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Electronic Monitoring and the Duty to Observe the Right to Privacy in the Workplace

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Abstract:- This paper focuses on the pivotal question of whether or not the right to privacy could be juxtaposed with the duty to monitor misconduct in the workplace. In relation to this subject, the author examines the constitution and other legal structure, especially in the context of the workplace, to see if workers are protected based on their right to privacy. It is noted that certain employers suggest that they have duty to electronically monitor misconduct in the workplace, whereas employees argue for their constitutional right to privacy to be respected by employers.

Given the dispute between employers and employees, it is suggested that an appropriate policy framework should be made which will focus on the use of computer technologies in the workplace. Furthermore, employees ought to be included in the processes by which their employers develop their policies. The proposed framework must be supplemented by workshops in order to provide education and training and continuous research. The same will assist in generating knowledge about legal and ethical misconduct. This policy can therefore be utilised as a flexible toolkit which conciliate both the employee's right to privacy and the employer's duty to electronically monitor of misconduct. The policy can also allow the future workplace as a platform where the notions of diversity, inclusion and mutual respect can be embraced.

Keywords:- *Electronic misconduct; Technology; Right to privacy; Monitoring; Policy; Constitution.*

I. INTRODUCTION

Advances in technology in the workplace have made it cumbersome to draw a clear distinction between the right to privacy of workers and the economic interests of employers. However, the Constitution safeguards a wide variety of conflicting and interrelated protections that are used in the workplace.[1]The rapid and increased usage of the internet in the workplace has brought a lot of challenges to the right to privacy.[2] These problems particularly relate to the competing interests and rights of both the employer and employees at work. The employer's interest is to monitor the workplace. As a consequence, the employees will understand what is required of them throughout business operations.

The reason for that is because the employer wants to know what their employees are doing during working hours. On the other hand, employees deserve to be regarded as autonomous, competent, and reasonable people who have the power to choose how their lives will unfold.[3] Employees are interested in their own development, to have their efforts valued, and to be free from monitoring for reasons of privacy.[4]The employer has to monitor employees for legitimate reasons such as prevention of misconduct or misuse of resources that might occur in the workplace.[5]As a result, the employer could decide to improve workplace surveillance, potentially jeopardising employees' right to privacy.[6]

Ultimately, the purpose of the study is to provide a solution for achieving a balance between the privacy rights of employees and employers' need to monitor employees for their economic interests in the workplace. Such a balance, is achieved by adopting clear and explicit policies, which set out the rules and practices regarding electronic monitoring in the workplace, as they apply to the use of internet facilities at work.

II. THE RIGHT TO PRIVACY IN THE WORKPLACE

The scope of the right to privacy under the context of employment is difficult to clarify.[7] This has become a complicated topic in the workplace, especially amid the increasing presence of technological devices in the workplace potentially posinga threat to employee's privacy.[8] This protection is not exhaustive and it extends to any method of obtaining information or unauthorised

[1] Moonsamy v Mailhouse (1999) 20 *ILJ* 464.

[2] Buy R *'Cyberlaw@SA' (*Sonnenberg Hoffman & Galombik Attorneys, Cape Town 2000) 365.

[3]Laura P *"Technology and ethics in the workplace"* (2002) on https://doi.org/10.1111/0045-3609.00099 access on 12 November 2020.

[4]Laura P (2002) 12.

[5]Collier D 'Workplace privacy in cyber age' (Juta 2002) 1743 *ILJ* 23.

[6]Collier D (2002) 23.

[7]Subramanian 'A fresh perspective on South African law relating to the risk posed to employers when employees abuse the internet' 17.

[8]Van Nierkek A 'The right to privacy in employment: *Contemporary Labour Law'*3:97.

information.[9] In *Waste Products Utilisation (Pty) Ltd v Wilkes,*[10]it was confirmed that a court had the authority to decide whether or not to admit tape recordings made in an unauthorized way or in violation of a constitutional right provided that doing so would be consistent with public policy.

The use of new technologies in monitoring employees raises concerns that the right to privacy of employees is becoming more difficult to balance against the employer'soperational rights. In *Smit v Workmen's Compensation Commissioner*,[11]the court held that the right to impose and enforce rules in the workplace is one of the fundamental features of the employment relationship.

Employees view monitoring of their electronic activities in the workplace as a violation of their right to privacy as it frustrates employees while performing their duties. [12]Studies show that monitoring in the workplace can inadvertently prove harmful to employee morale as it can create unfavourable working conditions which may foster an environment characterised by low levels of trust and resentment. These could prove counterproductive and ultimately negate the objective of implementing such systems. Accordingly, monitoring can negatively affect employees and even lead to more destructive workplaces.[13]However, employersmay view monitoring as increasing productivity and improving on the quality of work done by their employees in the workplace.[14]Therefore, it is crucial for both employer and employee to build up a good working relation by involving each in the process of making policies which are related to the use of technology within the workplace.

A. Employers' right to monitor electronic devices in the workplace

As noted above, advances in technology have increased the capabilities of employers to electronically monitor employee conduct and behaviour when using technological or electronic devices. However, such monitoring technologies raise concerns for employees' privacy. The right to privacy protects various constitutional values,which values include the fundamental right to human dignity.[15]Although a convenient term, it should be noted that there is no general 'right' to monitor. A 'right to monitor' is in fact a misnomer. The law does not extend to any person a right to monitor another. It merely creates circumstances under which monitoring *may be* allowed. The true nature of this so-called 'right to monitor' of employers is in fact a matter coincidental to the employer's right to freedom of trade. Employers, like any other person, have a right to engage in trade.

Logically, one does not aimlessly or even fruitlessly engage in trade. Legitimately carrying out a trade always has certain objectives such as acquiring profit (for for-profit entities) or attainment of a specific goal (in the context of non-profit organisations). Of import, in this context, is that employers rely on the services provided by their employees to achieve their objectives. As such, they are by extension entitled to ensure that their employees work towards the realisation of their objectives. Monitoring, as a tool to facilitate the achievement of their objectives, comes into the fold this way. It is not so much a right, but a means to exercise their right to engage in trade. In the right circumstances, as discussed below, employers may even electronically monitor the conduct of their employees.

As discussed below, however,employers cannot monitor highly private parts of the workplace such as restrooms and locker rooms.[16] Moreover,electronic monitoring should be restricted to employees within the workplace.[17]Employers must control the risks associated with their employee's access to and use of electronic media and the internet by establishing an electronic communications program that can regulate employees' internet access and use with their consent. [18]

B. Employees right to privacy in the workplace

Section 14 of the Constitution entrenches a broadly-encompassing right to privacy, which includes employees in the workplace.[19]The right is viewed as the cornerstone of the employee's claim to privacy. In *Re Hyundai Motor*

[9]McQuoid-Mason *"Constitutional Law of South Africa Privacy"* (1998) 1811.

[10]*Waste Products Utilisation (Pty) Ltd v Wilkes* 2003 2 SA (W) 550F.

[11]*Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A).

[12] Mahmoud M 'Monitoring Employee Behavior Through the Use of Technology and Issues of Employee Privacy in America' on http://doi.org/101177/2158244015580168 access on 18 November 2020.

[13] Litzky, Eddleston and Kidder "The Good, the Bad, and the Misguided: How Managers Inadvertently Encourage Deviant Behaviors" (2006) *Academy of Management Perspectives* 91.

[14]Van Jaarveld 'Forewarned is forearmed: Some thoughts on the inappropriate use of computers in the workplace'(2004) 16*SA Mercantile Law Journal*651.

[15]Section 10 of the Republic Constitution of South Africa.

[16]Laura P (2002) 21.

[17]*Ibid.*

[18]Papadopoulos S & Snail S '*Ed Cyberlaw@SA III: The law of the Internet in South Africa 3rd edition'* (Pretoria, Van Schaik 2012) 276.

[19] Section 14 (a – d) of the Constitution, 1996.

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Distributors v Smit NO and Others,[20]The court ruled that the right to privacy protected by Section 14 of the Constitution applies to people in situations outside of their defined 'intimate core' as well. In these situations, people still have a right to privacy in the social contexts in which they engage.[21]Thus, individuals still have the right to be left alone unless specific requirements are met, whether they are at their offices, cars, or using mobile phones. The aforementioned information leads us to the conclusion that the right to privacy would be questioned whenever a person had the choice to determine whatinformation they want to make public, provided, of course, that their expectation of privacy was reasonable.[22]

The employees' right to privacy in the workplace remains controversial, however. This controversy is exacerbated by the proliferation of technological devices that are used to monitor employees' electronic activities during working hours.In *Moonsamy v The Mailhouse*,[23]an employee was charged and dismissed as a result of his employer's monitoring of his phone calls at work without his permission. Following his dismissal, the employee filed a complaint with the CCMA, claiming that the recordings were made in violation of the Interception and Monitoring Prohibition Act (IMPA) 127 of 1992, and that his employer's conduct was ' violation of his constitutional right to privacy.

The employee took the employer to CCMA and put forward an argument that the evidence obtained by the employer was inadmissible. Having considered the facts of the case, the Commissioner highlighted that the actions of the employer went a step beyond "rummaging in an employee's desk or filing cabinet".[24] The Commission found that the employer's action had deprived the employee of his right to privacy[25]based on the former's failure to obtain prior consent from the employee. This resulted in a violation of section 14 (d) of the Constitution, as well as section 36.

Employees should be made aware of the monitoring as well as what devices will be used to monitor them, how the data collected will be used, as well as exactly when they will be monitored within the workplace. In the case of *Smith v Partners in Sexual Health (non-profit)*,[26] the applicant was employed by the respondent as an administrative assistant.[27]The applicant also maintained a private Gmail server of her own.[28] While on leave, the respondent's chief executive officer used the computer to log onto the applicant's private email and discover classified details that had been exchanged amongst former employees as well as other outside information.[29]At the arbitration, this was regarded as unlawfully obtainedevidence and was found to not be admissible.

However, an employer's intrusion can be justified based on employee's consent to gain access to workplace electronic devices.[30] This normally occurs through getting prior consent in the employment contract.[31] This must be express or implied and it must comply with section 6(2) of the Regulation of Interception of Communication and Provision of Communication-Related Information Act 70 of 2002 (RICA). Although, the most important aspect in this context is contained in section 5(1) of the RICA. The provision states that someone may intercept communication if one of the parties has given prior consent. Therefore, employers have a responsibility to ensure that employeesare aware of, and understand, their electronic monitoring policies.[32] The statute purports to protect employees from any exploitation of their right to privacy in the workplace.

Section 14 (d) of the Constitution, provides that a right to privacy includes protection from infringement on one's communications.[33]Thus, the right may be used as a defence for employees in circumstances whereby their private communications are monitored or intercepted by the employer without consent.[34]Chigumba, citing Cockhead, indeed succinctly The right to privacy is not a new legal concept in South Africa. Before this right came into being, decisions supporting privacy were based on property rights and contract because an independent right to privacy was not recognized. "Privacy is the right to be left alone; the most comprehensive right and the most valued by civilized

[20] 2001 (1) SA 545 (CC).

[21] 2001 (1) SA 545 (CC) at para 16.

[22]*Ibid*.

[23]*Moonsamy v The Mailhouse* (1999) *20 ILJ* 464 (CCMA).

[24](1999) *20 ILJ* 464 (CCMA)at para 470B.

[25]See section 14 of the Constitution, which provides that everyone has a right to privacy.

[26]*Smith v Partners in Sexual Health (non-profit)* 2011 32 *ILJ* 1470 (CCMA).

[27] *Smith and Partners in Sexual Health (non-profit) 2011* 32 *ILJ 1470 (CCMA) 1470F.*

[28]*Smith and Partners in Sexual Health (non-profit) 2011* 32 *ILJ 1470 (CCMA).1470F.*

[29]*Smith and Partners in Sexual Health (non-profit) 2011* 32 *ILJ 1470 (CCMA) 1470G.*

[30]Dekker A 'Voice or devices: employee monitoring at the workplace' (2004) 16 *South African Mercantile Law Journal* 624.

[31]Van Nierkek A 'The Right to Privacy Law. *Contemporary Labour Law*' (1994) 3100.

[32]Dekker A (2004) 16.

[33]Constitution of the Republic of South Africa, 1996.

[34]Section 5(1) of the Interception Monitoring Prohibition Act 70 of 2002.

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men'- a legal shield which could be asserted by the individual against the prying eyes of the public.[35]This became the same proposition in our courts through the case of *O'Keeffe v Argus Printing and Publishing Co. Ltd and Others,*[36] which stipulates that the modern law of invasion of privacy arose from a need to protect the individual's dignity and mental tranquillity in a sophisticated and developed society where technology has enabled the former boundaries of privacy to be invaded."

As such, the use of technology in the workplace should be approached with care and prudence. Employers must be aware that workers may retaliate against the employer if they believe their monitoring practicesare unfair. It is crucial to educate employees about the rationalefor electronic monitoring and to develop comprehensive monitoring policies and procedures. These policies should be able to inform employees of what is expected from them during working hours. Doing so, this study argues,can also contribute to the lessening of disputes and prove conducive to better employer-employee relations. However, employersmust effectively communicate with employees about any monitoring systems policies, preferably at the implementation stage.Employers should alsobe able to justify the need for such policies, and show how they can safeguard both the interests of the business and those of employees.

III. PROTECTION AGAINST VIOLATION OF THE RIGHT TO PRIVACY IN THE WORKPLACE

Employees should be protected from violations of their right to privacy in the workplace.[37] The right to privacy seeks to protect the following interrelated concerns:

- The right to privacy aims to safeguard aspects of life in which a person has the right to be alone with his or her body, certain environments, and certain relationships,
- The right to privacy helps to preserve people's freedom to regulate how their personal information is used.[38]

The right must be respected and employees should not wantonly be deprived of such right. In *Bernstein v Bester NO,*[39]the Constitutional Court held that an individual's intimate personal realm of existence and the preservation thereof should be afforded a very high degree of security.According to the court, it was the "final untouchable sphere of human freedom that was beyond any intervention by any public authority".[40]The Constitutional court went further to hold that although there is a higher expectation of privacy in one's personal space and affairs once one moves away from this and into more communal and public activities such as business and social interactions the scope and expectation of this right diminishes[41]. Despite the diminishing of the right to privacy in certain settings, employeesare not without an expectation of privacy. Such a right still exists but only much less than it would have in employees' private lives.

Similarly, in*National Media Ltd v Jooste,*[42]

> *"a right to privacy encompasses the competence to determine the destiny of private facts. The individual concerned is entitled to dictate the ambit of disclosure, [for example], to a circle of friends, a professional adviser or the public. He may prescribe the purpose and method [sic] the disclosure. Similarly, I am of the view that a person is entitled to decide when and under what conditions private facts may be made public. A contrary view will place undue constraints upon the individual's so-called "absolute rights of personality "*

When employers electronically monitor the conduct of, or communications amongst, employees without their knowledge or consent, it is submitted that aviolation of the employees' right to privacy occurs.[43] This may also occur in situations where employers access their employees' confidential documents or private conversations,[44]or when they search their medical reports or computer devices without their prior knowledge and consent. Therefore, when employers engage in such unauthorised monitoring, they are consequently engaging in conduct that deprives employees of their right to keep certain aspects of their lives from the knowledge of others, something which the right to privacy aims to protect.[45] Such conduct also robs them of their right, should they so choose, to decide who may collect their personal information, when such information may be collected, how the information should be processed, and for what purpose the same is to be used.

[35]Chigumba P *The employee's right to privacy versus the employer's right to monitor electronic transmissions from the workplace* (2013 Dissertation UKZN) at6.

[36]*O'Keeffe v Argus Printing and Publishing Co. Ltd and Others* 1954 (3) SA 244 (C).

[37]Cockhead A '*A Critical Analysis of Law of Privacy with Reference to Invasion of Privacy of Public Figures*' (1990) 05.

[38]De Waal J, Currie I & Erasmus G '*The Bill of Rights Handbook*3rdedititon' (Juta Kenwyn 2000) 270.

[39] 1996 (2) SA 751 (CC).

[40] 1996 (2) SA 751 (CC) 77.

[41]1996 (2) SA 751 (CC) 77.

[42] *National Media Ltd v Jooste* 1996 (3) SA 262 (A).

[43]Van Niekerk A '*The Right to Privacy Law. Contemporary Labour Law*' (1994) 97.

[44]*Bernstein v Bester* 1996 (2) SA 751 (CC) para 65.

[45]De Waal, Currie & Erasmus '*The Bill of Rights Handbook'* 6th edition (Juta & Company Ltd 2000) 270.

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IV. LIMITATION OF THE RIGHT TO PRIVACY UNDER SECTION 36 OF THE CONSTITUTION

In the context of an employment relationship, limiting someone's right to privacy may be justified. The limitation clause can assist employers in protecting their operations from exploitation by employees who may otherwise rely on the right to privacy to defend against monitoring by employers.[46] To assess justifiability, a balance must be struck between the employer's conflicting interests of the parties, namely the right to engage in economic enterprise and the employees' right to privacy.[47]

The right to privacy must be upheld as much as possible. Section36 (1) (a) - (e) of the Constitution, however, states that rights in the Bill of Rights may be limited to the extent that doing so is "justifiable and reasonable in an open and democratic society" as provided in the section.[48]Employees' right to privacy should be balanced against competing commercial interests of employers.[49] It is in the employer's interest to protect the its legitimate business and operations.[50]However, there needs to be a balance between the individual's rights and the competing social interests.[51] Social interests refer to employees' social life outside the workplace. An electronic monitoring policy in the workplace cannot extend to one's social life outside the workplace.

Consequently, the purpose of this contribution is to show that section 14 of the Constitution may be limited by section 36.[52] The limitation clause assists employers to ablyprotect their workplace from exploitation of electronic devices by employees, relying on the right to privacy.[53] The employer's right to monitor electronic devices in the workplace is limited. However, this right should be weighed against the employer's expectation to protect his business interests.

V. POLICYFRAMEWORK FOR ELECTRONIC MONITORING

The employer is required to establish a workplace policy, but it should be highlighted that the policy must not unduly violate an employee's right to privacy and must enable the peaceful resolution of any disputes arising thereunder, be undertaken. These policies will assist employers to be less vulnerable in terms of issues of invasion of privacy when written policies are communicated effectively; however, it can be argued that excessive monitoring creates a workplace filled with distrust. It has become difficult for the employer to ensure that the rights and expectations of their employees are protected and respected, while at the same time adopting policies which will minimise the potential for harm which could be caused by employee's misconduct using electronic devices in the workplace.

Employers need to carefully balance monitoring gains and the costs of invading their employees' privacy in the workplace. Employers failing to respect employee's rights can cause extensive loss, such as expensive legal battles, damage to company reputation, and irreparable impairment of employee values. Therefore, the rights and privacy of the employees should be balanced with the right of the employer to monitor electronics in the workplace.

The policy which will be used by the employer as a guiding tool must be put in place and it must be fair for both the employer and the employees. Therefore, without such a balance being reached, then there could be an infringement of the employee's right to privacy. It is recommended that the employer ensures that all policies are accepted and

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[46] Pistorius T 'Monitoring, interception and Big Boss in the workplace: is the devil in the details? *PER:' (Potchefstrooms*2009)*12*(1) on http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812009000100002&lng=en&1tlng=en, access on 11 November 2020.

[47]Dekker A 'Vice or Devices: employee monitoring at the workplace' *SAMLJ* 2004 60.

[48] The following factors must be considered:

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.

[49]Frayer C E *'Employee Privacy and internet monitoring: Balancing workers' rights to dignity with legitimate management interests'* (Business Lawyer 2002) 57.

[50]Subramanien D & Whitear-Nel N 'A fresh perspective on South African law relating to the risks posed to employers when employees abuse the internet' (2013) 37 *South African Journal of Labour Relations* 133.

[51] De Vos & Freedman W 'South African Constitutional Law in Context' (Oxford University Press Cape Town 2013) 349.

[52] The limitation clause, under Section 36 of the Constitution.

[53] Pistorious T *'Monitoring, interception and Big Boss in the workplace:* is the devil in the details?' (2009) 12 *PER* vol.12 4.

agreed to by the workers, ideally at the start of their jobs. The contractor will be effectively protected from prosecution and all presumption of privacy will be removed with prior consent. As a result, the employee will be well aware that such electronic contact can be tracked and will be able to avoid transmitting any potentially harmful material.

In light of the dispute between employers and employees, it is proposed that an appropriate policy framework (focussing on use of new electronic and computer technologies in the South African workplace) to be developed by employers. The proposed framework must be supplemented by workshops, continuous research and involvement employees, as well as other relevant stakeholders. Once this is done, the policy can be utilised as a flexible toolbox which unites both employee`s right to privacy and the employer`s duty to electronic monitoring of misconducts, as well as conciliating future workplace disputes.

VI. CONCLUSION

There must be implementation of clear and unambiguous policies crafted by employers in consultation with employees in relation to exploitation of electronic devices. These policies must be formulated and updated in accordance with the relevant laws as well as amended in line with the technological sphere and the changes of laws aligned to it.[54] Employers must make sure that these policies are readily available to all employees in the workplace by making sure that it is a prerequisite that each and every employee is inducted on these policies prior to being awarded a privilege to use the company sponsored technological devices.

The best way to achieve this balance is for the employer to adopt a clear and explicit policy which sets out the rules and practices of the workplace as they apply to the use of internet facilities at work.[55] The policy should be developed in consultation with the employees, and the employer should explain why there is a necessity for a policy to protect both the interests of the business as well as the employees themselves. The Employer should ensure that the employee is aware that the business reserves the right to use disciplinary measures against any employee if the said employee's electronic communication is in violation company policy. Effectiveness of the policy is paramount in ensuring harmony in the workplace and safeguard the rights of employees.

[54]Johnson J *"Information Technology Policies"* (2001) *De Rebus* 38

[55]Subramanian D at 19.