

The Legal Effects of Social Media during COVID-19 lockdown.

Masego Morige

Paralegal, Snail Attorneys Inc. Bcom Law (Pearson Institute of Higher Education) and LLB student at the University of Pretoria

Article written under supervision of *Sizwe Lindelo Snail – Senior Partner at Snail Attorneys @ Law Inc*

1. Introduction

The world is facing a huge and unpredictable pandemic, which has led to the closure of many businesses from small to large, people being in their homes as they are “social distancing” and finding ways to entertain themselves, and many others working from home. With the ever increasing technological developments, we are all now more than ever exposed to social media, for work, entertainment, business purposes, and many other reasons, but the fazing question is, are people really ready for and aware of the power that social media holds?

“The right to privacy”¹, “the right to freedom of expression”² and “right to dignity”³ are all real rights which are protected by the Constitution, of which one could be charged or held liable for damages for infringing any one of them. The South African Courts have not been unmindful to the technological developments and the use of social media, in fact the Courts have realised that it can be used as a suitable and reliable medium to serve court papers were appropriate as per the courts discretion (see *CMC Woodworking Machinery (Pty) Ltd v Pieter Ondedaal Kitchens*)⁴

As a result of all these ever changing ways of social media use, employee dismissals on the grounds of social media misconduct can be confirmed by the CCMA, hence one of the major reasons why people should be careful of what they put out in social media, what social media events they choose to form part of etc. An extension has been made for claims for damages relating from *defamation* in social media platform, there is also a recognition and confirmation of *delictual claim* for damages by the

Judges, this is also confirmed in the case of *Manuel v Economic Freedom Fighters and Others*.

This article seeks to provide guidelines and a brief review of the dos and don'ts of social media, in terms of South African Jurisprudence, matters of reasonable use and legal risks associated with the use of social media.

2. Fundamental rights and Social Media

It is important that we make a distinction between “the right to privacy” and “the right to freedom of expression” as enshrined in the Constitution.

2.1 Right to privacy

Not everyone who is on social media understands the extent of privacy with their social media accounts – no one has the right to have their social media account hacked (without their consent), or have their personal information stolen and/or spread all over social media.

The rights to privacy and to dignity are protected in terms of section 14 of the Bill of Rights in the South African Constitution which stipulates that

- (14) Everyone has the right to privacy, which includes the right to not have
 - (a) their person or home searched;
 - (b) their property searched;
 - (c) their possession seized; or
 - (d) the privacy of their communication infringed

Furthermore section 10 of the Bill of Rights provides that “everyone has an inherent right to have their dignity respected and protected.” See *Isparta v Richter* The Court found the post that was put on Facebook to be scandalous, therefore the court ordered the author of the post and her husband equally liable to pay damages in the sum of ZAR 40 000.(see also *Mckenzie v Braithwaite*)

Furthermore in *Citizen v McBride*⁸ where the Court held that

[...] the Republic is founded on the values of human dignity and failure to uphold that value is both a violation of the constitutional right and a threat to a bedrock principle that underpins the legitimacy of the state

On the other hand, section 86 of the Electronic Communications and Transactions Act 25 of 2002 (ECTA), and several parts of the Regulations of Interception of Communications Act and Provision of Communication-related communications, save where:

- There is a written consent or there are legally accepted grounds of justification as stipulated in RICA, or
- You are a party to the communication

Meaning, everyone has the right to not have their private social media account hacked (without their consent), and their personal information stolen and/or disseminated, or their particular views expressed to the public

In *Attorney General of Georgia v Hardwick*, as cited in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, the court found that

[...] the much-quoted “right to be left alone” should be seen not simply as a negative right to occupy a private space free from government intrusion, but as a right to get on with your life, express your personality. [...] Just as “liberty” must be viewed not merely negatively or selfishly as a mere absence of restraint, but positively and socially as an adjustment of restraints to the end of freedom of opportunity so must “privacy” be regarded as suggesting at least some responsibility on the state to promote conditions in which personal self-realisation can take place.

In *Bernstein and Others v Bester and Others NOO*, Ackermann J pointed out that the scope of privacy is closely related to the concept of identity and that

[...] rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one’s autonomous identity. [...] In the context of privacy this means that it is [...] the inner sanctum of the person such as his/her family life, sexual preference and home environment which is shielded from erosion by conflicting rights of the community.

2.2 Right to freedom of expression

It is clear from the above cases that there is a need for balance and limit with regard to the right to privacy and dignity. The balancing factor in this equation could be the right to freedom of expression which is protected in terms of section 16(1) of the Bill of Rights in the Constitution which stipulates that

- 16(1) 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

These rights can be limited in terms of section 36 and section 16(2) in cases where the freedom of expression promotes

- (a) Propaganda war
- (b) incitement of imminent violence, or
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm

According to Davey and Dahms Jahnsen in dealing with a test of how freedom of expression on social media should be weighed against an individual's right to privacy, giving effect to the right to freedom of expression may adversely affect one's right to dignity.¹ In the case of *S v Mamabolo*, South Africa's Constitutional Court had an opportunity to distil the status of the right to dignity *vis a vis* the right to freedom of expression—and to lay to rest the question of whether the rights are equal or whether the right to freedom of expression trumps any other right in the Constitution

In all these cases the Court granted a mandatory interdict instructing the Respondents to take down any posts regarding the Applicants on Facebook and any other social media site.

It can be deduced that all these rights are inter-twined, in the South African jurisprudential context, the right to freedom of expression is curtailed by the right to dignity, as the right to dignity seems to be an inherent human quality that may not be eroded in by the right to freedom of expression. Individuals must be aware and careful that in exercising their right to freedom of expression and opinion that the rights are

¹

not absolute and may be liable for damages for infringing on one's right to dignity by defaming them.

According to the view of Davey and Dahms-Jahnsen the correct approach to "Dignity and [Freedom in] Social Media " which is also supported herein and was also echoed in the case of *ANC v Penny Sparrows* were the Court had to deal with an case of racial, unreasonable and unacceptable use of social media in which the Equality Court held that

[...] a person's dignity is intrinsic to his or her existence as a human being. Human dignity in the final text is also the foremost foundational value when compared to the interim constitution.

3. Social media in the workplace and Defamation

Although there are no stringent policies put in place with regards to social media in the workplace or in general. Employees generally have a fiduciary duty to act in good faith to their employer, which include to further their employer's business interest and to refrain from misconduct generally, and the public is expected to act in a way that is not against good morals,

In *Fredericks v Jo Barkett Fashions* and *Sedick & another v Krisray (Pty) Ltd*. The employees in these cases were dismissed as a result of their posting of derogatory Facebook status updates. They challenged the fairness of the dismissal at the CCMA, and in both cases the CCMA found that the employees were fairly dismissed as their privacy had not been infringed when their employees accessed their Facebook posts. The CCMA took the view that the employers were entitled, in terms of *RICA*¹², to intercept the posts, because the employees had not restricted their privacy settings and could be viewed by anyone.

(see also *Workers Association of SA obo Mvenwe v Kathorus Community Radio* and *National Union of Food, Beverage, Wine, Spirits and Allied Workers Union obo Arendse v Consumer Brands Business, Worcester, a Division of Power Foods*)

It is important that we realise that even posts that are meant to be a "joke" may have far reaching consequences. In the case of *Chambers v Director of Public Prosecution* on appeal the High Court of Justice judgement considered if one of the messages that

the appellant posted on twitter qualified a message of “menacing character” under the United Kingdom’s Communications Act 2003. The Court considered the *actus reus* requirement, which involves the context of the message and the reactions of the reasonable twitter user to the message and and determined that the Chambers’ “tweet” did not constitute a menacing message within the meaning of the act.

In the above case we see that regardless of the decision that was taken on appeal, anything you say on social media can have a far reaching consequence.

In *Herholdt v Wills* the South Gauteng High Court was called to determine a claim of defamation arising out of a comment that was made on Facebook, to weigh up the right to privacy against the right to freedom of expression. The court emphasized that in our law...

“The fact that the published statement may be true is not, of itself, a defence. The publication must also be for the public benefit. Our law does not protect salacious gossip”

The Judge also pointed out that, the “social” quality of social media has legal implications for publications thereon. The Court therefore held that

“The remarks were defamatory and the Applicants right to privacy, a good name and reputation had been unlawfully infringed by the Respondent”

This was also confirmed in the case of *M v B*. In this case the applicant launched an urgent application seeking an order that the respondent be ordered to remove all messages as contained in annexure ‘D’ to the applicant’s founding affidavit, from her Facebook page and that the respondent be ordered to refrain from posting any further defamatory statements about the applicant on her Facebook page and / or distributing defamatory statements about the applicant.

Furthermore in *Manuel v Economic Freedom Fighters and Others*, the applicant applied for an interdict against the Respondents due to the latter’s publication of allegedly defamatory statements on Twitter, saying, the Applicant had conducted “.... A nepotistic, corrupt, and clandestine process in appointing a SARS Commissioner...”

Similar in the *Hanekom v Zuma* matter the Court found that that Respondent’s tweet regarding the Applicant was defamatory and unlawful. The Court accordingly ordered

the Respondent to remove from all media platforms including Twitter, issue an apology within 24 hours, granted an interdict prohibiting the Respondent from publishing any statement that implies that the Applicant is or was an enemy agent or apartheid spy. The Court further awarded damages amounting to R500 000.00 (Five Hundred Thousand Rands).

4. Concluding remarks

It is clear that social media has us in its palms. For this reason it is important that people are educated on the effects that social media may have in their lives and the legal consequences of abusing it. It is important that people find the balance between the right to freedom of expression and the right to dignity and make use of it in a lawful and acceptable manner, which the courts have now clarified. It is also clear from all the case law that the courts do not take the misuse of social media very light, failure of employee to comply could lead to a dismissal or may expose one to a claim for damages for defamation or may see one receiving an interdict.

Masego Morige

Paralegal

Snail Attorneys @ Law Inc

Skype: Masego Morige

E-mail: masego@snailattorneys.com

References

Legislation

RICA [Regulation of Interception of Communication-related Information Act 70 of 2002]

Electronic Communications and Transactions Act 25 of 2002 (ECTA)

United Kingdom's Communications Act 2003

South African cases

ANC v Penny Sparrows

Bernstein and Others v Bester and Others NOO

CMC Woodworking Machinery (Pty) Ltd v Pieter Ondedaal Kitchens (KZD) 2012 (5) SA 604 (KZD)

Fredericks v Jo Barkett Fashions [2012] 1 BALR 28 (CCMA)

Hanekon v Zuma (D6316/2019) [2019]ZAKZDHC 16 (6 September 2019)

Herholdt v Wills [2013] 2 ALL SA 218

Isparta v Richter [2013] (6) SA 529 (GNP)

M v B

Manuel v Economic Freedom Fighters and Others

Mckenzie v Braithwaite 2015 (1) SA 270 (KZP) and RM V RB 2015 (1) SA 270 (KZP)

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others

National Union of Food, Beverage, Wine, Spirits and Allied Workers Union obo Arendse v Consumer Brands Business, Worcester, a Division of Power Foods [2014] 7 BALR 716 (CCMA)

Sedick & another v Krisray (Pty) Ltd (2011) 32 ILJ 752 (CCMA)

The Citizen 1978 (Pty) Ltd and Others v McBride (CCT 23/10) [2011] ZACC 11; 2011 (4) SA 191 (CC) 2011 (8) BCLR 816 (CC)

Workers Association of SA obo Mvenwe v Kathorus Community Radio(2010) 31 ILJ 2217 (CCMA)

Foreign cases

Attorney General of Georgia v Hardwick

Chambers v Director of Public Prosecutions

Secondary Sources

Cohen, T. (2017, October 10). Go Legal Industry News and Insight. Retrieved from Go Legal: <http://www.golegal.co.za/social-media-company-reputation/>

SAFLII. (n.d.). Retrieved from South African Legal Information Institute: <http://www.saflii.org>

S. Snail (2013). The reasonable use and legal risks associated with the Social Media (available online at www.snailattorneys.com/wp-content/uploads/2013/11/social-media-cases.pdf)

University, C. (2020). *Global Freedom of Expression*. Retrieved from Columbia University in the City of New York: available at <https://globalfreedomofexpression.columbia.edu/cases/chambers-v-dir-of-pub-prosecutions/>