

*The reasonable use and legal risks associated with Social Media – a discussion of cases and the Constitution*<sup>1</sup>

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Introduction :

The risk of the use Social Media for attorneys and their clients has become a serious legal issue in light of the “right to privacy” and the “right of freedom of expression” as enshrined in our Constitution. Our Courts have not been oblivious to technological development and have started accepting that the internet and social media can be used as a suitable medium to serve Court papers were suitable ( see the case of CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens (KZD)<sup>2</sup>), employees dismissal can be confirmed by the CCMA based on social media misconduct , the Courts may grant interdicts against persons ordering them to remove offensive or defamatory content from public social media pages and also the extension of the claim for damages as a result from defamation on a social media platform has now been recognised and confirmed.

The Right to Privacy and Dignity

The Right to Privacy and Dignity in terms of Constitution is enshrined in Section 14 of the Bill of Rights provides that “Everyone has the right to privacy, which includes the right not to have- (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed.” In addition Section 10 of the Bill of Rights provides that “Everyone has inherent dignity and the right to have their dignity respected and protected.” In addition Section 86 of the in Electronic Communications Act 25 of 2002 (ECT) several part of the Regulation of Interception of Communications and Provision of Communication - Related Information Act 70 of 2002 also known as RICA have outlawed unlawful interception and monitoring of communications save for where there is written consent or there are legality accepted grounds of justification as stipulated in the RICA or you are a party to the communication.

Does one have a legitimate expectation on social media platforms ?

In other words with reference to social media accounts everybody has the right not have his private social media account to be hacked and personal information being disseminated or particulars views expressed to the public without their prior consent. This should be seen in light of Section 16(1) of

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<sup>1</sup> This was case discussion was initially a script prepared for the Law Society of South Africa for its online lecture series. This article is a further developed and version of the original script.

<sup>2</sup> (unreported case no 6846/2006, 3-8-2012 )

the Bill of Rights provides that “Everyone has the right to freedom of expression, which includes- (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research.” The exposure of one’s views on a particular issue may be legally their right on their private social media page but if such information were to be leaked the right to freedom of expression must be balanced with the right of others not to be disparaged or defamed.

In addition, one may ask the question - do you still have a legitimate expectation right to privacy (as stated in the case of *Bernstein v Bester*<sup>3</sup>) by merely setting your social media settings to a select few? One may however argue that if one of your friends makes a screen dump of your Facebook account pages he or she may not necessarily be infringing your privacy as you had allowed them access. The question then is what may you legally do with such access which may result in you being sued for damages or being subjected to disciplinary action.

### Social Media at the workplace

I will now illustrate how our Courts and other dispute resolution forums approach the use of social media at the workplace and in an employee’s private space. In *Fredericks v Jo Barkett Fashions*<sup>4</sup> and *Sedick & another v Krisray (Pty) Ltd*<sup>5</sup> the employees in these two matters were dismissed as a result of derogatory Facebook status updates. They challenged the fairness of the dismissals at the CCMA. In both cases the CCMA found that the employees were fairly dismissed as their privacy had not been infringed when their employers accessed their Facebook posts.<sup>6</sup>

The employees had not restricted their Facebook privacy settings and the updates could be viewed by anyone, even those with whom they were not ‘friends’ on the website. The CCMA took the view that the employers were entitled to intercept the posts in terms of the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 (RICA). The commission decided that the employer was entitled to access the wall posts as the employees had ‘open’ Facebook profiles.

In *Workers Association of SA obo Mvemve v Kathorus Community Radio*<sup>7</sup> the employee of a radio station criticised the organisation’s board and claimed its station manager was a criminal. The CCMA found that the employee was fairly dismissed as he had posted unfounded allegations on Facebook without having addressed these internally first.<sup>8</sup>

In *Smith v Partners in Sexual Health (non-profit)*<sup>9</sup> an organisation’s chief executive officer accessed an employee’s private Gmail e-mail account while she was on leave. As a result of the [unlawful]

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<sup>3</sup> [1996] 2 SA 751 (cc)

<sup>4</sup> [2011] JOL 27923 (CCMA)

<sup>5</sup> (2011) 32 ILJ 752 (CCMA)

<sup>6</sup> L Dahms-jahnsen (2012) "Dismissals for social media misconduct." DR, December 2012:6 DEREBUS at page 80

<sup>7</sup> (2010) 31 ILJ 2217 (CCMA)

<sup>8</sup> L Dahms-jahnsen (2012) "Dismissals for social media misconduct." DR, December 2012:6 DEREBUS at page 80

<sup>9</sup> (2011) 32 ILJ 1470 (CCMA)

access he found e-mails between her and former employees, as well as persons outside the organisation, which made reference to internal matters.

The employer initially gained access to the employee's account accidentally but subsequent access was intentional. The employee was charged with a number of offences, including bringing the employer's name into disrepute. In her defence at a disciplinary inquiry, the employee contended that the e-mails were accessed in violation of her right to privacy and in contravention of RICA.<sup>10</sup>

The CCMA found that the intentional access on the second occasion contravened RICA and the evidence obtained through this access was inadmissible on the basis of an infringement of the constitutional right to privacy. The CCMA held that the employee's dismissal was procedurally and substantively unfair.<sup>11</sup>

It could also be argued that the employer contravened the ECT in that Section clearly states that if you are not authorised to have access to an information and accidentally do so and remain thereon knowing it unlawful – the access becomes unlawful from the time the employer knew it had no right to access the employee's e-mail and decided to remain thereon and access the employee's mail never the less.

### The law of defamation and claim for damages for defamatory social media posting

The issue of the law of defamation and Social Media was settled by the Court in *H v W*,<sup>12</sup> where the Court held that the Court may grant an interdict and order a party to remove defamatory posting on one's social media account that is open to the public. In other words what you say on Facebook about others must be fair comment or the truth and not defamatory or scandalous. This position was also recently confirmed in the case of *M v B*<sup>13</sup>

In *Isparta v Richter*<sup>14</sup> the court held that defamation on social media exposes the person making the defamatory statements to a claim for damages by the party having been defamed. The Court held that "Crude as damages for defamation may be, our courts have consistently awarded damages to the victims of defamation, albeit in modest amounts. Since the defendants did not apologise or retract their defamatory comments, I believe that an amount of R40 000 is appropriate in the circumstances."<sup>15</sup>

In addition the defendants were also ordered, to pay the plaintiff's costs on the appropriate magistrates court scale, including the costs of counsel.

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<sup>10</sup> L Dahms-jahnsen (2012) "Dismissals for social media misconduct." DR, December 2012:6 DEREBUS at page 80

<sup>11</sup> Ibid at page 81

<sup>12</sup> (12/10142) [2013] ZAGPJHC 1

<sup>13</sup> (10175/2013) [2014] ZAKZPHC 49 (19 September 2014)

<sup>14</sup> (22452/12) [2013] ZAGPPHC 243; 2013 (6) SA 529 (GNP)

<sup>15</sup> Ibid at par 41

### Conclusion

In conclusion it is important to mention that due to the increasing popularity of social media, it is important that persons take cognisance of it and use it in lawful and acceptable manner. Failure to observe reasonable use and lawful use may expose you for a claim for damages or may see you on receiving of an interdict.

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