

Is it legal for someone to record you without your knowledge?

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With all the benefits technology has garnered us, recent times have seen the uprising of smartphones against not-so-smart people. We have all watched legal or police series and bore witness to phone tapping and people being sent on undercover assignments wearing wires; audio transmissions linked to dingy vans containing overeager policemen heavily anticipating some sort of confession of murder. We've witnessed 007-esque gadgets, phones, watches and even pens with audio recording capabilities used against the unsuspecting, and unbeknown to the other party.



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Most recently, I have come across such 007-esque characters in my own life. The growing trend amongst even mere technology-mortals these days is Call Recording Apps. Apps with the capability of recording incoming and outgoing phone calls and the saving of same in internal storage or even on a cloud. I had to stop and ask myself, what century am I living in? The thought that anyone with a smartphone could be recording *any* conversation at their whim, left me feeling exposed, monitored, surveilled and generally unsafe in this society.

The next, more pragmatic question to myself, and one typical of my profession was, is this even legal? Is such an infringement of my rights even legal and could this recording ever be used in legal proceedings as evidence? So, in true form, I went on a research binge.

I asked a number of friends (outside of the legal profession): “Do you think it would be legal for someone to record you without your knowledge?” The collective answer was a certain and resounding *no*. The general consensus was that our rights to privacy are protected by the law.

Well, yes and no. Every right can have its limitations. In South Africa, the interception of communication is regulated by the *Regulation of Interception of Communications and Provision of Communication-Related Information Act of 2002* otherwise known as RICA and in terms of the Act, generally, no person may record a conversation without consent. However, the Act sets out the following exceptions to the rule:

- you are a party to the conversation
- you have the prior written consent of at least one of the parties to the conversation; or
- the conversation relates to, or occurs in the course of, the carrying on of your business

Section 35(5) of The Constitution protects us but only to a point, it provides that evidence obtained in a manner which violates any right should be excluded *if* it will render the trial unfair or if it will be detrimental to the administration of justice. In simple terms, even if a recording is unlawfully obtained, it may still be used as evidence if to the interests of justice.

One of the RICA exceptions relate to the carrying on of your business, with regard to laptops, emails, cellphones issued to employees by employers; how much of communications privacy would these employees have? Could employers use the employees private or even business-related conversations as evidence? *Protea Technology v Wainer 1997 (9) BCLR 1225 (W)* asked the same question. In this case, the respondents argued that the transcripts of telephone calls recorded by a surveillance device were inadmissible. It was held that in respect of telephonic conversations pertaining to the employer's affairs and at the employer's business, there was no legitimate expectation of privacy and the employer was entitled to access such conversations. Simply put, you cannot have reasonable expectation of privacy when using work communication tools and same communication could be admissible as evidence in legal proceedings.

S v Kidson 1999 (1) SACR 338 (W) demonstrates that the RICA exceptions to consent where the recording person was party to the conversation. In this case, an accomplice to a murder was given a voice-activated tape recorder by the police. He carried it in his jacket pocket and used it to record a conversation with the accused. The conversation detailed the planning and execution of the murder. The court was tasked with determining the admissibility of the recordings and distinguished between 'third party monitoring' (a conversation *by* another person), and participant monitoring (a conversation *with* a person). The court confirmed that the interception of a telephone call to which one is a party does not constitute "third party monitoring" as it would be flawed to say that one is eavesdropping on one's own conversation. Third party monitoring would only occur in cases where, the recording person is not a party to the conversation for example, if he is eavesdropping from across the room, or listening in through a phone tap.

In simple terms, a person who is party to a meeting, conversation or even a disciplinary hearing can legally record the proceedings, even without the consent of other present parties as it is regarded as participant monitoring and same would be admissible as evidence.

All in all, it would appear that recording in South Africa is indeed legal, even without the knowledge of the second party.

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