

BALANCING RIGHTS AMIDST SOCIAL MEDIA SCANDALS: HOW EMPLOYERS CAN DEAL WITH EMPLOYEES' REPUTATION-DAMAGING AND/OR DEFAMATORY SOCIAL MEDIA POSTS

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Abstract

It is unquestioned that social media is present in almost every aspect of our daily lives. Due to the widespread accessibility of posts on social media, comments posted by a person in his/her personal capacity often boils over and negatively affects his/her role as an employee. Posts have the potential to either damage the reputation of an organisation directly or indirectly (the latter being caused by an employee's mere association with the business). Defamatory posts are becoming more and more common and, consequently, social media misconduct clashes are finding their way into dispute resolutions forums. These disputes create a constant battle between the rights of an employer and the rights of an employee. Given that social media misconduct can be rather complex, it is imperative that employers are aware of the legislation governing misconduct to ensure that they are well-prepared to take preventative or swift action should the need arise.

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1 Introduction

The rise of the digital age is evident all around us and has brought with it many advances in technology. The way in which people communicate has undoubtedly transformed,¹ consequently making digital social platforms fundamental tools for communication – for both personal and business purposes.² However, this surge in the use of technology, particularly social media, has started to affect the way employees conduct themselves on online platforms. Social media posts are easily accessible, thereby blurring the lines between what employees post in their private/personal capacities (often about their employers) and the effect that this has on the employee-employer relationship.³

Although many employees are under the impression that they are permitted to say anything that they desire on social media platforms, this is rarely the case.⁴ Many moral and/or legal obligations may arise when dealing with one's social media presence. It is important for employees to know that their views expressed on online or digital platforms have a much greater impact, as opposed to non-digital conversations. This is due to, *inter alia*, digital platforms reaching a far wider audience, as well as providing a permanent record of the communication.⁵

Many trends are emerging in the ways in which employees are interacting with, and on, social media. An increasingly topical issue concerns the wide-reaching effects of employees expressing themselves on social media and then having these personal opinions affect their role as employees.⁶ Posts by employees can be categorised in two forms. Firstly, posts may be directly aimed at employers or the business and may be alleged to be defamatory. Although a certain social media post may be viewed as defamatory by the employer, it is imperative that he/she is able to prove such.⁷

1 L Clark & SJ Roberts 'Employer's use of social networking sites: A socially irresponsible practice' (2010) 95(4) *Journal of Business Ethics* at 507.

2 R Davey & RYL Dahms-Jansen 'Social media and strikes' (2012) 12(10) *Without Prejudice* at 26.

3 SP Phungula 'The clash between the employee's right to privacy and freedom of expression and social media misconduct: What justifies employee's dismissal to be a fair dismissal?' (2020) *Obiter* at 504.

4 Sedick and Another v Krisay (Pty) Ltd 2011 (8) BLLR 979 (CCMA) (Sedick) para 53; *National Union of Food, Beverage, Wine, Spirits and Allied Workers Union obo Arendse v Consumer Brands Business Worcester, a Division of Pioneer Foods (Pty) Ltd* 2014 (7) BALR 716 (CCMA) para 17.

5 S Nel 'Social media and employee speech: The risk of overstepping the boundaries into the firing line' (2016) 49 *Comparative and International Law Journal of Southern Africa* at 183.

6 Phungula (n 3) 505.

7 JM Burchell *The Law of Defamation in South Africa* (1985) at 35; D Iyer 'An Analytical Look into the Concept of Online Defamation in South Africa' (2018) 32(2) *Speculum Juris* at 126.

Secondly, posts may not directly refer to the employer but, nevertheless, have the capability of negatively affecting the employer, for example, by bringing the employer's name into disrepute. In the latter instance, posts are often alleged to be racist, sexist or contain some other remark that could damage the employer's reputation. A major risk for employers arises when employees make comments in their personal capacity, but due to the employee working for the employer, the association between the two tarnishes the reputation and brand image of the employer.⁸ With the increased use of digital communication, the above-mentioned categories of posts are filling social media platforms at a rapid pace. This is evident from the increase in unfair dismissal disputes based on social media that have mainly been brought before the Council for Conciliation, Mediation and Arbitration (CCMA), and a few before the Labour Court.

This article first investigates the current legislative framework concerning social media misconduct and the circumstances under which an employee may be dismissed for publishing certain posts on social media. Second, it examines the rights that are affected through social media [mis]conduct and whether a balance may be struck between the rights afforded to employers and the rights afforded to employees. Third, it critically examines how social media misconduct has been addressed by the courts and the CCMA. Last, a few practical recommendations are provided in relation to the steps that employers may take to ensure that future social media misconduct cases are dealt with in an effective (and hopefully preventative) manner.

2 Background

There is no doubt that digital technology permeates almost every aspect of daily life. The most common method of communicating via digital technology is on social media networking sites such as Facebook, Twitter, LinkedIn, and Instagram.⁹ The popularity of these platforms is brought about by the many advantages that they offer, not only within the personal lives of their users, but also within various business and employment sectors.

A general benefit of social media is its creation of a steady flow of information within the workplace and its establishment of channels of communication with clients, colleagues, and peers.¹⁰ For companies and businesses, an advantage of social media is its ability

⁸ Phungula (n 3) 505.

⁹ Iyer (n 7) 125.

¹⁰ TM Thompson & NO Bluvstein 'Where technology and the workplace collide: An analysis of the intersection between employment law and workplace technology' (2008) *Privacy & Data Security Law Journal* at 285.

to act as an effective tool for reaching and communicating with a wider range of its target market, as well as existing clients.¹¹ However, in contrast to these benefits, social media [mis]conduct has increasingly become a material factor in employment litigation.¹² Owing to the controversial nature of social media in creating both benefits and harms, one can understand why it has been described as ‘being both a blessing and a curse [within] the working place.’¹³

When examining the potential dangers of social media, employees’ increased use of technology has led to greater levels of employee misuse, discipline for such misuse, and ultimately matters being taken to dispute resolution bodies, such as the CCMA.¹⁴ During these disputes, many employers have had to determine whether or not an employee’s posted comments (which are alleged to be offensive, racist and/or defamatory) justify the enforcement of disciplinary action or classification as dismissible offences.¹⁵

When these disputes arise, the first point of reference for employers is usually to investigate what statutory obligations are placed on them in terms of addressing the alleged misconduct of their employees on social media. The next section will therefore serve as a foundational basis in addressing defamatory social media posts by outlining the legislative framework that arises within employee/employer disputes.

3 Legislative Framework

3.1 Labour Relations Act

A key piece of legislation regulating dismissals for employee misconduct is the Labour Relations Act (LRA).¹⁶ The LRA importantly distinguishes fair dismissals from unfair dismissals and outlines the substantive and procedural requirements for fair dismissal proceedings. Section 188 of the LRA states:

- (1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove –

11 B Solis ‘Social Media is About Sociology Not Technology’ 28 August 2007 <http://www.briansolis.com/2007/08/social-media-is-about-sociology-not/> (accessed 01 May 2021).

12 RC Daugherty ‘Around the Virtual Water Cooler: Assessing, Implementing and Enforcing Company Social Media Policies in Light of Recent National Labor Relations Board Trends’ 5 August 2011 <https://www.mcbrayerfirm.com/blogs-Employment-Law-Blog/around-the-virtual-water-cooler-assessing-implementing-and-enforcing-company-social-media-policies-in-light-of-recent-national-labor-relations-board-trends> (accessed 01 May 2021).

13 Phungula (n 3) 505.

14 Thompson & Bluvshtein (n 10) 284.

15 Phungula (n 3) 505.

16 Labour Relations Act 66 of 1995.

- (a) that the reason for dismissal is a fair reason –
 - (i) related to the employee's conduct or capacity; or
 - (ii) based on the employer's operational requirements; and
- (b) that the dismissal was effected in accordance with a fair procedure.

In line with this provision, dismissals must be substantively and procedurally fair. Furthermore, a dismissal can be fair if it is based on one of three grounds namely: misconduct; incapacity; or operational requirements.¹⁷

If employees make use of abusive language, such as swearing, or remarks that instigate racism,¹⁸ religious discrimination,¹⁹ sexism²⁰ or any other discriminatory action, they will be found guilty of misconduct.²¹ This use of abusive language may occur in person or on social media platforms and the context of these abusive remarks will obviously be considered.²²

It is clear that the most plausible ground in the LRA for reputation-damaging, racist, or defamatory social media posts is that of misconduct, which involves a contravention of a rule or standard regulating conduct in, or of relevance to, the workplace.²³ It is important to note that these acts of misconduct are not only limited to social media platforms, but apply to any written communication, including email.²⁴

Schedule 8 of the LRA consists of the ‘Code of Good Practice: Dismissal’ (Dismissal Code).²⁵ The Dismissal Code deals with some important aspects relating to dismissal on conduct and capacity grounds. If an employer wishes to dismiss an employee for misconduct, that employer must follow the steps set out in the Dismissal Code to ensure substantive and procedural fairness in this regard. There are various guidelines to be followed in the case of dismissal for misconduct and these are set out below:²⁶

Any person who is determining whether a dismissal for misconduct is unfair should consider –

- (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
- (b) if a rule or standard was contravened, whether or not –
 - (i) the rule was a valid or reasonable rule or standard;

¹⁷ Labour Relations Act (n 16) sec 188(1).

¹⁸ *NUM & Another v CCMA & Others* (2010) 31 ILJ 703 (LC).

¹⁹ *Cronje v Toyota Manufacturing* (2001) 22 ILJ 735 (CCMA).

²⁰ *Rautenbach v Relyant Retail (Pty) Ltd* (2005) 8 BALR (CCMA).

²¹ M Budeli-Nemakonde, W Germishuys & E Manamela *Labour Law Rules* (2017) at 199.

²² Budeli-Nemakonde et al (n 21) 199.

²³ Schedule 8 of the Labour Relations Act: The Code of Good Practice: Dismissal (Dismissal Code) Item 7.

²⁴ Nel (n 5) 190.

²⁵ Labour Relations Act (n 16) Schedule 8.

²⁶ Dismissal Code (n 23) Item 7.

- (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
- (iii) the rule or standard has been consistently applied by the employer; and
- (iv) dismissal with an appropriate sanction for the contravention of the rule or standard.

Determining whether an employee contravened a rule or standard is a matter of fact and generally, the onus is on the employer to establish. The rule must regulate conduct in, or be relevant to the workplace.²⁷ The validity of the rule must be considered as rules that purport to regulate conduct outside of the workplace or that have little to no relevance to the employment relationship would generally be invalid.²⁸ The validity of a rule must be determined on a case-by-case basis and factors such as the nature and requirements of the employer's business should be considered.²⁹ Since the rule must be valid and reasonable, unlawful or simply capricious rules cannot form the basis of an unfair dismissal.

As can be seen from the quoted item of the Dismissal Code above, another pre-condition for a finding of dismissal is that the employee must have knowledge of the rule. However, this requirement does not mean that the employer must establish actual subjective knowledge, as it is sufficient that the employee only be reasonably expected to have knowledge of the rule.³⁰ There have been many instances where employees have been expected to know that misconduct was not acceptable, without being specifically advised of this.³¹ There are certain standards of ethics that are expected of employees, and it is not always necessary for these standards to be encompassed within the employer's employment policies.³² Furthermore, to ensure fairness standards are met, employers should apply the same standards of conduct to all employees.³³ Finally, dismissal must be the appropriate sanction for contravening this rule. The appropriateness of dismissal depends on, *inter alia*, the seriousness of the misconduct, as well as its impact on the employment relationship.³⁴

In terms of identifying which party carries the onus of proof, generally, the employee must establish the existence of the dismissal.³⁵ If the employee succeeds in doing this, the employer must

27 A van Niekerk & N Smit *Law@work* (2019) at 305.

28 van Niekerk & Smit (n 27) 305. See section 5 below.

29 van Niekerk & Smit (n 27) 306.

30 van Niekerk & Smit (n 27) 307.

31 As above.

32 Phungula (n 3) 516.

33 van Niekerk & Smit (n 27) 307; Dismissal Code (n 23) Item 3(6).

34 van Niekerk & Smit (n 27) 307; Dismissal Code (n 23) Item 3(4).

35 Labour Relations Act (n 16) sec 192.

prove that the dismissal is fair.³⁶ For a dismissal based on the ground of misconduct, the CCMA does not review the procedure adopted by the employer but rather relies on the facts that are established by the evidence led at arbitration.³⁷ In many instances, the commissioner is required to determine whether a sanction of dismissal is fair for the misconduct that has been established. Previously, controversy existed with regards to the deference, if any, that a commissioner may extend to employers' decisions regarding dismissal.³⁸ However, our Constitutional Court has held that it is the commissioner's sense of fairness, and not the employer's view, that must prevail in these instances.³⁹

3.2 Common law

Most employment relationships are regulated by employment contracts which set out the rights and obligations of the employers and employees.⁴⁰ These rights and obligations often embody principles that stem from the common law duties of employers and employees. A prominent common law duty that finds application to the current topic is that of the duty of good faith between an employer and an employee.

This duty obligates employees to act honestly, within the best interests of the organisation, and to show a commitment towards the success of the employer, even in instances where this obligation is not expressly mentioned in the contract of employment.⁴¹ The employee owes a fiduciary duty and stands in a position of confidence and trust in relation to the employer.⁴² If an employee fails to comply with this obligation, it may constitute a breach of contract⁴³ and the employer will, consequently, have contractual remedies at his/her disposal. However, labour legislation is purpose-built for employment disputes and remedies should, therefore, firstly be sought in terms of these statutes, if applicable.⁴⁴

Trust plays an important role in the employment relationship. Since business risk is based to a large extent on the trustworthiness of company employees, an accumulation of individual breaches of trust can thus have significant economic repercussions.⁴⁵ There are many

³⁶ As above.

³⁷ van Niekerk & Smit (n 27) 259.

³⁸ As above.

³⁹ *Sidumo v Rustenburg Platinum Mines Ltd & Others* [2007] 12 BLLR 1097 (CC).

⁴⁰ Nel (n 5) 187-188.

⁴¹ L Osman 'Social Media: A Menace or Benefit in the Workplace?' (2013) *South African Pharmaceutical Journal* at 2; van Niekerk & Smit (n 27) 93.

⁴² van Niekerk & Smit (n 27) 93.

⁴³ van Niekerk & Smit (n 27) 100.

⁴⁴ *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC) para 41; Budeli-Nemakonde et al (n 21) 44.

⁴⁵ *Miyambo v CCMA & Others* [2010] 10 BLLR 1017 (LAC) para 13.

ways in which the abovementioned common law duty can be violated, such as through the repudiation of the employment contract; violating management's integrity; harming the organisation's legitimate business interests; or bringing the name of the company into disrepute.⁴⁶ One manner in which an employee may bring the company name into disrepute is by expressing a negative or defamatory view about the employer, client, or customer on social media platforms. This type of behaviour, depending on the extent thereof, may not only lead to the employee possibly facing disciplinary action and/or dismissal, but also raises the crucial question: How does one balance the rights of employees with those of employers?

4 Conflicting rights

Legislative and/or statutory provisions are not the only defences raised by parties in social media disputes, as constitutional rights are also often brought to the forefront of these matters. Constitutional rights have the potential to affect labour laws in a variety of ways,⁴⁷ such as: testing the validity of legislation seeking to give effect to fundamental rights; interpreting legislation; or developing the common law.⁴⁸ Furthermore, these rights may also be used by employers when instituting action, and by employees when defending such action. The most common defences raised by employees, when faced with alleged social media misconduct are, *inter alia*, the right to freedom of expression and the right to privacy.⁴⁹ Although there are a vast number of rights that are affected by social media conduct and potential misconduct, the most prominent and often most difficult balance is that between an employee's rights to privacy and freedom of expression versus the employer's right to a good reputation.

4.1 Defamation and protecting an employer's good name

The reputation and good name of an organisation are of utmost importance to the employer. An employer's interest lies in ensuring that the business grows, expands, and is profitable and these results are often dependent on the good name and brand image of the

⁴⁶ P MacDonald & P Thompson 'Social Media(tion) and the Reshaping of the Public/Private Boundaries in Employment Relations International' (2016) *Journal of Management Reviews* at 78-79.

⁴⁷ van Niekerk & Smit (n 27) 41.

⁴⁸ van Niekerk & Smit (n 27) 93.

⁴⁹ Phungula (n 3) 506; Iyer (n 7) 127.

business.⁵⁰ Therefore, if an employer's reputation is negatively affected, it is likely to cause substantial harm to the success of the business.⁵¹ One of the most common ways in which an employer's reputation can be damaged is through an act of defamation.

Defamation involves the wrongful intentional publication of defamatory statements regarding another person and results in the violation of a person's status, good name, or reputation.⁵² Furthermore, it is known to be one of the main sources of violating one's right to dignity in South Africa.⁵³ As already mentioned, a leading cause of conflict within the workplace arena is when employees post defamatory comments about their employer(s) on social media. Since employees play an integral part in the success of an organisation, any negative remarks made on social media can seriously damage the employer's business.⁵⁴

The law of defamation seeks to achieve a balance between the right to freedom of expression and the right to a good name and reputation.⁵⁵ Although the right to a good name or reputation is recognised in our common law and not specifically mentioned in the Bill of Rights, this right is generally accepted as an independent personality right under the right to dignity in terms of section 10 of the Constitution.⁵⁶ The rights to dignity and a good name are not only limited to individuals, but may also be afforded to juristic persons.⁵⁷ Our courts have accepted that trading and non-trading corporations have a right to their good name and reputation and this can be protected by the usual remedies under the law of defamation.⁵⁸

In *National Media v Bogoshi*⁵⁹ the Supreme Court of Appeal investigated the meaning of 'publication' as an element of defamation. For an employer to be successful, they will, firstly, have to prove the existence of a defamatory publication referring to the

- 50 D Kumar, P Varma & S Pabboju 'Security issues in social networking.' (2013) 13 *International Journal of Scientific and Research Publications* at 120; M Gotsi & A Wilson 'Corporate Reputation: Seeking a Definition' (2001) 6 *Corporate Communications: An International Journal* at 24.
- 51 G Mushwana & H Bezuidenhout 'Social Media Policy in South Africa' (2014) 16 *Southern African Journal of Accountability and Auditing Research* at 64.
- 52 *Khumalo v Holomisa* 2002 (8) BCLR 771 (CC) para 18.
- 53 H Chitimira & K Lekopanye 'A Conspectus of Constitutional Challenges Associated with the Dismissal of Employees for Social Media-Related Misconduct in the South African Workplace' (2019) 15 *Revista Direito GV* at 27.
- 54 Phungula (n 3) 516.
- 55 Nel (n 5) 190.
- 56 J Neethling & J Potgieter *Neethling-Potgieter-Visser Law of Delict* (2014) at 330; 'Freedom of expression' in van der Merwe (ed) *Information and communications technology law* (2008) at 401.
- 57 *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A) 462.
- 58 *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) para 30; *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A).
- 59 *National Media v Bogoshi* 1998 (4) SA 1995 (SCA).

employer, and secondly, that it has been published. It was held that ‘publication’ is the act of making a defamatory statement or the act of conveying an imputation by conduct to a person or persons other than the person who is the subject of the defamatory statement or conduct.⁶⁰ Posts made on social media sites may also form part of ‘publications.’ It is also evident that an offending post must come to the knowledge of one other person, other than the defamed person or organisation. Examples of other parties who may see the post would include other employees of the employer, or even clients. In many instances, it is the customers of the employer who bring the offending post to the attention of the employer.⁶¹ Therefore, employers must be able to prove publication of the social media post by proving that at least one other person saw it. Thereafter, it must be proved that the post violated the business’ good name or reputation. The employer will have to prove that their good name or standing in society has been tarnished in the ‘eyes of the community’.⁶²

In *Media Workers Association of SA obo Mvemve v Kathorus Community Radio*, an applicant was dismissed for failing to apologise on social media after posting malicious remarks on Facebook regarding the employer’s board of directors, whilst simultaneously claiming that the station manager was a criminal.⁶³ The Commissioner ruled that the dismissal was substantively fair because the applicant had tarnished the image of the respondent by posting unfounded allegations on Facebook without attempting to address their concerns through internal channels.⁶⁴ This case proves that tarnishing a business’ name, through posting unfounded allegations without addressing such concerns internally, can lead to a substantively fair dismissal.

However, employers are not the only parties who wish to protect their constitutionally entrenched rights. Employees also desire for their rights, in terms of freedom of expression and privacy, to be upheld.

4.2 An employee’s right to freedom of expression and the limitation placed thereon

Section 16 of the Constitution protects an individual’s right to freedom of expression. This right embodies the principle that individuals in our society should be able to hear, form, and express

60 C Padayachee ‘Employee’s Right to Privacy Versus the Employer’s Right to Monitor Electronic Communication in the Workplace’ LLM thesis, University of KwaZulu-Natal, 2015 at 31.

61 M Potgieter *Social Media and Employment Law* (2014) at 84.

62 M Loubser & R Midgley *The Law of Delict in South Africa* (2012) at 339.

63 *Media Workers Association of SA obo Mvemve v Kathorus Community Radio* (2010) 31 ILJ 2217 (CCMA) (*Media Workers*).

64 *Media Workers* (n 63) para 5.7.

opinions and views freely on a diverse range of matters.⁶⁵ Freedom of expression lies at the heart of our South African democracy as it recognises and protects the moral values of individuals and facilitates the search for the truth about individuals and/or society at large.⁶⁶

Section 16(1) of the Constitution provides that: '[E]veryone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas [...]'. The term 'other media' encompasses social media, which implies that everyone (including employees) has a right to make commentary on social media platforms.⁶⁷ This is reiterated by the fact that interpreting freedom of expression does not warrant a narrow reading, and would thus include posting statements and photos and sharing other users' content on social media.⁶⁸ In recent times, social media platforms have become innovative mechanisms that allow South Africans to express their views freely. This has highlighted the pivotal role that digital platforms play in safeguarding the right to freedom of expression.⁶⁹

When relating the right to freedom of expression to the employment environment, employees, in most instances, are unaware that this right does not provide an unfettered right to defame others, particularly their employers.⁷⁰ Employees' social media posts must not exceed the limitations set out in section 16(2) of the Constitution. These internal limitations clearly delineate the scope of the right and state that the right does not extend to expression that enlists propaganda of war, incites violence or advocates for hatred on the basis of race, gender, ethnicity, or religion.⁷¹

There are many factors that courts must consider when determining the boundaries of the right to freedom of expression. Judges must take cognisance of the issues involved, the context of the debate, the protagonists to the dispute or disagreement, the language used, as well as the content of the publication.⁷²

⁶⁵ South African National Defence Union v Minister of Defence and Another 1999 (4) SA 469 (CC) para 7.

⁶⁶ As above.

⁶⁷ Phungula (n 3) 506.

⁶⁸ *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 (1) SA 406 (CC) para 48.

⁶⁹ Iyer (n 7) 127; R Davey 'Understanding and Managing the Risks of Social Media in the Workplace' 20 July 2015 <https://www.lexology.com/library/detail.aspx?g=db5837b2-b86c-486d-9062-786c6c6a2bbe> (accessed 22 April 2021) 1.

⁷⁰ V Oosthuizen 'How Far is Too Far for Employees on Social Media?' 2016 <https://www.labourguide.co.za/most-recent/2166-how-far-is-too-far-for-employees-on-social-media> (accessed 22 April 2021).

⁷¹ Constitution of the Republic of South Africa, 1996 (Constitution).

⁷² *Dutch Reformed Church Vergesig Johannesburg Congregation and Another v Sooknunan t/a Glory Divine World Ministries* 2012 (3) All SA 322 (GSJ) (Dutch Reformed Church) para 17.

A Labour Court matter that dealt with these limitations is the *Edcon Limited v Cantamessa and Others* case.⁷³ The facts of the case involve an employee who worked for Edcon as a specialist buyer. She held a senior position but was not part of management.⁷⁴ While the employee was on annual leave in December of 2015, she published the following post on her Facebook account:⁷⁵

Watching Carte Blanch and listening to these f***** stupid monkeys running our country and how everyone makes excuses for that stupid man we have to call a president ... President my f***** ass!! #zumamustfall This makes me crazy ass mad.

A month later, Edcon received an email from Amanda Sibeko, who may have been a customer, complaining about the abovementioned Facebook post.⁷⁶ Sibeko exclaimed that the employee's biography stated that she worked for Edcon and, therefore, Sibeko associated the employee's racist remarks posted on social media with the organisation. Sibeko claimed that Edcon is entrenched in the black community and that racism should not be tolerated.⁷⁷

The Court held that the employee did enjoy freedom of expression; however, her right could not extend to advocating hatred based on race which constitutes incitement to cause harm.⁷⁸ Although the Court ruled that she had the freedom to criticise the government where she felt it erred in its administrative activities, she did not have the right to resort to racial slurs to vent her anger.⁷⁹ It was ruled that her conduct amounted to advocating hatred based on race which incited racial disharmony within the workplace and within the general public.⁸⁰ When noting her misconduct, the Court considered various factors. Cele J found that since she formed part of the senior personnel of Edcon, her misconduct was serious in nature and the post had the potential of seriously harming Edcon's business.⁸¹ The Court reiterated the statement made in *Custance v SA Local Government Bargaining Council*⁸² that defamatory terms that manifest deep-rooted racism have no place in a democratic society.⁸³

The right to freedom of expression may, however, not only be limited by these internal limitations but must also be balanced against other parties' rights. Therefore, in determining disputes, the employer's rights must be balanced against the employee's right to

73 *Edcon Limited v Cantamessa and Others* (2020) 2 BLLR 186 (LC) (*Edcon*).

74 *Edcon* (n 73) para 2.

75 *Edcon* (n 73) para 3.

76 *Edcon* (n 73) para 4.

77 As above.

78 *Edcon* (n 73) para 21.

79 As above.

80 As above.

81 As above.

82 *Custance v SA Local Government Bargaining Council* (2003) 24 ILJ 1387 (LC) para 28.

83 *Edcon* (n 73) para 21.

freedom of expression.⁸⁴ This is when section 36 of the Constitution comes into play, which sets out the requirements that must be applied when determining whether to limit rights contained in the Bill of Rights.⁸⁵

4.3 Right to privacy

Another right that is often raised by employees when confronted on their alleged reputation-damaging or defamatory posts, is the right to privacy. Privacy is often described as an individual condition of life that is characterised by seclusion from the public and publicity.⁸⁶ The right to privacy is recognised in the South African legal system within the provisions of section 14 of the Constitution and empowers persons to have control over their affairs.

Since social media has become a regular medium of communication for people on a worldwide scale, it has created difficulties within the workplace in ensuring that both employees' and employers' rights to privacy are protected. It must be remembered that the right to privacy is also not free from limitations. This is echoed by the words of the judge in *Bernstein v Bester*,⁸⁷ who held that:⁸⁸

[P]rivacy is acknowledged as in the truly personal realm, but as a person moves into the communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.

Although the right to privacy has no inherent limitations under the Constitution, it may be limited by policies enforced by the employer which aim to curb social media related misconduct in the workplace.⁸⁹ Such policies may be constitutionally justified in instances where an employee's use of social media affects his/her performance and/or the employer's business reputation.⁹⁰

A relevant case that investigates the issue of privacy and its relation to employment-related posts is *Sedick v Another v Krisray (Pty) Ltd.*⁹¹ The matter involved the dismissal of two employees for posting derogatory comments on Facebook about a senior manager and other senior staff. When the employees raised the defence of the right to privacy, the Commissioner found that Facebook is a public domain and that most of its content is open to anyone who has the

⁸⁴ Nel (n 5) 189.

⁸⁵ Constitution (n 71) sec 36.

⁸⁶ *Bernstein v Bester* 1996 (2) SA 751 (CC) (*Bernstein*) para 94.

⁸⁷ *Bernstein* (n 86).

⁸⁸ *Bernstein* (n 86) para 67.

⁸⁹ Chitimira & Lekopanye (n 53) 14.

⁹⁰ A Dekker 'Vices or Device: Employee Monitoring in the Workplace' (2004) 16 *South African Mercantile Journal* at 622.

⁹¹ *Sedick* (n 4).

time and inclination to search through the information.⁹² Since neither of the employees restricted their settings on their Facebook pages, their pages fell into the public domain.⁹³ Consequently, they had abandoned their right to privacy.

The factors that were considered with regards to the enquiry on the violation of privacy included the content of the post, the place where the comments were posted, to whom they had been directed, and by whom they were said.⁹⁴ The Commissioner found that the employees' behaviour amounted to gross insolence as their comments were serious, intentional, and demeaning. It was further ruled that it is not necessary to explicitly name one's employee on the social media platform, as a link may still be made to the employer if previous or current employees are still able to identify the individual referred to in the post.⁹⁵ Although the actual damage to the reputation of the company was not proved, the potential for damage was sufficient to uphold the dismissals of the employees.⁹⁶ This case highlights that it is important for employees to be aware of their privacy settings on social media platforms and to know whether or not they are, in fact, waiving their right to privacy in this regard.

Another case that involved the dismissal of an employee for destroying the name of the employer in public would be *Fredericks v Jo Barkett Fashions*.⁹⁷ The applicant had posted derogatory remarks about the general manager on her Facebook account and argued that her right to privacy was infringed when she was later dismissed.⁹⁸ Through the interpretation of Item 7 of the Dismissal Code, the Commissioner found that the applicant's actions were not justifiable, and the dismissal was fair, even though the employer had no policy regarding Facebook usage.⁹⁹ This judgment is similar to that of *Sedick v Krisray (Pty) Ltd* in terms of the right to privacy. In both instances, the commissioners took the view that an employer's failure to restrict access to his/her social media profile results in it being open and accessible to the public.¹⁰⁰

In these abovementioned two cases, the argument made by the employees concerning the infringement of their privacy rights were ruled to be unfounded. Since these employees did not restrict access to their social media, they waived their right to privacy as their posts were visible to the public.¹⁰¹ These cases set out a two-step approach

⁹² *Sedick* (n 4) para 50.

⁹³ As above.

⁹⁴ *Sedick* (n 4) para 57.

⁹⁵ *Sedick* (n 4) para 53.

⁹⁶ *Sedick* (n 4) para 57.

⁹⁷ *Fredericks v Jo Barkett Fashions* 2011 JOL 27923 (CCMA) (*Fredericks*).

⁹⁸ *Fredericks* (n 97) para 5.

⁹⁹ *Fredericks* (n 97) para 6.3.

¹⁰⁰ *Fredericks* (n 97) para 6.3; *Sedick* (n 4) para 50.

¹⁰¹ Phungula (n 3) 509.

that may be undertaken by employers, in the applicable circumstances, to disprove a violation of employees' rights to privacy. First, that defamatory posts were published, and secondly, that those defamatory comments were made on a public social media platform, without any restriction thereto.¹⁰²

The question then arises as to what the situation will be in instances where employees do restrict access to their social media accounts. In the abovementioned cases, the Commissioner found that the dismissal was fair due to, *inter alia*, the employees' waiving of their privacy rights due to their failure to limit access to their Facebook accounts. Our courts have yet to provide clarity with regards to how the right to privacy should be dealt with when posts are published on social media accounts that are restricted from the public. It could be argued that due to the restriction placed on the employee's social media account, the recipients of such posts should be specific 'friends' of the employee only and, therefore, the right to privacy may not necessarily be waived.¹⁰³ However, it is still possible for the employer to find out about these posts, even on a restricted social media page. In these instances, the employer would likely still be able to prove defamation, if the requirements thereof are met.¹⁰⁴ Although uncertainty in this regard still exists, one position is clear: an employer's access to an employee's social media account will still be justified if that employee did not restrict access to those comments.¹⁰⁵

There is no doubt that more cases regarding situations where employees restrict the access and/or privacy settings of their social media sites, prior to making defamatory statements about their employers, will soon reach our dispute resolution bodies.

5 Social media misconduct unrelated to the employer and workplace

5.1 Employee liability for off-duty conduct

Generally, employers should only be concerned about employees' conduct that takes place within the workplace. However, this is not a hard and fast rule, since employees can be held accountable for actions performed outside the workplace under certain circumstances. Conduct outside the workplace affects an employer's business if it is prejudicial to a legitimate business interest or if it undermines the relationship of confidence and trust which are vital

¹⁰² Phungula (n 3) 510.

¹⁰³ As above.

¹⁰⁴ Phungula (n 3) 510-511.

¹⁰⁵ Phungula (n 3) 510.

components to the employment relationship.¹⁰⁶ Therefore, the rule that any misconduct should have a serious impact on the employment relationship before dismissal is justified and applies equally to ‘off the job’ conduct.¹⁰⁷

Employee liability for reputation-damaging or racist posts that do not mention the employer

It has been stated above that employers have a legitimate interest in protecting the image of their business. Posts may, directly or indirectly, damage the reputation of a business. Since employees are representatives of the business, they have a major impact on the business’s reputation.¹⁰⁸ Due to the fact that inappropriate posts made by employees can be associated with the name of the business, the employer may face backlash from customers, prospective customers, and other stakeholders as a result of an inappropriate post (even in instances where the post does not even mention the employer).¹⁰⁹

In *Dyonashe v Siyaya Skills Institute (Pty) Ltd*,¹¹⁰ the Commissioner had to investigate whether the applicant’s dismissal was fair. The employee had been dismissed for posting comments including the phrases, ‘Kill the Boer, we need to kill these ...’.¹¹¹ These posts were not directly aimed at the employer in any way, however, the respondent argued that the posts were racist and were available in the public domain. The Commissioner held that, even though the applicant neither mentioned the name of the employer nor posted the comments during working hours, there was a nexus between the employee’s conduct and his employment relationship with the respondent, which did have an influence on his suitability for employment.¹¹² Therefore, the dismissal was found to be fair.

Although the Labour Court case of *Edcon* was dealt with earlier in the context of freedom of expression, this case also dealt with an employee posting social media comments that did not directly mention the employer nor took place during working hours.¹¹³ The Labour Court looked at the steps and arguments brought forth before the matter reached its doorstep. When an internal disciplinary was held, the Chairperson found, *inter alia*, that although the employee published the post outside of working hours, *Edcon* was still

¹⁰⁶ van Niekerk & Smit (n 27) 302; *City of Cape Town v South African Local Government Bargaining Council and Others* (2011) 5 BLLR 504 (LC).

¹⁰⁷ van Niekerk & Smit (n 27) 302.

¹⁰⁸ L Thorneithwaite ‘Chilling Times: Social Media Policies, Labour Law and Employment Relations’ (2016) 54 *Asia Pacific Journal of Human Resources* at 334.

¹⁰⁹ SA Coetze ‘A Legal Perspective on Social Media Use and Employment: Lessons for South African Educators’ (2019) 22 *Potchefstroom Electronic Law Journal* at 7-8.

¹¹⁰ *Dyonashe v Siyaya Skills Institute (Pty) Ltd* [2018] BALR 280 (CCMA) (*Dyonashe*).

¹¹¹ *Dyonashe* (n 110) para 7.

¹¹² *Dyonashe* (n 110) para 46.

¹¹³ *Dutch Reformed Church* (n 72).

associated with the post as the employee's profile indicated that she was employed by Edcon.¹¹⁴ Furthermore, the Chairperson held that, regardless of whether the communication took place during or after working hours, employees are to communicate in a professional, courteous, and sensitive manner.¹¹⁵

At the CCMA, the Commissioner concluded that the dismissal was substantively unfair. It was reasoned that the post did not pertain to the employee's work at Edcon, and a reasonable internet user would not have associated the post with Edcon.¹¹⁶ Furthermore, the post did not violate Edcon's Social Media Policy as the employee used her own equipment to post the message and it was not done whilst she was at work.¹¹⁷ The Commissioner held that no convincing evidence existed that proved that the employee's post impacted Edcon negatively, financially, or otherwise.¹¹⁸

The case then progressed to the Labour Court. The Court investigated Edcon's legal entitlement to discipline the employee. As a general rule, the employer has no jurisdiction or competency to discipline an employer for non-work related conduct occurring after hours or away from the workplace.¹¹⁹ However, if misconduct cannot expressly be found in the employer's disciplinary code, such misconduct may still be of such a nature that the employer may, nonetheless, be entitled to discipline the employee.¹²⁰ The Court made reference¹²¹ to *Hoechst (Pty) Ltd v Chemical Workers Industrial Union and Another* where it was held that enquiries relating to misconduct not covered in a disciplinary code involve looking into whether the employee's conduct 'had the effect of destroying or seriously damaging the relationship of employer and employee between the parties'.¹²² The possibility of a damaged reputation did exist as hundreds of Twitter users started to mention the employee's Facebook post and wanted to hear Edgars' thoughts on 'the degrading racist remarks by one of [their] buyers'. Twitter users started demanding answers from Edcon and some even threatened to stop doing business with the franchise.¹²³

Furthermore, the Labour Court held that Edcon would be able to exercise discipline over the employee's conduct if it established the

¹¹⁴ *Edcon* (n 73) para 8.

¹¹⁵ As above.

¹¹⁶ *Edcon* (n 73) para 10.

¹¹⁷ As above.

¹¹⁸ As above.

¹¹⁹ *Edcon* (n 73) para 12; *National Education, Health and Allied Workers Union obo Barnes & Department of Foreign Affairs* (2001) 22 ILJ 1292 (BCA) 1294.

¹²⁰ *Edcon* (n 73) para 12.

¹²¹ As above.

¹²² *Hoechst (Pty) Ltd v Chemical Workers Industrial Union and Another* (1993) 14 ILJ 1449 (LAC). See also *Anglo American Farms T/a Boschendal Restaurant v Konjwayo* (1992) 13 ILJ573 (LAC) 589 (G-H).

¹²³ *Edcon* (n 73) paras 5-6.

necessary connection between the misconduct and its business. It was noted that the comments themselves did not relate to the employer-employee relationship, but a connection did exist in that the employee's Facebook page stated that she worked at Edcon. The Court held that the success of Edcon's business was largely dependent on how it marketed itself to the public, thus, having a good name was of utmost importance to Edcon.¹²⁴ The Court, therefore, found that there was a connection between the employee's conduct and the relationship she had with Edcon due to her position as a buyer of the company. It is imperative that buyers are portrayed in a positive light, and if this is not the case, they pose a risk of bringing the name of the company into disrepute.¹²⁵ There was no doubt that Edcon was exposed to the risk of reputational damage and the fact that no damage was proven by Edcon could not be a valid defence.¹²⁶ Overall, the dismissal of the employee was found to be substantively fair by the Labour Court.¹²⁷

From the above cases, it has been proven that it is not necessary for the employee to mention his/her employer directly or explicitly, as long as a nexus exists between the applicant's conduct and his/her relationship of employment with the employer. An employee can thus bring an employer's name into disrepute without even mentioning the name or posting the remarks during working hours.

6 Suggestions for employers to reduce social media misconduct

Although employers can rely on the provisions of the LRA and the Dismissal Code, it would still be beneficial for employers to take steps to ensure organisational clarity regarding permissible social media conduct. Although the implementation of social media policies or disciplinary codes is not mandatory, it would be advisable for employers to take such action as it aids in building a stronger case when proving the violation of a workplace rule or standard. Adopting these guidelines could result in the dismissal being unquestionably fair, both substantively and procedurally.¹²⁸ Furthermore, such policies could help prove the requirement that an employee knew or should reasonably have known about the relevant rule or standard,¹²⁹ as discussed above. The implementation of such policies would make it difficult for an employee to claim that he or she was not aware of such a standard or rule.

¹²⁴ *Edcon* (n 73) para 16.

¹²⁵ As above.

¹²⁶ *Edcon* (n 73) para 19.

¹²⁷ *Edcon* (n 73) paras 21-22.

¹²⁸ Phungula (n 3) 517.

¹²⁹ Dismissal Code (n 23) Item 7.

These policies should not only act as a defensive mechanism to be used before dispute resolution bodies, but can hopefully be proactive in reducing employee ignorance and creating a greater awareness with regards to what constitutes social media misconduct. Furthermore, clear, written, and detailed social media processes have been proven to prevent reputational damage and expensive legal proceedings.¹³⁰

It is important for these policies to encompass all the applicable aspects and safeguards necessary to create clear, enforceable rules and ensure that employees are aware of these provisions and enforce compliance therewith.¹³¹ Employers who do not currently have specific policies addressing social media usage may amend current policies or disciplinary codes to include provisions regarding permissible and impermissible online conduct. Alternatively, employers could create an entirely new policy that deals exclusively with social media conduct. Some of the content that should be included in such a policy would, *inter alia*, be the purpose of the policy, to whom it applies, and the differentiation between employees using social media for business interests versus employees using social media for personal use during and after working hours.¹³² Thereafter, the policy should clearly set out the disciplinary actions and sanctions that may be instituted against employees and under which circumstances these sanctions may be imposed.¹³³

It is not sufficient for employers to merely implement these policies and then become complacent. It is therefore advisable to offer training to employees on the applicable areas of law, such as employment law, privacy and the waiver of said privacy, copyrights, and the rules of the social media platform being used.¹³⁴ This training can be done in conjunction with the implementation of social media misconduct policies. However, it is important for employers to avoid being too restrictive in their policies and to ensure that freedom of expression is still permitted. Given the battle of rights discussed above, businesses must aim to create a balance between the employees' rights and the best interests and good name of the employer.

¹³⁰ Mushwana & Bezuidenhout (n 51) 64.

¹³¹ Daugherty (n 12).

¹³² J Havenga 'How to Regulate Employee Social Media Use' 9 February 2016 <http://www.phinc.co.za/NewsResources/NewsArticle.aspx?ArticleID=1514> (accessed 02 May 2021).

¹³³ R LaPlaca & N Winkeller 'Legal Implications of the Use of Social Media: Minimizing the Legal Risks for Employers and Employees' (2010) 5 *Journal of Business and Technology Law Proxy* at 16.

¹³⁴ N Manyathi 'Dismissals for Social Media Misconduct' (2012) *De Rebus* at 7.

7 Conclusion

If employees' posts are alleged to be racist, reputation-damaging and/or defamatory by employers, and can later be proved as such, employers can definitely take action in the form of disciplinary action and/or dismissal. The legislative framework that is available to employers is the relevant misconduct provisions found within the LRA, as well as common law obligations. An employer's knowledge of the LRA is important to ensure that misconduct can actually be proven and, thereafter, that the correct steps and procedures are followed.

When instituting disciplinary action and/or dismissal, there will undoubtedly be a battle between the constitutional rights of the employee, versus the rights afforded to employers. When comments made on social media by employees have the potential to bring the name of the company into disrepute, companies generally claim their right to a good name. Employees, in most instances, defend this by claiming their rights to freedom of expression and/or privacy. When social media-related misconduct cases arise, the CCMA and the courts should consider the circumstances surrounding the disputes in order to attempt to balance the constitutional rights of the employees and the employers' business reputation rights.

Although each case depends on its own merits and the content of the post, the general approach of the courts has been to rule in favour of employers. Many commissioners or judges have found dismissals to be fair in instances where the employee has tarnished the image and good repute of the business (through the employer's proving of defamation) and when such posts have been found on a public domain, accessible to everyone. Furthermore, there are often instances where the employee does not directly mention the employer, but the employee's racist and/or reputation-damaging post can still be associated with the employer. In these instances, if the judge or commissioner finds a nexus between the employee's conduct and his/her employment relationship with the organisation, this will, most likely, negatively influence the employee's suitability for employment.

Recent times have shown an increase in these social media misconduct cases being addressed through various dispute-resolution avenues. In most cases, internal disciplinary actions are held, whereafter it is usually heard at the CCMA. A few matters have progressed to the Labour Court. With the immense utilisation of social media in modern society and the blurring of the line between people's personal and work lives, it is clear that our dispute resolution bodies have only seen the tip of the iceberg in terms of having to deal with these disputes. There is no doubt that matters surrounding social media misconduct will still reach the hands of superior courts and it

is likely that greater clarity on the issues and steps to be taken by employers will be brought about in the near future.