

1 North-West University – Law.
Corner University Drive & Albert
Luthuli Drive, Mmabatho,
South Africa
<https://orcid.org/0000-0003-1881-1242>

2 North-West University – Law.
Mmabatho, South Africa
<https://orcid.org/0000-0001-6691-310X>



A conspectus of constitutional challenges associated with the dismissal of employees for social media-related misconduct in the South African workplace

CONPECTO DOS DESAFIOS CONSTITUCIONAIS ASSOCIADOS À DEMISSÃO DE EMPREGADOS POR MÁ CONDUTA RELACIONADA AO USO DE REDES SOCIAIS NO AMBIENTE DE TRABALHO SUL-AFRICANO

Howard Chitimira¹ e Kefilwe Lekopanye²

Abstract

Currently, there is no legislation that specifically outlaws the misuse of social media in the South African workplace. Consequently, the absence of a robust social media legislation has culminated into several unlawful and unconstitutional dismissals of employees for social media-related misconduct in the South African workplace. Conversely, this gap has also given rise to rampant abuse of social media platforms by employees in the South African workplace. This status quo has caused various constitutional and other related challenges to be experienced by both employees and employers in South Africa. For instance, the abuse of social media by employees in the workplace during working hours could affect the reputation, productivity, and profitability of their employer's business. Similarly, any employers' draconian rules prohibiting or monitoring the use of social-media in the workplace could infringe upon their employees' rights to freedom of expression, privacy, dignity and freedom of association. Accordingly, the article discusses constitutional challenges that could result from the unlawful dismissal of employees for social media-related misconduct in the South African workplace. In this regard, the article exposes challenges that occur when balancing the employees' constitutional rights and the employers' business reputation and related rights. This is done to isolate constitutional problems that ensue from the abuse of social media by employees in the workplace during office working hours. The article also discusses constitutional and related problems that stem from the unlawful dismissals of employees for social media-related misconduct in the South African workplace. Lastly, recommendations that could be adopted to combat employees' social media-related misconduct and enhance the regulation of social media in the South African workplace are provided.

Keywords

Social media-related misconduct; workplace; challenges; Constitution; South Africa.

Resumo

Atualmente, não há legislação que proscrisse especificamente o mau uso de redes sociais no ambiente de trabalho sul-africano. Consequentemente, a ausência de uma rigorosa legislação sobre redes sociais culminou em inúmeras demissões inconstitucionais relacionadas ao mau uso de redes sociais no ambiente de trabalho na África do Sul. Em contrapartida, essa lacuna também favoreceu o uso excessivo das redes sociais pelos funcionários de empresas desse mesmo país. Esse status quo causou vários desafios constitucionais e de outros tipos, enfrentados tanto pelos empregados quanto pelos empregadores na África do Sul. Por exemplo, o uso excessivo de redes sociais por empregados em seu horário de trabalho pode afetar a reputação, a produtividade e a rentabilidade do negócio do empregador. De modo

semelhante, qualquer regra muito rigorosa de proibição ou monitoramento do uso de redes sociais no ambiente de trabalho pode infringir os direitos dos empregados de liberdade de expressão, de privacidade, de dignidade e de liberdade de associação. Dessa maneira, este artigo apresenta os desafios constitucionais que poderiam resultar de demissões ilegais de empregados em razão de má conduta relacionada ao uso de redes sociais no ambiente de trabalho na África do Sul. Sob esse aspecto, o presente artigo apresenta os desafios que podem ocorrer na tentativa de equilíbrio entre os direitos constitucionais dos empregados e a reputação e direitos conexos do negócio do empregador. Este texto foi escrito com o objetivo de isolar os problemas constitucionais que resultam do uso excessivo de redes sociais por empregados durante seu horário de trabalho. Discute também os problemas constitucionais e outros a eles relacionados que se originam de demissões contrárias à lei em razão do mau uso de redes sociais por empregados no ambiente de trabalho sul-africano. Por fim, são fornecidas recomendações que poderiam ser adotadas para combater a má conduta relacionada ao mau uso das redes sociais e para aumentar a regulamentação das redes sociais no ambiente de trabalho da África do Sul.

Palavras-chave

Má conduta relacionada ao uso de redes sociais; ambiente de trabalho; desafios; Constituição; África do Sul.

INTRODUCTION

Currently, there is no legislation that specifically outlaws the misuse of social media in the South African workplace. Consequently, the absence of a robust social media legislation has culminated into several unlawful and unconstitutional dismissals of employees for social media-related misconduct in the South African workplace.¹ Conversely, this gap has also given rise to rampant abuse of social media platforms by employees in the South African workplace. This *status quo* has caused various constitutional and other related challenges to

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* This article was influenced in part by Kefilwe Lekopanye's LLM dissertation entitled *Selected Challenges Associated with the Dismissal of Employees for Social Media-Related Misconduct in the South African Workplace*. This article also made use of *Potchefstroom Electronic Law Journal* standard of style and citation, available at <http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-per/documents/PER_Standard%20for%20Style%20and%20Citation_ENGLISH_rev23-08-2016_FINAL.pdf>. Accessed: 26 dec. 2018.

¹ It must be noted that the article is only limited to the employees' misuse of social media during office working hours and their subsequent dismissal for social media-related misconduct in the South African workplace. "Lekopanye K *Selected Challenges Associated with the Dismissal of Employees for Social Media-Related Misconduct in the South African Workplace* (LLM dissertation North-West University 2018) 74-99".

be experienced by both employees and employers in South Africa.² For instance, the abuse of social media by employees in the workplace during working hours could affect the reputation, productivity, and profitability of their employer's business.³ Similarly, any employers' draconian rules prohibiting or monitoring the use of social-media in the workplace could infringe upon their employees' rights to freedom of expression, privacy, dignity, and freedom of association.⁴ Accordingly, the article discusses constitutional challenges that could result from the unlawful dismissal of employees for social media-related misconduct in the South African workplace.⁵ In this regard, the article exposes challenges that occur when balancing the employees' constitutional rights and the employers' business reputation and related rights.⁶ This is done to isolate constitutional problems that ensue from the abuse of social media by employees in the workplace during office working hours. This is further done to explore constitutional and related problems that stem from the unlawful dismissals of employees for social media-related misconduct in the South African workplace.

Moreover, the article points out that the Constitution⁷ is the supreme law of South Africa. Consequently, any law or conduct that is inconsistent with the Constitution is invalid.⁸

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- 2 Lekopanye *Dismissal of Employees for Social Media-Related Misconduct* 74-99; Visser A *Freedom of Expression in the Workplace and Social Networking Systems* (LLM dissertation University of Johannesburg 2016) 3-45.
- 3 Russell R and Stutz M "Social Media: What Employers Need to Know" 2014 *Journal of Internet Law* 3 3-5; Davey R "Dismissals for Social Media Misconduct" 2012 *De Rebus* 80 81-83; McDonald P and Thompson P "Social Media(tion) and the Reshaping of Public/Private Boundaries in Employment Relations" 2016 *International Journal of Management Reviews* 69 70-81; Broughton A, Higgins T, Hicks B and Cox A *Workplaces and Social Networking: The Implications for Employment Relations* (Research Paper, Ref: 11/11, The Institute for Employment Studies 2009) 1-35.
- 4 McGoldrick D "The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective" 2013 *Human Rights Law Review* 125 125-151; Davey 2012 *De Rebus* 82-83; Cilliers FG "The Role and Effect of Social Media in the Workplace" 2013 *Northern Kentucky Law Review* 567 568-592; Buchbach J *Social Media Policies and Work: Reconciling Personal Autonomy Interests and Employer Risk* (PHD thesis Queensland University of Technology 2017) 15-255.
- 5 Lekopanye *Dismissal of Employees for Social Media-Related Misconduct* 74-99; Visser *Freedom of Expression in the Workplace* 3-45; Hoy JS *Employee Behaviour in Social Media Environments Impacting Corporate Reputational Risk* (MBA University of Pretoria 2012) 1-112.
- 6 Štefko M "Social Media in the Workplace in the Czech Republic, Poland and Slovakia" 2016 *International Journal for Legal Research* 11 11-17; Justin P "'Never Tweet?' Social Media and Unfair Dismissal" 2016 *Alternative Law Journal* 271 272-274; Mtuze K and Snail S "Social Media-Reasonable Use and Legal Risks" 2016 *Without Prejudice* 18 18-20; Mangan D *A Platform for Discipline: Social Media Speech and the Workplace* (Osgoode Legal Studies Research Paper No. 08/2015, 2015) 1 2-28 and Lam H "Social Media Dilemmas in the Employment Context" 2016 *Employee Relations* 420 421-437.
- 7 *Constitution of the Republic of South Africa*, 1996 (Constitution).
- 8 Sections 1(c) and 2 of the Constitution.

Thus, any employee dismissal for social media-related misconduct would be unfair if that employee's use of social media in the workplace was *bona fide* and/or did not constitute a serious misconduct. In this regard, a serious misconduct is conduct which could warrant or justify a dismissal of an employee by his or her employer for social media-related misconduct. For instance, when an employee posts defamatory, racial or prejudicial remarks about his or her employer or other employees on social media platforms, he or she can be lawfully dismissed by the employer for social media-related misconduct.⁹ Such misconduct could subsequently damage the name of the employer and other employees in the workplace. The Constitution states that everyone has the right to fair labour practices.¹⁰ An unfair dismissal occurs where an employer fails to provide justifiable reasons for the dismissal of the employee in question.¹¹ Such justifiable reasons usually relate to the conduct or capacity of an employee¹² or based on the operational requirements of the employer.¹³ Therefore, dismissal of employees without justifiable reasons constitute an unfair labour practice in terms of the South African Constitution. For this reason, the article analyses the rights to dignity,¹⁴ privacy,¹⁵ freedom of expression,¹⁶ and freedom of association¹⁷ in relation to some Constitutional challenges associated with the dismissal of employees for social media-related misconduct in South Africa. For instance, Constitutional challenges involving the employers' intrusion on their employees' personal social media accounts and/or social media platforms are discussed. Obviously, such intrusion on the part of the employer negatively affects the employees' rights to freedom of expression, dignity, freedom of association and privacy by unlawfully restricting and/or interfering with their use of social media in the workplace.¹⁸ Lastly, recommendations that could be adopted to combat employees' social

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⁹ Lam 2016 *Employee Relations* 421-437; Davey 2012 *De Rebus* 81-83; Štefko 2016 *International Journal for Legal Research* 11-17.

¹⁰ Section 23(1) of the Constitution.

¹¹ Section 188(1)(a) of the *Labour Relations Act* 66 of 1995 (LRA) as amended by the *Labour Relations Amendment Act* 6 of 2014.

¹² Section 188(1)(a)(i) of the LRA.

¹³ Section 188(1)(a)(ii) of the LRA.

¹⁴ Section 10 of the Constitution.

¹⁵ Section 14 of the Constitution.

¹⁶ Section 16 of the Constitution.

¹⁷ Section 18 of the Constitution.

¹⁸ Abril PS, Levin A and Del Riego A "Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee" 2012 *American Business Law Journal* 63 65-124.

media-related misconduct and enhance the regulation of social media in the South African workplace are provided.

I SCOPE AND LIMITATION OF THE ARTICLE

The discussion on the broad aspects of the principle of constitutional subsidiarity is beyond the scope of this article. The article is only limited to the employees' misuse of social media during office working hours and their subsequent dismissal for social media-related misconduct in the South African workplace. This entails that any lawful use of social media by employees in the South African workplace during normal working hours will not give rise to social media-related misconduct and/or their dismissal. Thus, although it might not really matter where and when (actual time) the misuse of social media by employees occurs, the article does not cover any abuse of social media by employees at their own leisure time outside the workplace working hours. In this regard, the authors submit that although the misuse of social media use by employees at their own leisure time outside normal working hours could affect their employers' business or reputation, the employees would ordinarily be held personally liable for their conduct through civil proceedings other than their employers' workplace social media-related rules. It is submitted that the outlawing of the abuse of social media by employees outside the workplace working hours must be carefully enforced to avoid over-criminalisation and undue restriction of their constitutional rights to privacy and freedom of association.¹⁹ The article is mainly premised on the adequacy of the current labour-related laws and social media-related rules and/or practices in the South African workplace. Consequently, social media-related practices and related laws in other countries are not covered in this article. The article seeks to expose the problems that normally result from the negative content of social media posts of both employees and employers in the South African workplace. This is done to isolate the challenges that occurs, especially, for employees that are sometimes dismissed for expressing their views on social media platforms, including all electronic communications via emails *bona fide*. For instance, if an employee write a non-derogatory email or social media post about their employer, other employees, work, or any other person in the workplace during office working hours, he or she must not be liable for social media-related misconduct. The authors submit that the strict and unfair application of social media rules and laws could violate the employees' rights to privacy and freedom of expression. On the other hand, the absence of clear, flexible and adequate social media laws and/or rules in the workplace could also affect the employers who could be held vicariously liable for their employees' social media-related misconduct.

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¹⁹ Lekopanye *Dismissal of Employees for Social Media-Related Misconduct* 15-19.

Such laws and rules must clearly define what social media entails and the acceptable and/or prohibited social media conduct in the workplace to protect both employers and employees from violating social media laws and rules ignorantly. Social media-related laws and rules must also provide penalties and applicable factors that must be considered by employers and/or the courts when dealing with social media-related misconduct cases in the South African workplace. Lastly, social media-related laws and rules must carefully provide the necessary boundaries between acceptable and prohibited conduct of both employees and employers in the workplace. This approach will empower employers, courts and other relevant persons to strike a health balance between the employers' right to good name and to dismiss employees for social media-related misconduct and the employees' rights to privacy and freedom of expression.

2 METHODOLOGY

No empirical research methods as well as questionnaires, statistical and other quantitative methods are employed in this article. The article is mainly focused on the general statutory and constitutional analysis of social media laws and/or rules in the South African workplace. The authors employ qualitative research methods in this article. Nonetheless, no specific theories and/or theoretical analysis on the use of social media in the workplace is employed in this article. Moreover, related general principles and/or related arguments underlying social media-related misconduct in the South African workplace will only be referred to where necessary for clarity and comparative purposes.

3 DEFINITION OF KEY TERMS

For the purposes of this article, the term “social media-related misconduct” is defined as the improper and/or unlawful use of social media by employees in the workplace during office hours to the detriment of their employers, employers' business or other persons.²⁰ It is submitted that social media-related misconduct occurs, *inter alia*, when employees deliberately or recklessly post derogatory comments about other persons, including their employer's conduct or business, on social media platforms. Accordingly, such conduct could result in the dismissal of employees in question for social media-related misconduct in the South African workplace.²¹ However, the aforesaid definition does not expressly indicate whether derogatory

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²⁰ Lekopanye *Dismissal of Employees for Social Media-Related Misconduct* 15-19.

²¹ Davey R 2016 *Off Duty Misconduct in the Age of Social Media* <http://www.golegal.co.za/off-duty-misconduct-in-the-age-of-social-media/> accessed 24 February 2016 1; Visser *Freedom of Expression in the Workplace* 3-45 and Cilliers 2013 *Northern Kentucky Law Review* 568-592.

comments should only include racial, prejudicial and defamatory comments by employees on social media platforms. Despite this, the authors submit that social media-related misconduct should be statutorily outlawed to prohibit all the forms of social media-related misconduct in the South African workplace.

The term “social media” includes social interactions between one person and another using technology and related instruments such as the Internet and cell phones through any combination of words, pictures, videos, email sharing, documents or audio sharing.²² Social media also constitutes mobile and web-based technologies that allow people to interact by both sharing and consuming information through social media platforms or email communication.²³ This definition is satisfactorily broad as it includes several factors and/or conduct that could be regarded as social media.

Moreover, a “misconduct” could include any wrong doing or delinquency on the part of the employee. Thus, any intentional, deliberate, negligent, unacceptable or improper conduct of an employee is regarded as misconduct in the workplace. For instance, a misconduct could occur when an employee culpably disregards the rules for the workplace that are given or indicated by express or implied terms of his or her employment contract and the employer’s disciplinary code.²⁴ The definition of misconduct does not adequately outline what constitutes a misconduct for the purposes of social media-related misconduct in South Africa. However, the misconduct definition does not cause confusion, as it is relatively clear and can be understood by a layperson. This could suggest that employers and the relevant courts can consistently apply the definition of misconduct in relation to social media-related cases in South Africa.

Generally, in the LRA, the word “workplace” refers to a place or places where the employees of an employer work.²⁵ Although the term “workplace” is broadly defined with reference to public service and other purposes under the LRA,²⁶ it is not clearly indicated whether this definition is applicable to all types of workplace where employees are required to provide services irrespective of their different employment contracts. Therefore, in this article, the term “workplace” refers to a place of employment for employees where they work or conduct their duties on a temporal, contract or permanent basis during normal office working

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²² Venezia SJ “The Interaction of Social Media and the Law and How to Survive the Social Media Revolution” 2012 *New Hampshire Bar Journal* 24 25-39.

²³ Kietzmann JH, Hermkens K, McCarthy IP and Silvestre BS “Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media” 2011 *Business Horizons* 241 243-251.

²⁴ Grogan J *Dismissal* 5 ed (Juta Cape Town 2013) 143.

²⁵ Section 213 of the LRA.

²⁶ Section 213 of the LRA.

hours. In this regard, social media-related misconduct by employees outside the workplace or normal office working hours is beyond the scope of this article.

The term “dismissal” is broadly defined in the LRA. This Act enumerates a number of instances where an employee can be dismissed by his or her employer.²⁷ For instance, dismissal entails that an employer has terminated a contract of employment of an employee with or without prior notice.²⁸ Dismissal also occurs when an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or does not renew it.²⁹ In this regard, the expectation of the employee must be objectively assessed by the courts and other interested parties. Moreover, a dismissal occurs where the employer refuses to allow an employee to resume work after she: (a) took maternity leave;³⁰ or (b) was absent from work for up to four weeks before the expected date, and up to eight weeks after the actual date of the birth of her child.³¹ Dismissal also occurs when an employer who dismissed several employees for the same reasons offers to re-employ one or more of them but refuses to re-employ the other employees.³² Dismissal further occurs when an employee terminates a contract of employment with or without prior notice after a transfer in terms of section 197 or section 197A of the LRA because the new employer provides the employee with conditions or circumstances at work that are less favourable than those provided to the employee by the old employer.³³ The LRA also stipulates that a dismissal could occur when an employee terminates a contract of employment with or without notice due to intolerable working conditions from his or her employer.³⁴ This also amounts to constructive dismissal on the part of the employer. As indicated, the definition of “dismissal” as contained in the LRA is satisfactorily broad because it outlines a number of instances where a dismissal of an employee could occur in the South African workplace. This suggests that the same or similar instances can also be employed in respect of employee dismissals for social media-related misconduct in the South African workplace.

Furthermore, “social media abuse” occurs, *inter alia*, where employees use social media inappropriately by posting material that may be defamatory, racist and prejudicial to the

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²⁷ Section 186(1) of the LRA.

²⁸ Section 186(1)(a) of the LRA.

²⁹ Section 186(1)(b) of the LRA.

³⁰ Section 186(1)(c)(i) of the LRA.

³¹ Section 186(1)(c)(ii) of the LRA.

³² Section 186(1)(d) of the LRA.

³³ Section 186(1)(f) of the LRA.

³⁴ Section 186(1)(e) of the LRA.

employer and other persons.³⁵ This definition usefully provides some examples where employees could abuse social media to the detriment of others by failing to take into consideration the consequences of their social media comments or posts. Employees should take responsibility for their social media abuse and they must face disciplinary sanctions for their social media-related misconduct in the workplace.

An “employer” is a legal entity that controls and directs employees to perform their duties in the workplace in terms of the express or implied terms of the employment contract.³⁶ In short, an employer is any person or organisation that hires or employs people in relation to their various expertise and services. The term “employer” is not expressly defined in the Basic Conditions of Employment Act³⁷ and the LRA.³⁸ However, the employer is obliged to pay remuneration to employees under both the BCEA and the LRA.³⁹ It is submitted that both the BCEA and the LRA should be amended to provide adequate definitions of the term “employer” which state the meaning of the employer and the obligations that could occur under the employment contract in South Africa.

The LRA and the BCEA provides that an “employee” is any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive a remuneration from the employer.⁴⁰ These Acts also stipulate that an employee is any other person who assists in carrying on or conducting the business of an employer in any manner.⁴¹ This shows that a similar definition of the term “employee” that merely provides that an employee is any person working for, or employed by another person is duplicated in the BCEA and the LRA.

Lastly, the term “employment relationship” refers, *inter alia*, to a legal link between employers and employees where reciprocal rights and obligations are created between them.⁴²

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³⁵ Personnel 2016 *Computer Misuse* <http://www.personneltoday.com/hr-practice/computer-misuse/> accessed 10 September 2016 1.

³⁶ Lekopanye *Dismissal of Employees for Social Media-Related Misconduct* 15-19.

³⁷ 75 of 1997 as amended (BCEA), see section 1.

³⁸ See section 213.

³⁹ See sections 1 and 213 of the BCEA and the LRA respectively. See further Gelms J “High-Tech Harassment: Employer Liability under Title VII for Employee Social Media Misconduct” 2012 *Wash. L. Rev* 249 250-279.

⁴⁰ Section 1 of the BCEA; section 213 of the LRA.

⁴¹ Section 1 of the BCEA; section 213 of the LRA.

⁴² International Labour Organisation 2016 *Employment Relationship* http://ilo.org/ifpdial/areas-of-work/labour-law/WCMS_CON_TXT_IFPDIAL_EMPREL_EN/lang—en/index.htm accessed 16 March 2016 1.

This normally occurs when employees or any person renders his or her services or performs some duties and/or work for another person or for the employer under certain conditions in return for remuneration. Thus, an employment relationship cannot exist without the reciprocal rights and obligations between the employer and the employee. Such rights and obligations assist in the running of the employer's business for the benefit of both the employer and employee.⁴³

4 CONSTITUTIONAL RIGHTS AFFECTED BY THE DISMISSAL OF EMPLOYEES FOR SOCIAL MEDIA-RELATED MISCONDUCT

4.1 THE RIGHT TO PRIVACY UNDER THE CONSTITUTION

Privacy can be defined as an individual condition of life which is characterised by seclusion from the public and publicity.⁴⁴ A person's right to privacy empowers him or her to have control over his or her affairs, free of unsolicited intrusions by employers and other employees.⁴⁵ The intrusions may arise when an employee is monitored in the workplace. For instance, the information obtained from such monitoring is sometimes erroneously and unlawfully regarded as social media-related misconduct by the employer.⁴⁶ The establishment of the right to privacy has its origins in the proclamations stated in more than a century ago by Brandeis and Warren.⁴⁷ Brandeis and Warren submitted that privacy is an individual's absolute right to be left alone.⁴⁸

The right to privacy is constitutionally protected in South Africa.⁴⁹ Accordingly, a two-stage enquiry is conducted by the courts in relation to the protection of the right to privacy in South Africa. This enquiry is conducted to assess whether someone's right to privacy was violated by the state and/or another person.⁵⁰ The scope of the right to privacy is analysed to

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⁴³ Lekopanye *Dismissal of Employees for Social Media-Related Misconduct* 15-19.

⁴⁴ *Bernstein v Bester* 1996 2 SA 751 (CC) para 94.

⁴⁵ Neethling J, Potgieter JM and Visser PJ *Neethling's Law of Personality* 2 ed (Lexis Nexis Durban 2005) 31.

⁴⁶ Davey 2012 *De Rebus* 80-83.

⁴⁷ Warren SD and Brandeis LD "The Right to Privacy" 1890 *Harvard Law Review* 193 194-220; Baum KJ "E-mail in the Workplace and the Right of Privacy" 1997 *Villanova Law Review* 1011 1012-1042.

⁴⁸ Warren and Brandeis 1890 *Harvard Law Review* 194-220; Baum 1997 *Villanova Law Review* 1041-1042.

⁴⁹ Section 14 of the Constitution.

⁵⁰ Currie I and De Waal J *The Bill of Rights Handbook* 6 ed (Juta Cape Town 2013) 295.

determine whether conduct, in this context social media-related misconduct, has infringed someone's right to privacy.⁵¹ If it is established that there was an infringement, it must be determined whether such infringement is justifiable in accordance with the limitation clause.⁵²

In South Africa, the right to privacy enjoys protection in terms of both the common law and the Constitution. However, the right to privacy is not always consistently protected in the South African workplace.⁵³ Prior to the advent of social media, employees would voice their objections at social gatherings, usually at the end of the workday or during a break at work.⁵⁴ Nowadays, derogatory remarks which may have been made in person at one time are sometimes posted on an employee's social media platform.⁵⁵ In the 19th century, employers adopted a laissez-faire approach⁵⁶ to employees' use of social media⁵⁷ because there was no abuse of social media by employees in the South African workplace. Consequently, employees were encouraged by employers to become comfortable and familiar with new technologies and to explore the World Wide Web and/or other relevant Internet-related technologies.⁵⁸ Two reasons were cited for the adoption of the laissez-faire approach. Firstly, some employers held that the laissez-faire approach could enable the employees to perform their workplace duties much better.⁵⁹ Secondly, the laissez-faire approach was adopted because employers were ignorant of the inherent risk that social media imposes on their workplace duties and businesses.⁶⁰ Moreover, various intrusions and/or contraventions of employees' right to privacy by employers were not yet prevalent since employers were not monitoring the activities of their employees on social media platforms in the

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⁵¹ Currie and De Waal *The Bill of Rights Handbook* 295.

⁵² Section 36 of the Constitution.

⁵³ Gondwe M *The Protection of Privacy in the Workplace: A Comparative Study* (LLD-dissertation University of Stellenbosch 2011) 52.

⁵⁴ Mangan *Osgoode Legal Studies Research Paper* No. 08/2015, 2015 3.

⁵⁵ Mangan *Osgoode Legal Studies Research Paper* No. 08/2015, 2015 3.

⁵⁶ According to the Cambridge dictionary, laissez-faire approach means, *inter alia*, the unwillingness to get involved in or influence other people's activities. See further <https://dictionary.cambridge.org/dictionary/english/laissez-faire> accessed 18 January 2018.

⁵⁷ Pistorius T "Monitoring, Interception and Big Boss in the Workplace: Is the Devil in the Details?" 2009 *PER* 1 2-21.

⁵⁸ McGregor M "The Right to Privacy in the Workplace: General Case Law and Guidelines for Using the Internet and E-Mail" 2004 *SA Merc LJ* 638 640-650.

⁵⁹ McGregor 2004 *SA Merc LJ* 638-640.

⁶⁰ McGregor 2004 *SA Merc LJ* 640-650.

workplace.⁶¹ However, employers that monitor social media activities of their employees in the South African workplace during office working hours may now easily violate such employees' right to privacy.⁶²

If the employer invades the employee (plaintiff)'s right to privacy, a careful assessment of such invasion of the right to privacy has to be made by the court. Watermeyer AJ rejected the argument that the right to privacy should be equated with the right to dignity.⁶³ Nonetheless, the courts or any tribunal must carefully assess all the relevant factors when determining the appropriate sanctions against employers that violate their employees' right to privacy while trying to combat social media-related misconduct in the workplace. This could be supported in part, by the fact that the *O'Keeffe* case became the *locus classicus* for the recognition of an independent right to privacy in the South African law.⁶⁴ Therefore, it must be noted that the right to privacy plays a crucial role in an individual's life. Accordingly, the right to privacy is important to an employee and the employer should not violate it through unlawful measures aimed at curbing social media-related misconduct. Where such violations occur and the employee is dismissed, the dismissal will be unfair and unjustified. Conversely, a fair dismissal would not amount to a violation of the employee's right to privacy because it would be justified. For instance, if the employee has posted derogatory comments about the employer on a social media platform, the employer will be entitled to dismiss that employee.⁶⁵ In this regard, it is submitted that the courts should consider the convictions of the society in determining whether some violations by the employer entail the impairment or violation of an employee's right to privacy.⁶⁶

The Constitution states that everyone has the right to privacy,⁶⁷ which includes the individual's right not to have their: (a) person or home searched;⁶⁸ (b) property searched;⁶⁹ (c) possessions seized;⁷⁰ and/or (d) privacy of their communications intercepted without

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⁶¹ Mangan *Osgoode Legal Studies Research Paper* No. 08/2015, 2015 3.

⁶² Davey 2012 *De Rebus* 80-83.

⁶³ *O'Keeffe v Argus Printing and Publishing Company Ltd* 1954 (3) SA 244 (C) 40 (*O'Keeffe* case).

⁶⁴ Padayachee C *Employee's Right to Privacy versus the Employer's Right to Monitor Electronic Communications in the Workplace* (LLB-dissertation University of KwaZulu-Natal 2015) 13.

⁶⁵ Davey 2012 *De Rebus* 80-83.

⁶⁶ Padayachee *Employee's Right to Privacy* 13.

⁶⁷ Section 14 of the Constitution.

⁶⁸ Section 14(a) of the Constitution.

⁶⁹ Section 14(b) of the Constitution.

⁷⁰ Section 14(c) of the Constitution.

prior consent or legal permission.⁷¹ Therefore, when an employer unlawfully intercepts social media communications of an employee in the workplace during office working hours, this could amount to an invasion or violation of that employee's right to privacy.⁷²

4.1.1 THE RIGHT TO PRIVACY UNDER COMMON LAW

The need to protect the right to privacy in South Africa can be traced back as early as the 1950s.⁷³ The right to privacy is protected by *actio iniuriarum* to remedy its breach by offenders under common law.⁷⁴ The common law protection of the right to privacy involves a single enquiry by the courts which assesses whether the invasion of someone's privacy was unlawful.⁷⁵ The *actio iniuriarum* was recognised by the Roman jurists who discovered a number of remedies for the impairment to constitutional rights.⁷⁶ The *actio iniuriarum* was utilised for a wrong which could be interpreted as an impairment of the right to privacy such as the invasion of the sanctity of another person's home.⁷⁷ However, in the early 1950s there were no social media platforms, therefore, an employee could not be dismissed for social media-related misconduct.⁷⁸

As indicated above, a person can rely on *actio iniuriarum* and other law of delict actions for the protection of his or her right to privacy under the South African common law.⁷⁹ A delict is a wrongful, culpable conduct of any person that causes harm to another.⁸⁰ In *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another*,⁸¹ the court held that a breach of the right to privacy could occur through any unlawful intrusion by the employer upon the personal privacy of the employee, or by the employer's unlawful disclosure of private facts about that employee to other persons. The court held further that the unlawfulness of any

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⁷¹ Section 14(d) of the Constitution.

⁷² Cilliers 2013 *Northern Kentucky Law Review* 568-592.

⁷³ Burchell J "The Legal Protection of Privacy in South Africa: A Transplantable Hybrid" 2009 *Electronic Journal of Comparative Law* 1 2-26.

⁷⁴ Currie and De Waal *The Bill of Rights Handbook* 295.

⁷⁵ Currie and De Waal *The Bill of Rights Handbook* 295.

⁷⁶ Burchell 2009 *Electronic Journal of Comparative Law* 6.

⁷⁷ Burchell 2009 *Electronic Journal of Comparative Law* 6.

⁷⁸ Mangan *Osgoode Legal Studies Research Paper* No. 08/2015, 2015 1-26.

⁷⁹ Papadopoulos S "Revisiting the Public Disclosure of Private Facts in a Cyberworld" 2009 *Obiter* 30 32-43.

⁸⁰ Neethling J "The Concept of Privacy in South African Law" 2005 *SALJ* 18 20-28.

⁸¹ *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1991 (2) SA 11 (W) (*Financial Mail* case).

infringement upon someone's right to privacy is determined in light of the contemporary *boni mores* and the general sense of the community as perceived by the court.⁸²

Social media is increasingly becoming a regular medium of communication for all persons globally. However, this has caused the protection of both employees and employers' right to privacy to be relatively difficult in the workplace.⁸³ In this regard, it is submitted that the employees' right to privacy under both the common law and the Constitution is not absolute since it can be lawfully limited by the employer's policies that are aimed at curbing social media-related misconduct in the workplace. This view is supported by *Case v Minister of Safety and Security*,⁸⁴ where the court held that the protection of the right to privacy is broad but it can be limited in appropriate circumstances.⁸⁵ Moreover, section 36 of the Constitution enumerates the manner in which the right to privacy may be limited. The limitation of the common law right to privacy in terms of the Constitution must be reasonable and justifiable.⁸⁶ The limitation must be based on human dignity, equality and freedom, taking into account all relevant factors including:

- a) the nature of the right;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the relation between the limitation and its purpose; and
- e) any other less restrictive means to achieve the purpose.⁸⁷

Accordingly, the employee's common law right to privacy may be limited to a certain extent by the employer through social media policies, and such limitation may be constitutionally justified when an employee's use of social media affected his or her employment duties and the employer's business reputation.⁸⁸

There is uncertainty whether information and communications that are normally considered private but are later published to the public could still enjoy legal protection in the

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⁸² *Financial Mail* case 11; see further *O'Keeffe* case 45.

⁸³ Antoniades L *Social Networks in the Workplace* (LLM-dissertation University of Pretoria 2015) 6.

⁸⁴ *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC) (*Case* case).

⁸⁵ *Case* case 106.

⁸⁶ Section 36(1) of the Constitution.

⁸⁷ Section 36(1) of the Constitution.

⁸⁸ Dekker A "Vices or Device: Employee Monitoring in the Workplace" 2004 *SA Merc LJ* 622 624-637.

workplace under common law and/or the Constitution.⁸⁹ According to Neethling,⁹⁰ individuals should be entitled to decide for themselves what personal information may be intercepted, collected and used by employers. It is submitted that the determination of what personal information of the employee may be intercepted by the employer should be legally recognised.⁹¹ This legal recognition should provide that an employee must be allowed to determine the social media content that the employer is allowed to access.⁹² The employer should not recklessly use any information obtained from social media platforms to dismiss an employee for social media-related misconduct unless such information is defamatory or harmful to other employees and/or the employer.⁹³

The employment relationship between an employee and his or her employer is regarded as *sui generis* or unique. Clarifying privacy is sometimes difficult to describe in the context of an employment relationship because of such uniqueness.⁹⁴ Employees are usually under the belief that the information they post on social-media platforms is private, based on their privacy settings.⁹⁵ Employees also believe that their right to privacy under both common law and the Constitution will protect their information from being accessed or used against them by their employers for reprisals in the future.⁹⁶

In order to establish whether an employee or someone's right to privacy was violated by the employer or another person under common law, there has to be a link between the space, secrecy, seclusion, subject matter, and privacy itself.⁹⁷ This is evident from case law.⁹⁸ Moreover, this could indicate that, as an employee interacts on social media, there are possibilities that his or her right to privacy may be lawfully limited in terms of the Constitution

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⁸⁹ Cilliers 2013 *Northern Kentucky Law Review* 581-582.

⁹⁰ Neethling, Potgieter and Visser *Neethling's Law of Personality* 10.

⁹¹ Neethling, Potgieter and Visser *Neethling's Law of Personality* 10.

⁹² Cilliers 2013 *Northern Kentucky Law Review* 592.

⁹³ Davey 2012 *De Rebus* 80-83.

⁹⁴ Dekker 2004 *SA Merc LJ* 626.

⁹⁵ Cilliers 2013 *Northern Kentucky Law Review* 567.

⁹⁶ Facebook 2013 *Statement of Rights and Responsibilities* <http://www.Facebookcom/legal/terms> accessed 12 January 2016 1.

⁹⁷ Papadopoulos 2009 *Obiter* 37.

⁹⁸ *Bernstein v Bester* 1996 2 SA 751 (CC) 789, *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2000 BCLR 1079 (CC) 557.

or common law.⁹⁹ However, it is questionable whether a reasonable expectancy of the right to privacy on social media platforms exist in the South African workplace context.¹⁰⁰ Despite this, it is submitted that everyone has the right not to have their private social media account hacked and personal information disseminated without their prior consent.¹⁰¹ A legitimate expectation of privacy comprises two components, namely, a subjective and objective expectancy.¹⁰² The subjective component provides an explanation of the permissibility of waivers of privacy.¹⁰³ For instance, an employee may not have an expectancy of privacy if consent was given explicitly or implicitly to having such privacy invaded by the employer or other persons.¹⁰⁴ Furthermore, an infringement on the employee's right to privacy may not be considered when he or she allows social media friends to access and abuse his or her account by posting derogatory information on social media platforms.¹⁰⁵ This entails that an employee may not claim an invasion of privacy of his or her social media communications, if he or she gave prior consent to the alleged offenders. However, there are certain instances where consent is not granted either explicitly or implicitly but an invasion of privacy still occurs. For instance, in *Smith v Partners in Sexual Health (non-profit)*,¹⁰⁶ an organisation's chief executive officer accessed an employee's private gmail e-mail account while she was on leave. Access to the employee's private email was unlawful as the employee did not give consent to such interception. This constituted an invasion of the employee's right to privacy. Unfortunately, this invasion led to the unlawful dismissal of the employee for social media-related misconduct. An email interaction may constitute social media communication as employees use e-mail to share information, pictures and documents that can be published by other employees or persons on their social media platforms.¹⁰⁷

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⁹⁹ Cheadle MH, Davis DM and Haysom NRL *South African Constitutional Law: Bill of Rights* (Butterworths Durban 2000) 76.

¹⁰⁰ Ka Mtuze SS 2015 *The Reasonable Use and Legal Risks Associated with Social Media – A Discussion of Cases and the Constitution* <http://www.snailattorneys.com/wp-content/uploads/2013/11/social-media-cases.pdf> accessed 14 November 2016 1-4.

¹⁰¹ Ka Mtuze 2015 <http://www.snailattorneys.com/wp-content/uploads/2013/11/social-media-cases.pdf> accessed 14 November 2016 1-4.

¹⁰² Currie and De Waal *The Bill of Rights Handbook* 298.

¹⁰³ Currie and De Waal *The Bill of Rights Handbook* 298.

¹⁰⁴ Currie and De Waal *The Bill of Rights Handbook* 298.

¹⁰⁵ Ka Mtuze 2015 <http://www.snailattorneys.com/wp-content/uploads/2013/11/social-media-cases.pdf> accessed 14 November 2016 1-4.

¹⁰⁶ *Smith v Partners in Sexual Health (non-profit)* (2011) 32 ILJ 1470 (CCMA).

¹⁰⁷ Venezia 2012 *New Hampshire Bar Journal* 25-30.

In *Moonsamy v The Mailhouse*,¹⁰⁸ the Commission for Conciliation, Mediation and Arbitration (CCMA) found that tape recordings recorded by the employer by way of interception, listening and recording device violated the privacy of the affected employee. The recording device was connected to the employee's telephone on the employer's premises and the tape recordings were regarded as an invasion of the employee's privacy. However, the CCMA noted that it is difficult to clarify the nature of the employee's right to privacy in workplace during office working hours. This case did not directly deal with the abuse of social media platforms and social media-related misconduct by employees but it shows how an employee's common law and/or constitutional right to privacy can be violated by an employer in the workplace. The authors submit that social media rules and laws must clearly provide instances where interception of employees' emails and social media accounts by employers in the workplace is acceptable and lawful. The same rules and laws should further provide adequate factors and conditions that must be met by employers before they intercept emails and social media accounts of their employees in the workplace. This will combat any unlawful access of employees' emails and social media accounts by employers and the violation of the employees' constitutional rights to privacy and freedom of association in the South African workplace. In addition, any interception of emails and social media accounts by employers must be undertaken in accordance with the constitution, the LRA,¹⁰⁹ schedule 8 of the Code of Good Practice of the LRA,¹¹⁰ the Regulation of Interception of Communications and Provision of Communication-related Information Act¹¹¹ and other relevant laws.

In *Cronje v Toyota Manufacturing*,¹¹² an employee was dismissed because of a racist cartoon that he distributed at his workplace. The applicant received an email that he printed out to other colleagues at a meeting. The email consisted of a cartoon depicting an adult and a young gorilla, both with the head of President Robert Mugabe pasted on them. The caption stated "we want to grow bananas". He defended himself by stating that he did not regard the cartoon as racist but rather as a depiction of Zimbabwe as a banana republic. The human resources manager deposed that the respondent's Internet and email usage was unlawful and the display of such content was specifically outlawed at the workplace. The manager

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¹⁰⁸ *Moonsamy v The Mailhouse* (1999) 20 ILJ 464 (CCMA).

¹⁰⁹ Section 188(1)(a) of the LRA as amended. Currently, no legislation expressly defines social media-related misconduct in South Africa.

¹¹⁰ Notably, this Code of Good Practice does not expressly deal with or define social media-related misconduct and/or indicate whether such misconduct is merely the same or applied differently from other types of workplace misconduct.

¹¹¹ 70 of 2002 (RICA), see sections 2-57.

¹¹² *Cronje v Toyota Manufacturing* (2001) 22 ILJ 735 (CCMA).

also stated that the transmission of any offensive racial, sexual, religious or political images and/or documents on any company system was outlawed. The factory employed 3500 blacks and 1000 whites and race related issues were very important on the factory floor. The black employees were angered by the cartoon. The CCMA found that it was reasonable to include a rule prohibiting the distribution of racist and inflammatory or offensive material in the company's code of conduct. The applicant was aware of the rule, which was applied consistently. Consequently, the CMMA found the dismissal to be fair. This case does not directly deal with the violation of employees' common law right to privacy through social media-related misconduct policies but it shows that an employee may be dismissed for breaching the company's code of conduct by distributing material that is prohibited by the employer. Nonetheless, the authors submit that the conduct of the employee constitutes social media-related misconduct committed through email because an email is also a social media platform.

The right to privacy has to be reasonable enough to qualify for protection under the relevant laws, common law and the Constitution. This is the objective component of a legitimate expectation of privacy on the part of the employee in the workplace.¹¹³ Reasonableness depends on what the courts may view as reasonable.¹¹⁴ One should assess whether the common law and/or constitutional right to privacy guarantees absolute privacy within the workplace premises.¹¹⁵ This is done to balance the rights of employees and their employers. If effectively enforced, this could discourage employees from abusing their social media platforms and also prevent employers from violating their employees' right to privacy in the workplace during office working hours.¹¹⁶ Employers are allowed to monitor the electronic communications of their employees in the workplace. Monitoring is important to discourage illicit social media-related activity and to limit liability on the company.¹¹⁷ However, the employer's right to monitor all electronic communications of their employees in the workplace should be carefully balanced since it could negatively affect the employee's right to privacy at common law or under the Constitution. Such monitoring could also create unnecessary stress that has a direct negative impact on the emotional and physical health of the employees.¹¹⁸ Consequently, employees expect their employers not

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113 Currie and De Waal *The Bill of Rights Handbook* 298.

114 Currie and De Waal *The Bill of Rights Handbook* 298.

115 Modiba M "Interpreting and Monitoring Employees' E-mail Communications and Internet Access" 2003 *SA Merc LJ* 363 364-371.

116 Modiba 2003 *SA Merc LJ* 365.

117 Hornung MS "Think Before You Type: A Look at Email Privacy in the Workplace" 2005 *Fordham Journal of Corporate and Financial Law* 115 117-160.

118 Hornung 2005 *Fordham Journal of Corporate and Financial Law* 166.

to access their email communications unlawfully.¹¹⁹ In the same vein, the employers expects their employees not to engage in social media-related misconduct in the workplace during office working hours. Therefore, it is imperative that the rights of the employees and those of the employers must be lawfully and carefully balanced at all times to combat social media-related misconduct challenges in the South African workplace.

4.2 THE RIGHT TO FREEDOM OF EXPRESSION UNDER THE CONSTITUTION

An individual's right to freedom of expression is constitutionally protected in South Africa.¹²⁰ Freedom of expression relates to the liberty that allows individuals to hold opinions and to receive or impart those opinions as information and ideas on other individuals.¹²¹ The significance of the right to freedom of expression was succinctly highlighted in *South African National Defence Union v Minister of Defence and Another*.¹²² The court held that freedom of expression lies at the heart of a democracy. The court also held that freedom of expression is valuable for many reasons. These reasons include its instrumental function as a guarantor of democracy and its implicit recognition and protection of the moral values of individuals in our society. Furthermore, the right to freedom of expression facilitates the search for truth about any matter by individuals and the society at large on social media platforms. Social media platforms provide innovative ways for all South Africans to express their views freely. This plays a pivotal role in safeguarding the right to freedom of expression.¹²³ The right to freedom of expression also allows individuals to voice their opinions on topical societal issues on social media platforms.¹²⁴ Therefore, any workplace policy that prohibit employees from mentioning the employer's name on a social media platform can be regarded as violating the employees' right to freedom of expression.¹²⁵ This follows the fact that the LRA recognises employees' rights to freedom of association and freedom of expression regarding

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¹¹⁹ *Gouws v Score/Price & Pride Furnishers* 2001 11 BALR 1155 (CCMA); *Philander v CSC Computer Sciences* [2002] 3 BALR 304 (CCMA); *Dauth and Brown v Wier's Cash N Carry* 2002 23 ILJ 1272 (CCMA).

¹²⁰ Section 16 of the Constitution.

¹²¹ Freedom of Expression Institute 2007 *The Media and the Law* <http://www.fxi.org.za/the-media-and-the-law> accessed 12 June 2016 1.

¹²² *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 CC.

¹²³ Davey R 2015 *Understanding and Managing the Risks of Social Media in the Workplace* <http://BowanGilfillan.co.za/understanding-and-managing-the-risks-of-social-media-in-the-workplace> accessed 15 March 2016 1.

¹²⁴ Hastie L 2012 *Freedom of Expression versus the Right to Dignity* [www.polity.org.za /article/freedom-of-expression-versus-the-right-to-dignity-2012-05-31](http://www.polity.org.za/article/freedom-of-expression-versus-the-right-to-dignity-2012-05-31) accessed 12 May 2016 1.

¹²⁵ Van Wyk J and Heyns M 2012 *To Name or Not to Name, That is the Question* www.werksmans.com/wp-content/uploads/2013/04/150/_JN5313 accessed 12 January 2016 2.

the identity of their employers.¹²⁶ However, employees may be dismissed for social media-related misconduct for their reckless and unlawful discussions of their employer's name on social media platforms.¹²⁷ It is crucial to note that the right to freedom of expression must be interpreted in light of other fundamental rights, as it is not an absolute right in South Africa.¹²⁸ Furthermore, the employee's of freedom of expression and employer's right to a good name and reputation must be carefully balanced to avoid constitutional and related social media-related challenges in the South African workplace.

In *Braithwaite vs McKenzie*,¹²⁹ Chetty J held that there is a significant risk to a person's reputational integrity due to the defamatory statements that may be made on a social media platform by other persons.¹³⁰ The fact that the Internet reaches a wide range of audiences instantly worsens the risk.¹³¹ The judge also noted that, in the present world, the most effective, efficient and immediate way to exercise the right to freedom of expression and voice one's opinions and ideas is through the Internet, in the form of social media platforms.¹³² Therefore, employees should use social media platforms carefully to avoid the negative consequences of social media-related misconduct.

In *Robertson and Value Logistics*,¹³³ the applicant Lynn Robertson made comments on her social media platform that she got retrenched before the retrenchment process was finalised. Her fellow employees saw the aforesaid comments on social media and alerted the employer. Ms Robertson was called for a disciplinary hearing and later dismissed. However, Ms Robertson took the matter to the National Bargaining Council where she stated that she was not well-knowledgeable with the use of computers. The CCMA held that Ms Robertson's post on Facebook appeared to be an expression of hurt that she felt and as such, it did not violate her right to freedom of expression. The CCMA held further that it was not a critical attack of the respondent's integrity and that her dismissal was substantively unfair. The CCMA ordered that Ms Robertson be reinstated under the same terms she was working under prior to the

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¹²⁶ See sections 4 and 5 and related provisions under Chapters 2 and 3 of the LRA; also see Van Wyk and Heyns 2012 www.werksmans.com/wp-content/uploads/2013/04/150/_JN5313 accessed 12 January 2016 2.

¹²⁷ Van Wyk and Heyns 2012 www.werksmans.com/wp-content/uploads/2013/04/150/_JN5313 accessed 12 January 2016 2.

¹²⁸ *Le Roux and others v Dey* 2011 (3) SA 274 (CC).

¹²⁹ *Braithwaite v McKenzie* 2015 (1) SA 270 (KZP) (*Braithwaite case*).

¹³⁰ *Braithwaite case* 28.

¹³¹ *Braithwaite case* 28.

¹³² *Braithwaite case* 28.

¹³³ *Robertson and Value Logistics* (2016) 37 ILJ 286 (BCA).

dismissal. The CCMA also ordered that the conditions of employment that governed Ms Robertson's employment before her dismissal should remain unchanged. Furthermore, the CCMA held that Ms Robertson should be paid her retrospective salary. This case indicates that employees can be unlawfully dismissed for social media-related misconduct, even in cases where they did not cause any harm to the employer. In this case, the employer violated the employee's right to freedom of expression hence the dismissal was unfair.

The scope of the right to freedom of expression is governed by the Constitution. The right to freedom of expression is treated as a fundamental right under the Constitution in South Africa. The Constitution states that everyone has a right to freedom of expression, which includes the following:

- 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.¹³⁴

Nonetheless, the Constitution further states that freedom of expression cannot extend to expression that enlists propaganda of war, incite violence and advocate for hatred on the basis of race, ethnicity, gender, religion.¹³⁵ Thus, the freedom of expression that is prohibited constitute incitement by an individual to cause harm to others.¹³⁶ This entails that the right to freedom of expression has to be exercised within the boundaries of expression that does not advocate for war, violence and hate speech.¹³⁷ Put differently, the right to freedom of expression is constitutionally limited to exclude the advocacy of hate speech and must be balanced against other rights such as human dignity and equality.¹³⁸ Any careless exercise

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¹³⁴ Section 16(1) of the Constitution.

¹³⁵ Section 16(2) of the Constitution.

¹³⁶ Section 16(2) of the Constitution. The authors acknowledge the new draft legislation, called the *Prevention and Combating of Hate Crimes and Hate Speech* Bill 698 of 2016 which gives effect to South Africa's obligations regarding prejudice and intolerance in terms of the international law. This Bill provides for the prosecution of persons who commit hate crimes and hate speech. However, the Bill does not expressly provide for hate speech which is advocated for on social media and social media-related misconduct. Accordingly, it is submitted that the Bill should be revised to enact adequate provisions for hate speech which is advocated on social media and provide penalties for such social media-related misconduct.

¹³⁷ Freedom of Expression Institute 2007 <http://www.fxi.org.za/the-media-and-the-law> accessed 12 June 2016 1.

¹³⁸ Oosthuizen V 2016 *How Far is Too Far for Employees on Social Media?* <http://www.labourguide.co.za/most-recent/2166-how-far-is-too-far-for-employees-on-social-media> accessed 12 April 2016 1.

of the right to freedom of expression by an employee or another person may infringe the rights of the employer or other persons.¹³⁹ Therefore, employees or other persons must not recklessly post derogatory comments on their social media platforms as that will not be protected under the right to freedom of expression in South Africa.¹⁴⁰ Any reckless use of social media platforms by employees under the guise of the right to freedom of expression may result in consequences that may warrant grounds for their dismissal for social media-related misconduct in the South African workplace.¹⁴¹

In *Dewoonarain v Prestige Car Sales (Pty) Ltd t/a Hyundai Ladysmith*,¹⁴² the employer laid charges against the employee for bringing the name of the company into disrepute. The charges were laid because of the employee's derogatory comments that were posted on a social media platform (Facebook). The employee posted, *inter alia*, that working for, and with Indians is not enjoyable. The employee stated further that Indians treat their own race poorly. The employee did not mention the name of the employer and relied on the right to freedom of expression. The employer made an assumption that the Facebook comments directly referred to his board of directors and employees, as they are Indians. The CCMA held that the right to freedom of expression is not an absolute right and the employee's reliance on the right to freedom of expression was rejected. Furthermore, the CCMA held that the employees' right to freedom of expression must be balanced with the right of the employers to maintain their reputation. The CCMA also held that the irresponsible remarks made on the social media platform by the employee had the potential to harm the business reputation of the employer. Therefore, the dismissal of the employee was found to be substantively fair. The employer correctly dismissed the employee for social media-related misconduct since hate speech is prohibited in the Constitution.¹⁴³ Employees should guard against violating the rights of their employer when exercising their right to freedom of expression on social media platforms.¹⁴⁴

In *Dutch Reformed Church Vergesig Johannesburg Congregation and Another v Rayan Soknunan t/a Glory Divinee World Ministries*,¹⁴⁵ the defendant rented the buildings owned by the applicant (also

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¹³⁹ Freedom of Expression Institute 2007 <http://www.fxi.org.za/the-media-and-the-law> accessed 12 June 2016 1.

¹⁴⁰ Oosthuizen 2016 <http://www.labourguide.co.za/most-recent/2166-how-far-is-too-far-for-employees-on-social-media> accessed 12 April 2016 1.

¹⁴¹ Dube T 2016 *The Risks of Freedom on Social Media in South Africa* <http://www.cnbcafrica.com/news/south-ern-africa/2016> accessed 13 February 2016 1.

¹⁴² *Dewoonarain v Prestige Car Sales (Pty) Ltd t/a Hyundai Ladysmith* [2013] 7 BALR 689 (MIBC).

¹⁴³ Section 16(2) of the Constitution.

¹⁴⁴ Davey 2012 *De Rebus* 80-83.

¹⁴⁵ *Dutch Reformed Church Vergesig Johannesburg Congregation and Another v Rayan Soknunan t/a Glory Divinee World Ministries* [2012] ZAGPJHC 97; 2012 (6) SA 201 (GSJ) (14 May 2012) (*Dutch Reformed Church Case*).

a religious body) for Christian religious services. The applicant decided to sell the buildings to an Islamic academy and the defendant could not match the offer for the premises. Therefore, Rayan Soknunan t/a Glory Divinee World Ministries was faced with the termination of its lease of the premises and subsequent eviction. Disgruntled with the process, the defendant launched a Facebook campaign to discredit the applicant and its leader, an ordained minister and to lobby against the sale of the church buildings.¹⁴⁶ The Facebook posts stated, *inter alia*, that the difference between Muslim leaders and Christian leaders is that when Muslim leaders believe they are fighting a righteous battle, they will be prepared to die. The Christian leaders will stand behind the shadows and spectate for the outcome. The court held that freedom of expression may often be robust, angry, vitriolic, and even abusive. This indicates that some persons abuse the right to freedom of expression for negative reasons and motives. An employer may dismiss an employee if such an employee has exceeded the boundaries of freedom of speech and has committed social media-related misconduct in the workplace.¹⁴⁷ Nevertheless, the employer's policies for social media-related misconduct in the workplace should not deprive them their right to express themselves on social media as long as such expression is *bona fide*.¹⁴⁸

Employees have the right to express themselves but this has to be exercised in accordance with the reasonable expectations of their working environment.¹⁴⁹ The advances in social media communications have enabled employees to voice their opinions to a broader audience on their social media platforms.¹⁵⁰ Freedom of expression has become more important to both employers and employees in various workplaces in other countries, including the South African workplace.¹⁵¹ In *Motlounq v The Market Theatre Foundation*,¹⁵² the employee was dismissed as a result of a social media platform post that was regarded as hate speech and which had a negative impact on the employer. The CCMA noted that the reliance upon the right to freedom of expression did not entitle the employee to conduct himself in a manner that he did. The CCMA held that the employer had correctly dismissed the employee for the social media post which constituted hate speech as outlawed by the Constitution.¹⁵³

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¹⁴⁶ *Dutch Reformed Church Case 1-15*.

¹⁴⁷ Davey 2012 *De Rebus* 80-83.

¹⁴⁸ Davey 2012 *De Rebus* 80-83.

¹⁴⁹ Dube 2016 <http://www.cnbcafrica.com/news/southern-africa/2016> accessed 13 February 2016 1.

¹⁵⁰ McGinley AC and McGinley-Stempel RP "Beyond the Water Cooler: Speech and the Workplace in an Era of Social Media" 2012 *Hofstra Labor and Employment Law Journal* 75 78-119.

¹⁵¹ McGinley and McGinley-Stempel 2012 *Hofstra Labor and Employment Law Journal* 78.

¹⁵² *Motlounq v The Market Theatre Foundation* [GAJB4458-11] 2.

¹⁵³ Section 16(2) of the Constitution.

The right to freedom of expression enables employees to engage other persons on social media platforms and share their views without any fear. This helps all individuals to know and attain the truth about topical issues.¹⁵⁴ The right to freedom of expression help employees to tolerate the views of others and protect themselves from abuse by their employers.¹⁵⁵ Freedom of expression is an important component in any constitutional democratic society.¹⁵⁶ However, as stated earlier, this right is restricted by the limitation clause.¹⁵⁷ This causes a problem, in that some employers' social media policies arbitrarily and unlawfully restricts employees from stating their views about matters relating to their workplaces on social media platforms.¹⁵⁸ The restriction is intended to protect employers from detrimental consequences of their employees' social media-related misconduct.¹⁵⁹ Although this conduct on the part of the employer could be justifiable, it must be consistently employed with due regard to the employee's right to freedom of expression. Consequently, any unlawful dismissal of employees for social media-related misconduct on the part of the employer contradicts and violates the employees' right to freedom of expression which is entrenched in the Constitution. Put differently, the employees' right to freedom of expression on social media platforms can be curtailed or restricted by employers in the workplace during office working hours in accordance with the Constitution.¹⁶⁰ However, such restrictions must not intimidate employees to freely express their opinions on social media due to fear of reprisals and/or the fear to be dismissed for social media-related misconduct. Thus, both employees and employers must consistently strike a balance when exercising their rights to avoid constitutional challenges for social media-related misconduct in the South African workplace.

As stated above, everyone has the right to freedom of expression¹⁶¹ which should be used responsibly.¹⁶² This right does not empower an employee or any other person to violate, invade

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¹⁵⁴ Freedom of Expression Institute 2007 <http://www.fxj.org.za/the-media-and-the-law> accessed 12 June 2016 1.

¹⁵⁵ Freedom of Expression Institute 2007 <http://www.fxj.org.za/the-media-and-the-law> accessed 12 June 2016 1.

¹⁵⁶ McGinley and McGinley-Stempel 2012 *Hofstra Labor and Employment Law Journal* 75-119.

¹⁵⁷ Section 36 of the Constitution.

¹⁵⁸ McGinley and McGinley-Stempel 2012 *Hofstra Labor and Employment Law Journal* 76.

¹⁵⁹ McGinley and McGinley-Stempel 2012 *Hofstra Labor and Employment Law Journal* 76.

¹⁶⁰ Freedom of Expression Institute 2007 <http://www.fxj.org.za/the-media-and-the-law> accessed 12 June 2016 1.

¹⁶¹ Section 16 of the Constitution.

¹⁶² *National Media Ltd and others v Bogoshi* 1998 (4) SA 1196 (SCA); *SA National Union* case 7.

or disregard the rights of other individuals.¹⁶³ According to Davis,¹⁶⁴ the interpretation of the right to freedom of expression depends on the manner in which the right conforms within the Constitution. In *R v VL*,¹⁶⁵ an employee challenged her dismissal for posting some comments about her employer on Facebook. The employee stated on her social media platform that a senior employer had retrenched her without prior notice despite her 20 years of service. Her employer contended that the post had put the employer's company name into disrepute and that it was factually incorrect. The CCMA held that it was imperative to understand whether the employee's social media conduct constituted a justifiable reason for her to be dismissed for social media-related misconduct by the employer. The CCMA held that the employee's social media post was an expression of hurt and the aforesaid inaccuracy was of little relevance. Additionally, the CCMA held that there was no sufficient evidence of damage to the reputation of the employer. The CCMA also held that it was unfair that during a traumatic time the employee was prevented from discussing it by the employer. The employee was subsequently reinstated. This indicates that the employee had correctly exercised her right to freedom of expression and was entitled to freely express her views without being terrorised or afraid of losing her job.

Furthermore, the employee's right to freedom of expression may be violated by the employers through draconian anti-social media policies that prohibit employees to freely express their opinions and views in the workplace. Accordingly, the right to freedom of expression may give rise to constitutional disputes between employers and employees pertaining to the latter's entitlement to express their views on social media platforms.¹⁶⁶ In this regard, it is submitted that employees must freely express their views on social media platforms without being deterred by their employers.¹⁶⁷ Nonetheless, employees must exercise their freedom of expression responsibly to avoid dismissal in the workplace. The right to freedom of expression does not amount to an exclusive right to defame others.¹⁶⁸ On the other hand, employers should take reasonable steps to ensure that their employees are aware that certain conduct that is derogatory or harmful to others on social media platforms

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¹⁶³ McGinley and McGinley-Stempel 2012 *Hofstra Labor and Employment Law Journal* 76.

¹⁶⁴ Cheadle H, Davis D and Haysom N *South African Constitutional Law, Bill of Rights* 11 ed (LexisNexis Durban 2013) 25.

¹⁶⁵ *R v VL (NBCRFI)* (RFBC 35099 31 August 2015) 1.

¹⁶⁶ McGinley and McGinley-Stempel 2012 *Hofstra Labor and Employment Law Journal* 76.

¹⁶⁷ McGinley and McGinley-Stempel 2012 *Hofstra Labor and Employment Law Journal* 76.

¹⁶⁸ Snail Attorneys "Cyberlaw: Privacy and Social Media @ the Workplace" Unpublished contribution delivered at the *ACFE 2013 Conference* (16 October 2013) 4.

will have negative consequences against them or any other offenders.¹⁶⁹ Be that as it may, the right to freedom of expression remains crucially important for the maintenance of any constitutional democracy in any country.¹⁷⁰ The right to freedom of expression is further important as it fosters open and free debate on issues pertaining to employment.¹⁷¹ Nevertheless, like any other right, the right to freedom of expression is limited by the Constitution.¹⁷² In relation to this, any such limitation of the right to freedom of expression should be reasonable and justifiable.¹⁷³ The question that would then arise is what is deemed reasonable and justifiable in relation to the limitation of this right. In this regard, it is submitted that the employers' limitation of the employees' right to freedom of expression should not unduly hinder their enjoyment of this right and other related rights.¹⁷⁴ Additionally, employers should take appropriate steps to ensure that their employees' freedom of expression is not unlawfully violated through arbitrary social media policies during office working hours.¹⁷⁵

4.2.1 THE RIGHT TO FREEDOM OF EXPRESSION UNDER COMMON LAW

The right to freedom of expression is also recognised under the South African common law.¹⁷⁶ For instance, this right is uniquely regarded for its support for the defences against any claims for *actio iniuriarum* under common law.¹⁷⁷ Moreover, the common law right to freedom of expression is regarded as an important right that positively influence other constitutional rights such as dignity and equality in South Africa.¹⁷⁸ This does not mean that the right to freedom of expression is more important than other constitutional rights.¹⁷⁹ Put differently,

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¹⁶⁹ Snail Attorneys *Cyberlaw: Privacy and Social Media* 4.

¹⁷⁰ Freedom of Expression Institute 2007 <http://www.fxj.org.za/the-media-and-the-law> accessed 12 June 2016 1.

¹⁷¹ Balule BT "Insult laws: A Challenge to Media Freedom in the SADC's Fledgling Democracies?" 2008 *CILSA* 404 426-427.

¹⁷² Section 36 of the Constitution.

¹⁷³ Davey 2015 <http://BowanGilfillan.co.za/understanding-and-managing-the-risks-of-social-media-in-the-workplace> accessed 15 June 2016 1.

¹⁷⁴ Balule 2008 *CILSA* 427.

¹⁷⁵ Balule 2008 *CILSA* 427.

¹⁷⁶ Homann LH *The Legal Implications of Defamatory Statements on Social Media Platforms in South Africa* (LLM-dissertation North West University 2015) 97.

¹⁷⁷ Homann *The Legal Implications of Defamatory Statements* 97.

¹⁷⁸ Homann *The Legal Implications of Defamatory Statements* 97.

¹⁷⁹ Homann *The Legal Implications of Defamatory Statements* 97.

the common law right to freedom of expression must be interpreted to reinforce and complement other values and rights enshrined in the Constitution.

In the early 1950s, the common law right to freedom of expression was not regularly violated in the South African workplace because employees were not yet using social media platforms.¹⁸⁰ This *status quo* has since changed and social media has now transformed the manner in which employees express their opinions in the workplace.¹⁸¹ Social media has usefully afforded both employees and employers an expanded and convenient platform to exercise their common law right to freedom of expression in accordance with the Constitution.¹⁸² In other words, all persons must exercise their right to freedom of expression responsibly without violating other rights that are protected under both the Constitution and common law. For instance, if an employee negatively expresses his or her personal opinions about matters of the workplace during office working hours, the employer could find such expression as a disruptive social media-related misconduct.¹⁸³

4.3 THE RIGHT TO DIGNITY UNDER THE CONSTITUTION

The Bill of Rights is the cornerstone of democracy in South Africa.¹⁸⁴ The Bill of Rights protects and affirms various rights and democratic values such as human dignity, equality and privacy.¹⁸⁵ The Constitution stipulates that everyone has an inherent right to dignity and the right to have their dignity respected and protected.¹⁸⁶ Defamation is probably the main source or cause of the violation of the right to dignity in South Africa. Defamation usually occur through the intentional publication of words or behaviour relating to another individual that degrades his or her status, good name or reputation.¹⁸⁷ Defamation of the employer or another person

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¹⁸⁰ Homann The Legal Implications of Defamatory Statements 13-24; 96-97.

¹⁸¹ Balkin JM “Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society” 2004 *N.Y.U. L. Rev* 1 3-58.

¹⁸² Balkin 2004 *N.Y.U. L. Rev* 2.

¹⁸³ Jacobson WS and Tufts SH “To Post or Not to Post: Employee Rights and Social Media” 2013 *Review of Public Personnel Administration* 84 86-107.

¹⁸⁴ Davey 2015 <http://BowanGilfillan.co.za/understanding-and-managing-the-risks-of-social-media-in-the-workplace> accessed 15 June 2016 1.

¹⁸⁵ Davey 2015 <http://BowanGilfillan.co.za/understanding-and-managing-the-risks-of-social-media-in-the-workplace> accessed 15 June 2016 1.

¹⁸⁶ Section 10 of the Constitution.

¹⁸⁷ Neethling J and Potgieter JM *Law of Delict* 6 ed (LexisNexis Durban 2010) 330-331. The law of defamation forms part of the South African common law of delict. Therefore, a victim who institutes an action for defamation will have to prove that all the elements of a delict are present. For example, an act, either

by the employees can be effected through social media, especially when employees post defamatory comments about such persons or their employers on social media platforms.¹⁸⁸ In this regard, any defamatory comments posted by employees against their employers on social media platforms in the workplace during office working hours may damage the personal and business reputation of such employers.¹⁸⁹ The South African Human Rights Commission (SAHRC) accused Sunette Bridges, an Afrikaans music artist, of posting racial comments on her Facebook page. It argued that such comments constituted hate speech under the *Promotion of Equality and Prevention of Unfair Discrimination Act*.¹⁹⁰ The SAHRC argued further that the racial comments on Bridges' Facebook page promoted racism. Bridges denied the allegations that she incited violence and hate speech through her social media posts. She stated that she would continue to exercise her constitutional right to freedom of speech and work harder to expose the oppression of the white minority. The Equality Court held that Bridges' conformation of controversial comments posted by other users on her page amounted to hate speech and harassment under the PEPUDA.¹⁹¹ The court correctly held that such freedom of expression ought not to be aimed at encouraging and spreading hatred, defamatory comments and impairing the dignity of certain groups of people in South Africa.

The Equality Court held that Bridges should regularly monitor her Facebook pages. She was also told to remove all content that amounted to hate speech, harassment, incitement of violence and/or an infringement on the dignity of other persons. Furthermore, she was told to warn users of the court order, block those who posted defamatory offending comments and put up English and Afrikaans posts distancing herself from hate speech and comments that violates other persons' right to dignity. It is submitted that the courts have been reluctant to interdict publications on social media platforms to due to conflicting positions between the right to dignity and the right to freedom of expression.¹⁹² The Equality Court held that it is more feasible to focus on the conduct of the wrongdoer than to order

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in the form of a publication of words or behaviour; an injury to personality (the defamatory effect of the words or behaviour); wrongfulness (the infringement of a person's right to a good name or reputation), either intention (*animus iniuriandi*) for actions against individuals or negligence as a form of fault.

188 Davey 2015 *Dismissal for Social Media Misconduct* <http://BowanGilfillan.co.za/dismissal-for-social-media-misconduct> accessed 14 April 2016 1.

189 Balule BT "Striking a Balance between Media Freedom and Protection of Reputation: The Defence of Reasonable Publication in Botswana" 2013 *CILSA* 1 2-19.

190 *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (PEPUDA), see section 10.

191 Section 10 of the PEPUDA.

192 Davey 2015 <http://BowanGilfillan.co.za/understanding-and-managing-the-risks-of-social-media-in-the-workplace> accessed 15 June 2016 1.

Facebook to take down the offensive post. Therefore, users of Facebook bear an onus in taking responsibility for what is posted on their social media platforms to eliminate defamatory comments.¹⁹³ This usually occur where there is little control on what is posted on social media by employees in the workplace. In this regard, it will be difficult for employers to monitor the activities of such employees as some of them do not take responsibility of their social media platforms.¹⁹⁴ The consequences of failing to remove the defamatory or any comments that violate other people's right to dignity on social media platforms may lead to an employee's dismissal for social media-related misconduct.

The right to dignity and/or good reputation is not limited to individuals alone. The Constitutional court affords juristic persons such as companies the right to a good reputation.¹⁹⁵ In *Financial Mail* case, the applicant recorded a private meeting of the respondent and its executives.¹⁹⁶ The respondent sought an urgent application which prohibited the publishing company (*Financial Mail*) from publishing information which it had obtained by a recording at a board meeting. The interdict was made on the basis that this act infringed the company's privacy and reputation. The interdict also stipulated that publishing information which was obtained by a recording at a board meeting was not justified by sufficient public interest since the information was obtained unlawfully. The court held that it was only proper that a company be afforded the usual legal processes to vindicate its reputation.¹⁹⁷ Moreover, the company is entitled to protection from any violation of its reputation and/or any unlawful invasion of its privacy, notwithstanding the fact that it cannot consciously grasp such an invasion.¹⁹⁸ A misguided comment or an incorrect fact can go viral once it is posted by an employee, resulting in possible brand damage and other reputational risks on the part of the employer.¹⁹⁹ In this regard, the employer would be entitled

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¹⁹³ Davey 2015 <http://BowanGilfillan.co.za/understanding-and-managing-the-risks-of-social-media-in-the-workplace> accessed 15 June 2016 1.

¹⁹⁴ Davey 2015 <http://BowanGilfillan.co.za/understanding-and-managing-the-risks-of-social-media-in-the-workplace> accessed 15 June 2016 1.

¹⁹⁵ *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A) 462 (*Financial Mail* case).

¹⁹⁶ *Financial Mail* case 31.

¹⁹⁷ *Financial Mail* case 462.

¹⁹⁸ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motors Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 CC.

¹⁹⁹ Davey 2015 <http://BowanGilfillan.co.za/understanding-and-managing-the-risks-of-social-media-in-the-workplace> accessed 15 June 2016 1.

to dismiss that employee for making a defamatory publication about the company on social media platforms.

In *Herholdt v Wills*,²⁰⁰ the applicant sought an urgent application against the respondent, interdicting and restraining the respondent from posting defamatory comments about the applicant.²⁰¹ The defamatory comments were posted on the respondent's social media platform (Facebook).²⁰² It was stated that the failure to comply with the order could result in the respondent being imprisoned for thirty days.²⁰³ Nevertheless, an open letter about the defamatory statements was published by Herholdt on Facebook for public consumption on 27 February 2012.²⁰⁴ The content of these statements was regarded as defamatory by High Court. The court held that such defamatory postings must be removed by the party responsible for posting them at the request of the aggrieved party.²⁰⁵ The court held further that the dignity of the applicant was violated as a result of the respondent's defamatory comments and unfounded allegations against the applicant.

In *O'Keeffe v Argus Printing and Publishing Company Ltd*,²⁰⁶ the plaintiff (a well-known radio personality) consented to the publication of her photograph and a photograph was taken from close range for use by a newspaper for an article. However, the photograph was used in the press for advertising purposes. Consequently, the plaintiff brought an action against the defendant on the basis that the advertisement had violated her dignity. The defendant argued that the insult had to be present in an *injuria*. This case illustrates that some persons may be aware of the consequences that may follow, hence the plaintiff in this case requested that her photograph be removed from publication. If the photograph was published by an employee of the respondent on social media platforms, that employee could have been dismissed by the employer for social media-related misconduct. Moreover, the publication of the photograph could have violated the dignity of the employee as well the reputation of the employer. Fortunately, the photograph was not published on social media platforms.

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²⁰⁰ *Herholdt v Wills* 2013 (2) SA 530 (GSJ) W (*Herholdt case*).

²⁰¹ *Herholdt case* 1.

²⁰² *Herholdt case* 1. The respondent's posts stipulated, *inter alia*, that: 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 for not taking 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?

²⁰³ *Herholdt case* 1.

²⁰⁴ *Herholdt case* 2.

²⁰⁵ *Herholdt case* 43.

²⁰⁶ *O'Keeffe case*.

In *Isparta v Richter*,²⁰⁷ the plaintiff brought an action for defamation against the defendants as a result of the comments made by the defendants.²⁰⁸ The plaintiff and the second defendant were divorced but were still engaged in litigation concerning the payment of maintenance.²⁰⁹ The first defendant posted several comments concerning the plaintiff on her Facebook and involved the second defendant.²¹⁰ The judge found that the comments made on the social media platform were defamatory.²¹¹ The court ordered the defendants to pay an amount of R40 000 in damages for defamatory comments she made.²¹² The amount was awarded to the plaintiff as a result of the defendants' refusal to make an apology and retract the defamatory comments on their Facebook page.²¹³ The conduct of the defendants constitute social media-related misconduct and could justify their dismissal in the workplace.²¹⁴ In a nutshell, the court held that the conduct of the defendants violated the dignity and right of the plaintiff to a good name.²¹⁵

4.3.1 THE RIGHT TO DIGNITY UNDER COMMON LAW

The right to a good name or reputation is recognised as an integral part of the right to dignity under the South African common law.²¹⁶ It is accepted that the right to a good name forms a crucial part of the right to dignity although it is not mentioned under the Bill of Rights in the Constitution.²¹⁷ In *Gardner v Whitaker*,²¹⁸ the court held that the right to respect one's dignity is something broader than the Roman Dutch concept of *dignitas*. Any infringement of the right to dignity is actionable through *actio iniuriarum*.²¹⁹ *Actio iniuriarum* originated from the Roman and Roman-Dutch law of *iniuria*.²²⁰ The right to dignity is protected as a value which

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²⁰⁷ *Isparta v Richter* 2013 6 SA 4529 (GP) (*Isparta case*).

²⁰⁸ *Isparta case* 8.

²⁰⁹ *Isparta case* 9.

²¹⁰ *Isparta case* 12.

²¹¹ *Isparta case* 13.

²¹² *Isparta case* 41.

²¹³ *Isparta case* 41.

²¹⁴ Davey 2012 *De Rebus* 80-83.

²¹⁵ Davey 2012 *De Rebus* 80-83.

²¹⁶ Neethling and Potgieter *Law of Delict* 330.

²¹⁷ Neethling and Potgieter *Law of Delict* 330.

²¹⁸ *Gardner v Whitaker* 1995 2 SA 672 (E).

²¹⁹ Currie and De Waal *The Bill of Rights Handbook* 256.

²²⁰ Collier D "Freedom of Expression in Cyberspace: Real Limits in the Virtual Domain" 2005 *Stellenbosch L Rev* 21 23-44.

is essential to human beings both at common law and under the Constitution.²²¹ The right to dignity also entails that the essence of humanity must be recognised and respected in equal quantum under common law as well as the Constitution.²²² Nevertheless, the increased use of social media in the workplace has expanded the potential liability of employers in respect of their employees' social media posts that violate the dignity and/or harms the reputation of other persons (social media-related misconduct) during office working hours.²²³

4.4 THE RIGHT TO FREEDOM OF ASSOCIATION UNDER THE CONSTITUTION

The Constitution states that everyone has a right to freedom of association.²²⁴ The right to freedom of association prevents powerful social actors, in this context, the employer from arbitrarily deciding how employees should exercise their freedom of association through coercion.²²⁵ The right to freedom of association is a fundamental right which facilitates the realisation of other rights, rather than the right in itself.²²⁶ Social media is a powerful tool which facilitates associations and professional relationships for employees to discuss topical issues regarding work.²²⁷ Employees' right to freedom of association should not be arbitrarily curtailed by employers to enable employees to freely associate with others through social media networks in the workplace during working hours.²²⁸ Social media has somewhat reshaped the nature of work and how such work is performed in the workplace.²²⁹ This follows the fact that most employees are more likely to rely on social media platforms to start, build and maintain their associations.²³⁰ Social media further enables employees to actively engage with each other so as to challenge pertinent contemporary issues relating to their

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²²¹ Steinmann R "The Core Meaning of Human Dignity" 2016 *PER* 1 3-32.

²²² Steinmann 2016 *PER* 2.

²²³ Gelms 2012 *Wash. L. Rev* 250-255.

²²⁴ Section 18 of the Constitution.

²²⁵ Currie and De Waal *The Bill of Rights Handbook* 397.

²²⁶ Budeli M "Workers' Right to Freedom of Association and Trade Unionism in South Africa: An Historical Perspective" 2009 *Fundamina* 57 60-74.

²²⁷ Swire P "Social Networks, Privacy, and Freedom of Association: Data Protection vs. Data Empowerment" 2012 *N.C. L. Rev* 1371 1372-1415.

²²⁸ Budeli 2009 *Fundamina* 57-60.

²²⁹ Bucher E, Fieseler C and Suphan A "The Stress Potential of Social Media in the Workplace" 2013 *Information, Communication and Society* 1639 1642-1667.

²³⁰ Swire 2012 *N.C. L. Rev* 1377.

employment, which could contribute to the proper functioning of the workplace.²³¹ Consequently, any unlawful restriction of the use of social media platforms by employers in the workplace during normal working hours could violate their employees' freedom of association.²³² Nevertheless, any illicit associations and reckless comments of employees that are posted on social media platforms regarding their employers and other persons could give rise to the dismissal of such employees for social media-related misconduct in the workplace.²³³ In other words, any social media engagements by the employees must be done *bona fide* to avoid violating the employers' rights and business reputation.

Social media plays an important role in fostering employees' associations in the workplace.²³⁴ Furthermore, social media platforms also have a professional component, such as LinkedIn²³⁵ which is often used by employees to achieve their professional objectives.²³⁶ Thus, employers who unlawfully restrict or completely ban their employees from using social media should be subjected to scrutiny, as they limit their employees' right to freedom of association.²³⁷ In relation to this, any social media-related dismissal of an employee who lawfully exercised his or her right to freedom of association through social media platforms in the workplace during working hours is unlawful, unconstitutional and unfair.²³⁸ The right to freedom of association could further enhance and promote employees' social and work-related development through social media platforms in the workplace.²³⁹ The right to freedom of association also allows employees to form good relations amongst each other which is crucially important for the workplace environment.²⁴⁰

4.4.1 THE RIGHT TO FREEDOM OF ASSOCIATION UNDER COMMON LAW

The right to freedom of association is recognised under common law. It is submitted that the

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²³¹ Balule 2008 *CILSA* 412.

²³² Decker JR "Facebook Phobia! The Misguided Proliferation of Restrictive Social Networking Policies for School Employees" 2014 *Northwestern Journal of Law and Social Policy* 163 164-205; Swire 2012 *N.C. L. Rev* 1377.

²³³ Decker 2014 *Northwestern Journal of Law and Social Policy* 164-166.

²³⁴ Swire 2012 *N.C. L. Rev* 1378.

²³⁵ LinkedIn is a social network that described itself as the world's largest professional network on the Internet with more than 135 million members in over 200 countries and territories.

²³⁶ Swire 2012 *N.C. L. Rev* 1378.

²³⁷ Swire 2012 *N.C. L. Rev* 1380.

²³⁸ Decker 2014 *Northwestern Journal of Law and Social Policy* 164-166.

²³⁹ Swire 2012 *N.C. L. Rev* 1415.

²⁴⁰ Swire 2012 *N.C. L. Rev* 1377.

common law right to freedom of association must be exercised and/or utilised in accordance with the Constitution.²⁴¹ Thus, employees whose right to freedom of association is unduly restricted or violated by employers in the workplace could rely and utilise their available common law remedies to claim damages from the employers. The right of employees to associate was not a course of concern for most employers as there was little or no potential chance of social media-related violations by employees in the workplace since they did not use social media platforms in the early 1950s.²⁴² Nowadays, the ability to access and utilise social media platforms has enhanced employees' freedom of association as a vital element for social interaction and unified workplace activities.²⁴³ Social media has now provided a useful platform for creating desirable associations amongst employees in the workplace although this was not immediately realised prior to the inception of social media.²⁴⁴ Social media provides employees with technological awareness and possibilities for their full participation in the *bona fide* utilisation of their right to freedom of association both at common law and the Constitution.²⁴⁵ Thus, the right to freedom of association both at common law and the Constitution may lead to the dismissal of employees for social media-related misconduct if it is unlawfully exercised and utilised to commit conduct outlawed by employers in the workplace.²⁴⁶

CONCLUDING REMARKS

Notwithstanding the fact that all employees and employers must respect and consistently abide by the Constitution in South Africa,²⁴⁷ the abuse of social media by employees in the workplace during working hours as well as the employers' draconian rules restricting the use of social-media in the workplace has given rise to various constitutional challenges involving both the employers and employees' rights to freedom of expression, privacy, dignity, and freedom of association. For instance, the abuse of social media by employees in the workplace during working hours sometimes affects the reputation of their employer's business.

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²⁴¹ Swire 2012 *N.C. L. Rev* 1386.

²⁴² Mangan *Osgoode Legal Studies Research Paper* No. 08/2015, 2015 3.

²⁴³ Herbert WA "Can't Escape from the Memory: Social Media and Public Sector Labor Law" 2013 *N. Ky. L. Rev* 427 430-506.

²⁴⁴ Swire 2012 *N. C. L. Rev* 1383.

²⁴⁵ Balkin 2004 *N.Y.U. L Rev* 6.

²⁴⁶ Davey *De Rebus* 2012 80-83.

²⁴⁷ Sections 1(c) and 2.

Conversely, employers' draconian workplace rules that restricts or ban employees from using social-media during working hours violates their rights to freedom of expression, privacy, dignity, and freedom of association. The article also revealed that a number of employers have unlawfully and unconstitutionally dismissed some of their employees for social media-related misconduct in the South African workplace. Given this background, it is submitted that the courts and all relevant persons should carefully consider the circumstances surrounding each case of employee dismissal for social media-related misconduct in order to balance the employees' constitutional rights and the employers' business reputation and related rights.²⁴⁸ This approach could ameliorate problems and challenges associated with the unlawful, unconstitutional and unfair dismissal of employees for social media-related misconduct in the South African workplace.

It is further submitted that the current labour-related legislation such as the LRA and the BCEA should be amended to enact adequate provisions that deals with social media-related misconduct in the South African workplace. The other option is for the policy makers to consider enacting an adequate legislation that specifically outlaws the misuse of social media in the South African workplace. Thus, the enactment of a robust social media legislation could combat any unlawful and unconstitutional dismissals of employees for social media-related misconduct in the South African workplace. Such legislation will also curb the current rampant abuse of social media platforms by employees in the South African workplace. The aforesaid legislation could further curb various constitutional and other related social media-related challenges that are being experienced by both employees and employers in South Africa.

List of Abbreviations

LRA	<i>Labour Relations Act 66 of 1995</i>
N.C. L. Rev	<i>North Carolina Law Review</i>
N Ky L Rev	<i>Northern Kentucky Law Review</i>
Nw.J. L. and Soc. Pol'y	<i>Northwestern Journal of Law and Social Policy</i>
N.Y.U. L. Rev	<i>New York University Law Review</i>
PEPUDA	<i>Protection of Equality and Prevention of Unfair Discrimination Act 4 of 2000</i>
PER	<i>Potchefstroom Electronic Law Journal</i>
SA Merc LJ	<i>South African Mercantile Law Journal</i>
Stellenbosch L Rev	<i>Stellenbosch Law Review</i>
Wash. L. Rev.	<i>Washington Law Review</i>

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²⁴⁸ See related discussions under the headings and sub-headings in paragraph 5 above.

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Howard Chitimira

PROFESSOR, FACULTY OF LAW, NORTH-WEST UNIVERSITY, SOUTH AFRICA. LLB (CUM LAUDE) DEGREE AND LLM DEGREE IN CORPORATE LAW FROM THE UNIVERSITY OF FORT HARE. LLD DEGREE IN SECURITIES AND FINANCIAL MARKETS LAW FROM THE NELSON MANDELA METROPOLITAN UNIVERSITY.

howard.chitimira@nwu.ac.za

Kefilwe Lekopanye

MASTER OF LAWS (LLM) IN MERCANTILE LAW AND BACHELOR OF LAWS (LLB) AT NORTH-WEST UNIVERSITY, SOUTH AFRICA.

kefilwelekopanye@gmail.com