OVERVIEW AND OBJECTIVES

• Introduction
• Constitutional rights
• Defamation
• Vicarious liability
• Fiduciary duties
• Insider trading
• Restraints
• Protecting confidential information and contacts
• Terminations for social media misconduct
• Other relevant laws
• Mitigating the risks and conclusion
INTRODUCTION

Publications in social media have legal implications and it is essential that care is taken to avoid liability and damage.

- Emergence of new channels for business and marketing
- This is not without risks
- Laws are in their infancy and thus there is uncertainty
- Laws of general application apply
FACEBOOK: NAMING AND SHAMING

Naming and shaming on Facebook is an example of people not considering the consequences of their posts.

- Invasion of privacy?
- Harassment?
- Cyber-bullying?
- Defamation?
- Proof of own unlawful conduct?
THE TWITTER JOKE TRIAL

“Crap. Robin Hood airport is closed. You’ve got a week and a bit to get your shit together otherwise I’m blowing the airport sky-high!”

Social media are “new and emerging phenomena raising difficult issues of principle which have to be confronted, not only by prosecutors, but also by others including the police, the courts and service provides.”

Keir Starmer
"Our Constitution knows no hierarchy of rights."

Social media have created tensions for these rights in ways that could not have been foreseen by the founders of the Constitution. There is a duty on the courts to develop the common law in accordance with Constitutional principles.
The Bill of Rights is “a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”

Section 10 provides that everyone has inherent dignity and the right to have their dignity respected and protected.
THE RIGHT TO PRIVACY

PROTECTION OF PERSONAL INFORMATION ACT

The right to privacy includes protection against the unlawful dissemination and use of personal information.

Personal information includes, among others, name, race, gender, sex, marital status, e-mail address, and financial, criminal or employment history, correspondence that is private or confidential, and the views or opinions of another person about the affected person.
FREE EXPRESSION

A limitation on the freedom of expression must be reasonable and justifiable.

“If dignity includes individual self-respect, as it must, then the respect due to the victim of insulting words or conduct is just as significant as the dignity given to the utterer of the insulting words. Why should the dignity of the speaker to say abusive things about his victim/s be any more important than the dignity of the recipient?”


“In today’s world the most effective, efficient and immediate way of conveying one’s ideas and thoughts is via the internet. At the same time the internet reaches out to millions of people instantaneously. The possibility of defamatory postings on the internet would therefore pose a significant risk to reputational integrity of individuals.”

“Freedom of expression lies at the heart of a democracy.…”

With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression … What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law.
THE LAW OF DEFAMATION

Right to personality and to one’s good name and reputation falls within the broader right to human dignity

A defamatory statement is one that has the effect of injuring a person’s reputation

No carte blanche to say what you please

Online conduct is governed by the same laws as offline conduct

Overstepping the right to freedom of expression may render the author liable for defamation

Gardener v Whitaker 1995 2 SA 672 (E), Froneman J held that right to respect of one’s dignity is something broader than the Roman Dutch concept of dignitas
THE LAW OF DEFAMATION

“Why is Lord McAlpine trending? *Innocent face***”

Context in which statement is written is important

THE LAW OF DEFAMATION

• Protects the right to privacy, dignity and reputation
• Balances right to unimpaired reputation and right to freedom of expression

DEFENCE

• True and in the public interest/for public benefit
When using social media **steer clear of racist, defamatory or controversial postings, salacious tweets and malicious statements.**

A *post on social media is “the written word”* and is a *publication.*

A wrong tweet, a misguided comment, an incorrect fact; once posted could go viral resulting in **possible brand damage, a defamation suit or liability for “cyber-bullying” or harassment.**
DUTCH REFORMED CHURCH

It is the content of what is posted that needs to be watched

To suggest that a churchman in the Christian religion is behaving in a manner akin to the betrayal of Jesus Christ is to attack the very foundation of his mission, profession and personal commitment.

These statements are injurious in the extreme. By definition they are defamatory.

DRC allowed Glory Devine World Ministries (“Glory Devine”) to use its premises for Sunday morning services.

DRC sold the premises to Islamic Academy.

Glory Divine embarked on public campaign to cause the DRC to abandon sale of the church.

Glory Divine posted about a holy war, a spiritual battle and likened the DRC to Judas Iscariot selling out for 30 pieces of silver.

No unlimited right to unfettered freedom to express every thought or viewpoint.

The court found:

- certain statements to be injurious and harmful - interdicted.
- email addresses of Van Rooyen and DRC attorney should not be disclosed on a public website.
I wonder too what happened to the person who I counted as a best friend for 15 years, and how this behaviour is justified. Remember I see the broken hearted faces of your girls every day. Should we blame the alcohol, the drugs, the church, or are they more reasons to not have to take responsibility for the consequences of your own behaviour? But mostly I wonder whether, when you look in the mirror in your drunken testosterone haze, do you still see a man?
Herholdt v Wills

The judge warned that “the law has to take into account the changing realities not only technologically but also socially or else it will lose credibility in the eyes of the people.”

- Facebook is fraught with dangers especially in the field of privacy
- The tensions between freedom of expression and dignitas are all about balance
- The comment was defamatory and unlawful
- Defendant to remove the post
ISPARTA V RICHTER & ANOTHER
DAMAGES CLAIM IN SOUTH AFRICA

Three photographs taken of children in the bath were sent by the plaintiff, to her ex-husband via e-mail. These photographs resulted in posts on Facebook by the ex-husbands new wife.

“Aan alle mammes en pappes ... wat dink julle van mense wat stief tiener boetjies toelaat om klein sus-sies te bad elke aan net omdat dit die ma se lewe vergerieflik???”

Following comment: “L-MC not a chance”.

The Judge stated: “This is obviously a jovial domestic moment. Only a depraved mind can see impropriety therein.”

Disparaging statement on Facebook

First comment: not serious defamation but it was gratuitous and aimed at placing Plaintiff in a bad light

Second comment: scandalous and suggested that Plaintiff encouraged and tolerated sexual deviation and paedophilia

Court awarded R40,000 in damages
Husband also liable because tagged in the post
MCKENZIE v BRAITHWAITE
DISPARAGING REMARKS ON FACEBOOK

Debate: Your ex has your daughter (5) for the weekend and is sleeping at a mates house. They all (about 6 adults) go jolling and your ex is drunk. So your old girl friend ends up sleeping with your daughter cause he doesn’t want his girl friend sleeping in a single bed she can share the double bed with his/ your daughter! How would you feel?

Interim relief: Respondent ordered to –

1. remove all messages of a defamatory nature
2. refrain from posting any defamatory statements about the Applicant
3. refrain from publishing, making or distributing defamatory statements about the Applicant

Final relief: Only order 1 confirmed. Respondent to pay Applicant’s costs

1. 2nd and 3rd orders went too far – court should not speculate on what could constitute a defamatory statement in the future. Not every defamatory statement is actionable in that the Respondent may have a good defence.
LIABILITY FOR DEFAMATORY CONTENT

Everyone who has contributed to the defamatory statement is liable – the chain of publication

What does this mean if you like, share or re-tweet a defamatory statement on social media? - risk of liability

RISKS FOR THE EMPLOYER

• Statements on social media can spread worldwide very quickly

• Vicarious liability

• Brand/ reputational damage
VICARIOUS LIABILITY

UK case: Otomewo v Carphone Warehouse Ltd

- Employees posted a status update on the claimant’s Facebook page, without his permission
- It was posted at work, during office hours and involved dealings between staff and a manager
- The tribunal found that the employer could be vicariously liable for conduct which amounted to sexual harassment on the grounds of sexual orientation

Our view

Risk of vicarious liability exists equally in South Africa. This is especially so when one considers that both under our common law and the Employment Equity Act an employer is required to adopt and enforce a sexual harassment policy to protect its employees. A failure to do so may result in the employer being directly liable/vicariously liable for such conduct.

“finally came out of the closet. I am gay and proud of it”

A company is at risk of being held to be vicariously liable for discrimination, harassment or defamation on Social Media Platforms where the employee’s conduct occurs “during the course and scope of employment”.

Bowman Gilfillan
AFRICA GROUP
BRAND DAMAGE

Racist remark by Jessica Leandra

Headlines: FHM Model’s racist tweets
FIDUCIARY DUTIES

The duty to act solely in the interests of the employer even where these conflict with the fiduciary’s own interests.

A fiduciary is prohibited from placing himself in a position where his interests conflict with his duty to the employer/the interests of the employer.

A fiduciary not entitled to misuse the employer’s confidential information.

A fiduciary duty extends to directors and employees of a company

In re Thundervision, L.L.C.
- Owners of a magazine in the Louisiana, filed for bankruptcy
- One of the owners started up a new magazine
- Using the old company’s Facebook page, invited those who “liked” the page, to instead “like” his new company Facebook page
- The court found that he was using the old company’s confidential information and that his conduct amounted to a breach of his fiduciary duty
- As social media is an important marketing tool, taking followers of the old company and directing them to the Facebook page of a new business is an unfair trade practice
SOCIAL MEDIA AND INSIDER TRADING

Insider trading is an offence and can result in criminal liability and/or administrative sanction in South Africa.

- Inside information is specific or precise information which has not been made public and which is obtained from an insider.
- If such information is made known it is likely to have a material effect on the share price.
- Insider trading constitutes a breach of duty of good faith, duty of confidentiality and fiduciary duty.
- An employee’s opinion posted online may affect the share price.
- If tweets/blogs about information may affect share price of listed company, that person may fall foul of insider-trading rules.
- Must be public through SENS announcement before information can be posted or tweeted.
SOCIAL MEDIA AND INSIDER TRADING

Congrats to [the team] monthly viewing exceeded 1 billion hours for the first time ever ... When [these shows] debut, we'll blow these records away

- Statement posted on Facebook by CEO.
- US Securities & Exchange Commissioner investigated.
- Decided not to lay charges.

Board meeting. Good numbers = Happy Board

- Tweet by CFO
- CFO Fired
LinkedIn updates connections when a member changes her details.

If an employee goes to work for a competitor there is a significant risk that clients and suppliers, connected to the employee on LinkedIn, will be notified of the move.

In these circumstances it may not be necessary for the employee to directly “solicit” these clients.

• Social media allow employees to forge trade connections with very little effort.

• This may mean that restraints should be drafted with more care to protect the proprietary interests of the employer.

• What happens to these contacts and connections when the employee leaves and goes to a competitor?

• What is the impact of these connections on the enforceability of restraint provisions?

• Is the employer entitled to demand that employees delete client/customer/supplier connections on termination of employment?
HAYS SPECIALIST RECRUITMENT V IONS

- LinkedIn contacts gathered by an employee during course of employment belong to the employer (UK)

EXPERIAN SOUTH AFRICA V HAYNES

- Employee’s LinkedIn contacts considered relevant to restraint of trade dispute
- Court enforced restraint partly as a result of these connections
Dispute regarding:
• ownership of social media platforms

Dispute regarding:
• ownership of the twitter handle @phonedog_kravitz;
• and the 17000 followers

Dispute regarding:
• ownership of social media platforms
• Nankivell ordered to hand over access to sites to Ardis Health pending final determination of dispute
LESSON

Have an agreement regulating ownership so as to ensure certainty and avoid/minimise the risk of lengthy and uncertain litigation
HANDLING SOCIAL MEDIA RELATED MISCONDUCT IN THE WORKPLACE

Many employees feel they have *carte blanche* to make derisive statements about their employers, colleagues, managers and/or subordinates on Facebook.

These statements may constitute misconduct which may warrant disciplinary sanction, including dismissal.

*All dismissals must be substantively and procedurally fair*
DISMISSALS, RICA AND PRIVACY

Discipline must be consistently applied

The standard laws of fairness and equity apply equally when dealing with social media misconduct

- CCMA has accepted that posts of social media may warrant dismissal
- Caution against infringements of Regulation of Interception of Electronic Communications Act
- Caution against unlawful infringements of the right to privacy
Not all derisive comments on social media will warrant disciplinary action

**Example:**

- If the post constitutes conduct in furtherance or support of a *protected strike* or a *protected disclosure*, dismissal may not be permissible
DEROGATORY STATEMENTS ON SOCIAL MEDIA

Derogatory comments made on social media platforms may be a fair reason to dismiss

- Beaurain v Martin NO & Others (1) (2014) 35 ILJ 2443 (LC)
- Sedick & another v Krisray (Pty) Ltd (2011) 8 BLLR 979 (CCMA)
- Media Workers Association of SA obo Mvemve v Kathorus Community Radio (2010) 31 ILJ 2217 (CCMA)
- Smith v Partners in Sexual Health (non-profit) (2011) 32 ILJ 1470 (CCMA)
OTHER LAWS FOR CONSIDERATION

• **Protection from Harassment Act** includes communications sent via electronic communications or e-mail.

• **Prevention of Unfair Discrimination Act** prohibits hate speech.

• **Employment Equity Act** Harassment (including sexual harassment) constitutes unfair discrimination.

• **Electronic Communications and Transactions Act** provides that evidence in the form of data messages is admissible in court.

• **RICA** prohibits the interception of communications (including electronic communications).

• **Copyright infringements**

• **Advertising standards**

• **Consumer protection**

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*That an employer may be held vicariously liable for the misdeeds of its employees on social media does not, however, mean that the employees will be exempt from liability.*

*Employees who commit “social media misconduct” may also face criminal and civil liability. Not to mention possible dismissal.*
HOW TO MITIGATE THE RISKS

1. A Social Media Strategy
2. A Social Media Policy
3. Staff Training
4. Enforcement Mechanisms
WHAT SHOULD A SOCIAL MEDIA POLICY INCLUDE?

- Clear guidelines & rules regarding acceptable & unacceptable use of social media
- Distinguish between personal social media use & professional social media use
- Guidelines on the risks of social media to personal & professional brands
- The consequences of breaches of the social media policy & relevant rules
- Who owns social media accounts, content & followers
IMPLEMENT AND ENFORCE A SOCIAL MEDIA POLICY AND EDUCATE STAFF ON:

- Consumer Protection Laws
- Employment Laws
- Rules of the social media platforms
- Copyright and Trademark
- Advertising Standards
- Privacy and Data Protection
CONCLUSION

- Education and training to encourage responsible social media use
- Enforcement on policy and rules relating to social media
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