journal* 273 2003, 279.

Turning to the arguments that are proposed against the protection of privacy in the workplace, firstly employers are concerned with work productivity and profitability and are of the opinion that employees are wasting time reading their own Email and making personal calls and other non-related work activity. As a result of this they are ‘eating into’ work time and the employers primary aim of productivity is being reduced. Secondly, employers are concerned with the improvement of economic conditions and hence wish to hire competent workers who are unlikely to cause workplace disruptions or be careless whether from absenteeism or ill health. This in turn justifies medical testing such as HIV/AIDS testing from the employer’s perspective.²⁴ Lastly the most common reason proposed by employers is that “they have an established right to run their organisation in a method that will best protect their company” and hence the aspect of ‘managerial prerogative’ takes precedence over an employee’s right to privacy. From these reasons advanced by the employer it is evident that little, or no recognition is given for an employee’s right to privacy and the main focus is rather on the freedom of employer to run his or her business according to his or her own will.

RESEARCH AREAS

It is against this background that in my dissertation I will be identifying and analysing some of the practices adopted by the employer in the workplace and I will illustrate how these practices may infringe the privacy rights of employees.

I will begin by analysing the development of the legal protection of privacy in South Africa and in the United States. This will be done on an analysis of the common law protection right up until Constitutional protection. The reason as to why I chose these two different countries is because each country has a distinct approach towards privacy protection. On the one hand South Africa provides for and protects for and protects the right to privacy explicitly in section 14 of the Constitution which is also given effect in various other legislation which I will set out in forthcoming chapters, whereas the United States of America has no specific right to privacy in its Constitution but has instead found a way to protect privacy through other rights in its Constitution.

²⁴ Mimmy Gondwe The Protection of Privacy in the Workplace: A Comparative Study (published LLD thesis, University of Stellenbosch, 2011) 147.

Thereafter I will examine four distinct practices utilized by an employer in the workplace which raises concerns for the accommodation of privacy in the employment sphere. These practices are polygraph testing, HIV/AIDS testing, body and desktop searches and lastly interception and monitoring of communications at the workplace.

Importantly with regards to the chapter on the interception and monitoring of communications at the workplace I will be discussing the impact of the newly promulgated Regulation of Interception of Communications and Provision of Communication- Related Information Act.²⁵ This Act was specifically enacted to prohibit the interception of direct and indirect communications in the workplace and in essence to protect the privacy right of employees. I will discuss what these practices entail, secondly I will examine the legislation, if any regulating or impacting on the practice itself, thirdly I will examine a selection of cases which deal with the application and impact of the practice and lastly I will examine the extent to which privacy is infringed in light of that particular practice.

On completion of the analysis of these practices I will then discuss the admissibility of such evidence obtained in terms of labour and civil proceedings, and will thereafter conclude.

²⁵ Regulation of Interception of Communications and Provision of Communication- Related Information Act 70 of 2002. Hereinafter referred to as RICA.

CHAPTER TWO

THE DEVELOPMENT OF THE LEGAL PROTECTION OF PRIVACY IN SOUTH AFRICA AND THE UNITED STATES

Introduction:

The significance and nature of the right to privacy is indeed an important one as outlined in chapter one. As a result of the importance of this right many countries had to provide some legal recognition either explicitly or by implication in their Constitutions. However such recognition was not instant but rather as a gradual development of the law. Hence in this chapter I will be focusing on the legal development of privacy protection in South Africa and in the United States. As indicated prior the reason as to why I chose these two different countries is because each country presents a different approach towards privacy protection. On the one hand South Africa provides for and protects the right to privacy explicitly in section 14 of the Constitution whereas the United States has no specific right to privacy in its Constitution but has instead found a way to protect privacy through other rights in its Constitution. My evaluation will be done by considering case law and legislation that has significantly contributed to the development of privacy protection in each country.

South Africa

Common Law Protection

The right to privacy in South Africa enjoys protection under both the common law and the Constitution. However this systematic protection under both the common law and the Constitution has not always been in place. The reason for this is that prior to both the Interim²⁶ and the adoption of the Final Constitution of South Africa²⁷ the right to privacy was only protected by the common law. “The common law recognises the right to privacy as an independent personality right that the courts consider to be part of the concept of dignitas”.²⁸ In terms of the common law, a breach of a person’s privacy constitutes an injuriarum. It is

²⁶ Constitution of the Republic of South Africa Act 200 of 1993 (interim Constitution).

²⁷ Note 7 above.

²⁸ Note 19 above, para 68.

said to occur when there is an unlawful intrusion on someone's personal privacy or an unlawful disclosure of private facts about a person.²⁹ Further, in order to succeed for the invasion of privacy based on the action injuriarum the plaintiff must prove the following three elements: (i) wrongfulness (ii) intention and (iii) impairment of the plaintiff's personality rights (in this instance privacy).³⁰

It is because of the failure of the common law to provide an independent right to privacy but rather to equate such right with one of the personality rights that the courts were reluctant to recognise the existence of an independent right to privacy.

Case Law

In the case of *O'Keefe v Argus Printing and Publishing Co Ltd*³¹, the plaintiff, an unmarried woman, brought the action injuriarum for the unauthorised use of her photograph and name in an advertisement for a company distributing rifles, pistols, revolvers and ammunition. The court in determining whether the plaintiff could reasonably have been subjected to offensive, degrading or humiliating treatment considered modern conditions and thought and concluded that "the unauthorised publication of a person's photograph and name for advertising purposes constitutes an aggression upon the person's dignitas".³² This decision has been criticized by Neethling who states that by failing to offer a comprehensive definition of privacy this has resulted in identity as a personality right being equated with privacy.³³

Also in terms of the common law court's judged the unlawfulness of a factual infringement of privacy in light of the boni mores and the general sense of justice of the community. As in the case of *S v A*³⁴ where two private detectives placed a listening device under the dressing table of the complainant at the request of her estranged spouse. The court concluded that the two private detectives were liable for invading the complainant's privacy. In reaching this decision Botha AJ reiterated that the right to privacy is included in the concept of dignitas and further that the "infringement of a person's privacy prima facie constitutes an impairment

²⁹ Currie & De Waal *Bill Of Rights Handbook* 5th ed (2005) 316.

³⁰ Note 4 above, 181.

³¹ *O'Keefe v Argus Printing and Publishing Co Ltd* 1954 (3) SA.

³² *Ibid*, para 248.

³³ Neethling, Potgieter and Visser *Neethling's Law of Personality* (1996) 240.

³⁴ *S v A* 1971 (2) SA 293.

of his dignitas”.³⁵ Importantly what was also stated in this case is that punishment for the impairment of one’s dignitas is dependent on the time, place and modes of thought and ways of life prevalent amongst a particular community.

In *Financial Mail (Pty) Ltd v Sage Holdings Ltd*³⁶ it was held that a breach of the right to privacy could occur either by way of an unlawful intrusion upon the privacy of another, or by way of unlawful disclosure of the private facts about a person.³⁷ Further it was stated that the unlawfulness of a factual infringement of privacy is adjudged “in light of the contemporary boni mores and the general sense of justice of the community as perceived by the court”.³⁸

It is thus evident that in terms of the common law the courts recognised the right to privacy as being one of the personality rights that was considered to be part of the concept of ‘dignitas’. “Despite recognising the existence of the right to privacy, the courts did not expressly attempt to define the concept of privacy”.³⁹ It is because of this failure to recognise privacy as an independent right of its own that courts were unable to “identify circumstances in which they should regard the breach of privacy as an actionable invasion”.⁴⁰

Constitutional Protection of Privacy

Interim Constitution

In 1993 South Africa enacted its first democratic Constitution of the Republic of South Africa. Accordingly the Bill of Rights provided for a right to privacy in section 13:

“ Every person shall have the right to his or her personal privacy which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications”.⁴¹

³⁵ Ibid, para 297.

³⁶ *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 2 SA 451 (A).

³⁷ Ibid, para 462.

³⁸ Ibid.

³⁹ Note 24 above, 58

⁴⁰ Note 24 above, 58.

⁴¹ Note 26 above, section 13.

This provision had the effect of re-enforcing the importance of the right to privacy⁴² and significantly gave it its own status as a specific right, not enjoined with the familiar personality right as under the common law.

Final Constitution

The Constitution of South Africa provides in section 14:

“Everyone has the right to privacy, which shall include the right not to have;

- a) their person or home searched;
- b) their property searched;
- c) their possessions seized; or
- d) the privacy of their communications infringed.”⁴³

It is evident that there is no major difference between the privacy provisions in the Interim and Final Constitution. The first part of section 14 guarantees a general right to privacy whereas the second part protects against specific breaches of privacy such a search and seizures and infringements of the privacy of communications.⁴⁴ On an analysis of section 14 it is evident that it has had positive effects on the right to privacy, firstly it has enhanced and given meaning to the existing protection of privacy provided for by the common law⁴⁵, secondly it has recognised privacy as an independent and important right,⁴⁶ thirdly it has created new rights to privacy, that being substantive privacy rights which deals with protecting personal autonomy, and secondly informational privacy rights which deals with preventing disclosures and access to information⁴⁷, lastly it requires courts to develop the existing common law so that “what once were victimless crimes are now lawful pursuits, the invasion of which creates a constitutional tort”.⁴⁸ Apart from these, importantly is that the right to privacy provided for in section 14 is now also subject to the limitation clause in section 36 of the Constitution, thus although being a fundamental right it is not absolute. This

⁴² Note 33 above, 239.

⁴³ Note 7 above, section 14.

⁴⁴ Note 29 above, 315.

⁴⁵ Note 24 above, 61.

⁴⁶ Note 24 above, 61.

⁴⁷ Note 5 above, 147.

⁴⁸ Dooley ‘Modern Tort Law’ 8 quoted by McQuoid-Mason ‘Privacy’ in *The Constitutional Law of South Africa* (eds) Chaskalson et al 18-7.

is relevant for the purposes of my dissertation because the question which arises is to what extent such right can be limited in the workplace where employees place a high value on their privacy rights.

Case Law

The Constitutional Court has heard and decided on a number of cases dealing with the right to privacy however it has not as yet dealt with the right to privacy in the employment context. The general trend of thinking of the Constitutional Court regarding the right to privacy is that such right warrants respect given its specific mention in the Constitution. However such right is not absolute and can be limited in terms of the limitation clause where it is reasonable and justifiable to do so.⁴⁹

*Bernstein v Bester*⁵⁰

This case remains the “locus classicus” for the Constitutional right to privacy.⁵¹ The issue in this case concerned the constitutionality of sections 417 and 418 of the Companies Act 61 of 1973, providing for the examination of persons and the disclosure of documents on company affairs. The applicants argued that these sections of the Act violated the privacy of a witness by forcing the witness to disclose books and documents the witness would under normal circumstances like to keep undisclosed and confidential. In this case Ackerman J held that “privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of a personal space shrinks accordingly”.⁵² He further found that the scope of privacy is “closely related to the concept of identity and that rights like the right to privacy are not based on the notion of the encumbered self, but on the notion of what is necessary to have one’s own autonomous identity”.⁵³

What is important to note in this case is that the right to privacy was viewed as a subjective expectation that society must consider as reasonable, and that such reasonable expectation

⁴⁹ Note 5 above, 148.

⁵⁰ Note 19 above.

⁵¹ Note 24 above, 62.

⁵² Note 19 above, para 67.

⁵³ Note 19 above, para 65.

exists only in the inner sanctum and the ‘truly personal realm’. It also established that privacy concerns diminish as one moves further from the personal realm and this is particularly important in the employment context as this reaffirms the approach of the Constitutional Court that the right to privacy is not absolute.

*Investigating Directorate: Serious Economic Offences v Hyundai Motor Services*⁵⁴

The issue in this case was whether section 28(13) and section 24(14) read with section 29(5) of the National Prosecuting Authority Act 32 of 1998 was inconsistent with the Final Constitution, particularly if those provisions authorising the search and seizure of documents, records and data breached the right to privacy in section 14 of the Constitution. Here Langa DP held that “section 14 does not only relate to the “truly personal realm or inner sanctum”. Thus when people are in their offices, in their cars or on mobile telephones, they retain the right to be left alone by the State unless certain conditions are satisfied. Wherever a person has the ability to decide what he or she reveals to the public, the expectation that such a decision warrants respect is reasonable and the right to privacy comes into play”.⁵⁵

Further the court stated that “privacy is a right which becomes intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from the core”.⁵⁶

*Mistry v Interim Dental Council of South Africa*⁵⁷

This case concerned section 28(1) of the Medicines and Related Substances Control Act 101 of 1965, which granted inspectors of medicines the authority to enter and inspect any premises, place, vehicle, vessel or aircraft in which they reasonably believe medicines or substances regulated by the Act are housed.

In this case the court held that the degree of privacy that a citizen can reasonably expect would vary significantly according to the activity that brings him or her in contact with the state.⁵⁸

⁵⁴ *Investigating Directorate: Serious Economic Offences v Hyundai Motors* 2001 (1) SA 545.

⁵⁵ *Ibid*, para 16.

⁵⁶ Note 54 above, para 18.

⁵⁷ *Mistry v Interim Dental Council of South Africa* 1998 (4) SA 1127 (CC).

Further the court stated that “the more public the undertaking and the more closely regulated, the more attenuated would the right to privacy be and the less intense the invasion” and “in the case of any regulated enterprise, the proprietors expectation of privacy with regard to the premises, equipment, materials and records must be attenuated by the obligation to comply with reasonable regulations and to tolerate the administrative inspections that are an inseparable part of an effective regime of regulation”.⁵⁹

Conclusion

It is evident from the preceding discussion that prior to the adoption of the Interim Constitution South Africa recognised the right to privacy as one of the personality rights and the infringement of such right as an impairment of dignitas. Although many court decisions recognised the right to privacy, such right was not specifically defined, and if it was there were too many inconsistent definitions. With the adoption of the Final Constitution privacy is now a right on its own and bears no attachment to the bundle of personality rights. It is still however not defined, but perhaps importantly for the purposes of my dissertation is that the court has stated that privacy becomes less intense as an individual moves away from the “inner sanctum” or “truly personal realm” and further that privacy depends on a subjective expectation that is reasonable.⁶⁰

United States

The development of the legal protection of privacy in the United States began with the invention of the printing press. The printing press increased individual access to information and as a result a need for the right to privacy had slowly emerged.

Common Law Protection

The common law protection of the right to privacy in the United States has its roots in an article by Brandeis and Warren entitled “The right to be let alone” published in the Harvard

⁵⁸ Ibid, para 27.

⁵⁹ Note 57 above, para 27.

⁶⁰ Note 54 above, para 18.

Law Review in 1890.⁶¹ According to Warren and Brandeis the right to privacy sought to protect the plaintiffs “right to be left alone”. They described the concept of privacy as an “inviolable personality right that would protect thoughts, emotions and sensations whether expressed in writing or conduct, in conversation, in attitude or in facial expression.”⁶² They also argued that “the intensity and complexity of life and modern enterprise and invention ripened the time for the courts and judges to redefine the nature of personal rights to protect appearance, sayings, acts and personal relations, domestic or otherwise”.⁶³ The authors in this article essentially sought a distinct right to privacy, and even though this article had little effect upon the law, it encouraged courts to start thinking about privacy protection at common law level.⁶⁴

Constitutional Protection of Privacy

In the United States of America, unlike South Africa there is no specific right to privacy in the Constitution.⁶⁵ “The Constitutional protection of privacy in the United States is the product of a long line of Supreme Court decisions, in which the court went beyond the literal and sometimes narrow meaning of the Constitutional language to strike down federal or state legislation thereby in effect recognising a Constitutional right to privacy”.⁶⁶ The Supreme Court has recognised that although there is no express constitutional right to privacy it is said to be implied in the First Amendment guaranteeing freedom of thought and expression⁶⁷, in the Fourth amendment affirming the right of persons to be secure in their persons, in the Fifth amendment creating a zone for the individual in against self-incrimination⁶⁸, in the Ninth amendment which provides that the enumeration of certain rights in the Constitution shall not be interpreted to deny or disparage others⁶⁹ and lastly it is provided for in the penumbras of the Bill Of Rights.⁷⁰

⁶¹ Brandeis and Warren ‘The Right to be Left Alone’ 1890 *Harvard Law Review* 193.

⁶² *Ibid*, 196.

⁶³ *Ibid*.

⁶⁴ Note 24 above, 75.

⁶⁵ Note 5 above, 138.

⁶⁶ Rubinfeld ‘The Right to Privacy’ (1989) 102 *Harvard Law Review* 737.

⁶⁷ *Stanley v Georgia* 394 U.S 557 (1969).

⁶⁸ *Katz v United States* 389 U.S 347 (1967).

⁶⁹ *Griswold v Connecticut* 381 U.S 477 (1965).

⁷⁰ *Ibid*.

Case Law

In my analysis I will focus on a few number of cases that helped towards the constitutional protection of privacy.

*Boyd v United States*⁷¹

In this case the Supreme Court interpreted privacy rights as generalisations of two maxims namely “a man’s home is his castle” or “sanctity of the home” which were regarded as enforceable legal principles by the English common law.⁷² Further the court explained the right to privacy as the right against unlawful searches and seizures.

*Katz v United States*⁷³

It was this case which formulated the “reasonable expectation test” of the right to privacy. Here the defendant received a conviction for violating a statute proscribing interstate transmission by wire communication of bets and wagers after the FBI had listened to and recorded conversations the defendant had from a public telephone booth. The court held that the governments listening and recording of the defendants conversations while using a public telephone booth violated his right to privacy and constituted a search and seizure within the ambit of the fourth amendment. Further the court stated that the defendant “did not shed his right to privacy simply because he made calls from a place where he might be seen. No less than an individual in a business office, in a friend’s apartment, or in a taxi cab, a person in a telephone booth may rely upon protection of the Fourth Amendment”.⁷⁴

*Griswold v Connecticut*⁷⁵

This case was the first from a long line of United States Supreme Court decisions to pave the way for constitutional privacy.⁷⁶ In this case the applicants were fined for contravening a

⁷¹ *Boyd v United States* 116 U.S 616 (1886) 616.

⁷² *Ibid.*

⁷³ Note 68 above.

⁷⁴ Note 68 above, para 352.

⁷⁵ Note 69 above.

⁷⁶ Note 24 above, 79.

Connecticut statute prohibiting the use of contraception, for giving medical advice to a married couple on preventing contraception. Here the court found that there are various guarantees in the Bill Of Rights which creates zones of privacy, that being all the amendments and that the right to privacy was not to be confined to a marital context but extended to a general right as it affects individuals.⁷⁷

Conclusion

In concluding it is evident that the printing press and the article by Warren and Brandeis which called for the recognition of a common law right to privacy was highly influential in the development of legal protection of privacy in the United States. As well as the number of Supreme Court cases which held that although the United States Constitution does not explicitly protect the right to privacy such right is protected through the various amendments. In comparison, privacy protection in South Africa is materially different, however the nature and significance of the right is substantially the same. Having analysed the development of privacy protection in South Africa what is important is the approach taken by the Constitutional Court where privacy is seen to diminish as one moves further away from the personal realm. Thus assuming that privacy in the workplace falls outside of the truly personal realm and inner sanctum.

⁷⁷ Note 69 above.

CHAPTER THREE

POLYGRAPH TESTING IN THE WORKPLACE

Introduction:

Polygraph testing is widely used in some countries as an interrogation tool with criminal suspects or candidates for employment. In South Africa, employers are increasingly turning to the polygraph test, not only to detect dishonesty in the workplace but also for the purposes of pre-employment selection. Some companies go as far as to make passing a polygraph test a requirement of pre-employment selection and some include clauses in their employment contracts that compel employees to submit to polygraph testing on demand.⁷⁸ In the United States of America the use of polygraph testing in the workplace is strictly monitored and limited in terms of the Employee Polygraph Protection Act of 1988.⁷⁹ Whereas in South Africa no such legislation exists to control the use of such testing. Therefore the testing and admissibility of polygraphs will have to be evaluated against the backdrop of the rules of evidence and Constitutional principles.

In this chapter the issues which I will be addressing is firstly what constitutes a polygraph test, secondly I will examine the legislation, if any, regulating or impacting on the use of polygraph testing, thirdly I will examine a selection of cases which dealt with the application and impact of polygraph testing and lastly I will examine the extent to which privacy is protected in the workplace in light of this practice.

What is a polygraph test?

“A polygraph is a device that measures and records several physiological indices such as blood pressure, pulse, respiration and skin conductivity while the examinee is asked and answers a series of questions”.⁸⁰ Generally the examinee is asked questions which are directly

⁷⁸ *Boonzaaier v HICOR Trading Ltd* (1999) E18745.

⁷⁹ The Employee Polygraph Protection Act 1988 Pub L NO 100-347 (28 June 1988).

⁸⁰ JP Rosenfeld (1995) ‘Alternative Views of Bashore and Rapp’s (1993) alternatives to traditional polygraphy: a critique’. *Psychological Bulletin*.

related to a specific matter under investigation and also questions which are not connected to the matter.⁸¹

Although commonly referred to as a lie-detector, a polygraph does not measure lying or deception.⁸² It merely records physiological activity in the examinee. “An examiner purports to infer from the recorded physiological results that an examinee was deceptive in answering questions relating to a factual issue. The theoretical assumption underlying the use of polygraph testing is that a fear of detection will produce a measurable physiological reaction in a person who knows that he or she is lying. Accordingly, the polygraph purportedly measures the fear of deception rather than the deception itself”.⁸³

Scientific reliability:

There has been much debate and researchers are divided as to whether the polygraph can produce empirically and scientifically reliable results.⁸⁴ “It has been submitted that there are three significant variables which can affect the accuracy of a polygraph examination: the examiner, the mental and physical state of the subject and the setting in which the examination takes place”.⁸⁵ Most authorities are of the view that the examiner is the most important variable because he or she required to interpret the meaning of an intricate graphic pattern reflecting various responses to questions.⁸⁶ A majority of polygraphers are not qualified psychologists so their level of expertise often does not allow them to discount the fact that other psychological states may produce the same bodily responses they infer as deception.⁸⁷ As such, lying does not always result in feelings of guilt, fear or anxiety, it could very well be attributed to other factors such as boredom, or the discomfort of the polygraph machine.

Critics of the test submit that there is no unique pattern of bodily responses that manifest when a person lies or fears detection. Polygraph tests only indicate that a person was in a

⁸¹ M Christianson ‘Polygraph Testing In South African Workplaces: ‘Shield and Sword’ In The Dishonesty Detection Versus Compromising Privacy Debate’ (2000) 21 *ILJ* 16, 20.

⁸² C Tredoux & S Pooley ‘Polygraph Based Testing of Deception and Truthfulness: And Evaluation And Commentary’ (2001) 22 *ILJ* 819, 825.

⁸³ *Ibid*, 825.

⁸⁴ Note 24 above, 195.

⁸⁵ Note 81 above, 24.

⁸⁶ Note 81 above, 24.

⁸⁷ Note 81 above, 24.

heightened state of general emotional stress and not that this was necessarily occasioned by a deceptive mind frame.⁸⁸

In a recent Labour Court case of *FAWU obo Kapesi and Others v Premier Foods Ltd*⁸⁹, the court held that polygraph testing can do no more than record the veracity of a person's answers to certain questions, and found that even on this score, scientists are divided.⁹⁰ In view of the controversy surrounding the reliability of the polygraph test, the Court declined to accept that polygraph testing was a fair and objective way to assess the dishonesty and reliability of employees in a retrenchment exercise. The court held that the results of a polygraph may be taken into account in assessing the credibility of a witness and in assessing the probabilities where other supporting evidence is available, provided also that it is clear from the evidence that the test was done according to acceptable and recognised standards.⁹¹ Problematically however is that the court did not determine what constitutes acceptable and recognised polygraph test standards and the qualifications of polygraphists.

So to, in the case of *Steen v Wetherlys (Pty) (Ltd)*⁹², the commissioner held that to date there is nothing either in the body of research or in the authority of any case law to convincingly suggest that polygraphers are in fact expert witnesses or that they are medically qualified to interpret the physiological responses of witnesses. In addition such evidence is inconclusive and does no more than to indicate that the subject was in a heightened state of general emotional arousal. The polygraphist is often a stranger and the test may be given in an unfamiliar environment. This alone may cause increased nervousness and physiological responses in the body. A further factor is the natural fear in the mind of the innocent that the tests results may not correctly reflect his innocence".⁹³

⁸⁸ Ms Benita Whitcher Lecture Notes 2012.

⁸⁹ *FAWU obo Kapesi and Others v Premier Foods Ltd* (2010) 9 BLLR 903.

⁹⁰ *Ibid*, para 111.

⁹¹ Note 89 above, para 112.

⁹² *Steen v Wetherlys (Pty) (Ltd)* (2006) 2 BALR 222 (CCMA).

⁹³ *Ibid*, 227 A-C.

Legislation

South Africa does not have any specific legislation or codes of practice that deal with the issue of polygraph testing. The only Act that has some relation to the issue of Polygraph testing is the Employment Equity Act 55 of 1998⁹⁴, in section 8 which states:

8. Psychological testing and other similar assessments

Psychological testing and other similar assessments of an employee are prohibited unless the test or assessment being used-

- (a) has been scientifically shown to be valid and reliable
- (b) can be applied fairly to all employees; and
- (c) is not biased against any employee or group.

The question that arises however is whether a polygraph test can be classified as a psychological or other similar assessment. Gondwe submits that “polygraph tests are clearly not psychological assessments as they measure a subject’s physiological reactions to draw an inference of truthfulness”. “It is further unlikely that a polygraph test can qualify as a “similar assessment”, again and in contrast to psychological or psychometric tests, because they do not measure personality traits”.⁹⁵ A contributing factor to this is that because the scientific validity and reliability of polygraph testing remains unresolved or contested, polygraph testing is likely to fall outside the provisions of the Employment Equity Act.⁹⁶

The only protection that the Labour Relations Act 66 of 1995⁹⁷ provides is the right of every employee to fair labour practices and not to be unfairly discriminated against or dismissed. It thus evident that South Africa seriously lacks any legislation regulating the manner in which polygraph testing is applied in the workplace. As a result, ‘legislation similar to the United States Employee Polygraph Protection Act⁹⁸ in South Africa would require that guidelines be created for adjudicators pertaining to the admissibility, reliability and weight to be given to

⁹⁴ Employment Equity Act 55 of 1998.

⁹⁵ Note 24 above, 197.

⁹⁶ Note 81 above, 36.

⁹⁷ Labour Relations Act 66 of 1995.

⁹⁸ Employee Polygraph Protection Act.

polygraph tests in an effort to create consistency and uniformity”.⁹⁹ This may be the most efficient way to counter the misuse of polygraph testing.

Case Law:

In this section I will review a selection of cases which show how courts and the Council for Conciliation, Mediation and Arbitration (CCMA) indicate how a polygraph test is to be applied as well as the approach they take when they are confronted with a polygraph test as evidence. In South Africa the results of a polygraph test have from time to time been used as evidence against employees in issues regarding unfair dismissal. However the issue of the admissibility of such evidence has been treated very inconsistently.

In the case of *Mahlangu v CIM Deltak*¹⁰⁰ which was heard before the Industrial Court the court found that the use of voice analyst tests administered by an unregistered psychiatrist was unscientific, invalid, unethical and unlawful.

In *Mncube v Cash Paymaster Services (Pty) Ltd*¹⁰¹ it was accepted that the polygraphist who conducted the test was qualified but the question was raised whether the evidence was reliable.

So to, in the case of *Sobiso & Others v Ceramic Tile Market*¹⁰² the commissioner observed that there is no clear approach as to the admissibility of polygraph test results, there were instead divergent approaches. It was also observed that generally tribunals take a cautionary approach to the reliability of polygraph evidence, in that polygraph tests alone cannot prove a person’s guilt without corroborative evidence to support the inference of guilt. The court held that there were three reasons as to why this cautionary approach is taken¹⁰³:

- The person administering the tests, while an expert in the polygraph field, was neither a qualified doctor nor psychologist.

⁹⁹ Note 82 above, 839.

¹⁰⁰ *Mahlangu v CIM Deltak* (1986) 7 ILJ 346 (IC).

¹⁰¹ *Mncube v Cash Paymaster Services (Pty) Ltd* (1997) 5 BLLR 639.

¹⁰² *Sobiso & Others v Ceramic Tile Market* (2001) 22 ILJ 811(CCMA).

¹⁰³ *Ibid*, 817.

- The tests were simply an indicator of deception and could not give details on the extent of the misconduct.
- The sole reliance on the polygraph results was insufficient to discharge the onus on the employer in terms of s192 of the Labour Relations Act of 1995 to prove the dismissal was fair.

The most recent case reported on polygraph testing is the case of *Truworths v Council for Conciliation, Mediation and Arbitration*¹⁰⁴. Here the court found that “although it is trite law that the probative value of a polygraph test on its own is not sufficient to find a person guilty, the result of a polygraph test is, however, one of the factors that may be considered in evaluating the fairness of a dismissal”.¹⁰⁵ The court went on further that “however, a polygraph may be taken into account where other supporting evidence is available provided also that there is clear evidence on the qualifications of the polygraphist and provided that it is clear from the evidence that the test was done according to acceptable and recognizable standards”.¹⁰⁶

An American Court¹⁰⁷ suggested a three step enquiry into the admissibility of polygraph test results, namely (i) whether the evidence is relevant and reliable (ii) whether the evidence assists the court in determining the facts in issue, and (iii) whether the evidence has an unfairly prejudicial effect, if it does, that would substantially outweigh its probative value.

In conclusion given the fact that there is no consensus in the scientific community that polygraph evidence is reliable and no regulatory framework in South Africa on what constitutes acceptable and recognized polygraph test standards and qualifications for polygraphists, the inquiry into admissibility would most likely cause a number of legal disputes. The examinee who is a party to the proceedings may be procedurally disadvantaged or otherwise exposed to a lengthy trial involving issues which, though logically relevant, are legally too remote to assist the court in its ultimate decision on the merits.¹⁰⁸ Evidently there is a need for proper guidelines on the way this evidence should be viewed and applied within the South African context

¹⁰⁴ *Truworths v Council for Conciliation, Mediation and Arbitration* 2009 (30) ILJ 677 (LC).

¹⁰⁵ *Ibid*, para 34.

¹⁰⁶ Note 104 above, para 37.

¹⁰⁷ *United States v Pasado* 57F 3RD 428.

¹⁰⁸ Ms Benita Whitcher Lecture Notes 2012.

Privacy Protection

“Privacy can have an impact on our bodily privacy, personal information, communication and even our intellectual capacity”.¹⁰⁹ This right however is not absolute and will have to be balanced against other rights in order to sustain laws and order. The South African Constitution¹¹⁰ protects an individual’s right to privacy in section 14. It is alleged that the use of polygraph examinations may infringe the right to privacy.

The issue of privacy in the context of polygraph testing has been identified as threefold¹¹¹:

- The attempt to penetrate the ‘inner domain’ of individual belief in violation of the constitutional distinction between acts and beliefs;
- The interference with the individuals sense of autonomy and reserve created by a machine sensing his emotional responses to personal questions;
- The increased psychological power that authorities acquire over individuals seeking employment or already in employment.

My submission is that polygraph tests certainly do infringe the privacy rights of employees by compelling them to communicate those personal facts and emotions which they have chosen to exclude from the knowledge of outsiders. With this form of testing, employees are always, the disadvantaged party in an unfair position almost being dominated by a machine that is able to make certain assumptions which are not necessarily correct. Nothing is essentially private any longer with the use of this machine and in my opinion is a gross violation of the right to privacy contained in section 14 of the Constitution.¹¹²

“By informing or giving the employee the assurance that the undertaking of the polygraph test is voluntary does not safeguard the employer against the infringement of the employees right to privacy”.¹¹³ This is because in the event of the employee declining to take the polygraph test it is almost a foregone conclusion that the employer’s first assumption is that

¹⁰⁹ Daniel Francisco Calaca The Use Of Polygraph Tests and Related Evidentiary Aspects In Labour Disputes (unpublished LLM thesis, University of Pretoria, 2010) 32.

¹¹⁰ Note 7 above.

¹¹¹ Note 81 above, 29.

¹¹² Note 7 above.

¹¹³ Note 109 above, 33.

the refusal is an admission of guilt. A very quick, selfishly thought reaction by the employer without having any regard to the fact that the employee might be innocent but is just not comfortable with taking the test. It is thus evident of how polygraph testing operates in such an unfair manner towards the employee.

Conclusion

It can be concluded that polygraph testing in the workplace is here to stay and is becoming a more lucrative mechanism for employers to detect theft, fraud and dishonesty. As a result of this it is important that legislation be enacted which sets out the circumstances in which polygraph tests may be done together with the procedure that needs to be followed. Equally important is that the question of who should be permitted to do the testing and what qualifications they should possess needs to be addressed urgently. At the least in my opinion a degree in medicine or psychology is what a polygraphist should have in order to understand the human body and how it functions when placed under stress.

My viewpoint is that submitting an employee to a polygraph test is not a fair labour practice. These tests infringe the privacy rights of employees because they essentially attempt to penetrate the private inner domain of an individual by compelling communication of thoughts, sentiments and emotions which the examinee may have chosen not to communicate.¹¹⁴ I have indicated that the polygraph tests cannot detect deceit or lies and neither is there any scientific research that proves a polygraph to be 100 percent reliable. This is also the reason why our courts have treated the admissibility of such evidence so inconsistently.

¹¹⁴ *Long Beach City Employees Association v City of Long Beach* 41 Cal.3d 937, 227 Cal.Rptr. 90 Cal. 198, 944.

CHAPTER FOUR

HIV/AIDS TESTING IN THE WORKPLACE

Introduction:

South Africa has one of the highest HIV/Aids rates on the globe. Notwithstanding global efforts to manage and contain the HIV/Aids epidemic it continues to grow rapidly.¹¹⁵ “In South Africa projections show that the number of people who test positive for HIV is likely to double every nine to eleven months”.¹¹⁶ The impact of this poses a direct challenge to the labour force in South Africa as businesses are increasingly concerned about the impact of the disease on their organisations.

A 2001 report-“The Economic Impact of HIV/Aids in Southern Africa”¹¹⁷-expounded on the major impact of HIV/Aids on labour productivity, economic growth and social development.

“The spread of HIV/Aids reduces labour productivity, raises private and public consumption and thereby reduces income and savings, with lower savings, the rate of investment falls, reinforcing the decline of economic growth. The loss of labour productivity occurs because a large share of the work force becomes debilitated and dies causing organizations to lose workers with critical skills. Skilled personnel are lost and valuable labour time is consumed when workers become debilitated, and work schedules are disrupted when organisations replace workers and managers who are ill or have died. The loss of capacity reduces economic growth”¹¹⁸.

As a result and in response to the spread and major impact of the epidemic employers, in order to safeguard their own interests and maintain productivity have resorted to mandatory HIV/Aids testing either in the recruitment stages or during employment. This is where the issue of the right to privacy in the workplace becomes uncertain and the right not to be discriminated on the grounds of one’s HIV positive status becomes relevant.

¹¹⁵ Note 24 above, 150.

¹¹⁶ S Albertyn & D Rosengarten ‘HIV & Aids: Some critical issues in Employment Law’ *South African Journal on Human Rights* 9 77 1993, 77.

¹¹⁷ Note 24 above, 159.

¹¹⁸ Note 24 above, 160.

Hence in this chapter I will be focusing on the legislation that governs HIV/Aids testing in the workplace, I will be analysing case law dealing with such issue and I will thereafter explain the impact of such testing on an employee's right to privacy.

Arguments for HIV/Aids Testing in the Workplace:

1. The employer has a freedom choice as to whom to hire, which freedom is founded on the legal principles of freedom of association and freedom of choice”.
2. “It is well known that the risk of occupational transmission of the HIV virus is unlikely, but this does not mean that the risk is non-existent. For this reason, some employers feel they have a responsibility to prevent occupational transmission of the virus by testing both prospective and existing employees”.
3. HIV positive persons, although not yet symptomatic, may experience psychoneurological symptoms such as dementia. As such, in some occupations (for example in the case of an aircraft/airline pilot and mine lift operator) a sudden onset of AIDS dementia may be very risky”.
4. “The employment of persons with HIV has costs associated with recruitment, training and support of such employee”.¹¹⁹

Arguments against HIV/Aids testing in the workplace:

1. “Requiring an employee or a prospective employee to undergo an HIV test as a general condition of employment may infringe an individual's constitutional rights, such as the right to physical integrity and privacy. These inherent and constitutionality protected rights should trump the employers right to contractual freedom in those instances where an employee's HIV positive status has no bearing on the job”.
2. “The risk of occupational transmission argument is valid only where an employee is exposed or will be exposed to procedures constituting possible modes of transmission such as surgical procedure in the case of a surgeon”.
3. “HIV is not a reliable or conclusive indicator of dementia, in fact psychometric testing is perhaps the better indicator of any neurological impairment”.

¹¹⁹ Note 24 above, 160-161.

4. "HIV positive employees may continue to be productive members of society for a long period of time after contracting the virus. Moreover, the costs associated with employing HIV positive persons are similar to those borne by commitments to equality and the prohibition on unfair discrimination".
5. "The fear and antagonism surrounding HIV/Aids cannot justify discrimination against individuals living with the illness, particularly in those countries with a history of discrimination".¹²⁰ This bears direct relevance to South Africa as we have emerged from a past characterised with prejudice and victimisation, therefore in order to achieve true equality we cannot afford to still discriminate against those living with the virus.

From this it is evident that this is a highly contentious issue in the workplace with competing arguments and at many instances seems like the employers contractual freedom and authoritative position outweighs the employee's constitutional right to dignity and privacy. The crux of the issue however is whether testing for HIV in the workplace is ever justified and how such testing infringes the privacy rights of employees.

Legislation:

Constitution:

Section 10: Human Dignity

"Everyone has inherent dignity and the right to have their dignity respected and protected."¹²¹

Section 12(2): Freedom and Security of the Person

"Everyone has the right to bodily and psychological integrity which includes the right-

(c) Not to be subjected to medical or scientific experiments without their informed consent".¹²²

¹²⁰ Note 24 above, 162-163.

¹²¹ Note 7 above, section 10.

¹²² Note 7 above, section 12 (2).

Most importantly is section 14 of the Constitution which recognises the right to privacy and it is this provision which protects or which should protect employees against HIV testing in the workplace. In South Africa legislation regulating HIV/Aids testing in the workplace is contained in the Employment Equity Act¹²³ and the South African Code of Good Practice on Key Aspects of HIV/Aids and Employment.¹²⁴

The Employment Equity Act

Section 7 provides:

“Medical Testing:¹²⁵

- (1) Medical testing of an employee is prohibited, unless-
 - (a) legislation permits or requires the testing; or
 - (b) it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job”.
- (2) “Testing of an employee to determine that employee’s HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court in terms of section 50(4) of this Act”.

“Section 50 provides:¹²⁶

- (3) If the Labour Court declares that medical testing of an employee as contemplated in section 7 is justifiable, the court may make any order that it considers appropriate in the circumstances including imposing conditions relating to-
 - (a) the provision of counselling
 - (b) the maintenance of confidentiality
 - (c) the period during which the authorisation for any testing applies, and
 - (d) the category or categories of jobs or employees in respect of which the authorisation for testing applies”.

¹²³ The Employment Equity Act.

¹²⁴ Code of Good Practice on Key Aspects of HIV/Aids and Employment (2001) 22 *IJJ* 62-75.

¹²⁵ Note 94 above, section 7.

¹²⁶ Note 94 above, section 50.

It is thus clear that in terms of the Employment Equity Act¹²⁷ the testing of employees or a prospective employee is strictly curtailed and is only permitted where the Labour Court deems fit.¹²⁸ “However, the Labour Court has held that employers need not apply for permission to conduct tests for HIV/Aids if the employees have consented and the tests are voluntary and anonymous”.¹²⁹

The South African Code of Good Practice on Key Aspects of HIV/Aids:

The South African Code of Good Practice on Key Aspects of HIV/Aids¹³⁰ which aims at creating a non-discriminatory environment and which recognises that the protection of the human rights and dignity of people living with HIV/Aids needs to be respected provides that there should be no compulsory testing of employees. This is also an important piece of legislation dealing with HIV/Aids testing.

Section 7: HIV Testing Confidentiality and Disclosure¹³¹

7.1. HIV Testing

7.1.1. No employer may require an employee, or an applicant for employment, to undertake an HIV test in order to ascertain that employee’s HIV status. As provided for in the Employment Equity Act, employers may approach the Labour Court to obtain authorisation for testing.

7.1.4. Authorised testing

Employers must approach the Labour Court for authorisation in, amongst others, the following circumstances:

- (I) during an application for employment;

¹²⁷ Employment Equity Act.

¹²⁸ Heywood and Hassan ‘The Employment Equity Act and HIV/AIDS: A Step in The Right Direction’ (1999) *IJJ* 845, 851.

¹²⁹ J Grogan *Workplace Law* 10th ed (2009) 119.

¹³⁰ Note 124 above.

¹³¹ Note 124 above, section 7.

- (ii) As a condition of employment;

7.1.5. Permissible testing

- (a) An employer may provide testing to an employee who has requested a test in the following circumstances:
 - (I) as part of a health care service provided in the workplace;
 - (ii) In the event of an occupational accident carrying a risk of exposure to blood or other body fluids;
 - (iii) For the purposes of applying for compensation following an occupational accident involving a risk of exposure to blood or other body fluids.
- (b) Furthermore, such testing may only take place within the following defined conditions:
 - (I) at the initiative of an employee;
 - (ii) Within a health care worker and employee-patient relationship;
 - (iii) With informed consent and pre- and post-test counselling, as defined by the Department of Health's National Policy on Testing for HIV; and
 - (iv) With strict procedures relating to confidentiality of an employee's HIV status as described in clause 7.2 of this Code.

7.2. Confidentiality and Disclosure

- 7.2.1. All persons with HIV or AIDS have the legal right to privacy. An employee is therefore not legally required to disclose his or her HIV status to their employer or to other employees.

Analysis of Case Law:

PFG Building Glass v CEPPAWU & Others.¹³²

In this case the issue was whether anonymous and voluntary testing of employees for HIV/Aids fell within the ambit of section 7(2) of the Employment Equity Act. The Labour Court stated that the right to bodily and psychological integrity in section 12 (2) (c) of the Constitution and the right to privacy were not absolute and had to be balanced against the competing fundamental rights of employers, shareholders and regulators, such as the right to access to information and the right to trade.¹³³ Further the court stated that “in limiting the right of employees to have control over their bodies, employers have a duty to guarantee that other rights such as the right to privacy, dignity, equality, fair labour practices, to choose a trade, occupation or profession and to access to court are not violated”.¹³⁴

In relation to the right to privacy the court stated that “the right to privacy deserves more than superficial treatment in the context of HIV testing. There is a plethora of publications and reports about the prejudice endured by those living with HIV/Aids. Disclosing the identity of employees who are positive runs the risk of exposing them to public ostracization. Invasion of the right to privacy could create real hardships for the HIV/Aids sufferers. Therefore this right has to be very carefully balanced against countervailing rights such as the right to information”.¹³⁵

The court was of the opinion that although the objective of the protection against HIV/Aids testing is to prevent discrimination and promote equality, the test for the justifiability of testing for HIV goes beyond determining whether such testing is equitable or not.¹³⁶ The court reasoned that the test for the justifiability of HIV testing is also a constitutional enquiry and as such it must meet the requirements of the limitation clause contained in section 36 of the Constitution.¹³⁷

In concluding the court interpreted section 7 (2) of the Code on Good Practice so as not to impose a limitation on employees in the exercise of their constitutional rights in section 12

¹³² *PFG Building Glass v CEPPAWU & Others* (2003) 24 ILJ 974 (LC).

¹³³ Ibid, para 32.

¹³⁴ Note 132 above, para 32.

¹³⁵ Note 132 above, para 12.

¹³⁶ Note 132 above, para 37.

¹³⁷ Note 132 above, para 38.

(2) (b) and section 12 (2) (c) of the Constitution.¹³⁸ Accordingly the court found that anonymous and voluntary testing in the workplace does not fall within the ambit of section 7(2).¹³⁹

*Hoffmann v South African Airways*¹⁴⁰

This case was decided in terms of the right to equality, however it recognised that respect for the human dignity of all human beings is essential in our new democracy and that there is no place for stereotyping.

In this case the applicant was HIV positive and was considered unsuitable for the position of flight attendant. He had undergone a pre-screening interview, a psychometric test and a formal interview successfully but was denied the job based on his HIV status. South African Airways argued that its operational requirements and employment policies and practices excluded the applicant from the position of flight attendant. The court held that an employer may not exclude an applicant from employment on the basis of their HIV status, especially if it has no bearing on the job.¹⁴¹

*South African Security Forces Union and Others v Surgeon General and Others*¹⁴²

In this case the issue concerned the constitutionality of a policy which excluded persons with HIV/Aids from being recruited, promoted or deployed on international missions if they tested HIV positive. It was argued that such policy was unconstitutional in that it unreasonably and unjustifiably infringed on the right not to be unfairly discriminated against in terms of section 9(3) of the Constitution and the right to privacy in terms of section 14 of the Constitution.¹⁴³

This matter was settled however with the parties agreeing that the SANDF policy was unconstitutional in that it unreasonably and unjustifiably infringed the rights of aspirant and

¹³⁸ Note 132 above, para 104.

¹³⁹ Note 132 above, para 105.

¹⁴⁰ *Hofmann v South African Airways* 2000 21 ILJ 2357 (CC)

¹⁴¹ *Ibid*, para 35.

¹⁴² *South African Security Forces Union and Others v Surgeon General and Others* High Court Of South Africa (Transvaal Provincial Division) Pretoria, Case No 18683/07.

¹⁴³ *Ibid*, para 20.

current HIV positive SANDF members. The court gave the SANDF 6 months within which to review its regulations and policies.¹⁴⁴

Privacy Protection:

It cannot be disputed that the HIV/Aids pandemic is undoubtedly a serious one which has wide ranging consequences. Its impact on the workforce is damaging and as a result employers have resorted to testing current as well as future employees for the virus. My submission is that such testing encroaches upon the privacy of such individuals. Privacy is a constitutionally protected right and as a result should not be infringed where an employee's HIV positive status has no bearing on the job. HIV/Aids in itself comes with a lot of stigmatisation and in a workplace environment employees will be victimised and belittled by other 'negative' employees. "In the workplace privacy protection is essential because it preserves and maintains the autonomy, dignity and wellbeing of employees in an environment where the employer in general yields more influence and authority than the employee."¹⁴⁵ HIV/Aids testing invades such privacy of employees who choose to keep the nature of their status, be it negative or positive to themselves. Employees with the virus may very well be productive for many years and as such the nature of their 'status' may be nothing more than a 'status'.

Not only is the testing of current employee's privacy invasive, so too is pre-employment testing. "The underlying rationale for pre-employment testing is to ensure a labour force that is free of HIV infection. However given statistical trends on the spread of the virus in South Africa, this is probably impossible".¹⁴⁶ In an article by Du Plessis¹⁴⁷ and Cameron¹⁴⁸ they cite a number of reasons why pre-employment testing should not be done, these include:

- "An employee who is HIV positive may have many years of productive and healthy working life ahead of him or her".
- "The nature of the disease means that no employment environment can ever be isolated from employees who are HIV positive and renders pre-testing meaningless".

¹⁴⁴ Note 142 above, para 20.7.

¹⁴⁵ Note 24 above, 163.

¹⁴⁶ Note 116 above, 85.

¹⁴⁷ A du Plessis 'Managing Aids at the Workplace: Some issues and consideration for Human Resource Practitioners' (1990) 2 (4) AIDS Scan 6.

¹⁴⁸ E Cameron 'Screening recruits for AIDS: Yes or No?' (1997) 7 (6) Employment Law 120.

- “It places the medical practitioner in a difficult ethical position in deciding how much information to divulge to the employer and to the job applicant”.
- “An employee may be HIV negative when the test is done, but after taking up employment either transmit or acquire the virus”.

Thus it can be seen that pre-employment testing is not really endorsed and is discriminatory especially when it has no bearing on the job. The prospective employer protrudes on the privacy of the individual who might want to keep his or her status confidential, but because the applicant is desperate for the job he or she gives in.

Having outlined how HIV/Aids testing infringes on the privacy of employees and prospective employees it is important to note that in some categories of work, involving a high level of skill and those involving risks, the testing of employees may be required as compulsory. Where this is required then I submit that the individual concerned must give informed consent and fully understand that if the application is declined on the basis of HIV status why that is so.

Conclusion:

In concluding it can be seen that HIV/Aids testing in the workplace is very prevalent considering the rapid rate of infection in South Africa. This however does not mean that such testing is endorsed and correct. The ideal behind privacy is to a certain extent diminished by testing individuals in a workplace environment. These individuals are already the subject of much victimisation and discrimination and therefore by bringing their HIV status into the workplace this just furthers the stigma that HIV/Aids is associated with. Although there is a lot of legislation protecting HIV/Aids individuals, when it comes to the workplace the employers contractual freedom almost always triumphs the employees right to privacy.

CHAPTER FIVE

BODY SEARCHES, WORKSTATION SEARCHES AND VIDEO SURVEILLANCE IN THE WORKPLACE.

Introduction:

Although under section 14 of the Constitution every person has the right to privacy the courts have generally found that this right can be limited in the workplace and that there must be a balancing of interests of the employer and the employee. The general principle is that employer cannot conduct searches without the employees consent or unless it has a good reason to suspect the employee is abusing the system or conducting unethical business. An exception to the general principle would be in instances where there was no legitimate expectation of privacy. “A legitimate expectation connotes that one must have a subjective expectation of privacy. But, at the same time, society must recognize this as objectively reasonable”.¹⁴⁹ “The subjective component of the test recognizes that a person cannot complain about an invasion of privacy if he or she has consented explicitly or impliedly to it. The objective component is more important, but is often quite difficult to assess the kinds of privacy protection that society would recognise as objectively reasonable”.¹⁵⁰ In determining what is legitimate depends on the circumstances of each case and the nature of the workplace. An example of the exception to the general principle would be of an employee who works in a top secret weapons factory or a diamond mine, in these working environments employees can expect to be constantly monitored and subject to spot searches.

The Constitutional Court has pointed out that “privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction the scope of personal space shrinks accordingly”.¹⁵¹ In light of this shrinkage however it would be unreasonable to hold that an employee has no expectation to privacy in the workplace whatsoever.

It is against this background that in this chapter I will examine the practices of body searches, workstation searches and monitoring through video surveillance in the workplace and how these practices infringe the privacy of employees.

¹⁴⁹ J de Waal, I Currie & G Erasmus *The Bill of Rights Handbook* 4 ed (2001) 269.

¹⁵⁰ M McGregor ‘The Right to Privacy in the Workplace: General Case Law and Guidelines for Using the Internet and e-Mail’ *Mercantile Law Journal* 2004 16 638, 640.

¹⁵¹ Note 19 above, para 67.

Body Searches:

In many industries body searches are very common and are considered as a routine in the workplace. The question that arises however is whether such search is a violation of the right to privacy. One is certainly invading another's private sphere when conducting a body search and perhaps what is vital is how the search is conducted. "Searches of employees should be properly and decently conducted, bearing in mind that they constitute a violation of the employee's dignity."¹⁵²

The Code of Good Practice on the Handling of Sexual Harassment Cases¹⁵³ defines sexual harassment as "unwanted conduct of a sexual nature". The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.¹⁵⁴ The Code lists the following as possibly falling under sexual harassment:¹⁵⁵

- a. "Physical conduct of a sexual nature includes all unwanted physical contact, ranging from touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite sex.
- b. Verbal forms of sexual harassment include unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about a person's body made in their presence or directed toward them, unwelcome and inappropriate enquiries about a person's sex life, and unwelcome whistling directed at a person or group of persons.
- c. Non-verbal forms of sexual harassment include unwelcome gestures, indecent exposure, and the unwelcome display of sexually explicit pictures and objects".

From this it is evident that in order for employers to meet the requirements of this Code, they must ensure that properly trained personnel carry out the body search and that they are aware of the importance of courtesy and dignity whilst conducting these searches. An important factor as well is that body searches should be conducted by members of the same sex as the employee being searched. This will create a more comfortable environment for the employee being searched.

¹⁵² N Van Dokkum *The Law and the Practice*, 201.

¹⁵³ The Code of Good Practice on the Handling of Sexual Harassment Cases.

¹⁵⁴ *Ibid*, section 3 (1).

¹⁵⁵ Note 153 above, section 4 (1).

Body searches is an extremely privacy invasive measure and as such should be conducted when absolutely necessary and when consent is obtained from the employee. Bodily integrity is a fundamental right in the Constitution and should be respected at the workplace.

Workstation searches:

It has been well argued that an employer has the right of access to every part of its premises and property.¹⁵⁶ Ideally this includes an employee's computer and desk. Although this may be the position, what is equally important to remember is that employees spend many hours in the workplace and it is reasonable to expect a measure of privacy in certain areas one being their workstation.¹⁵⁷ It is an area where employees not only keep related information but also matters of a personal nature and hence they regard it as personal space.

“Given the fact that work takes up a lot of our time and energy and plays a significant part in our lives and how we conduct ourselves, it could be argued that an employee has a legitimate expectation to some form of privacy in the workplace”.¹⁵⁸ Such expectation can reasonably be said to exist at the workstation of an employee who besides the keeping of work related information often regards his or her workstation as “home away from home, complete with pictures of the family, souvenirs from trips, a large collection of coffee cups and other personal information”.¹⁵⁹

Case Law:

In the case of *Moonsamy v The Mailhouse*¹⁶⁰ the court held “that it is extremely difficult to clarify at least with any precision, the nature of the right to privacy of an employee on the premises of an employer during working hours.”¹⁶¹ This shows the difficult nature of harmonising both the interests of the employer and the employee regarding workplace privacy

¹⁵⁶ Note 152 above, 203.

¹⁵⁷ Note 152 above, 203.

¹⁵⁸ Note 152 above, 203.

¹⁵⁹ Stephen Allred ‘Employee Privacy and Workplace Searches’ available at <http://www.sogpubs.unc.edu/electronicversions/pg/pgspro2/articles.pdf>, accessed on 17 September 2010.

¹⁶⁰ *Moonsamy v The Mailhouse* (1999) 20 *ILJ* 464 (CCMA).

¹⁶¹ *Ibid*, 469.

In the case of *Katz v US*,¹⁶² the US Supreme Court held that the individual is entitled to a reasonable expectation of privacy. “This reasonable expectation could only exist when the individual had a subjective expectation of privacy, and secondly, that society must recognize the expectation as reasonable. Within the context of the employment relationship, the second requirement is largely determined by the operational realities of the workplace”.¹⁶³

Further, the U.S Supreme Court in the case of *O’Connor v Ortega*,¹⁶⁴ found “that office practices and procedures, and legitimate employer regulations might reduce the employee’s expectations of privacy in their offices, desks and filing cabinets. Given the great variety of work environments, the question of whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis”¹⁶⁵.

Gerhard Erasmus,¹⁶⁶ correctly submits that “your work or occupation is a pivotal influence on your life, both personal and professional. The rights that a citizen is entitled to in his or her personal life cannot simply disappear in his or her professional life as a result of the employer’s business necessity “. ¹⁶⁷ I strongly agree with this proposition as an employee’s personal rights should be given greater weight as oppose to an employer’s right to economic activity. An employer who has done his interviewing and selection procedures correctly should be able to expect trust and loyalty from an employee and should not have to resort to the drastic measure of searching an employee’s workstation. This can also reduce an employee’s confidence and potential in the workplace by making him or her feel somewhat uncomfortable and untrustworthy.

Video surveillance:

“Employers may wish to use surveillance in the workplace for a variety of beneficial reasons, including employee safety, prevention of theft, supervision of employees and reducing the

¹⁶² Note 68 above.

¹⁶³ Ibid.

¹⁶⁴ *O’Connor v Ortega* 480 U.S 709 (1987).

¹⁶⁵ Ibid.

¹⁶⁶ G Erasmus *The Bill of Rights Handbook* 1998, 289.

¹⁶⁷ Ibid.

potential for liability”.¹⁶⁸ Despite these ‘good’ reasons advanced for surveillance in the workplace there are negative aspects. The use of camera surveillance in the workplace makes employees feel that they are constantly watched and that their employer does not trust them. This in turn may lead to feelings of resentment and inhibit an employee’s capacity to work effectively knowing that they are being policed all the time.

Understandably in certain industries employers are extremely vulnerable to losses because of employee misconduct. Such industries include casinos, security firms, jewellers and financial institutions.¹⁶⁹ As a result an employer may have to utilize video surveillance. Importantly in these cases is that employers need to make employees aware that they are being monitored due to valid operational reasons and furthermore due consideration must be given to the right of privacy of an employee and hence employers should not install surveillance cameras in toilets and change rooms.

Case Law:

Video surveillance has been accepted in some cases and not in others due to the fact that certain circumstances can render such footage unacceptable. In the case of *Afrox Ltd v Laka and Others*¹⁷⁰ the Labour Court found that the arbitrator’s decision to disallow video footage was grossly irregular as the evidence that the employer wanted to use was relevant to the case at hand.¹⁷¹

In the case of *Satawu abo Assagai v Autopax*¹⁷² the employee was trapped on video carrying out a dishonest transaction. The employee argued that the video tape evidence should be disallowed because he was unaware that he was being taped. However the arbitrator found that the taped interaction was not a confidential one and therefore did not fall under the

¹⁶⁸ Brian Moore & Ashley Pack ‘Workplace Surveillance: Balancing the Employees Right to Privacy with the Employers Right to Know’ available at <http://www.employmentlawalliance.co./firms/dinslaw/articles/workplace-surveillance>, accessed on the 10 of August 2012.

¹⁶⁹ Ibid.

¹⁷⁰ *Afrox Ltd v Laka and Others* 1999 20 ILJ 1732.

¹⁷¹ Ibid, para 44.

¹⁷² *Satawu abo Assagai v Autopax* 2002 2 [BALR] 17.

prohibition of the Interception and Monitoring Prohibition Act.¹⁷³ This act being replaced with RICA, which imposes much heavier burdens on employers, will result in arbitrators not too readily admitting video surveillance.

Interestingly, an arbitration tribunal recently decided¹⁷⁴ on whether it was legal for a federally regulated Canadian employer to install 27 video cameras in and around its workplace. The tribunal noted that a determination of whether the surveillance cameras were legal, required an assessment of the parties respective interests, pointing out that in accordance with the collective agreement, the employer was obliged to treat its employees with ‘consideration’ and was entitled to issue directives for the purpose of maintaining security.¹⁷⁵

As the foundation for its analysis the court used the four stage test out in the case of *Eastmond v Canadian Pacific Railway*:¹⁷⁶

- Were the surveillance cameras and recording system necessary to meet a specific need of the employer?
- Were the cameras likely to be effective in meeting that need?
- Was the loss of privacy proportional to the benefit gained?
- Was there a less privacy invasive way of achieving the same end?

Based on the above, the tribunal ruled that the indoor cameras that kept watch over employees on a continuous basis, without a valid reason, were to be removed, while the installation of all the outdoor cameras and some of the indoor one’s was considered reasonable.¹⁷⁷

My submission regarding video surveillance is that unless it is absolutely necessary to monitor employees through such a mechanism, it should be refrained from. “Electronic surveillance should not be used as a substitute for monitoring by management. Rather

¹⁷³ Ibid, para 32.

¹⁷⁴ *Societe de transport de l’Outaouais et Syndicat uni du transport, unite 591* (grief syndical), SOQUIJ AZ-50801767, D.T.E 2011T-806 (ROSS C. Dumoulin, arbitrator).

¹⁷⁵ Ibid.

¹⁷⁶ *Eastmond v Canadian Pacific Railway* 2004 FC 852.

¹⁷⁷ Note 174 above.

technology should be used as a supplement to good old fashioned supervising”.¹⁷⁸ An employer must produce evidence that it has valid reasons for using video surveillance and that he or she has given due consideration to the employees right to privacy.

Conclusion:

Having analysed the practices of body searches, workstation searches and monitoring through video surveillance it is evident that they all to a certain extent infringe the privacy rights of employees in the workplace. Kevin J Conlon is of the view that monitoring devices have liberally brought “big brother” into the office.¹⁷⁹ All these practices utilized by an employer essentially make the employee feel constantly under the watch and dishonest in an ‘honest way’. “Proponents of legislative reform of workplace privacy laws believe that the use of bugging devices, employee monitoring computers and video cameras have turned jobsites into detention centres where the rights of privacy are surrendered at the door”.¹⁸⁰

¹⁷⁸ Jan duToit ‘Video and audio surveillance in the workplace’ available at <http://www.labourguide.co.za> , accessed on 17th July 2012.

¹⁷⁹ K J Conlon ‘Privacy in the Workplace’ (1996-1997) 72 *Univ of Chicago LR* 285, 296.

¹⁸⁰ Ibid.

CHAPTER SIX
INTERCEPTION AND MONITORING OF COMMUNICATIONS IN THE
WORKPLACE

Introduction:

In the information age that we currently live in, communication through letters, fax, and office memos have in most cases become redundant. Instead, Internet and Email have replaced these traditional modes of communication and have altered the business environment. “Email has replaced memos and other correspondence, computers have replaced filing cabinets, and the Internet has allowed people access to virtually unlimited information without ever leaving their desks”.¹⁸¹ “Communication facilities have linked the office with the home and the home with the office and hence the border between office and home has become fuzzy”.¹⁸² This has resulted in a number of issues as far as privacy in the workplace is concerned.

Although Internet and Email have become the preferred method of communication in today’s business environment, employers believe that monitoring is necessary in order to prevent illicit activity and to limit liability.¹⁸³ This monitoring however which the employer finds it necessary to conduct gives rise to two conflicting interests, namely the employers right to conduct his or her business according to his or her prerogative, and on the other hand the employees right to privacy. Viewed from the employer’s perspective it may be argued that privacy is not an absolute right and that it needs to be balanced against business necessity. Furthermore the employer can also argue that he or she has a right to protect the business interests and integrity of his or her technological equipment against viruses, excessive use and ‘cyber loafing’.¹⁸⁴ These rights however must be weighed up against the privacy rights of an employee.

¹⁸¹ Benita du Plessis ‘Managing Internet and Email Abuse in the Workplace’ available at <http://www.labournet.co.za>, accessed on 11 August 2012.

¹⁸² T Pistorius ‘Monitoring, Interception and Big Boss in The Workplace: Is the Devil in the Details’ 2009 1 *Potchefstroom Electronic Law Journal* 2.

¹⁸³ Note 24 above, 257.

¹⁸⁴ Note 182 above, 4.

The problem that monitoring presents for employers is that it “is detrimental to employee privacy and creates unnecessary stress that has a direct negative impact on emotional and physical health of the employees, which can have a detrimental effect on work productivity”.¹⁸⁵ This is unfortunate because although privacy is not an absolute right it does deserve recognition and protection in the workplace especially because “the once demarcated boundaries between work and private life have become more and more blurred and in many cases eroded through new ways of working and technological developments”. As a consequence of this in my opinion I believe that employees should be accorded a degree of privacy in the workplace which will include some personal use of the employer’s technological resources. This will result in a workplace environment which is more conducive to employees needs in this current age that we live in and also will in turn result in enhanced productivity for the employer.

With that being said, my focus in this chapter firstly will be on an analysis of the legislation, most importantly RICA which proscribes to what extent an employer may monitor electronic communication in the workplace, secondly I will examine a selection of cases which dealt with telephone tapping, and the monitoring of employees Email and Internet and communication and lastly I will explain the extent to which privacy is protected in the workplace in light of this practice, This will be done by illustrating that although employers advance a number of reasons as justification for the monitoring of telephone, Internet and Email communication, the main reason being to ensure a productive and efficient workplace, at the same time employees have a right to privacy and such right does not cease to exist once they enter the employment relationship.

Legislation:

Section 14(d) of the Constitution provides “that everyone has a right not to have the privacy of their communications infringed”. This aspect of privacy is known as informational privacy.¹⁸⁶ According to De Waal and Currie informational privacy “should be construed as safeguarding the interest of an individual to restrict the collection, storage and use of personal

¹⁸⁵ M S Hornung ‘Think Before you Type: A Look at Email Privacy in the Workplace’ *Fordham Journal, Corporate & Financial Law* 2005-2006 115, 116.

¹⁸⁶ Note 29 above, 323.

information concerning him or her”.¹⁸⁷ A proviso to this principle however is that an individual’s expectation of informational privacy must be reasonable.¹⁸⁸ Also, it is important to remember that the constitutional right to privacy is not absolute and will have to be balanced against section 36 of the Constitution.¹⁸⁹ An important case which interpreted the concept of informational privacy was that of *Mistry v Interim Dental Council of South Africa*,¹⁹⁰ in this case the court considered the following factors to determine whether an individual’s expectation of informational privacy was reasonable: whether the information was obtained in an intrusive manner, whether it was about intimate aspects of an individual’s life, whether it involved data provided by the individual for one purpose, which was then used for another purpose and lastly whether it was disseminated to persons from whom the individual could reasonably expect such information would be withheld.¹⁹¹

Apart from the Constitutional protection afforded to privacy the critical question of whether and to what extent an employee may monitor electronic communications in the workplace was answered when the Legislature formulated the Regulation of Interception of Communication-Related Information Act. This Act came into operation on the 30th of September.

Prior to the enactment of RICA, there existed the Interception and Monitoring Prohibition Act¹⁹² which regulated monitoring. The IMPA prohibited the interception of confidential information; however its biggest failure was that it was not applicable in the private sphere such as the workplace.¹⁹³ Hence the scope of RICA is much wider and is concerned with interception in both the private and public spheres and applies to private sector employees and employers.

RICA prohibits, with exceptions, the intentional interception of direct or indirect communications. More specifically, section 2 of the Act contains the general prohibition, it

¹⁸⁷ Note 29 above, 324.

¹⁸⁸ Note 29 above, 324.

¹⁸⁹ Note 7 above, section 36.

¹⁹⁰ Note 57 above.

¹⁹¹ Note 57 above, para 30.

¹⁹² The Interception and Monitoring Prohibition Act Act 27 of 1992.

¹⁹³ W Beech ‘Right of Employer to Monitor Employees Electronic Mail, Telephone Calls, Internet Usage and other Recordings’ 2005 26 *ILJ* 654.

states that “no person may intentionally intercept or attempt to intercept, or authorise or procure any other person to intercept or attempt to intercept at any place in the Republic, any communication in the course of its occurrence or transmission”.¹⁹⁴ A contravention of the provisions of RICA constitutes a criminal offence¹⁹⁵ and could lead to the imposition of a fine not exceeding two million rand or a period of imprisonment not exceeding 10 years.¹⁹⁶

The term “communication” in the Act is defined to include both “direct” and “indirect” communication.

The Act defines a “direct communication” as:¹⁹⁷

(a) oral communication, other than an indirect communication, between two or more persons which occurs in the immediate presence of all the persons participating in that communication; or

(b) utterance by a person who is participating in an indirect communication, if the utterance is audible to another person who, at the time that the indirect communication occurs, is in the immediate presence of the person participating in the indirect communication;

An “indirect communication” is defined as:¹⁹⁸

the transfer of information, including a message or any part of a message whether-

(a) in the form of-

(i) speech, music or other sounds; data, text, visual images, whether animated or not; signals; or radio frequency spectrum; or

¹⁹⁴ Note 25 above, section 2.

¹⁹⁵ Note 25 above, section 49.

¹⁹⁶ Note 25 above, section 51 (1) (b).

¹⁹⁷ Note 25 above, section 1.

¹⁹⁸ Note 25 above, section 1.

- (b) in any other form or in any combination of forms, that is transmitted in whole or in part by means of a postal service or a telecommunication system.

The definition of “intercept” is also contained in section one and reads as follows:

The aural or other acquisition of the contents of any communication through the use of any means, including an interception device, so as to make some or all of the contents of a communication available to a person other than the sender or recipient or intended recipient of that communication, and includes the (a) monitoring of any such communication by means of a monitoring device; (b) viewing, examination or inspection of the contents of any indirect communication; and (c) diversion of any indirect communication from its intended destination to any other destination.

The prohibition in section 2 applies only to third party interception; not participant interception, i.e. when one of the parties to the communication records and/or divulges it to a third party.¹⁹⁹ A third party may intercept a communication with the consent of one of the parties to the communication or access communications that are in the public domain, such as unrestricted access to facebook.²⁰⁰ To fall foul of the Act, the prohibited interception must be intentional. An accidental or chance of discovery of a message is not covered by the prohibition.²⁰¹

Notwithstanding the general prohibition contained in section 2, section 6 of the Act contains a further exception to the prohibition which applies specifically to the workplace. This section allows an employer to intercept and monitor ‘indirect communications’ taking place via its telecommunications system if certain conditions listed in section 6(2) are met. As indicated above, an ‘indirect communication’ is a transfer of information that occurs over a telecommunication system (via technology) or via the postal service to another person.

The requirements listed in section 6(2) are that:²⁰²

¹⁹⁹ *Dauth/Brown and Weirs Cash & Carry* [2002] BALR 837 (CCMA); *Volkwyn/Truworths Ltd* [2002] 4 BALR 455 (CCMA’).

²⁰⁰ *Sedick & Another v Krisray (Pty) Ltd* [2011] 8 BALR 879 (CCMA).

²⁰¹ *Smuts v Backup Storage Facilities* [2003] 3 BALR 219 (CCMA).

²⁰² Note 25 above, section 6(2).

1. The interception must be authorized by its 'system controller', which is defined as a 'natural person' in the case of a private body; any partner in a partnership; and the chief executive officer or person duly authorized by him or her in the case of a juristic person.
2. The interception must be to establish facts, to detect unauthorised use of the telecommunication system or to secure the effective operation of the system.
3. The communications must have been made via the electronic and telecommunications systems provided for use wholly or partly in connection with the employers business.
4. The systems controller must make reasonable efforts to inform the employees using the system that indirect communications may be intercepted, or alternatively, the consent of the employees must be obtained either expressly or impliedly.

Aside from RICA, there also exists the Electronic Communications and Transactions Act²⁰³ which was enacted to remove barriers to the legal recognition of electronic transactions. The overall objective of this Act is to enable and facilitate electronic transactions and to create public confidence in electronic transacting.²⁰⁴ Section 86 of the Act purports to require an employer to obtain the authority and consent of employees before intercepting and monitoring their email and telephone communications and data stored on an employee's computer.²⁰⁵ However section 6 of the RICA prevails because section 86 is expressly subject to the RICA. The RICA requires consent or prior knowledge of the employees and moreover it does not require that notice be given immediately prior to the interception. Prior knowledge can be obtained through a standing written policy advising the employees of the company's right to intercept and monitor when the need arises or in the case of company Email use, the checking of an appropriate box confirming knowledge of the new rule before any user may obtain further access to the computer system of the company.

It is thus evident that RICA constitutes a statutory right of the employer to violate an employee's right to privacy under certain conditions. Together with section 36 of the Constitution which will have to be applied in each situation. This is where the employees' rights may be limited in terms of the employers common law right to protect its property and business interest, but the limitation must be reasonable and justifiable after considering the

²⁰³ Electronic Communications and Transactions Act 25 of 2002.

²⁰⁴ Ibid, section 2 (1) (c)-(f), (i)-(o).

²⁰⁵ Note 203 above, section 86.

employees right to dignity and privacy, the importance, purpose and extent of the limitation and whether less restrictive means exist to achieve the purpose.²⁰⁶

Telephone Tapping:

In the employment context the question that arises is whether an employer is entitled to intrude into the conversations of his or her employees that have nothing to do with the employers business, or even if they do, how far does such privilege extend. The general trend of thinking is that an employee's telephone calls which impact on the business affairs of the employer do not constitute a zone of privacy and as such are not private and not protected by the Constitution.²⁰⁷

Case law:

*Protea Technology Ltd & another v Wainer & Others*²⁰⁸

Here the employer, Protea Technology had, without the consent of the employee (Wainer), recorded telephone calls made by Weiner in the workplace which was tendered in court to prove that Wainer was acting in breach of a restraint of trade agreement. The employee argued that the recordings invaded his right to privacy and contravened the Interception and Monitoring Prohibition Act and that the court no longer had discretion to admit the evidence.

The court found that the right to privacy requires a subjective expectation of privacy which society recognises as objectively reasonable.²⁰⁹ In its enquiry the court considered the fact that the telephone calls were conducted from the employer's premises within business hours and that conversations of the employee relating to the employers affairs were not private and were not protected under the Constitution.²¹⁰ The court held that the employer had a contractual right to know where his employee may be committing a delictual action. In concluding the court held that Wainer was not entitled to insist upon the protection of the

²⁰⁶ D Collier 'Workplace Privacy in The Cyber Age' (2002) 23 *ILJ* 1743, 1748.

²⁰⁷ Note 152 above, 208

²⁰⁸ *Protea Technology Ltd & another v Wainer & Others* 1997 9 BCLR 1225 (IC).

²⁰⁹ *Ibid*, 1240.

²¹⁰ *Ibid*, 1243.

constitutional right to privacy and upheld the discretion of the court to admit illegally obtained evidence which was reasonable in an open and democratic society.²¹¹

Moonsamy v The Mailhouse²¹²

Here the right to privacy was interpreted and applied extensively.²¹³ The issue in this case was whether the employer was entitled to use evidence at a disciplinary hearing, which it had obtained by intercepting and recording the employee's telephone calls in his office on the employer's premises, and which contributed to Moonsamy's dismissal. The employee argued that the telephonic evidence was obtained illegally in violation of the Interception and Monitoring Prohibition Act and the Constitution and accordingly it should have not have been led at the hearing.

The arbitrator held that the recording was an invasion of the employees' rights in terms of section 14 (d) of the Constitution.²¹⁴ The second stage of the enquiry was to consider whether the infringement could be justified in accordance with the limitation clause in terms of section 36 of the Constitution. The arbitrator structured his reasoning on five premises:²¹⁵

1. The nature of the right: The arbitrator considered American case law to the effect that a person is entitled to a 'reasonable expectation of privacy'. A reasonable expectation can only be said to exist when the individual has a subjective expectation of privacy and society, objectively, recognize the expectation as reasonable. The court held "in reality it is extremely difficult to clarify, at least with any degree of precision, the nature of the right to privacy of an employee on the premises of the employer during working hours".²¹⁶ The court stated that the present case went further than rummaging in an employee's desk or filing cabinet.²¹⁷ The court explained that it could be argued that if a telephone call related to the employers business, the employer was entitled to be privy to that conversation. But if the employer were allowed to make that initial decision

²¹¹ Note 208 above, 1244.

²¹² Note 160 above.

²¹³ Note 150 above, 641.

²¹⁴ Note 160 above, 469.

²¹⁵ Note 160 above, 469

²¹⁶ Note 160 above, 469.

²¹⁷ Note 160 above, 470

regarding the nature of the call, the right to privacy would be meaningless.²¹⁸ The right would then amount to having a tribunal decide, after the interception of the call that the call did not relate to the business of the employer and so was confidential.²¹⁹

2. The importance of the purpose of the limitation: The court explained that the employee's right to privacy regarding work related matters had to be qualified on the basis of the fiduciary relationship between employee and employer that entitled the employer to loyalty and honesty.²²⁰ In this case the employer contended its actions necessary for its self-preservation, however the court held that a person's occupation was pivotal to his personal and professional life and that the rights to which a citizen was entitled in his personal life could not simply disappear in his professional life as a result of the employer's business necessity.²²¹
3. The nature and extent of the limitation: The court held that whereas an employer might ask for and monitor the number of personal calls an employee makes, the disclosure ends there unless prior authorisation is sought or compelling reasons of business necessitates that the content be disclosed.²²²
4. The relation between the limitation and its purpose: In this case the interception of the telephone call was intended to provide evidence against the employee. The court stated that the method chosen to obtain the evidence was excessively invasive and therefore only justifiable if the employer could show that the interception was the only way to secure essential evidence.²²³ The court concluded that in this instance the employer had to seek prior authorization.²²⁴
5. Less restrictive means to achieve the purpose: The point that was stressed here was that if an employer actually could have used other more conventional methods of obtaining incriminating evidence against the employee then it should have done so. If, however there were no alternatives to telephone tapping, then the employer should seek prior authorization. This could be obtained by way of either employee consent as a condition of the employment contract, or by authorization by the Labour Court.²²⁵

²¹⁸ Note 160 above, 470

²¹⁹ Note 160 above, 470

²²⁰ Note 160 above, 470.

²²¹ Note 160above, 471

²²² Note 160 above, 472.

²²³ Note 160 above, 472

²²⁴ Note 160 above, 472.

²²⁵ Note 97 above, section 158.

Internet and Email Monitoring:

Today, Internet and Email is seen as a crucial business tool and has replaced the traditional modes of communication in the workplace such as letter, fax and telex. It has redefined the workplace and altered the face of communication in many respects.²²⁶ Email has enabled instantaneous and inexpensive communications between individuals²²⁷ and the Internet has brought with it access to virtually unlimited information and has moved beyond being a communications infrastructure to becoming a new software platform.²²⁸ Although, given the fact that Internet and Email has irreversibly changed the way the workplace is conducted and has brought with it ease of communication and unlimited information, it has also brought with it many liabilities, threats and legal risks for employers.²²⁹ In an effort to reduce Internet and Email misuse in the workplace, employers have found it necessary to regulate and monitor their use by employees, thus threatening employee privacy. Many companies have also established an Internet and Email usage policy informing employees of what is acceptable in terms of using these facilities. In an article by Mc Gregor, she identifies three problems encountered in the workplace with Internet and Email, firstly both the employer and the employee can be exposed to various form of liability where for example material subject to copyright is downloaded, or when an employee makes defamatory statements and where discriminating material is sent, secondly viruses can be contracted and transmitted by internal networks and lastly excessive use of the facilities which might result in a company's mail server and Internet becoming congested because of the over loading of networks as well as unnecessary time being spent on personal business which in turn will result in a loss of productivity.²³⁰

These reasons advanced by employers to justify the monitoring of Internet and Email in the workplace relate mainly to economic reasons of ensuring an efficient and productive workplace. It seems that many employers have lost sight of the right to privacy of an

²²⁶ Note 24 above, 257.

²²⁷ Note 24 above, 257.

²²⁸ Maite Modiba 'Intercepting and Monitoring Employees e-Mail Communications and Internet Access' *Mercantile Law Journal* 363 2003, 364.

²²⁹ Note 206 above, 1743.

²³⁰ Note 150 above, 646.

employee which also deserves special protection and recognition and that non-recognition could have negative effects on an employees work performance.

Case law:

*Bamford & others v Energizer (SA) Limited*²³¹

In this case, Energizer, a manufacturing company of batteries, dismissed a group of its employees for violating the company's email policy. The employees were charged with and dismissed for "the repeated violation of company's policies and procedure regarding the use of company email and "the repeated receipt and forwarding to colleagues of obscene pornographic, racist and sexist material and jokes".²³² The applicants did not dispute sending or receiving the material. However they contended that there was no clear rule against the private use of email and that their right to privacy was invaded.

In dealing with these arguments, the arbitrator noted that the company had issued several directives concerning the use of email, including one issued in response to a chain letter forwarded by one of the employees, While none of these dealt expressly with porn or racist material, they left no room for doubt that the circulation of such material was forbidden. The background of the employees, which the arbitrator described as "middleclass not bereft of education", convinced the arbitrator that the applicants should have known that their conduct was unacceptable.²³³ The arbitrator also stated that even if the policy was silent on prohibitions against e-mail use in the workplace, common sense should have made the employees realise that the grotesqueness of the material they were receiving and forwarding was offensive and not permitted in the workplace.²³⁴

Regarding the privacy claim, the arbitrator found that there was no violation as the material could not be described as personal in nature, the dignity or personal affairs of the employees had not been affected and lastly that the materials were stored on the employers computers and therefore could not be considered personal communications.²³⁵

²³¹ *Bamford & Others v Energizer (SA) Limited* [2001] 12 BALR 1251 (P).

²³² *Ibid*, para 1.

²³³ Note 231 above, para 45.2

²³⁴ Note 231 above, para 45.3

²³⁵ Note 231 above, para 48.

This case is illustrative of the fact that even if the company has no explicit policy regulating email use in the workplace, employees cannot claim that they had a reasonable expectation of privacy in respect of all communication received and forwarded in the workplace.

*Cronje v Toyota Manufacturing*²³⁶

In this case a manager was dismissed for circulating a cartoon he had received, which depicted the President of Zimbabwe as a gorilla via the company's email. He was charged with distribution of racist/and or inflammatory material and violation of the company's email policy.²³⁷ The employee argued that he did not regard the cartoon as racist and that he was aware of the company's e-mail policy, but was not aware of the fact that the cartoon fell within the policy's prohibitions.²³⁸ On evaluation of the evidence the commissioner found that the cartoon was racist and inflammatory and that the employers Internet and Email code specifically prohibited the transmission of any offensive racial, sexual, religious or political images, documents and images on the company's system.²³⁹ Although the right to privacy was not the direct issue in this case, it provided some insight into how seriously the courts view the online activity of employees in the workplace.²⁴⁰

*Singh v Island View Storage Ltd*²⁴¹

In this case an employee had been dismissed for sending a sexually explicit email to three colleagues on the company's intranet. The employee admitted that what he had sent was inappropriate, contained sexually explicit material and he also was aware of the company's electronic communications policy. He further stated that he had intended no harm and it was merely a joke. The commissioner in this case placed a lot of emphasis on the employee's motive in sending out the Email and said that his intention was to embarrass and cause offence, especially after he had admitted that he had a hostile

²³⁶ *Cronje v Toyota Manufacturing* [2001] 3 BALR 213 (CCMA).

²³⁷ *Ibid*, para 215.

²³⁸ Note 236 above, para 219.

²³⁹ Note 236 above, para 221.

²⁴⁰ Note 206 above, 1754.

²⁴¹ *Singh v Island View Storage* (2004) 13 CCMA 8.32.1

relationship with his colleagues.²⁴² The commissioner accordingly concluded that he was aware of the consequences of his actions, his intention was to offend and hence his dismissal was justified.²⁴³

*Philander v CSC Computers*²⁴⁴

In this case the applicant was dismissed for forwarding porn material on the company's email system. The commissioner found that the applicant had clearly accessed material to which he knew he was not allowed access, and to forwarding that material through the company's email system.²⁴⁵ Although the applicant had forwarded the material to a select group, he must have known that others would intercept/see it. The dismissal was accordingly upheld.²⁴⁶

*Toker Bros (Pty) Ltd v Keyser*²⁴⁷

In this case an employee was charged with dishonesty in that she excessively misused the company computer for personal use during working hours and further she was charged with making defamatory remarks about her employer in an Email to a friend she sent from the company computer. The arbitrator found that the issue was whether, in the absence of a written policy against personal use of Internet, the employee could be reasonably be expected to know or be aware of the rule.²⁴⁸ In deciding on this issue the arbitrator "found that not all rules and policies have to be made known to employees as some common sense has to weighed against reasonableness".²⁴⁹ As a result the employee "could reasonably have been expected to know the rules as she was cautioned at the start of her employment and due to her experience as an employee".²⁵⁰ With regard to the defamatory charge, the employer argued that the manner in which the Email was obtained was not illegal in that the Email was obtained during an investigation into the employee's

²⁴² Note 24 above, 279.

²⁴³ Note 24 above, 279.

²⁴⁴ *Philander v CSC Computers* (2002) 3 [BALR] 204 (CCMA).

²⁴⁵ A Breetzke 'IR Update-Internet Usage', available at <http://dیمانage.wordpress.com/category/industrial-relationslabour-law-andrew-breetzke/page/2/>, accessed on 15 August 2012.

²⁴⁶ Ibid.

²⁴⁷ *Toker Bros (Pty) Ltd v Keyser* (2005) 26 ILJ 1366 (CCMA).

²⁴⁸ Note 247 above, 1372.

²⁴⁹ Note 247 above, 1372.

²⁵⁰ Note 247 above, 1372.

excessive Internet usage. The arbitrator stated that the right to privacy contained in section 14(d) of the Constitution particularly, can be limited where consent has been given or a clear policy on monitoring and intercepting of communications in the workplace is implemented.²⁵¹ The arbitrator found that the Email was not obtained with malicious intent but its discovery was incidental to the investigation into the employee's abuse of the Internet.²⁵²

*Kalam v Bevkap*²⁵³

The employer in this case found out that his employee had over a period of five months visited thousands of Internet sites, most of which contained pornographic material. The employer found out that the employee had spent approximately 285 hours per week visiting 14802 non-work related sites.²⁵⁴ The employee argued that his actions could not be considered unacceptable because he was aware of the company's IT policy document, but did not read it because it was a bulky document. The commissioner found this argument to be unacceptable and also found that the employee knew of the policy because he ignored the popup messages that warned that the sites he was accessing were prohibited.²⁵⁵ Further the commissioner stated that even if the employee was unaware of the company's policy, he should have made use of his common sense. The commissioner thus found the employees dismissal to be substantively and procedurally fair.²⁵⁶

Conclusion:

In concluding on this chapter of Interception and Monitoring of Communications in the workplace I think it is quite evident that South Africa is lacking in precedent regarding the issue of privacy in the workplace in terms of electronic communications. Most of the cases which I have discussed illustrate that courts are more accommodating of employers monitoring Internet and Email usage of employees.²⁵⁷ The main reason for this is because the employer owns the Internet and Email facilities in the workplace and hence it is

²⁵¹ Note 247 above, 1374.

²⁵² Note 247 above, 1373.

²⁵³ *Kalam v Bevkap* (2006) 15 MEIBC 8.32.1.

²⁵⁴ Note 24 above, 282.

²⁵⁵ Note 24 above, 282.

²⁵⁶ Note 24 above, 282.

²⁵⁷ Note 206 above, 1753.

justified in protecting its business interests by regulating and monitoring the use of these facilities. While this may be the position, the right of an employee to privacy is often overlooked either because “the way in which the employer gathers information is done in circumstances which eliminate a reasonable expectation of privacy”, or the employer’s business interest constitutes a justifiable and acceptable limitation to the right to privacy in terms of section 36 of the Constitution.²⁵⁸

With RICA having been adopted, it is indeed a better piece of legislation than the previous IMPA. It directly regulates the interception and monitoring of Internet and Email communications in both the public and private spheres as oppose to IMPA which was mainly intended for use by public agencies in gathering evidence during criminal investigations. An employer will have to follow the stringent procedures laid down for any interception and monitoring in the workplace otherwise such violation will lead to a fine or imprisonment.

Although with the advent of RICA, it is evident that case law has not really dealt with the application of the Act and more importantly has not paid much attention to the balancing of the rights of an employer to monitor and intercept electronic communications versus an employee’s right to privacy. A vast majority of the cases have dealt with the issue of whether an employee’s dismissal was fair and merely have paid lip service to the right of privacy. In these cases as well, most of them have indicated that the employer’s business interests will trump those of the employee.²⁵⁹ “It is probably just a matter of time before the extent of an employee’s right to privacy is tested in the Constitutional Court, particularly in relation to the interception of electronic communications”.²⁶⁰

CHAPTER SEVEN

²⁵⁸ Note 24 above, 284.

²⁵⁹ Note 24 above, 286.

²⁶⁰ Jan Truter ‘Electronic Communications and Employee Privacy’ available at <http://www.labourwise.co.za> accessed on the 2nd July 2012.

THE ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE IN CIVIL & LABOUR COURT PROCEEDINGS

Introduction:

Labour disputes arise from the relationship between employers and employees, or the termination thereof.²⁶¹ Thus far in my dissertation I have examined a series of practices that an employer conducts in his or her workplace, in each of these practices the employer seeks some sort of evidence or ‘answer’ from an employee that ultimately leads to the employees dismissal. In the majority of cases the manner in which the employer acquires information about an employee is not sanctioned by law and the question which arises is whether the employer may use it against the employee in disciplinary and arbitration proceedings. How evidence is presented and its admissibility depends on whether the proceedings are internal disciplinary proceedings, statutory arbitrations conducted by the CCMA or relevant Bargaining Council in terms of section 138 of the Labour Relations Act, or Labour Court Proceedings.

Onus of Proof:

Section 192 of the Labour Relations Act places the onus of proving misconduct and the fairness of any dismissal on the employer. Where it is disputed, the onus rests on the employee to prove that a dismissal took place.

Standard of Proof:

In Labour matters the degree of proof required to discharge an onus is the balance of probabilities. To succeed the party who bears the onus of proof would have to show that its version is more likely to have happened than the version of the other party. If for example, an employee is accused of misconduct or the employer is accused of unfair dismissal, to discharge its onus, the employer does not need to show that the facts are inconsistent with any possible or even reasonable inference except that the employee

²⁶¹J Grogan *Labour Litigation and Dispute Resolution* 10th ed (2010) 16.

committed the specific misconduct in question, and in the latter case, that the dismissal was fair.

The Shifting Evidentiary Burden:

Although the overall onus never shifts, during the arbitration the need to counter evidence may rest on different parties. In a misconduct case, for example, once the employer has fleshed out its allegations in evidence to a degree that its version requires an answer or rebuttal, if it is to be believed, the evidentiary burden shifts onto the accused employee to prove otherwise. For example, video footage capturing an employee concealing merchandise on her person while working in a retail store constitutes a prima facie case of dishonesty against the employee and this then shifts the evidentiary burden to the employee. In the absence of a credible and probable explanation from the employee, the inference that could reasonably be drawn is that the employee had acted dishonestly and the employer has discharged its onus.²⁶²

The Right to Remain Silent:

Some disciplinary offences may be crimes as well. The employee faces a choice between possibly losing his case through failing to reply to accusations or disclosing evidence that may lead to his conviction. In this situation, an employee is not entitled to a stay of the disciplinary or arbitration proceedings until the completion of the criminal trial, nor is he immune from the evidentiary burden to rebut a case made against him on the basis of a right against self-incrimination and to remain silent. Section 35 of the Constitution is applicable to criminal proceedings, not labour proceedings.²⁶³ As a result, should an employee make incriminating statements during a labour case, he may apply in the criminal trial for the statements to be suppressed on the grounds that its use in that forum would constitute a violation of his right to remain silent.

Admissibility of Evidence in Arbitrations:

²⁶² *Woolworths (Pty) Ltd v CCMA and Others* (2011) 32 ILJ 2455 (LAC).

²⁶³ *New Forest Farming CC v Cachalia and Others* (2003) 24 ILJ 1995 (LC).

Admissibility refers to whether a particular item of evidence may be introduced at the hearing and/or be taken into account by the arbitrator. While arbitrators are required to observe the most basic of the rules of evidence, such as those relating to the onus and standard of proof, relevance and privileged information, section 138 directs them to deal with the admissibility of evidence with a minimum of legal formalities. Generally, if the evidence appears to be logically and legally relevant, arbitrators should admit it. There must be some advance indication that the evidence, if received, may assist the arbitrator in deciding the case.

Interception of Communications:

If an employer acquires information about an employee by means not sanctioned by the law, the question which arises is whether the employer may use it against the employee in civil and Labour Court proceedings.

Admissibility Criteria in Civil Proceedings:

A civil litigant who wants to introduce improperly obtained evidence must explain why he did not follow lawful means to obtain the evidence. The court will have regard to the type of evidence which was improperly obtained. In the case of *Fedics Group v Matus*²⁶⁴ the court held that a civil court has discretion to allow illegally and unlawfully obtained evidence.²⁶⁵ Further it was stated that evidence obtained through conscious and deliberate violations of a statutory and Constitutional right should only be allowed in exceptional circumstances.²⁶⁶

In the case of *Lotter v Arlow and Another*²⁶⁷ the court held that a tribunal in a civil case does have a discretion to exclude improperly obtained evidence and in this regard the court should examine all relevant considerations, including (i) whether the evidence could have been obtained lawfully; (ii) whether justice could have been achieved by following ordinary procedures; and (iii) whether there was a deliberate violation of another's

²⁶⁴ *Fedics Group v Matus* 1997 (9) BCLR 1199 (C).

²⁶⁵ *Ibid*, para 85.

²⁶⁶ Note 264 above, para 87.

²⁶⁷ *Lotter v Arlow and Another* 2002 (6) SA 60 (T).

constitutional rights.²⁶⁸ The court accordingly concluded that to admit the relevant evidence would bring the administration of justice into disrepute and invite a similar disregard of the constitutional rights of litigants by other creditors, encouraging disrespect for the law and the Constitution.²⁶⁹ As a matter of public policy and in upholding the constitutional rights of the respondents, the court had to act against the unwarranted intrusion into the private sphere of individuals.²⁷⁰

However, arbitration and disciplinary proceedings are not civil court proceedings and section 138 of the Labour Relations Act provides that admissibility rules must not be applied with the same strictness as that applied in courts of law.

Labour Proceedings:

The Industrial Court suggested that in labour matters the adjudicator has no discretion to exclude illegally or improperly obtained evidence.²⁷¹ However in later decisions, the Labour Court refused to admit evidence that was obtained in contravention of the criminal legislation that regulates entrapment and held that the onus is on the employer to prove its conduct was fair.²⁷² It is suggested that based on an employee's constitutional right to fair labour practices, an arbitrator does have discretion to exclude illegally and improperly obtained evidence. In this context fairness may be defined in terms of a balancing of the employee's right to dignity and privacy and the employer's right to protect its business and the rule that employer's decisions should be substantively and procedurally fair where the rights of employees are concerned.²⁷³ Bases on this and the fact that section 6 already accommodates the balancing of rights and prejudice, the arbitrator, in determining whether to admit the evidence, should consider the following factors,: whether the evidence could have been obtained lawfully; whether the employer knowingly and deliberately contravened any law that regulates the gathering of the evidence, such as RICA; whether there was a pre-existing suspicion that the employee was committing misconduct and whether there were reasonable grounds for believing

²⁶⁸ Ibid, para 64.

²⁶⁹ Note 267 above, para 65.

²⁷⁰ Note 267 above, para 65.

²⁷¹ *Goosen v Caroline Frozen Yoghurt Parlour (Pty) Ltd and Another* (1995) 16 396 (IC).

²⁷² *Cape Town City Council v SAMWU and Others* (2000) 21 ILJ 2409 (LC).

²⁷³ The fact that section 6 of RICA permits interception only under certain conditions indicates that employees do have rights in these situations.

that evidence relating to that offence may be found in the communications of the employee.²⁷⁴

In *Moonsamy v The Mailhouse*,²⁷⁵ the arbitrator stated that telephone conversations are a “very private affair” and that the employer must show that there are compelling reasons within the context of business necessity that the contents of those conversations are disclosed.²⁷⁶ He drew the line at continual tapping of an employee’s business telephone and found that the employer could have and had in fact acquired evidence against Moonsamy by less intrusive means.²⁷⁷

In *Sugreen v Standard Bank of SA*,²⁷⁸ the employer had obtained a tape recording of a conversation between one of its managers and a service provider which revealed a bribe. The tape recording was made and given to the employer by the service provider. Here the arbitrator distinguished Moonsamy on the basis that there were few other methods by which the evidence could have been acquired. That the recording was made during business hours, using the employers telephone, and that, in any event, it was a case of ‘participant monitoring’ which is permitted by RICA.²⁷⁹

*Protea Technology Ltd and Another v Wainer and Others*²⁸⁰ pointed out that an employee may receive and make calls which have nothing to do with his employers business. The employee making such calls has a legitimate expectation of privacy and the employer cannot compel him to disclose the substance of those calls.²⁸¹ The employer may however have access to the content of conversations involving the employer’s affairs.²⁸²

In the case of *Bramford & Others v Energiser (SA) Limited*²⁸³ the arbitrator sanctioned the collection and storage of Email messages from employee’s private mailboxes on the basis that the content of the messages (crude jokes and pornographic material) could not

²⁷⁴ Benita Witcher Lecture Notes 2012.

²⁷⁵ Note 160 above.

²⁷⁶ Note 160 above, 471.

²⁷⁷ Note 160 above, 472.

²⁷⁸ *Sugreen v Standard Bank of SA* 2002 23 ILJ 1349 (CCMA)

²⁷⁹ *Ibid*, para 12-13.

²⁸⁰ Note 208 above.

²⁸¹ Note 208 above, 1240.

²⁸² Note 208 above, 1240.

²⁸³ Note 231 above.

be construed as private. Moreover, when the company conducted an audit of its system when technical problems arose through overloading, it was seeking to establish the existence of facts (the root of the technical problem) to secure the systems effective operation, and in the process discovered improper use of the system which amounted to misconduct.²⁸⁴

Other monitoring and searches:

An employer is entitled to monitor its premises and the conduct of employees in operational areas (excluding change-rooms and toilets) through video and other camera surveillance to protect its business and property. Evidence obtained in these circumstances is admissible as there is no legitimate expectation of absolute privacy in these areas. Evidence obtained from searches of an employee's workstation or body searches is admissible if the employer had good reason to suspect an offence and, in the case of a body search, the employee has contractually agreed to such searches and the search was conducted decently and other less drastic methods of detection were not available.

Conclusion:

In concluding on this chapter it is clear that evidence obtained by an employer by means not sanctioned by law will not be readily admitted by the courts. An employer will have to provide reasons as to why he or she could not follow the proper procedures laid down for the collection of the specific evidence in question. One of the courts function is to prevent an abuse of the process through improper or unlawful practices by disallowing evidence obtained in violation of the law, good morals, ethics or the public interest.

CHAPTER EIGHT

²⁸⁴ Note 283 above, para 55

CONCLUSION

My dissertation set out to examine the extent to which privacy is protected in the workplace given the many advancements in technology coupled with the practices adopted by the employer to monitor employees. I indicated at the outset (chapter one) that privacy is a fundamental right in the Constitution, however such right is not absolute and can be limited where it is reasonable and justifiable to do in terms of section 36 known as the limitation clause. I also explained that the right to privacy in the workplace is something which employee's value and is essential for their personal development and growth. At the same time however it was apparent that employers have a considerable interest in their business and property and hence will be seen to infringe the privacy rights of employees. This is where the ultimate balancing act is put to the test, between the employees right to privacy on the one hand and on the other hand the right of the employer to conduct his or her business according to his or her managerial prerogative.

Chapter two traced the development of the legal protection of privacy in both South Africa and the United States of America. My reason for choosing these two countries as indicated was because each one represents a different and distinct approach to privacy protection. South Africa provides for and lists privacy as a fundamental right in its Constitution whereas the United States of America does not provide for a distinct right to privacy, instead it is inferred from and given meaning from other rights. This was an important chapter as it indicated how in both countries how the protection grew from a common law position to ultimately constitutional status. South Africa initially regarded privacy as one of the personality rights until it was recognised as a specific distinct right. Importantly it is "submitted that the United States of America should be commended for not only recognising but also protecting the right to privacy despite the absence of the right in its Constitution to be an impediment towards the protection of the right".²⁸⁵

²⁸⁵ Note 24 above, 387.

In chapter three I examined the practice of polygraph testing and how it infringes on the right to privacy. I indicated that polygraph tests certainly do infringe the privacy rights of employees by compelling them to communicate those personal facts and emotions which they have chosen to exclude from the knowledge of outsiders. With this form of testing, employees are always, the disadvantaged party in an unfair position almost being dominated by a machine that is able to make certain assumptions which are not necessarily correct. I also stated that the polygraph tests cannot detect deceit or lies and neither is there any scientific research that proves a polygraph to be 100 percent reliable. This is also the reason why our courts have treated the admissibility of such evidence so inconsistently. Unfortunately though is the reality that polygraph tests are here to stay and are gaining more popularity. Perhaps if legislation were enacted to regulate this practice the negative aspects would be diminished.

Chapter four was an analysis of HIV/Aids testing in the workplace and its effects on the right to privacy. I explained that the HIV/Aids pandemic is certainly a serious one with far reaching consequences. One of the biggest effects is in the workplace where productivity is hampered with the loss of employees and as a result of this damaging effect employers have resorted to testing current as well as future employees. This testing invades the privacy of employees who choose to keep the nature of their status, be it negative or positive to themselves. Employees with the virus may very well be productive for many years and as such the nature of their 'status' may be nothing more than a 'status'. Notwithstanding this, in certain industries a negative HIV status is an inherent requirement of the job and as a result testing is compulsory, in this situation then informed consent is crucial and if the applicant is not awarded the job he or she must fully understand why.

In chapter five I provided an analysis of body and workstation searches as well as monitoring through video surveillance. The general rule is that an employer may not conduct body and workstation searches without an employee's consent or unless the employer has a good reason to suspect that the employee is committing an offence. Video surveillance is also commonly used in many companies and the effects are largely that an employee is made to feel constantly under the watch which hampers work productivity and confidence to a certain extent.

In chapter 6 I provided an overview of interception and monitoring in the workplace with particular reference to RICA. This type of monitoring in the workplace has become a new

trend in almost every workplace and has enabled employers to monitor their employees more effectively through enhanced technological equipment. The chapter also revealed that the main reasons advanced by employers to monitor Internet and Email usage of employees is that they have a direct interest in the Internet and Email facilities being the owners of it and secondly in ensuring that the workplace is productive and efficient. On the other hand the arguments adopted by employees relate to their right to informational privacy and not to be policed in the workplace. Especially today where the line between workplace and personal activity has become very blur. In this chapter it was also clear that after the adoption of RICA, not much has been said about the right to privacy, instead in the majority of cases the right of the employer's business interests has been given priority.

In chapter seven I answered the question of whether the evidence obtained by the employer in all these practices will be admissible. This chapter highlighted that the courts will not readily admit such evidence without proper reasons as to why it could not be obtained lawfully. I also indicated the difference between civil and labour court proceedings when it comes to the admissibility of evidence.

To conclude, the protection of privacy in the workplace is certainly not something which a high premium is placed on. My dissertation set out to examine how privacy is infringed in light of the various practices adopted by the employer and it was quite evident how in each practice the infringement was undoubtedly clear. The value and importance of the right to privacy cannot be underestimated as it is indeed an important right and necessary for all human being in order to flourish and develop. Unfortunately it is not given the proper value in a workplace environment, where in almost every case the employers operational concerns trump the employees right to privacy.

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