

# May I intercept your communication?

The RICA-ACT, although promulgated in December 2002, only came into effect as of September 2005 and aims to regulate the interception of communications and the monitoring of signals and radio-frequency spectrums.

In principle this act states that we may not intentionally intercept or authorise somebody else to intercept any communication in the course of its transmission in South-Africa. "Communication" includes oral communication, eg telephonic discussions or direct discussions and indirect communication, eg music, text, visual images, signals, etc. The definition is wide enough to include any form of possible communication currently available in the world.

Unlawful interception of communication is subject to a penalty of a maximum of R2 million or imprisonment not exceeding 10 years.

\* Of paramount importance to us as your attorneys, or to our clients, is to know that certain interceptions of communications are not prohibited, for example: You may intercept communication when you are a party to the discussion. The way I understand the act, it is therefore not illegal to put a dictaphone in your briefcase and record your conversation with any other person.

\* You may also intercept communication when you are not a party to the communication, but have received prior written consent by a party to the communication. You can therefore request a friend to tape a discussion in which you are involved.

\* Law enforcement officers may also intercept communications in certain situations for example:

\* if the authorised person has reasonable grounds to believe that:

o a serious offence has, is being or will be committed;

o public health or safety, or national security or national economic interests are being threatened;

o if communications relate to organised crime, terrorism, or if a party to the communication may cause serious bodily harm to another or himself.

\* In some cases the law enforcement officer needs prior written consent to such

interception and in some cases it will not be necessary.

\* For employers it is important to note that you may intercept indirect communication with the express or implied consent of the employees if the interception is carried out for the purpose of monitoring the indirect communications. The RICA-ACT is therefore an important tool and gives direction to companies on how to manage employee e-mails. The crux is that unless the written consent of the employee is obtained, you may only monitor his/her e-mails if all the following conditions are met:

- o It must be authorised by the CEO or by the person to whom such authority has been delegated.

- \* The e-mail must relate to the business of the employer or must be sent/received by an employee in the course of carrying on the business of the employer.

- \* The purpose of the monitoring must be to monitor to establish the existence of facts or to investigate or to detect unauthorised use of the e-mail system or to secure the effective operation of the e-mail system. PLEASE NOTE THAT ALL REASONABLE EFFORTS MUST BE USED TO INFORM YOUR EMPLOYEES IN ADVANCE THAT THEIR E-MAIL MAY BE MONITORED.

- \* The RICA-ACT provides that a recording of the intercepted communication may be admissible as evidence in criminal or civil proceedings if it contains information regarding the commission of any criminal offence. Unfortunately this Act does not tell us when the recording will not be admissible in a court of law.

- \* It is therefore clear that according to this Act, you may make a recording of communications if you are a party to that communication and that you may use this communication as evidence regarding the commission of any criminal offence, not only in the criminal court, but also in a civil court. Furthermore you must give notice to your employee that you intend monitoring their e-mails to investigate or detect unauthorised use of the e-mail system.