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EMPLOYMENT ALERT

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Global day for decent work: COSATU calls a nationwide stay-away on 7 October 2020

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Section 4 of RICA: The big brother constant and the admissibility of secret recordings

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Global day for decent work: COSATU calls a nationwide stay-away on 7 October 2020

In its September 2020 media statement, COSATU noted that: "*South Africa is teetering on the brink of collapse and it is about time we all stand up and demand urgent action from policymakers and decision-makers*".

The Congress of South Africa Trade Unions (COSATU) on 28 September 2020 called for a nationwide stay-away on 7 October 2020, in commemoration of the 13th Global Day for Decent Work and the ongoing plight of workers as a result of the COVID-19 pandemic. The Global Day for Decent Work is celebrated annually by trade unions worldwide as a call to governments to take action in relation to economic challenges faced by workers and to compel them to provide "*decent work*" as a mechanism to achieve economic growth and a people-centred economy. In its September 2020 media statement, COSATU noted that: "*South Africa is teetering on the brink of collapse and it is about time we all stand up and demand urgent action from policymakers and decision-makers*".

So, what are the issues being raised by COSATU? They include the following:

1. a lack of Personal Protective Equipment for frontline workers;
2. an emphasis on the failure of the public transport system;
3. the undermining of collective bargaining in the public service by the state;
4. the general inefficiency of the state;
5. the scourge of corruption in South Africa;
6. the loss of some ZAR80 billion annually through transfer pricing manipulation;
7. the looting of the COVID-19 UIF TERS Fund by employers;
8. mismanaged and now cash strapped or bankrupt SOE's;
9. the maximum penalty threshold which can be imposed by the Competition Commission is inadequate;
10. Continued cartel conduct;
11. the amendment to the Competition Act 89 of 1998 was meant to provide for directors and managers to be criminally prosecuted, but thus far there have been no prosecutions; and
12. families of politicians should be barred from doing business with the state.

The issues raised by COSATU are broad and for the most part the majority of South Africans already support action to rid the state of inefficacies and corruption and seek to hold criminals within government and the private sector accountable. What is interesting to note is the emphasis on fraud in relation to TERS as well as the focus on commercial issues like transfer pricing and anti-competitive conduct. Like in other parts of the world, fraud perpetrated against the state in the provision of COVID-19 employee benefits has attracted civil and criminal liability. This is also the case in South Africa. Companies which received TERS benefits are well advised to conduct proper audits on the receipt and disbursement of benefits. Also, companies should be alive to transfer pricing manipulation and anti-competitive conduct and guard against such conduct which is not only unlawful but appears, in time, that it will also be attracting a lot more public scrutiny.

Global day for decent work: COSATU calls a nationwide stay-away on 7 October 2020...*continued*

As the protest action is authorised in terms of section 77(2) of the LRA, persons who engage in the protest action are afforded protection under the LRA, including the protection against dismissal for participating in the protest action.

Significant about the nationwide protest called by COSATU is that this constitutes protest action in terms of section 77 of the Labour Relations Act 66 of 1995 (LRA) which section affords employees the right to engage in "*protest action to promote or defend socio-economic interests of workers*". Section 77(1) of the LRA provides for procedural requirements that must be adhered to by trade unions when embarking on a protest in terms of the section. These requirements are: (i) the protest must be called by a registered trade union or federation of trade unions; (ii) the National Economic Development and Labour Council (NEDLAC) must be provided with a notice of the proposed protest stating the nature and purpose thereof; (iii) the matter giving rise to the proposed protest must then be considered by NEDLAC or an appropriate forum and (iv) the trade union must provide NEDLAC with a notice of its intention to proceed with the proposed protest action 14 days prior to the commencement of same.

Whilst the protest action was called for by COSATU, it is also endorsed by the Federation of Unions of South Africa (FEDUSA) and the National Council of Trade Unions (NACTU), which are all represented at NEDLAC. Breakaway federation SAFTU (the South African Federation of Trade Unions) is not part of NEDLAC, but will also participate in the 7 October 2020 stayaway. COSATU and SAFTU make strange bedfellows for a number of historic reasons.

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The procedural requirements set out in section 77(1) of the LRA must be complied with and the courts take a dim view on trade unions who fail to do so. In the recent Labour Court judgment of *Business Unity SA v Congress of South African Trade Unions & others* (2020) 41 ILJ 174 (LC), a nationwide protest was called by COSATU and other trade unions against a draft Employment Standards Bill. Business Unity SA obtained an interdict in the Labour Court against the proposed protest action on the basis that the respective trade unions had not complied with the procedural requirements of the LRA. COSATU argued that the right to protest is a manifestation of the right to strike.

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Global day for decent work: COSATU calls a nationwide stay-away on 7 October 2020...*continued*

Only time will tell what impact this stay-away will have on the course of history, as the country must navigate through the continued uncertainty of COVID-19 as well as the already failing economy which South Africa was faced with before the pandemic, all against the backdrop of a global recession.

The Labour Court disagreed with COSATU and emphasised that there is a clear distinction between the right to strike and the right to protest action. Hence, the LRA provides for different procedural requirements for the right to protest and the right to strike. This distinction is one which finds support in international law where a differentiation is made between industrial action underpinning the collective bargaining process and a work stoppage for *"political"* purposes (such as the broad socio-economic interests of workers).

The practical effect of the nationwide protest action on employers is that their workforce may participate in the protest action or employees may be unable to attend work due to the non-availability of public transport.

All this at a time where many businesses have only recently recommenced operations after the national state of disaster was announced in March 2020 and which continues. Businesses are therefore in a precarious position as they cannot prevent employees from participating in the protest action but also cannot afford to have their employees away from work whilst seeking to at least recover some of the financial losses suffered as a result of the pandemic.

The law establishes that the purpose of informing NEDLAC of the proposed protest is to allow for government, labour, business and community organisations to cooperate, through problem-solving and negotiation on economic, labour and development issues as well as related challenges facing the country. Only time will tell what impact this stay-away will have on the course of history, as the country must navigate through the continued uncertainty of COVID-19 as well as the already failing economy which South Africa was faced with before the pandemic, all against the backdrop of a global recession.

Does trading under the African Continental Free Trade Agreement (ACFTA), which becomes operational in January 2020, at least create a green shoot which COSATU should be focussing on like many innovative businesses? Will the ACFTA bring the necessary economic growth?

Imraan Mahomed, Riola Kok and Nomathole Nhlapo

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Section 4 of RICA: The big brother constant and the admissibility of secret recordings

Is secretly recording colleagues or employees legally permissible? Does the secret recording of employees or colleagues constitute admissible evidence in court proceedings?

COVID-19 has definitively altered the workplace and has accelerated a changing work order. Never before have employers had to manage their workplaces as delicately as under the current circumstances, which has forced the world of work to become largely remote. The advent of technological advances has been imperative in this regard; "*Zoom*" and "*Microsoft Teams*" may be 2020's greatest contribution to our common vocabulary. An intuitive question to ask in this environment is: what are the limits of this technology in a constitutional democracy and in the employer-employee trust relationship? Zoom, Microsoft Teams and our smart devices are all equipped with recording capabilities. Is secretly recording colleagues or employees legally permissible? Does the secret recording of employees or colleagues constitute admissible evidence in court proceedings?

In *S v Kidson* 1999 (1) SACR 338 (W), the court was called upon to determine whether the secret recording of a communication between an accomplice to a murder and the accused constituted admissible evidence in a criminal trial. The court made a distinction between 'third party monitoring' (monitoring by those who are not party to the conversation) and participant monitoring (monitoring by a party to the conversation). The court held that the interception of a call where 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. The court therefore confirmed that secret recordings of conversations where they constitute "*participant monitoring*" is admissible as evidence in court proceedings.

This position was later codified in the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (RICA). Section 4(1) of RICA provides –

> *"Any person, other than a law enforcement officer, may intercept any communication if he or she is a party to the communication, unless such communication is intercepted by such person for the purposes of committing an offence."*

Furthermore, in terms of section 1 of RICA, a "*party to the communication*" includes a person who might be listening, but not actively participating in the communication.

It is evident from section 4 of RICA that parties to communication may record such communication, with or without the consent of the other parties, provided that the recording is not intended to be used in the commission of an offence. Therefore, subject the proviso contained in section 4 of RICA, the recording of Zoom or Microsoft Teams meetings and the like is permitted, where one is a party to the meeting or conversation, irrespective of whether one has informed the other parties of such recording and whether one is actively participating in the communication.

In addition to section 4 of RICA which allows for the secret recording of communication by a party thereto, RICA also provides for instances of interception by non-parties to communication. One such section is section 16 of RICA in terms of which an applicant may make application to a designated judge for an interception direction. The

Section 4 of RICA: The big brother constant and the admissibility of secret recordings...*continued*

The court held that it was common cause that RICA violated the right to privacy as enshrined in section 14 of the Constitution.

section provides for a judge to make an interception direction in terms of which a party may intercept communication, subject to certain conditions, without the knowledge or consent of the person whose communication is to be intercepted. The constitutionality of section 16 of RICA was the subject matter of the recent decision of *Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others* 2020 (1) SA 90 (GP). In the aforesaid judgment, the Pretoria High Court was called upon to decide the constitutionality of several of South Africa's surveillance schemes including and particularly certain sections of RICA, specifically section 16 thereof. The case related to an application made pursuant to an investigative journalist becoming aware that his communications had been intercepted when a lawyer referred to transcripts of his communications in unrelated legal proceedings. The applicant then approached the court challenging the constitutionality of RICA on, inter alia, its failure to provide notice of surveillance; the lack of sufficient safeguards in relation to the safety and custody of information gathered by way of surveillance and the preservation of the confidentiality of sources of investigative journalists.

The court emphasised the constitutional requirement to limit the right to privacy in the least intrusive way and highlighted the need to safeguard the media's right to freedom of expression by ensuring protection of the confidentiality of sources. The court held that it was common cause that RICA violated the right to privacy as enshrined in section 14 of the Constitution. The court then sought to determine whether such violation was justifiable in terms of section 36 of the Constitution. The court ruled that RICA was unconstitutional to the extent that it did not allow for post-surveillance notification (section 16(7)(a) of RICA), that the current appointment system of the designated judge did not ensure their independence in ex part interception applications (with reference to the definition of designated judge in section 1 of RICA), and that RICA did not require the applying agency to inform the judge that the subject of surveillance was a lawyer or a journalist (section 16 of RICA). The court gave parliament two years to remedy the deficiencies. The ruling further declared that bulk surveillance is unconstitutional. The matter has been referred to the constitutional court to confirm the order of constitutional invalidity as is required by the Constitution and we await the judgment in this regard.

This judgment of *Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others* should not be viewed as invalidating RICA in its entirety, neither was section 4 of RICA the subject matter of the case. Notwithstanding, it remains important to bear in mind the constitutional right to privacy when secretly recording a communication as there may come a time when section 4 of RICA comes under constitutional scrutiny.

Section 4 of RICA: The big brother constant and the admissibility of secret recordings...*continued*

Privacy and confidentiality issues in communication are layered and complex and employees must still bear in mind their confidentiality obligations when seeking to use secret recordings in legal proceedings.

In the employment context however, this issue requires consideration of the tension between the right of any person to record a conversation (provided that such person is a party to and has not objected to the recording) and the principle that an employment relationship is based on an implicit trust relationship between an employer and an employee as well as the robust level of communication which takes place at an executive level.

RICA provides for a single party to monitor or record direct communications; this means that an employee may legally intercept or record any communication with his employer, manager, direct supervisor, HR manager or other person in a position of authority at the workplace if the employee is a party to the communication.

On the other hand, since the employment relationship is built on trust, secretly recording your employer without their knowledge or consent, even if this is legal in terms of RICA, may be problematic for the ongoing employment relationship, particularly where the conversation pertains to confidential information of the business. Privacy and confidentiality issues in communication are layered and complex and employees must still bear in mind their confidentiality obligations when seeking to use secret recordings in legal proceedings.

Similarly, despite section 4 of RICA clarifying that employers may, in appropriate circumstances, secretly record communication with employees, the uncertainty as to whether communication is being recorded may erode robust communication in the workplace that may be necessary for the growth and development of businesses. While the secret recording of communication by parties thereto may be permissible, in doing so an employer runs the risk of corroding an open and honest communication work culture which may positively contribute to the running of their organisations.

In order to deal with this, employers must take a robust approach and ensure that the requisite policies are in place related to the recording of communication. In order to ensure complications associated with secret recordings are mitigated, particularly in the current flexible, changing work environment, policies pertaining to electronic communication more broadly and specifically provisions related to the recording of workplace meetings or discussions must be crafted in accordance with the needs of each business.

Faan Coetzee, Aadil Patel, Riola Kok and Vaughn Rajah

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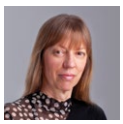

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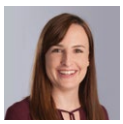

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