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An analysis of the Labour Relations Act 66 of 1995 as it relates to derogatory comments posted by employees on social media

by

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DECLARATION

This research has not been previously accepted for any degree and is not being currently considered for any other degree at any other university.

I declare that this dissertation contains my own work except where specifically acknowledged.

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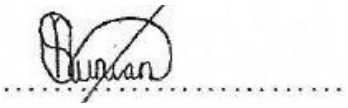
Signed: 

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ABSTRACT

With the rise of the digital age, social media has become a tool for communication in the modern world. The law on social media in South Africa is underdeveloped and there is an absence of current legislation that specifically deals with social media.

Employees are often under the impression that they are permitted to say anything they desire on social media platforms without consequence. Problems arise when employees take to social media to vent their frustrations about work and post derogatory comments about their employer(s).

In the absence of legislation specifically regulating the use of social media, an employer will often rely on the Labour Relations Act 66 of 1995 in order to dismiss an employee for misconduct of the kind mentioned above. Employees for their part will often cite constitutional rights such as the right to freedom of expression and the right to privacy as defences against being unfairly dismissed for their social media posts.

This study aims to determine whether or not the Labour Relations Act 66 of 1995 is still fit for purpose in view of the rapid and exponential rise of social media during recent years. The main focus of this study is on the dismissal of employees for posting derogatory comments about their employees on social media and seeks to determine whether or not South African Labour Legislation has adequately kept pace in this area

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1.1 Aim of dissertation

1.1.1 The research question

Whether or not the Labour Relations Act 66 of 1995 (hereafter referred to as the 'Act') is still fit for purpose in view of the rapid and exponential rise of social media during recent years.

1.1.2 Statement of purpose

The purpose of this study is to determine whether or not the Act[1] is still fit for purpose in view of the rapid and exponential rise of social media during recent years.

1.1.3 The rationale for this study

In light of the absence of current legislation dealing with social media, the rationale for this study is to determine whether or not South African labour legislation[2] has adequately kept pace with the rise of social media in the digital age and whether or not the Act[3] is still fit for the purpose of dealing with dismissals for derogatory comments posted on social media.

This dissertation will also examine a number of issues surrounding this central question, such as the desirability of South African businesses enacting a social media policy in the workplace; and the manner in which the constitutional rights to freedom of expression[4] and privacy[5] inform and impact upon debates in this area.

1.2 Breakdown of chapters

1.2.1 Chapter 2

Chapter 2 will discuss the increase in dismissals for derogatory comments posted by employees on social media. It will examine the rise of social media and it will raise the question as to

[1] The Labour Relations Act 66 of 1995.
[2] Ibid.
[3] Ibid.
[4] The Constitution of South Africa, 1996 (Constitution) s 16.
[5] Ibid., s 14.

whether or not the current Labour Relations Act[6] is fit for purpose in relation to derogatory comments posted by employees on social media.

1.2.2 Chapter 3

Chapter 3 will analyse in detail the Labour Relations Act[7] as it relates to derogatory comments posted by employees on social media. The grounds and the factors for dismissal will be looked at.[8] It will then be determined whether or not the posting of derogatory comments on social media amounts to misconduct[9] in terms of the Act.[10] The Act[11] implies that misconduct[12] encompasses a breach of good faith[13] as well as a breach of a workplace rule.[14] These two concepts will be discussed in detail.

Under the duty of good faith concept,[15] the Act[16] and the common law will be discussed. The good faith concept[17] will then be analysed as it relates to derogatory comments posted by employees on social media.

Under the workplace rule concept,[18] the Act[19] and the common law will be discussed. The workplace rule concept[20] will then be analysed as it relates to derogatory comments posted by employees on social media. This analysis will look at two situations namely; dismissals where there are workplace rules[21] in place; and dismissals where there are no workplace rules[22] in place. It is suggested that a workplace rule[23] may take the form of a social media policy which employers are able to implement in the workplace.

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[6] LRA (note 1 above).
[7] Ibid.
[8] Ibid., Schedule 8, items 2(2) & 3(5).
[9] Ibid., Schedule 8, items 3(4), 3(5), 3(6) & 7.
[10] LRA (note 1 above).
[11] Ibid.
[12] Ibid., Schedule 8, items 3(4), 3(5), 3(6) & 7.
[13] Ibid., Schedule 8, items 1(3) & 3(4).
[14] Ibid., Schedule 8, item 7.
[15] Ibid., Schedule 8, items 1(3) & 3(4).
[16] LRA (note 1 above).
[17] Ibid., Schedule 8, items 1(3) & 3(4).
[18] Ibid., Schedule 8, item 7.
[19] LRA (note 1 above).
[20] Ibid., Schedule 8, item 7.
[21] Ibid.
[22] Ibid.
[23] Ibid.

1.2.3 Chapter 4

Chapter 4 will discuss the desirability of social media policies. In particular, the following will be discussed:

i. the reasons why many businesses have not enacted a social media policy;
ii. the advantages and disadvantages of enacting a social media policy;
iii. how a social media policy may be implemented;
iv. an example of a social media policy which might be suitable in the South African context; and
v. the risks of not enacting and implementing a social media policy.

1.2.4 Chapters 5 and 6

Having discussed social media policies, this dissertation will turn to the manner in which certain constitutional rights inform and impact upon debates in this area. These are tensions in South African law that have been created by social media; and arise when employees often cite constitutional rights such as the right to freedom of expression[24] and the right to privacy[25] as defences against being dismissed for derogatory comments posted on social media. Chapters 5 and 6 will briefly discuss the right to freedom of expression[26] and the right to privacy[27] as it relates to derogatory comments posted by employees on social media.

1.2.5 Chapter 7

Lastly Chapter 7 will conclude that certain provisions of the Act[28] are still fit for purpose in terms of dismissals for derogatory comments posted by employees on social media, while there are other provisions of the Act[29] that have not kept pace with the rapid and exponential rise of social media during the recent years.

[24] Constitution (note 5 above) s 16.
[25] Ibid., s 14.
[26] Ibid., s 16.
[27] Ibid., s 14.
[28] LRA (note 1 above).
[29] Ibid.

CHAPTER 2
INCREASE IN DISMISSALS FOR DEROGATORY COMMENTS POSTED BY EMPLOYEES ON SOCIAL MEDIA

2. INTRODUCTORY COMMENTS

With the rise of the digital age, social media has become one of the main tools for communication in the modern world.[30] A significant number of people use social media to communicate their thoughts and share content with the world.[31] Social media is accessed on technological devices such as smart phones, tablets, laptops and the like. The law[32] relating to social media in South Africa is underdeveloped and there is very little current labour legislation[33] that specifically deals with social media.[34]

2.1 Increase in dismissals for derogatory comments posted by employees on social media

De Vos acknowledges that 'there is something about internet websites and social media platforms like Facebook and Twitter that seem[s] to bring out the worst in people'.[35] Employees are often under the impression that they are permitted to say anything they desire on social media platforms without consequence.[36] The distinction between one's private and professional life becomes blurred; and conflicts in the workplace arise when employees post derogatory comments about their employer(s) on social media.[37]

2.2 Definition of 'derogatory'

According to an online dictionary[38] the definition of 'derogatory' means something that is 'insulting, disrespectful, unflattering, unkind, or demeaning'.[39] When employees take to social media to post a derogatory comment about their employer(s), this may result in dismissal.[40]

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[30] *Fredericks v Jo Barkett Fashions* 2011 JOL 27923 (CCMA) para 6.3.
[31] L Clark and SJ Roberts 'Employer's Use of Social Networking Sites: A Socially Irresponsible Practice' (2010) 95 (4) *Journal of Business Ethics* 507–525.
[32] LRA (note 1 above).
[33] Ibid.
[34] R Davey 'Dismissals for Social Media Misconduct' (2012) 6 *De Rebus* 80.
[35] P De Vos 'Defamation and Social Media: We have moved on from Jane Austen' (2013) *Constitutionally Speaking*<http://constitutionallyspeaking.co.za/defamation-and-social-media-we-have-moved-on-from-janeausten> (accessed 15 June 2016).
[36] *Sedick* (note 138 below) para 53; *National Union of Food* (note 161 below) para 17 and; *Fredericks* (note 31 above) para 6.4 (Case law on fair dismissals).
[37] Ibid.
[38] Vocabulary.Com Dictionary.
[39] Ibid., < https://www.vocabulary.com/dictionary/derogatory> (accessed 1 May 2016).
[40] See item 3 (4) of Schedule 8 of the LRA (note 1 above) which states that an employer may dismiss an employee for 'misconduct that is serious and of such gravity that it makes a continued employment relationship

There has been an increase in dismissals for derogatory comments posted on social media because of the recent rise in the use of social media.[41]

2.3 Problems in the workplace resulting from the use of social media

Various authors have pointed out the types of problems which have emerged in the workplace as a result of the recent rise in the use of social media as follows:

D'Mello states that 'our private use of social media could be one of the pitfalls of the modern workplace',[42] while Duff states that 'employees who vent their frustration of their employer, in a public forum such as Facebook, are opening themselves up to a potential law suit or dismissal'.[43]

The Southern African Legal Information Institute states that it 'has seen an increase in the number of people who are dismissed for social media misconduct'.[44] According to Bennington, social media 'status firings have become downright common'.[45]

Angermair et al add that 'during the last five to seven years we have seen a number of cases across the world on the subject'.[46] According to Davey and Dahms-Jansen 'social media usage is becoming increasingly topical (as is) clear from the recent spate of CCMA cases dealing with dismissals for social media misconduct'.[47]

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intolerable'; as well as items 1 (3) & 7 of Schedule 8 of the LRA (note 1 above); and the case of *Costa/Nu Metro Theatres* (note 129 below) 1027 which held 'that it is now established law that an employee may be disciplined for misconduct that takes place outside working hours provided the misconduct negatively impacts on the employment relationship' (Employers' right to dismissal).

[41] Case law on fair dismissals (note 37 above).

[42] CD Mello 'The Perils of Social Media for Employees' (2016) *Sydney Morning Herald* <http://www.smh.com.au/small-business/managing/the-perils-of-social-media-for-employees-20160308-gndly7.html> (accessed 15 June 2016).

[43] A Duff 'Can an Employer Dismiss due to Facebook?' (2010) 36(2) *Packaging Review South Africa*.

[44] J Wood 'You Can Get Fired for What You Say Online' (2015) *Moneybags* <http://www.moneybags.co.za/article/can-get-fired-say-online/> (accessed 15 June 2016).

[45] E Bennington 'Handling Employee Violation of your Social Media Policy' <http://hiring.monster.com/hr/hr-best-practices/small-business/social-media-trends/social-media-guidelines.aspx> (accessed 15 June 2016).

[46] T Angermair et al 'Dismissal on Grounds of Employee Social Media Comments' (2015) *International Bar Association: Employment and Industrial Relations Law Committee Publications* <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=78137209-857a-48c6-a068-33454f18611b> (accessed 4 December 2016).

[47] R Davey & L Dahms-Jansen 'Social Media and Strikes' (2012) 12 (10) *Without Prejudice* 26.

It has also been stated that 'dismissal cases involving social media have grown in numbers in recent times, increasing the need for courts and tribunals to apply the law in new and novel situations'.[48]

Angermair et al state that one of the main problems that has emerged is whether or not the derogatory comments posted on social media are 'severe enough to constitute grounds for dismissal'.[49] The courts are therefore faced with deciding whether or not derogatory comments are sufficiently severe to warrant dismissal of the employee who made the comments on social media.[50]

Apart from authors such as those cited above, judges have also started to make mention of the new problems to emerge with the recent rise in the use of social media as follows:

Ramushowana J in the case of *Fredericks v Jo Barkett Fashions*[51] acknowledged that 'social media interaction is a new concept in the globe and it is growing very fast'.[52]

In the case of *Heroldt v Wills*[53] Willis J acknowledged that:

> '[t]he social media, of which Facebook is a component, have created tensions for these rights in ways that could not have been foreseen by the Roman Emperor Justinian's legal team, the learned Dutch legal writers of the seventeenth century ("the old authorities") or the founders of our Constitution'.[54]

Social media communication has become a popular method of communicating one's thoughts, opinions and feelings.[55] Therefore, whether or not technology evolves further, and communication takes for example the form of holographic videos, our law[56] will still need to keep up and be applicable to the times.

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[48] Fairwork Centre 'Social Media and Unfair Dismissal' <http://www.fairworkcentre.com.au/newsblog/Case-Studies/Social-Media-and-Unfair-Dismissal/> (accessed 15 June 2016).
[49] Angermair et al (note 47 above).
[50] Case law on fair dismissals (note 37 above).
[51] 2011 JOL 27923 (CCMA).
[52] *Fredericks* (note 31 above) para 6.3.
[53] 2014 JOL 31479 (GSJ).
[54] *Heroldt v Wills* 2014 JOL 31479 (GSJ) para 7.
[55] *Fredericks* (note 31 above) para 6.3.
[56] LRA (note 1 above).

The development of technology may have impacted on the suitability of our current legislation[57] to deal adequately with dismissals for derogatory comments posted by employees on social media. It is only fitting that our laws[58] should be applicable to the times we are living in now. With the recent rise in the use of social media, it has now become necessary to determine whether or not our current Labour Relations Act[59] is fit for purpose in relation to derogatory comments posted by employees on social media

[57] Ibid.
[58] Ibid.
[59] Ibid.

CHAPTER 3

ANALYSIS OF THE LABOUR RELATIONS ACT 66 OF 1995 AS IT RELATES TO DEROGATORY COMMENTS POSTED BY EMPLOYEES ON SOCIAL MEDIA

3. INTRODUCTORY COMMENTS

Having discussed the increase in dismissals for derogatory comments posted by employees on social media, this Chapter will turn to an analysis of the Labour Relations Act[60] as it relates to derogatory comments posted by employees on social media. The Act[61] cautions that 'it is intentionally general [as] each case is unique, and departures from the norms established by this Code may be justified in proper circumstances'.[62]

3.1 Factors and grounds employers should take into account when dismissing employees[63]

The Act[64] suggests factors that the employer should take into account when dismissing an employee[65] which are:

i. 'the employee's circumstances (including length of service, previous disciplinary record and personal circumstances)'; [66]
ii. 'the nature of the job'; [67] and
iii. 'the circumstances of the infringement itself'.[68]

There are three grounds in terms of which an employer may dismiss an employee[69] which are:

i. 'the conduct of the employee';[70]
ii. 'the capacity of the employee';[71] and
iii. 'the operational requirements of the employer's business'.[72]

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[60] Ibid.
[61] Ibid.
[62] Ibid., Schedule 8, item 1(1).
[63] Ibid., Schedule 8, items 2(2) & 3(5).
[64] LRA (note 1 above).
[65] Ibid., Schedule 8, item 3(5).
[66] Ibid.
[67] Ibid.
[68] Ibid.
[69] Ibid., Schedule 8, item 2(2).
[70] Ibid.
[71] Ibid.
[72] Ibid.

In relation to dismissals for derogatory comments posted by employees on social media the 'circumstances of the infringement'[73] that the employer may take into account will be:

i. the nature of the derogatory comment;
ii. that the derogatory comment was posted on social media; and
iii. the negative impact that the derogatory comment has had on the employer or business.

Once the employer has taken the aforementioned factors[74] into account, the employer may dismiss the employee for her conduct.[75] To dismiss an employee on this ground[76] it must be determined whether or not such conduct[77] (the posting of derogatory comments on social media) amounts to misconduct[78] in terms of the Act.[79]

3.2 Misconduct[80]

The Act[81] does not define precisely what constitutes misconduct.[82] The Act[83] provides certain examples of serious misconduct such as:

i. 'dishonesty';[84]
ii. 'wilful damage of the employer's property';[85]
iii. 'wilful endangering of the safety of others';[86]
iv. 'physical assault on the employer, a fellow employee, client or customer';[87] and
v. 'gross insubordination'.[88]

[73] Ibid., Schedule 8, item 3(5).
[74] Ibid.
[75] Ibid., Schedule 8, item 2(2).
[76] Ibid.
[77] Ibid.
[78] Ibid., Schedule 8, items 3(4), 3(5), 3(6) & 7.
[79] LRA (note 1 above).
[80] Ibid., Schedule 8, items 3(4), 3(5), 3(6) & 7.
[81] LRA (note 1 above).
[82] Ibid., Schedule 8, items 3(4), 3(5), 3(6) & 7.
[83] LRA (note 1 above).
[84] Ibid., Schedule 8, item 3(4).
[85] Ibid.
[86] Ibid.
[87] Ibid.
[88] Ibid.

The Act[89] permits an employer to dismiss an employee for 'misconduct that is serious and of such gravity that it makes a continued employment relationship intolerable'.[90] The misconduct[91] of the employee will be the cause; and the effect will be 'the employment relationship becoming intolerable'.[92] This means that misconduct encompasses a breach of good faith.[93]

The Act[94] further provides a set of guidelines for determining whether or not dismissals for misconduct are fair.[95] These guidelines[96] refer to:

i. whether or not the employee has contravened a workplace rule;[97]
ii. whether or not the workplace rule was valid or reasonable;[98]
iii. whether or not the employee was aware of the workplace rule;[99]
iv. whether or not the workplace rule has been consistently applied;[100] and
v. whether or not dismissal was an appropriate sanction.[101]

This means that for an employer to dismiss an employee for misconduct,[102] the employee would have to have breached a workplace rule.[103] Therefore, misconduct[104] encompasses a breach of good faith[105] as well as a breach of a workplace rule.[106] These two concepts will be discussed in turn.

[89] LRA (note 1 above).
[90] Ibid., Schedule 8, item 3(4).
[91] Ibid.
[92] Ibid.
[93] Ibid., Schedule 8, items 1(3) & 3(4).
[94] LRA (note 1 above).
[95] Ibid., Schedule 8, item 7.
[96] Ibid.
[97] Ibid., Schedule 8, item 7(a).
[98] Ibid., Schedule 8, item 7(b)(i).
[99] Ibid., Schedule 8, item 7(b)(ii).
[100] Ibid., Schedule 8, item 7(b)(iii).
[101] Ibid., Schedule 8, item 7(b)(iv).
[102] Ibid., Schedule 8, items 3(4), 3(5), 3(6) & 7.
[103] Ibid., Schedule 8, item 7.
[104] Ibid., Schedule 8, items 3(4), 3(5), 3(6) & 7.
[105] Ibid., Schedule 8, items 1(3) & 3(4).
[106] Ibid., Schedule 8, item 7.

3.3 Duty of good faith[107]

3.3.1 Duty of good faith[108] *in terms of the Labour Relations Act 66 of 1995*[109]

The Act[110] states that 'employers and employees should treat each other with mutual respect'.[111] An employer may dismiss an employee for 'misconduct that is serious and of such gravity that it makes a continued employment relationship intolerable'.[112] The Act further states that 'employers are entitled to satisfactory conduct and work performance from their employees'.[113] In the workplace it is expected that employees will be on their best behaviour and that they will act in the best interests of their employer.[114]

3.3.2 Duty of good faith in terms of the common law

Toba states that:

> '[t]he power of the employer to regulate the conduct of an employee is to be found in the implied common law duties of the employees. In terms of the common law the employee has a duty to obey reasonable and lawful commands from his employer as well as the duty to perform his functions with due diligence and skill'.[115]

In the case of *National Union of Metal Workers of South Africa obo Tiou/ Vanchem Vanadium Products (Pty) Ltd*[116] the court held that:

> '[i]t is well established that the relationship between employer and employee is in essence one of trust and confidence and that at common law conduct clearly inconsistent therewith entitles the innocent party to cancel the agreement'.[117]

It is therefore clear that the employer must be able to trust that the employee will not conduct herself in a manner that is contrary to the employment contract.[118]

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[107] Ibid., Schedule 8, items 1(3) & 3(4).
[108] Ibid.
[109] LRA (note 1 above).
[110] Ibid.
[111] Ibid., Schedule 8, item 1(3).
[112] Ibid., Schedule 8, item 3(4).
[113] Ibid., Schedule 8, item 1(3).
[114] Ibid., Schedule 8, items 1(3) & 3(4).
[115] W, Toba, 'Substantive fairness of dismissal for misconduct' (2004) *University of Port Elizabeth* 7.
[116] 2015 (5) BALR 525 (MEIBC).
[117] *National Union of Metal Workers of South Africa obo Tiou/ Vanchem Vanadium Products (Pty) Ltd* 2015 (5) BALR 525 (MEIBC) para 26.
[118] Ibid.

The court in the case of *National Union of Metalworkers of South Africa obo Zulu / GUD Holdings (Pty) Ltd*,[119] held that 'in terms of the common law an employee is obliged to act in the interests of his employer and not against it'.[120] This implies that an employee should not make derogatory comments about the employer.[121] If an employee makes derogatory comments about the employer, then this will not be in the best interests of the employer as it may place the employer in a bad light; and may tarnish the employer's reputation.[122]

3.3.3 Analysis of the duty of good faith[123] *as it relates to derogatory comments posted on social media*

According to Oosthuizen:

> '[e]mployees may not be aware of the duty of good faith that they owe to their employer and by posting a defamatory statement on social media in frustration or in an attempt to be humorous, it will be a breach of that duty'.[124]

The posting of derogatory comments about one's employer is similar to gossiping orally to the public about the employer. The difference between gossiping orally and posting comments on social media is that oral gossip may be difficult to prove in court because of the rule against hearsay evidence, whereas comments posted on social media are in writing and are therefore easy to prove in court.

Gossiping may cause a relationship to sour when the person being gossiped about finds out what was being said about her. In the same way, the posting of derogatory comments on social media may damage the employment relationship when the employer finds out about the derogatory post on social media.[125] Therefore, depending on the circumstances this may amount to a breach of good faith.[126]

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[119] 2015 (12) BALR 1306 (DRC).
[120] *National Union of Metalworkers of South Africa obo Zulu / GUD Holdings (Pty) Ltd* 2015 (12) BALR 1306 (DRC) para 37.
[121] Ibid.
[122] See *Sedick* (note 138 below) para 53; *National Union of Food* (note 161 below) para 16; and *Fredericks* (note 31 above) para 4.1. (Employers' reputation).
[123] LRA (note 1 above) Schedule 8, items 1(3) & 3(4).
[124] V Oosthuizen 'Social Networking: A New Form of Misconduct?' (2011) *Professional Accountant* 19.
[125] Case law on fair dismissals (note 37 above).
[126] LRA (note 1 above) Schedule 8, items 1(3) & 3(4).

The court in the case of *Costa/Nu Metro Theatres*[127] held that:

> '[i]t is now established law that an employee may be disciplined for misconduct that takes place outside working hours provided the misconduct negatively impacts on the employment relationship'.[128]

Most employees do not realise that the duty of good faith[129] may sometimes extend beyond the workplace.[130] It is submitted that an employee should not exhibit a kind of 'split personality' by being faithful to her employer in the workplace and then by being deceitful to her employer by posting derogatory comments on social media. Although the posting of derogatory comments on social media may have occurred outside the workplace and in the personal time of the employee, that comment may still reach the employer and may hinder the working relationship.[131]

It is therefore submitted that it does not matter whether or not the derogatory comment was posted on social media within the workplace during working hours; or outside the workplace after hours,[132] as it will still amount to misconduct;[133] and a breach of good faith.[134]

The case of *Sedick and another/ Krisay (Pty) Ltd*[135] serves as an example as to how the court has deliberated on the concept of good faith,[136] by determining whether or not dismissal was fair for derogatory comments posted by employees on social media. In this case, employees were charged with 'bringing the company's name into disrepute by posting derogatory statements in the public domain'.[137]

Although the name of the company and employer were not explicitly stated on the employees' Facebook page, the public would still have been able to make the connection.[138]

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[127] 2005 (10) BALR 1018 (BCEISA).
[128] *Costa/Nu Metro Theatres* 2005 (10) BALR 1018 (BCEISA) 1027.
[129] LRA (note 1 above) Schedule 8, items 1(3) & 3(4).
[130] *Costa/Nu Metro Theatres* (note 129 above) 1027.
[131] Case law on fair dismissals (note 37 above).
[132] *Costa/Nu Metro Theatres* (note 129 above) 1027.
[133] LRA (note 1 above) Schedule 8, items 3(4), 3(5), 3(6) & 7.
[134] Ibid., Schedule 8, items 1(3) & 3(4).
[135] 2011 (8) BLLR 979 (CCMA).
[136] LRA (note 1 above) Schedule 8, items 1(3) & 3(4).
[137] *Sedick and another/ Krisay (Pty) Ltd* 2011 (8) BLLR 979 (CCMA) para 12.
[138] Ibid., para 29.

The employer stated that the employees' posts on Facebook were serious enough to warrant dismissal because of the following factors:

i. the employees represented the company;[139]
ii. the employees had dealings with customers and suppliers;[140]
iii. the comments posted on Facebook could be accessed by anyone;[141] and
iv. the comments encouraged participation from other employees.[142]

Bennet J stated that 'the ever-increasing access to and use of the Internet has been, and continues to be, both a blessing and a curse to businesses worldwide'.[143] The blessing refers to employers being able to advance their business through the use of social media by way of adverts, promotions and the like.

The curse refers to employees of the business taking to social media, to post derogatory comments about their employer which may tarnish the reputation of the employer or businesses among its clients, suppliers, investors and competitors.[144] In this case, Bennet J took into account the reputation of the company being tarnished in the eyes of customers and competitors; as well as the employees' lack of respect for their employer.[145]

Bennet J assessed the content of the comments posted on social media by taking into account the following factors:

i. 'the circumstances - what was written';[146]
ii. 'where the comments were posted';[147]
iii. 'to whom they were directed';[148]
iv. 'to whom they were available';[149] and
v. 'by whom they were said'.[150]

[139] Ibid., para 34.
[140] Ibid.
[141] Ibid.
[142] Ibid.
[143] Ibid., para 45.
[144] Employers' reputation (note 123 above).
[145] *Sedick* (note 138 above) para 53.
[146] Ibid.
[147] Ibid.
[148] Ibid.
[149] Ibid.
[150] Ibid.

In reaching his judgment, Bennet J took into account the following factors:

i. privacy;[151]
ii. the content of the comments posted on social media;[152]
iii. the circumstances surrounding the comments posted on social media;[153]
iv. the breach of good faith by taking into account the employer's reputation;[154] and
v. whether or not the work relationship has become intolerable.[155]

It was concluded that the dismissal of the employees was fair.[156] Although Bennet J adequately assessed whether or not there had been a breach of good faith,[157] the judge 'with respect' did not assess whether or not there had been a breach of a workplace rule.[158]

In the case of *National Union of Food, Beverage, Wine, Spirits and Allied Workers Union obo Arendse v Consumer Brands Business Worcester, a Division of Pioneer Foods (Pty) Ltd*[159]an employee was dismissed for breaching his employer's IT (Information Technology) policy by posting derogatory comments on Facebook about his employer.[160] The employee cited the right to privacy[161] as a defence against being dismissed for derogatory comments posted on social media.[162]

De Vlieger-Seynhaeve J held that dismissal would be fair with regard to 'critical comments placed on Facebook'[163] by implementing the following three-stage test:

i. 'where an employee fails to restrict access to the site';[164]
ii. 'where the posting brings the employer into disrepute';[165] and

[151] Ibid., para 50.
[152] Ibid., para 53.
[153] Ibid.
[154] Ibid.
[155] Ibid.
[156] Ibid.
[157] Ibid.
[158] LRA (note 1 above) Schedule 8, item 7.
[159] 2014 (7) BALR 716 (CCMA).
[160] *National Union of Food, Beverage, Wine, Spirits and Allied Workers Union obo Arendse v Consumer Brands Business Worcester, a Division of Pioneer Foods (Pty) Ltd* 2014 (7) BALR 716 (CCMA) para 3.
[161] Constitution (note 5 above) s 14.
[162] *National Union of Food* (note 161 above) para 16.
[163] Ibid.
[164] Ibid.
[165] Ibid.

iii. 'where the posting leads to the working relationship becoming intolerable'.[166]

However, the test in determining whether or not the dismissal was fair for the derogatory comments posted by the employee was not followed.[167] De Vlieger-Seynhaeve J 'with respect' only implemented the first leg of the test and held that the dismissal was fair because the employee had failed to restrict access to his Facebook account.[168]

It is submitted that it should have been determined whether or not the derogatory comment posted on social media was a breach of good faith[169] by assessing whether or not the employee had brought the employer's name into disrepute;[170] and more importantly whether or not the derogatory comments posted on social media had in fact led to the working relationship becoming intolerable.[171] By not following the proposed three-step test,[172] De Vlieger-Seynhaeve J 'with respect' undermined the importance of determining whether or not there had been a breach of good faith[173] between the employee and employer.

In the case of *Dauth/Brown and Weir's Cash and Carry*,[174] the court held that:

> '[t]he employer's attitude to the misconduct and its effect on the relationship must be taken into account, although it is not always necessarily the deciding factor and in the final analysis it is a judgment call that must be made by the judge or arbitrator'.[175]

From the aforementioned case, the court averred that the effect of the employee's misconduct on the employment relationship may not be the only factor in determining whether or not dismissal is fair.[176] This implies that there may be another factor[177] in addition to the breach of good faith factor[178] to determine whether or not dismissal for misconduct[179] is fair.

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[166] Ibid.
[167] Ibid., para 17.
[168] Ibid.
[169] LRA (note 1 above) Schedule 8, items 1(3) & 3(4).
[170] *National Union of Food* (note 161 above) para 16.
[171] Ibid.
[172] Ibid.
[173] LRA (note 1 above) Schedule 8, items 1(3) & 3(4).
[174] 2002 (8) BALR 837 (CCMA).
[175] *Dauth/Brown and Weir's Cash and Carry* 2002 (8) BALR 837 (CCMA) 847.
[176] Ibid.
[177] Ibid.
[178] Ibid., Schedule 8, items 1(3) & 3(4).
[179] Ibid., Schedule 8, items 3(4), 3(5), 3(6) & 7.

When making a final decision as to whether or not dismissal for misconduct[180] is fair, a judge may take into account an additional factor[181] which is whether or not there has been a breach of a workplace rule.[182]

3.4 Workplace rule[183]

3.4.1 Workplace rule[184] *in terms of the Labour Relations Act 66 of 1995*[185]

The Act[186] advises that 'all employers should adopt disciplinary rules that establish the standard of conduct required of their employees'.[187] The Act[188] acknowledges that 'the form and content of disciplinary rules will obviously vary according to the size and nature of the employer's business'.[189]

In addition, the Act[190] provides a set of guidelines for determining whether or not dismissals for misconduct are fair.[191] According to this set of guidelines it must be determined:

a. 'whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace'; and[192]
b. 'if a rule or standard was contravened, whether or not';[193]
i. 'the rule was a valid or reasonable rule or standard';[194]
ii. 'the employee was aware, or could reasonably be expected to have been aware, of the rule or standard';[195]
iii. 'the rule or standard has been consistently applied by the employer';[196] and
iv. 'dismissal was an appropriate sanction for the contravention of the rule or standard'.[197]

[180] Ibid.
[181] *Dauth/Brown* (note 176 above) 847.
[182] LRA (note 1 above) Schedule 8, item 7.
[183] Ibid.
[184] Ibid.
[185] LRA (note 1 above).
[186] Ibid.
[187] Ibid., Schedule 8, item 3(1).
[188] LRA (note 1 above).
[189] Ibid., Schedule 8, item 3(1).
[190] LRA (note 1 above).
[191] Ibid., Schedule 8, item 7.
[192] Ibid., Schedule 8, item 7(a).
[193] Ibid., Schedule 8, item 7(b).
[194] Ibid., Schedule 8, item 7(b)(i).
[195] Ibid., Schedule 8, item 7(b)(ii).
[196] Ibid., Schedule 8, item 7(b)(iii).
[197] Ibid., Schedule 8, item 7(b)(iv).

3.4.2 Workplace rule in terms of the common law

In the case of *Hoch v Mustek Electronics (Pty) Ltd*[198] the court held that 'it is for the employer to set standards of conduct for its employees'[199] while the court in the case of *Costa/Nu Metro Theatres*[200] held that 'as a general rule, misconduct implies breach of a valid workplace rule'.[201] Toba explains that 'misconduct could be described as any act or omission on the part of the employee not in conformity with the set guidelines, standards, rules and policies of the workplace'.[202]

This means that an employer may dismiss an employee for misconduct[203] if there has been a breach of a workplace rule.[204] However the Act[205] goes beyond this common law requirement by providing a set of model guidelines or questions that a court should take into account when determining whether or not dismissal is fair[206] for breach of a workplace rule.[207]

3.4.3 Analysis of the workplace rule[208] as it relates to derogatory comments posted on social media

3.4.3.1 Dismissals where there are workplace rules[209] in place

In a situation where there is a workplace rule[210] in place and the employer dismisses an employee for posting derogatory comments on social media, the employer must take into account the following factors:

i. whether or not the employee has contravened a workplace rule;[211]
ii. whether or not the workplace rule was valid or reasonable;[212]
iii. whether or not the employee was aware of the workplace rule;[213]

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198 1999 (12) BLLR 1287 (LC).
199 *Hoch v Mustek Electronics (Pty) Ltd* 1999 (12) BLLR 1287 (LC) para 41.
200 2005 (10) BALR 1018 (BCEISA).
201 *Costa/Nu Metro Theatres* (note 129 above) 1026.
202 Toba (note 116 above) 3.
203 LRA (note 1 above) Schedule 8, items 3(4), 3(5), 3(6) & 7.
204 Ibid., Schedule 8, item 7.
205 LRA (note 1 above).
206 Ibid., Schedule 8, item 7.
207 Ibid.
208 Ibid.
209 Ibid.
210 Ibid.
211 Ibid., Schedule 8, item 7(a).
212 Ibid., Schedule 8, item 7(b)(i).
213 Ibid., Schedule 8, item 7(b)(ii).

iv. whether or not the workplace rule has been consistently applied;[214] and
v. whether or not dismissal was an appropriate sanction.[215]

Answering in the affirmative to each of the propositions put forward will mean that the dismissal was fair.[216] A few of the above propositions will be discussed in relation to case law.

3.4.3.2 Determination as to whether or not a workplace rule has been contravened[217]

In determining whether or not the employee contravened a workplace rule pertaining to social media misconduct,[218] the court in the case of *Page/Edcon Group Employee Relations Dept*[219] held that the term 'monkey' uttered by an employee was not derogatory.[220] In making a decision, Grobler J followed a three-step test by taking into account the following factors:

i. 'does the usage of the word in context amount to abusive, insulting and derogatory language in terms of the disciplinary code';[221]
ii. 'does it justify the sanction of dismissal in the circumstances?';[222] and
iii. 'has there been a breakdown in the trust of employment relationship?'.[223]

Grobler J further indicated that 'a chairperson can't conclude that an employment relationship has broken down –it has to be proved'.[224] This case looked at whether or not the employee had contravened a workplace rule[225] pertaining to derogatory language uttered by the employee.[226]

Grobler J 'with respect' did not however, take into account the following factors:

i. whether or not the workplace rule was valid or reasonable;[227]
ii. whether or not the employee was aware of the rule;[228] and

[214] Ibid., Schedule 8, item 7(b)(iii).
[215] Ibid., Schedule 8, item 7(b)(iv).
[216] Ibid., Schedule 8, item 7.
[217] Ibid., Schedule 8, item 7(a).
[218] Ibid.
[219] 2006 (6) BALR 632 (CCMA).
[220] *Page/Edcon Group Employee Relations Dept* 2006 (6) BALR 632 (CCMA) 642.
[221] Ibid., 635.
[222] Ibid.
[223] Ibid.
[224] Ibid., 643.
[225] LRA (note 1 above) Schedule 8, item 7.
[226] *Page/Edcon* (note 221 above) 635.
[227] LRA (note 1 above) Schedule 8, item 7(b)(i).
[228] Ibid., Schedule 8, item 7(b)(ii).

iii. whether or not the workplace rule had been consistently applied in terms of the model guidelines[229] set by the Act.[230]

3.4.3.3 Determination as to whether or not the workplace rule was valid or reasonable[231]

In determining whether or not the workplace rule was valid or reasonable,[232] the case of *Pillay/Rennies Distribution Services*[233] referred to the international case of *Atlantis Diesel Engines (Pty) Ltd v Roux NO*[234] which provided the following twofold test: 'was the rule reasonably related to':[235]

i. 'the orderly, efficient and safe operation of the company's business'; [236] and
ii. 'the performance that the company might properly expect of the employee?'.[237]

This test does not necessarily indicate how workplace rules[238] relating to derogatory comments posted on social media may be validly formulated.[239] A workplace rule[240] prohibiting the posting of derogatory comments on social media may not necessarily be aimed at facilitating 'the orderly, efficient and safe operation of the business';[241] it may however be aimed at protecting the reputation of the employer.[242]

3.4.3.4 Determination as to whether or not dismissal was an appropriate sanction[243]

In determining 'whether or not dismissal was an appropriate sanction for the contravention of the rule or standard',[244] the court in the case of *UASA obo Jones/Commuter Transport Engineering (Pty) Ltd*[245] held that 'the company is entitled to impose a sanction of dismissal in

[229] Ibid., Schedule 8, item 7(b)(iii).
[230] LRA (note 1 above).
[231] Ibid., Schedule 8, item 7(b)(i).
[232] Ibid.
[233] *Pillay/Rennies Distribution Services* 2007 (2) BALR 174 (CCMA)181.
[234] 1988 (9) *ILJ* 45 (IC) 209.
[235] *Pillay/Rennies* (note 234 above) 181.
[236] Ibid.
[237] Ibid.
[238] LRA (note 1 above) Schedule 8, item 7.
[239] *Pillay/Rennies* (note 234 above) 181.
[240] LRA (note 1 above) Schedule 8, item 7.
[241] *Pillay/Rennies* (note 234 above) 181.
[242] Employers' reputation (note 123 above).
[243] LRA (note 1 above) Schedule 8, item 7(b)(iv).
[244] Ibid.
[245] 2011 (11) BALR 1172 (MEIBC).

terms of its disciplinary code'[246] and therefore cannot 'interfere with the discretion of the company in this regard'.[247]

If there is a legally valid workplace rule[248] prohibiting an employee from making derogatory comments on social media, the sanction of dismissal must still be appropriate in the circumstances.

3.4.3.5 Dismissals where there are no workplace rules[249] in place

The reality is that many employers do not adopt their own set of rules for employees to follow.[250] This becomes a problem when employers dismiss employees for derogatory comments posted on social media and there is no workplace rule[251] prohibiting such conduct. According to the Act[252] misconduct[253] implies breach of a workplace rule[254]and a breach of good faith.[255]

In the absence of a workplace rule[256] employers will have to establish that there has been a breach of good faith.[257] This is because the Act[258] does not make specific provision for a situation or situations where an employer may dismiss an employee in the absence of a workplace rule.[259]

Many employers have not taken the step of setting their own rules regarding social media misconduct,[260]as they are unaware that the posting of derogatory comments by employees on social media could become a serious issue.[261] The issue of social media only comes to light when it personally affects the employer; and the employee is then faced with a dismissal.[262] It

[246] *UASA obo Jones/Commuter Transport Engineering (Pty) Ltd* 2011 (11) BALR 1172 (MEIBC) para 1184.
[247] Ibid.
[248] LRA (note 1 above) Schedule 8, item 7.
[249] Ibid., Schedule 8, item 7.
[250] *Fredericks* (note 31 above) para 6.3.
[251] LRA (note 1 above) Schedule 8, item 7.
[252] LRA (note 1 above).
[253] Ibid., Schedule 8, item 3(4).
[254] Ibid., Schedule 8, item 7.
[255] Ibid., Schedule 8, items 1(3) & 3(4).
[256] Ibid., Schedule 8, item 7.
[257] Ibid., Schedule 8, items 1(3) & 3(4).
[258] LRA (note 1 above).
[259] Ibid., Schedule 8, item 7.
[260] *Fredericks* (note 31 above) para 6.3.
[261] Case law on fair dismissals (note 37 above).
[262] Employers' right to dismissal (note 41 above).

is then left to the courts to determine whether or not dismissal is fair in the absence of a workplace rule[263] prohibiting the posting of derogatory comments on social media.[264]

The case of *Fredericks v Jo Barkett Fashions*[265] serves as an example of how the court has determined whether or not dismissal was fair in a situation where there was no workplace rule in place. In this case, the employer was informed that the employee was posting derogatory comments about her on Facebook.[266]

The employer went on to the employee's Facebook page and found derogatory comments made about the employer.[267] The employer stated that the derogatory comments had a negative impact on other employees and customers which may result in a loss of revenue for the company.[268] The employee cited the right to privacy[269] as a defence against dismissal for posting derogatory comments on social media; and further stated that such dismissal was unfair and too harsh a sanction.[270]

In making a decision as to whether or not dismissal was fair, Ramushowana J assessed whether or not the employee had breached a workplace rule.[271] Ramushowana J followed the guidelines in item 7 of the Labour Relations Act[272] to determine whether or not the dismissal for misconduct was fair.[273] It was clear that there was no workplace rule[274] prohibiting the posting of derogatory comments on social media.[275]

The employer stated that the employee had, however, contravened provisions of the employment contract.[276] Ramushowana J relied on the employee's admission that she had committed the offence[277] in determining that the dismissal was fair.[278] Ramushowana J

[263] LRA (note 1 above) Schedule 8, item 7.
[264] Case law on fair dismissals (note 37 above).
[265] 2011 JOL 27923 (CCMA).
[266] *Fredericks* (note 31 above) para 4.1.
[267] Ibid.
[268] Ibid.
[269] Constitution (note 5 above) s 14.
[270] *Fredericks* (note 31 above) para 5.1.
[271] Ibid., para 6.1.
[272] LRA (note 1 above).
[273] *Fredericks* (note 31 above) para 6.2.
[274] LRA (note 1 above) Schedule 8, item 7.
[275] *Fredericks* (note 31 above) para 6.3.
[276] Ibid.
[277] Ibid.
[278] Ibid., para 6.4.

deliberated that the employee's privacy had not been infringed.[279] A proper interrogation and analysis of whether or not the derogatory comments posted on Facebook amounted to social media misconduct was not undertaken.

As there was no workplace rule prohibiting the posting of derogatory comments on social media,[280] Ramushowana J 'with respect' did not assess whether or not the employer had dismissed the employee on the basis of misconduct[281] which is inclusive of a breach of good faith,[282] as provided for in the Labour Relations Act.[283] The judgement was therefore one dimensional as it did not take into account the applicability of the Labour Relations Act[284] as it relates to social media misconduct.

3.4.3.6 Impairment of dignity

In the case of *Steenberg / Liebherr-Africa (Pty) Ltd.*[285]Panellist J stated that:

> '[i]t is further trite that the use of derogatory or abusive language invariably impairs the dignity of those against whom the language is directed, whether directly or indirectly, and it is not even necessary for offences in this regard to be codified'.[286]

In the case of *Costa/Nu Metro Theatres*[287] the court found that the employee was fairly dismissed for making defamatory comments against his co-workers which were untrue.[288] The court held that even if there is not a specific policy prohibiting derogatory comments, the employee is obliged to respect the dignity of others.[289]

Generally speaking for an employee to be guilty of misconduct[290] she would have to have breached a workplace rule.[291] But according to the above-mentioned cases, if an action is serious enough to impair the dignity of a co-worker or employer, (discussed in Chapter 5) it is

[279] Ibid., para 6.3.
[280] Ibid.
[281] LRA (note 1 above) Schedule 8, items 3(4), 3(5), 3(6) & 7.
[282] Ibid., Schedule 8, items 1(3) & 3(4).
[283] LRA (note 1 above).
[284] Ibid.
[285] 2012 (10) BALR 1039 (MEIBC).
[286] *Steenberg / Liebherr-Africa (Pty) Ltd* 2012 (10) BALR 1039 (MEIBC) para 21.
[287] 2005 (10) BALR 1018 (BCEISA).
[288] *Costa/Nu Metro Theatres* 2005 (note 129 above) 1030.
[289] Ibid., 1026.
[290] LRA (note 1 above) Schedule 8, items 3(4), 3(5), 3(6) & 7.
[291] Ibid., Schedule 8, item 7.

obvious that this amounts to misconduct[292] and a workplace rule[293] is not needed in this instance.[294] It is submitted that it is preferable for employers to remove all uncertainty in such cases by formulating a suitable workplace rule[295] prohibiting derogatory comments being posted on social media.

3.5 Summary of findings

After analysing the various provisions of the Labour Relations Act[296] it is clear that certain provisions in the Labour Relations Act[297] may still be applied to dismissals for derogatory comments posted by employees on social media.

Item 3(5) of Schedule 8 of the Act[298] may be still be applied and adjusted according to the factors[299] that the employer should take into account when dismissing an employee for derogatory comments posted on social media.

Item 2(2) of Schedule 8 of the Act[300] lists 'the conduct of the employee' as one of the grounds[301] for dismissal. This ground[302] will still apply to dismissals for derogatory comments posted on social media. This is because the act of posting a derogatory comment on social media amounts to conduct on the part of an employee.

If the employer dismisses the employee on this ground[303] in terms of the Act[304] it must be determined whether or not such conduct[305] (the posting of derogatory comments on social

[292] Ibid., Schedule 8, items 3(4), 3(5), 3(6) & 7.
[293] Ibid., Schedule 8, item 7.
[294] *Costa/Nu Metro Theatres* (note 129 above) 1026.
[295] LRA (note 1 above) Schedule 8, item 7.
[296] LRA (note 1 above).
[297] Ibid.
[298] Ibid.
[299] Ibid., Schedule 8, item 3(5).
[300] LRA (note 1 above).
[301] Ibid., Schedule 8, item 2(2).
[302] Ibid.
[303] Ibid.
[304] LRA (note 1 above).
[305] Ibid., Schedule 8, item 2(2).

media) amounts to misconduct[306] in terms of the Act.[307] As explained above, misconduct[308] encompasses a breach of good faith[309]as well as a breach of a workplace rule.[310]

3.5.1 Breach of good faith[311] requires a 'subjective test'

The concept of breach of good faith[312] is a 'subjective test' that the courts will take into account when determining whether or not dismissals for misconduct[313] are fair. The factors that the courts will take into account are as follows:

i. the reputation of the employer;[314]
ii. the working relationship becoming intolerable;[315]
iii. the consequences of the misconduct;[316] and
iv. a number of other factors depending on the situation of the case.

3.5.2 Breach of a workplace rule[317] requires an 'objective test'

The breach of a workplace rule[318] is an 'objective test' that the courts will take into account in the form of a 'check list'[319] in terms of the Act.[320] The factors that the courts will take into account are as follows:

i. whether or not the employee has contravened a workplace rule;[321]
ii. whether or not the workplace rule was valid or reasonable;[322]
iii. whether or not the employee was aware of the workplace rule;[323]
iv. whether or not the workplace rule has been consistently applied;[324] and

[306] Ibid., Schedule 8, items 3(4), 3(5), 3(6) & 7.
[307] LRA (note 1 above).
[308] Ibid., Schedule 8, items 3(4), 3(5), 3(6) & 7.
[309] Ibid., Schedule 8, items 1(3) & 3 (4).
[310] Ibid., Schedule 8, item 7.
[311] Ibid., Schedule 8, items 1(3) & 3(4).
[312] Ibid.
[313] Ibid.
[314] Ibid.
[315] Ibid.
[316] Ibid.
[317] Ibid., Schedule 8, item 7.
[318] Ibid.
[319] Ibid.
[320] LRA (note 1 above).
[321] Ibid., Schedule 8, item 7(a).
[322] Ibid., Schedule 8, item 7(b)(i).
[323] Ibid., Schedule 8, item 7(b)(ii).
[324] Ibid., Schedule 8, item 7(b)(iii).

v. whether or not dismissal was an appropriate sanction.[325]

It is submitted that both the concepts of good faith[326] and the workplace rule[327] are still valid and applicable in determining whether or not dismissals for derogatory comments posted on social media are fair. This is because misconduct[328] entails a 'subjective test' (breach of good faith[329]) and an 'objective test' (breach of a workplace rule[330]) which if co-applied will adequately determine whether or not dismissals for derogatory comments posted on social media are fair.

3.5.3 Shortcomings in the Labour Relations Act 66 of 1995

The following provisions of the Act[331] have not kept pace with social media and problems have arisen in applying the current legislation[332] to dismissals for derogatory comments posted on social media:

The Act[333] does not provide a definition of misconduct[334] nor does it provide a definition of social media misconduct. The Act[335] provides a few examples of serious misconduct,[336] but it does not provide social media misconduct as an example. Since social media misconduct is not listed as an example of serious misconduct,[337] this may lead to uncertainty in determining whether or not the Act[338] may be applied to this new phenomenon of social media and more specifically to dismissals for derogatory comments posted on social media.

3.5.4 Shortcomings in court decisions

In analysing the cases, it seems that the courts have become side tracked by issues such as the right to privacy[339] (discussed in Chapter 6) in determining whether or not dismissals for

[325] Ibid., Schedule 8, item 7(b)(iv).
[326] Ibid., Schedule 8, items 1(3) & 3(4).
[327] Ibid., Schedule 8, item 7.
[328] Ibid., Schedule 8, items 3(4), 3(5), 3(6) & 7.
[329] Ibid., Schedule 8, items 1(3) & 3(4).
[330] Ibid., Schedule 8, item 7.
[331] LRA (note 1 above).
[332] Ibid.
[333] Ibid.
[334] Ibid., Schedule 8, items 3(4), 3(5), 3(6) & 7.
[335] LRA (note 1 above).
[336] Ibid., Schedule 8, item 3(4).
[337] Ibid.
[338] LRA (note 1 above).
[339] Constitution 1996 (note 5 above) s 14.

derogatory comments posted on social media are fair. The courts have also been inconsistent in applying the concept of breach of good faith[340] and breach of the workplace rule[341] to determine whether or not dismissals for derogatory comments posted on social media are fair.

In the case of *Fredericks*[342] the court only applied the objective test of determining whether or not there had been a breach of a workplace rule[343] but did not determine the subjective test of whether or not there had been a breach of good faith.[344]

In the cases of *Sedick*[345]and *National Union of Food*[346] the court applied only the subjective test of determining whether or not there had been a breach of good faith[347] but did not determine the objective test of whether or not there had been a breach of a workplace rule.[348]

The breach of the workplace rule[349] is an important factor that the courts should take into account because it is an objective assessment that will determine whether or not dismissals for derogatory comments posted on social media are fair. The workplace rule[350] would generally be a rule prohibiting the employees from posting derogatory comments on social media. It is therefore submitted that this workplace rule[351] may take the form of a social media policy which businesses may implement in the workplace.

[340] LRA (note 1 above) Schedule 8, items 1(3) & 3(4).
[341] Ibid., Schedule 8, item 7.
[342] *Fredericks* (note 31 above).
[343] LRA (note 1 above) Schedule 8, item 7.
[344] Ibid., Schedule 8, items 1(3) & 3(4).
[345] *Sedick* (note 138 above).
[346] *National Union of Food* (note 161 above).
[347] LRA (note 1 above) Schedule 8, items 1(3) & 3(4).
[348] Ibid., Schedule 8, item 7.
[349] Ibid.
[350] Ibid.
[351] Ibid.

CHAPTER 4
THE DESIRABILITY OF SOUTH AFRICAN BUSINESSES ENACTING A SOCIAL MEDIA POLICY IN THE WORKPLACE

4. INTRODUCTORY COMMENTS

Having discussed the Labour Relations Act[352] as it relates to derogatory comments posted on social media, this chapter will discuss the desirability of businesses enacting a social media policy. This social media policy may act as the workplace rule[353] that businesses are advised to formulate in terms of the Act.[354] According to Recalde 'employers are advised to adopt a clear, written and detailed social media policy'.[355]

Mushwana and Bezuidenhout state that:

> '[i]n order to balance the benefits and risks associated with employees making use of social media, employers have an obligation to put in place policies and processes that protect their assets and reputations against any form of damage as [a] result of the actions of employees. This includes the implementation and practical application of a social media policy, training employees on its scope and impact, and enforcing the policy'.[356]

4.1 Reasons why many businesses have not enacted a social media policy

According to Mushwana and Bezuidenhout 'the absence of policies guiding social media usage might have arisen because social media policy is perceived to be ineffective and a lesser priority in addressing social media risk'.[357]

However, in the same way that businesses are advised to keep up with technological advances such as computers, cell phones, software and the like; they should also keep up with the use of social media by enacting a social media policy which prohibits employees from posting derogatory comments about the employer or business on social media.

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[352] LRA (note 1 above).
[353] Ibid., Schedule 8, item 7.
[354] LRA (note 1 above).
[355] M E Recalde *The Need for a Social Media Policy* (2010).
[356] G Mushwana & H Bezuidenhout 'Social Media Policy in South Africa' (2014) 16 *Southern African Journal of Accountability and Auditing Research* 64.
[357] Ibid., 72.

Many businesses have jumped on the social media bandwagon in the interests of promoting their products, services and company image. Today, many businesses have a Facebook page, a Twitter account, an Instagram account and the like. If businesses are able to reap the benefits of social media, then they should take into account the advantages of enacting a social media policy.

4.2 Advantages of enacting a social media policy

Dismissal of an employee will be justified if there is a proper social media policy in place as a workplace rule[358] and the employee has breached it. The social media policy will serve to protect the reputation of the employer or business in the eyes of customers, suppliers, investors and competitors on social media.[359] It will provide clear guidance to employees on what conduct is acceptable; what conduct is not acceptable on social media; and the consequences thereof.

LaPlaca and Winkeller state that:

> '[a] social media policy will go a long way to help the employer avoid costly legal problems and other associated risks arising from situations that are otherwise beyond the employer's immediate control'.[360]

Although a social media policy may provide certain advantages for businesses as mentioned above, certain disadvantages may also arise from enacting a social media policy.

4.3 Disadvantages of enacting a social media policy

One disadvantage is that the social media policy may act as a quasi-legal code which employees may view as less binding than statutory legislation.[361] It would also mean added costs for employers in having to hire an attorney to draft a social media policy.

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[358] LRA (note 1 above) Schedule 8, item 7.

[359] Employers' reputation (note 123 above).

[360] D LaPlaca and N Winkeller 'Legal Implications of the Use of Social Media: Minimizing the Legal Risks for Employers and Employees' (2010) *Journal of Business & Technology Law Proxy* 1–19.

[361] HB Olesen 'The Legal Profession. Competition and Liberalisation' (2006) *Copenhagen Economics* <http://ec.europa.eu/competition/sectors/professional_services/conferences/20061230/01_henrik_ballebye_olesen.pdf.> (accessed 3 October 2016).

Furthermore, the social media policy has to be current and applicable to the conduct of employees without limiting or infringing on their rights to freedom of expression[362] (discussed in Chapter 5) and privacy[363] (discussed in Chapter 6). It will, therefore, have to be updated on a regular basis, in order to keep up with the constantly changing social media platforms.

After assessing the risks of not enacting a social media policy, as well as the advantages and disadvantages of enacting a social media policy, it is worth assessing the manner in which a social media policy may be implemented.

4.4 Manner in which a social media policy may be implemented

According to Herlle and Astray-Caneda the policy should be coupled with training and monitoring.[364] One of the factors that the Act[365] lists in determining whether or not dismissal for misconduct[366] was fair, is whether or not the employee was aware of the workplace rule.[367] Enacting a social media policy as a workplace rule[368] goes hand in hand with educating the employees about the workplace rule and the consequences of breaching the workplace rule.[369]

Schoeman proposes that as a solution to social media misconduct 'broad based leadership is needed to build and maintain high levels of ethical awareness and to continually strive to build commitment to common values such as integrity and respect'.[370] This will ensure that there is good faith[371] between the employee and employer.

Along with the social media policy, employers should stress the importance and the reason for the workplace rule[372] being enacted. It is important that employees know that they also have a duty to respect their employer.[373] One of the ways to carry out that respect is to refrain from posting derogatory comments about the employer on social media.

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[362] Constitution (note 5 above) s 16.
[363] Ibid., s 14.
[364] M Herlle & V Astray-Caneda 'The Impact of Social Media in the Workplace' (2012) *Florida International University* 67-73.
[365] LRA (note 1 above).
[366] Ibid., Schedule 8, items 3(4), 3(5), 3(6) & 7.
[367] Ibid., Schedule 8, item 7(b)(ii).
[368] Ibid., Schedule 8, item 7.
[369] Herlle & Astray-Caneda (note 364 above) 67-73.
[370] C Schoeman 'Manage your Social Media Risks: Challenges Employers Face with regard to Social Media might not be what you think they are' (2016) 1(1) *HR Future* 38-39.
[371] LRA (note 1 above) Schedule 8, items 1(3) & 3(4).
[372] Ibid., Schedule 8, item 7.
[373] Ibid., Schedule 8, items 1(3) & 3(4).

Shinn states that:

> '[e]mployers barely have the time to continuously monitor normal business operations for employee misconduct. So, to add policing off-duty on social media employee conduct is a burden that most employers are not excited to undertake, nor want to'.[374]

Employers do not have to constantly monitor the internet to establish whether or not their employees have posted derogatory comments on social media. Instead, employers should place their reliance on a social media policy, which will serve as a fair reason for dismissal when it does come to the employer's attention that an employee has posted a derogatory comment about the employer/ business on social media.

In South Africa, the government has enacted a social media policy that serves as a set of social media guidelines for government employees. This is an example of a social media policy which is, perhaps, suited to South African conditions.

4.5 An example of a social media policy suited to South African conditions

The Social Media Policy Guidelines[375] drafted by the South African Government recognises that:

> '[t]here is a phenomenal growth in digital technology and the rise of social media platforms over the past few years have revolutionised the way in which people communicate and share information'.[376]

The purpose of the policy is:

> '[t]o create an awareness of social media and the opportunities it presents for government and to make government agencies and government staff aware of how to manage the risks associated with the use of social media'.[377]

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[374] J Shinn 'Employee Fired for Facebook Postings Latest Example for Why Companies Need a Social Media Policy and Plan' (2015) *Michigan Employment Advisor* <http://www.michiganemploymentlawadvisor.com/social-media/employee-fired-for-facebook-postings-latest-example-for-why-companies-need-a-social-media-policy-and-plan/> (accessed 17 June 2016).

[375] Department of Government Communication and Information System, Republic of South Africa 'Social Media Policy Guidelines 2011' *GCIS Social Media Guidelines and Resources.*

[376] Ibid., 3.

[377] Ibid.

The Social Media Policy Guidelines recognise that there has been a rise in communication via social media and provides a set of guidelines on how government employees may manage the risks of using social media.[378] The government has taken the step to safeguard against the risk of the use of social media by government employees.[379]

'The government has provided that when contributing on behalf of the government and/or department, government employees should consider the following':[380]

i. 'Keep your postings legal, ethical and respectful'.[381]
ii. 'Respect copyright laws'.[382]
iii. 'Ensure that information published online is accurate and approved'.[383]
iv. 'Comply with your department's spokesperson policy'.[384]

The government has further provided that 'when using social media at personal capacity, employees should consider the following;'[385]

i. 'Keep government- confidential information confidential'.[386]
ii. 'Keep personal social media activities distinct from government communication'.[387]
iii. 'Respect government time and property'.[388]

Lastly 'when using any type of social media', the government has indicated that government employees must:[389]

i. 'Be credible- accurate, fair, thorough and transparent'.[390]
ii. 'Be respectful-encourage constructive criticism and deliberation'.[391]

[378] Ibid.
[379] Ibid.
[380] Ibid.,9.
[381] Ibid.
[382] Ibid.
[383] Ibid.
[384] Ibid.
[385] Ibid.,10.
[386] Ibid.
[387] Ibid.
[388] Ibid.
[389] Ibid.,8.
[390] Ibid.
[391] Ibid.

iii. 'Be cordial honest and professional at all times'.[392]

iv. 'Listen before you talk- before entering any conversation you need to understand the context, who is the potential audience? is there a good reason to place a comment or respond'?[393]

v. 'Write what you know- you have to know your facts and cite credible sources'.[394]

vi. 'Acknowledge if a mistake is made through your comment or response and respond to it immediately'.[395]

vii. 'Be both reactive and responsive- when you gain insight share it where appropriate'.[396]

The implementation of a social media policy by the government should inspire businesses in the private sector to follow in the steps of the government by also implementing a social media policy to safeguard against the risks of the use of social media by its employees.

After assessing, the advantages and disadvantages of enacting a social media policy; how the social media policy may be implemented; and an example of a social media policy, it is necessary to assess the risks of not implementing a social media policy.

4.6 Risks of not implementing a social media policy

A study conducted by Mushwana and Bezuidenhout revealed that social media is a risk, and a majority of organisations which they surveyed had not implemented a social media policy.[397] This is evident in the increase in the number of cases that have arisen which pertain to the dismissals of employees for derogatory comments posted on social media in the absence of a social media policy prohibiting such conduct.[398]

Businesses that fail to enact a social media policy run the risk of employees casting the business or employer in a bad light.[399] Posts on social media enter the public domain and can be accessed by anyone at any time.[400] This could negatively impact on the business when people read and

[392] Ibid.
[393] Ibid.
[394] Ibid.
[395] Ibid.
[396] Ibid.
[397] Mushwana & Bezuidenhout (note 357 above) 63-74.
[398] Case law on fair dismissals (note 37 above).
[399] Employers' reputation (note 123 above).
[400] *Sedick* (note 138 above) paras 48 & 50.

believe the derogatory comments posted on social media which could lead to a decrease in sales, a loss of profit and investors withdrawing their investments from businesses.

Thompson and Bluvshtein state that 'the increase in the use of social media and technology by employees has resulted in an increase in cases of misuse and ultimately in litigation'.[401]

It is obvious that employees are not permitted to use social media in the workplace as it would hinder their performance. The misuse of social media occurs when employees use social media to post derogatory comments about their employer on social media regardless of whether it was done within or outside the workplace.[402]

Along with the risks of businesses not implementing a social media policy, there are tensions in our law that have been created by the rise of social media. These tensions arise when employees often cite constitutional rights such as the right to freedom of expression[403] and the right to privacy[404] as a defence against being dismissed for derogatory comments posted on social media. Each defence will be discussed in brief in Chapter 5 and the discussion is limited to potential areas of concern that are relevant to the main argument.

[401] T M Thompson & N Bluvshtein 'Where Technology and the Workplace Collide: An Analysis of the Intersection Between Employment Law and Workplace Technology' (2008) 3(4) *Privacy & Data Security Law Journal* 283-299.
[402] *Costa/Nu Metro Theatres* (note 129 above) 1027.
[403] Constitution (note 5 above) s 16.
[404] Ibid., s 14.

CHAPTER 5

ANALYSIS OF THE RIGHT TO FREEDOM OF EXPRESSION AS IT RELATES TO DEROGATORY COMMENTS POSTED BY EMPLOYEES ON SOCIAL MEDIA

5. INTRODUCTORY COMMENTS

Having discussed the desirability of businesses enacting a social media policy, this dissertation will turn to the manner in which certain constitutional rights inform and impact upon debates in this area. The purpose of discussing these constitutional rights is to determine whether or not the right to freedom of expression[405] and the right to privacy[406] are satisfactory defences against dismissals for derogatory comments posted on social media.

In the case of *Heroldt v Wills*[407] Willis J stated that the founders of our Constitution could not have foreseen the tensions that social media have created for the rights to freedom of speech and privacy.[408] These tensions refer to the employee citing the right to freedom of expression[409] and the right to privacy[410] (discussed in Chapter 6) as defences against being dismissed for derogatory comments posted on social media.

The right to freedom of expression[411] and the right to privacy[412] are provided for in the South African Constitution. People often believe that these rights extend to social media which they use as a platform to exercise their right to freedom of expression[413] and right to privacy.[414] As a defence against being dismissed for derogatory comments posted on social media, an employee may argue that she has the right to freedom of expression.[415]

[405] Ibid., s 16.
[406] Ibid., s 14.
[407] 2013 (2) SA 530 (GSJ).
[408] *Heroldt* (note 55 above) para 7.
[409] Constitution (note 5 above) s 16.
[410] Ibid., s 14.
[411] Ibid., s 16.
[412] Ibid., s 14.
[413] Ibid., s 16.
[414] Ibid., s 14.
[415] Ibid., s 16.

5.1 Laws on freedom of expression in South Africa[416]

An employee cites the right to freedom of expression[417] from the South African Constitution which is used as a defence against dismissal for derogatory comments posted on social media. Section 16 of the Constitution states that 'everyone has the right to freedom of expression which includes':[418]

i. 'freedom of the press and other media';[419]
ii. 'freedom to receive or impart information or ideas';[420]
iii. 'freedom of artistic creativity';[421] and
iv. 'academic freedom and freedom of scientific research'.[422]

In terms of section 16(2) of the Constitution, the right to freedom of expression[423] does not extend to the following:

i. 'propaganda for war';[424]
ii. 'incitement of imminent violence';[425] or
iii. 'advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm'.[426]

Various judges of the Constitutional Court and authors have explained the meaning and the importance of the right to freedom of expression[427] as follows:

In the case of *South African National Defence Union v Minister of Defence and Another*[428] O'Regan J explained that:

[416] Constitution (note 5 above).
[417] Ibid., s 16.
[418] Ibid., s 16(1).
[419] Ibid., s 16(1)(a).
[420] Ibid., s 16(1)(b).
[421] Ibid., s 16(1)(c).
[422] Ibid., s 16(1)(d).
[423] Ibid., s 16.
[424] Ibid., s 16(2)(a).
[425] Ibid., s 16(2)(b).
[426] Ibid., s 16(2)(c).
[427] Ibid., s 16.
[428] 1999 (6) BCLR 615 (CC).

> '[f]reedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters'.[429]

In the case of *Democratic Alliance v ANC and Another*[430] the court held that the right to freedom of expression:[431]

> '[i]s valuable both for its intrinsic importance and because it is instrumentally useful. It is useful in protecting democracy, by informing citizens, encouraging debate and enabling folly and misgovernance to be exposed. It also helps the search for truth by both individuals and society generally. If society represses views it considers unacceptable they may never be exposed as wrong. Open debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values'.[432]

Papadopoulos and Snail state that 'freedom of opinion and expression is widely acknowledged as a human basic right that should be available to all as it plays a crucial role in fair and open society'.[433]

With the meaning and importance of the right to freedom of expression[434] borne in mind it is necessary to hone in on the right to freedom of expression[435] by analysing it in relation to derogatory comments posted by employees on social media.

5.2 Analysis of the right to freedom of expression[436] as it relates to derogatory comments posted on social media

In analysing the right to freedom of expression[437] as it relates to derogatory comments posted on social media, Davey acknowledges that:

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[429] *South African National Defence Union v Minister of Defence and Another* 1999 (6) BCLR 615 (CC) para 7.
[430] 2015 ZACC 1 (CC).
[431] Constitution (note 5 above) s 16.
[432] *Democratic Alliance v ANC and Another* 2015 ZACC 1 (CC) para 14 e.
[433] S Papadopoulos & S Snail *Cyberlaw @ SA III The Law of The Internet in South Africa* 3 ed (2012) 251.
[434] Constitution (note 5 above) s 16.
[435] Ibid.
[436] Ibid.
[437] Ibid.

> '[i]n today's world the most effective, efficient and immediate way of conveying one's ideas and thoughts is via the internet. At the same time, the internet reaches out to millions of people instantaneously'.[438]

Papadopoulos and Snail state that 'the internet has become a key instrument for communication and for exercising the right to freedom of expression in the form of writing, audio or video'.[439] Forms of social media like Twitter, Instagram and Facebook have become instruments for users to post their thoughts or comments on their social media profile.

Nel states that 'freedom of speech is a treasured human right in most democracies and in the process of communicating via any social network a user is exercising his right to freedom of speech'.[440] Previously, people were limited to oral speech, writing or using the media to convey their political thoughts and opinions. Now people are able to post their political thoughts and opinions instantly on social media which is seen on the news feed of their friends and followers.

It is submitted that the right to freedom of expression[441] refers to opinions, thoughts, truths, debates and expressions in a political context.[442] This right generally protects the democracy of the country by allowing people the freedom to express their thoughts and opinions about the government.[443]

Freedom of expression[444] in a political context, is still protected even if such thoughts or opinions are expressed on a platform of social media. However, the confusion comes in when people believe that freedom of expression[445] extends to the freedom to express one's thoughts or opinions in relation to anything or anyone on social media.[446]

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[438] R Davey 'South Africa: Understanding and Managing the Risks of Social Media in the Workplace' (2015) *Bowman Gilfillan* https://www.lexology.com/library/detail.aspx?g=db5837b2-b86c-486d-9062-786c6c6a2bbe (accessed 10 June 2016).
[439] Papadopoulos & Snail (note 434 above) 251.
[440] S Nel 'Social Media and Employee Speech: The Risk of Overstepping the Boundaries into the Firing Line' (2016) 49 (2) *XLIX CILSA* 188.
[441] Constitution (note 5 above) s 16.
[442] Constitution (note 5 above) s 16, *South African National Defence Union* (note 430 above) para 7 & *Democratic Alliance* (note 433 above) para 14 e.
[443] Constitution (note 5 above) s 16.
[444] Ibid.
[445] Ibid.
[446] Case law on fair dismissals (note 37 above).

This is a pivotal mistake that most employees make in believing that they have the freedom to post derogatory comments about their employer on social media.[447]

In the political sphere, the right to freedom of expression[448] is widely protected. Once the right to freedom of expression[449] enters a social sphere (by expressing one's thoughts and opinions about another person), the scope of protection for the right to freedom of expression[450] becomes narrower. This is because protection of the right to freedom of expression[451] diminishes once it amounts to defamation.

5.3 Analysis of the right to freedom of expression[452] *in terms of the common law*

5.3.1 Defamation

Nel states that:

> '[a]n individual's right to freedom of speech includes the right to comment, but also the right to complain or "gripe." However, as soon as the remarks (comments or complaints) referring to an individual (or business) are derogatory the poster of such remarks may be liable for defamation'.[453]

Therefore, when an employee posts a derogatory comment about the employer on social media, that derogatory comment has the potential to cross the line of being insulting to actually injuring the reputation of the employer. In this instance, the employee may become liable for defamation.

Although this dissertation is particularly focused on derogatory comments and not defamatory comments, it is important to look at how the two may become intertwined on a platform of social media. A derogatory comment may or may not be defamatory but all defamatory statements are derogatory. Derogatory comments are 'insulting, disrespectful, unflattering,

[447] Ibid.
[448] Constitution (note 5 above) s 16.
[449] Ibid.
[450] Ibid.
[451] Ibid.
[452] Ibid.
[453] S Nel 'Problematic Issues Surrounding Transborder Cybersmear' (2010) 22 (3) *SA Merc LJ* 360.

unkind, or demeaning',[454] whereas defamatory statements are not only insulting but also reputation damaging.

It is worth noting that the freedom to post a derogatory comment on social media does not entail the absolute enjoyment of the right to freedom of expression.[455] A derogatory comment metaphorically can be likened to a 'person skating on the thin ice'. However, that person is heavy enough to break the ice and land in a 'puddle of defamation'. If a comment falls into the category of defamation, the right to freedom of expression[456] will be limited by the common law remedy of defamation.

According to Truter:

> '[d]efamation is the wrongful and intentional publication of defamatory words or conduct that refers to another person. The common law elements of defamation are: the wrongful and intentional publication of a defamatory statement concerning another person'.[457]

5.3.2 Elements of defamation

The derogatory comments posted by employees about their employer(s) on social media will be analysed in terms of the elements of defamation.

5.3.2.1 Wrongfulness

For a defamatory statement to be wrongful it must be *contra boni-mores.*[458] This means that if a statement is found to be defamatory in the eyes of the community, such statement will be wrongful. In the context of a derogatory comment posted by an employee on social media, such comment is available in the public domain and is accessible to the public online.[459] In cyberspace, people have a tendency to post comments that are controversial or comments that stir conversation on social media platforms.

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[454] Vocabulary.Com Dictionary (note 39 above).
[455] Constitution (note 5 above) s 16.
[456] Ibid., s 16.
[457] A Truter 'Your Right of Recourse for Defamation of Character' (2016) *Schoeman Law Inc* <https://www.schoemanlaw.co.za/wp-content/uploads/2016/07/Your-right-to-recourse-for-defamation-of-character-1.pdf> (accessed 29 June 2017).
[458] Ibid., 2.
[459] *Sedick* (note 138 above) paras 48 & 50.

Controversial comments posted by people on social media, are often derogatory comments posted by employees of their employer(s). By re-posting, republishing, re-tweeting and sharing the comment with other users on social media, attention is drawn to the derogatory comment which often indicates that such comment is wrongful.

In Chapter 6 of this dissertation, it will be clear that it is this mobility of comments posted on social media that mitigates against any exercise of a right of privacy[460] in these circumstances and that the reasonable user should expect the posting to travel beyond its original site.

5.3.2.2 Intention

The person committing the defamation must have the intention to damage another person's reputation in the eyes of the public.[461] Therefore *dolus* is required and *culpa* would be insufficient. In the context of an employee posting a derogatory comment about the employer on social media, the employee has the intention to insult or demean the employer in the eyes of friends and followers on social media. The employee is usually frustrated, angry or upset with the employer and uses social media as an outlet to retaliate against the employer.

The employee thus has the intention to demean the employer publicly or to show everyone what a 'terrible boss' the employer is. In some instances, the posting of the derogatory comment by the employee is done to garner support or sympathy from friends and followers. In other instances, the derogatory comment is posted for the purpose of being 'relatable' or 'popular' on social media; or to gain more followers or 'likes' based on the derogatory post about the employer.

5.3.2.3 Publication

Defamation occurs when a defamatory statement is communicated from one person to another through publication.[462] Publication used to mean transmitting a statement, for example, via newspapers, radio, or television.[463] However, with the rise of the digital age, publishing now includes the posting of a statement or comment on a social media account such as Facebook, Twitter, Instagram, WhatsApp, Snapchat and the like.[464]

[460] Constitution (note 5 above) s 14.
[461] Truter (note 458 above) 2.
[462] Ibid.
[463] Ibid.
[464] Ibid.

In the case of *Dutch Reformed Church Vergesig Johannesburg Congregation v Rayan Sooknunan t/a Glory Divine World Ministries*[465] Satchwell J stated that individuals who post comments on a Facebook page are 'little different from persons who have attached a scrappy piece of paper to a felt notice board in a passage with a pin or stub of Prestik'.[466]

Therefore, if a piece of paper is available for anyone to view in a public place it is regarded as being published in the same way a comment posted on a social media account, is regarded as being published. This is because the comment is available in the public domain for anyone to view.[467] The problem is that employees are 'often unaware that posting material on social media is a form of publication for which they can be held liable'.[468]

Nel explains that:

> '[w]hen users of social networking sites share information, photos, and other materials, they may be held liable to others as 'publishers' of the information in the same way that offline content publishers such as radio or newspapers are responsible'.[469]

Nel explains further that:

> '[a]nyone who links to, shares, or re-tweets a defamatory post will be liable for defamation as a 'publisher'. If, for instance, an employee happens to 'like' a Facebook post that is subsequently deemed defamatory, that simple 'click' could have far-reaching consequences as the employee is in actual fact 'publishing' the defamation'.[470]

5.3.2.4 Defamatory statement

A defamatory statement is a statement which reduces the reputation of a person in the eyes of the public.[471] A derogatory comment may also infringe on the reputation of a person, depending

[465] 2012 JOL 28882 (GSJ).
[466] *Dutch Reformed Church Vergesig Johannesburg Congregation v Rayan Sooknunan t/a Glory Divine World Ministries* 2012 JOL 28882 (GSJ) para 48.
[467] Ibid.
[468] O Ampofo-Anti & P Marques 'Taking Responsibility on Social Media' (2015) 15 (9) *Without Prejudice* 43-44.
[469] Nel (note 441 above) 189.
[470] Ibid.
[471] Truter (note 458 above).

on what was said. Derogatory comments posted on social media by an employee about an employer, may also equate to a form of cyberbullying.[472]

Privitera and Campbell explain that:

> '[c]yberbullying techniques use modern communication technology to send derogatory or threatening messages directly to the victim or indirectly to others, to forward personal and confidential communication or images of the victim for others to see and to publicly post denigrating messages'.[473]

Snail explains:

> '[t]he exposure of one's views on a particular issue may be a legal right on a private social media page but, if this information were to be leaked, the right to freedom of expression must be balanced with the right of others not to be disparaged or defamed'.[474]

The posting of a derogatory comment on social media, has the potential to be a serious form of infringement of the law.[475] In the context of derogatory comments posted by the employee about the employer on social media, such comment may be of such gravity and seriousness that it may infringe on the reputation of the employer.[476] As a result, the employer will be entitled to dismiss the employee and sue the employee for defamation if the derogatory/defamatory comment is not true.[477]

5.3.2.5 Another person

The defamatory statement must be about another person.[478] With regard to derogatory comments posted on social media, this dissertation focuses on the relationship between the employee and the employer. In the context of an employee posting a derogatory comment on social media, such comment must refer to the employer as the other person.

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[472] C Privitera and M Campbell 'Cyberbullying: The New Face of Workplace Bullying?' (2009) 12 *Cyberpsychology and behavior* 395-396 < https://doi.org/10.1089/cpb.2009.0025> (accessed 20 August 2017).
[473] Ibid.
[474] S Snail 'Social media – Reasonable Use and Legal Risks' (2016) *Without Prejudice* 18.
[475] The common law of defamation.
[476] Employers' reputation (note 123 above).
[477] Employers' right to dismissal (note 41 above).
[478] Truter (note 458 above) 2.

In an analysis of derogatory comments in relation to the elements for defamation, it is quite clear that derogatory comments can easily amount to defamatory statements which infringe on the employer's reputation in the eyes of the public.[479] Therefore, the employee's freedom to post derogatory comments on social media may be limited by the common law action of defamation.

5.4. Analysis of the right to freedom of expression[480] in light of the employer's right to dignity[481]

In the context of an employee posting a derogatory comment about his employer on social media, it is clear that the employer's right to dignity[482] is highly valued and that the employer is entitled to be treated with respect.[483] The Labour Relations Act[484] reiterates this right in item 1(3) of Schedule 8 of the Labour Relations Act[485] which states 'that employers and employees should treat one another with mutual respect' while section 10 of the Constitution states that 'everyone has inherent dignity and the right to have their dignity respected and protected'.[486]

In the case of *S v Makwanyane*[487] O'Regan J stated that:

> '[r]ecognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many other rights that are specifically entrenched in [the Bill of Rights]'.[488]

In a scenario where an employee posts a derogatory comment about her employer on social media, the employee enjoys the right to freedom of expression[489] by imparting this information about the employer to her friends and followers on her social media account.

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[479] Employers' reputation (note 123 above).
[480] Ibid., s 16.
[481] Ibid., s 10.
[482] Constitution (note 5 above) s 10.
[483] LRA (note 1 above) Schedule 8, items 1(3) & 3(4).
[484] LRA (note 1 above).
[485] Ibid.
[486] Constitution (note 5 above) s 10.
[487] 1995(3) SA 391 (CC).
[488] *S v Makwanyane* 1995() SA 391 (CC) para 328.
[489] Ibid., s 16.

However, because this comment is derogatory and because it infringes on the employer's right to dignity[490] (that the comment infringed on the employer's reputation[491] or was disrespectful to the 'intrinsic worth' of the employer);[492] the employer may dismiss the employee in terms of the Labour Relations Act[493] or sue the employee in terms of the law of defamation depending on the circumstances.

Therefore, the action of posting a derogatory or defamatory comment about the employer on social media is demeaning, insulting and disrespectful to the employer[494] and also infringes on the employer's right to dignity[495] at the same time. The employee therefore does not have unlimited freedom to post derogatory comments about the employer on social media.

5.5 Analysis of the right to freedom of expression[496] in terms of the Labour Relations Act 66 of 1995[497]

According to Nel 'a reliance on the defence of freedom of speech does not provide a licence to breach a contract of employment'.[498]

Vries and Moosa explain that:

> '[e]mployees need to keep in mind that the right to freedom of expression is limited. All employees should think carefully before posting anything relating to their employers, companies, colleagues and clients, and they should never assume that their social media network is too small to attract scrutiny from employers or the public'.[499]

[490] Ibid., s 10.
[491] Employers' reputation (note 123 above).
[492] *Makwanyane* (note 489 above) 328.
[493] LRA (note 1 above) & Employers' right to dismissal (note 41 above).
[494] Vocabulary.Com Dictionary (note 39 above).
[495] Constitution (note 5 above) s 10.
[496] Ibid, s 16.
[497] LRA (note 1 above).
[498] Nel (note 441 above) 221.
[499] M Vries & N Moosa 'The Laws Around Social Media: student feature' (2015) 15(9) *Without Prejudice* 40.

Nel explains that:

> '[i]n terms of an employment contract an employee undertakes to promote the interests of the employer. This means the right to freedom of speech must also be balanced against the rights of the employer'.[500]

5.5.1 The employment relationship becoming intolerable

In a scenario where the employee posts a derogatory comment about her employer on social media, the employee enjoys her right to freedom of expression[501] by imparting this information about her employer to her friends and followers on her social media account. However, because this comment is derogatory and because the employer and anyone else will be able to gain access to; or become aware of the comment on social media, the employer will be able to dismiss the employee in terms of item 3(4) of Schedule 8 of the Labour Relations Act.[502] This item states that an employer may dismiss an employee 'if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable'.[503]

The sanction of dismissing an employee for posting derogatory comments about the employer is to ensure that there is a good working relationship between the employer and employee.[504] The employee's right to freedom of expression[505] is limited only to the extent that she does not make derogatory comments about the employer which would impact on the working relationship.[506]

The link between ensuring that there is a good working relationship between the employee and employer in the workplace and limiting the employee's freedom to post a derogatory comment on social media is underpinned by the concept of good faith.[507] Item 1(3) of Schedule 8 of the Labour Relations Act[508] states that 'the key principle in this Code is that employers and

[500] Nel (note 441 above) 182.
[501] Constitution (note 5 above) s 16.
[502] LRA (note 1 above).
[503] Ibid., Schedule 8, item 3(4).
[504] LRA (note 1 above) Schedule 8, items 1(3) & 3(4).
[505] Constitution (note 5 above) s 16.
[506] LRA (note 1 above) Schedule 8, items 1(3) & 3(4).
[507] Ibid.
[508] LRA (note 1 above).

employees should treat one another with mutual respect'.[509] Therefore the posting derogatory comments about the employer by the employee is a serious misconduct because it destroys the working relationship between the employee and the employer.[510]

Having briefly discussed the freedom of expression[511] in terms of derogatory comments posted on social media, it is submitted that employees do not have an absolute right to freedom of expression.[512] When an employee posts a derogatory comment about the employer on social media, the employee cannot raise the right to freedom of expression[513] as a defence against being dismissed. This is because the employee's right to freedom of expression[514] may be limited, if the derogatory comment posted on social media:

i. amounts to defamation of the employer;
ii. infringes on the employer's right to human dignity;[515] or
iii. is of such gravity that it makes the continued employment relationship intolerable in terms of the Labour Relations Act.[516]

In the context of an employee posting a derogatory comment about the employer on social media, it is submitted that the courts should apply the two-step test that is provided for in the Labour Relations Act,[517] which is whether or not there has been a breach of a workplace rule[518] and whether or not there has been a breach of good faith.[519] By following this two-step test as provided for in the Labour Relations Act,[520] the courts will be able to determine whether or not dismissals for derogatory comments posted on social media are fair.[521]Having briefly discussed the employee's defence of the right to freedom of expression,[522] the employee's right to privacy[523] as a defence against being dismissed for derogatory comments posted on social media will be discussed briefly.

[509] Ibid., Schedule 8, item 1(3).
[510] LRA (note 1 above) Schedule 8, items 1(3) & 3(4).
[511] Constitution (note 5 above) s 16.
[512] Ibid.
[513] Ibid.
[514] Ibid.
[515] Ibid., s 10.
[516] LRA (note 1 above) Schedule 8, items 1(3) & 3(4).
[517] LRA (note 1 above).
[518] Ibid., Schedule 8, item 7.
[519] Ibid., Schedule 8, items 1(3) & 3(4).
[520] LRA (note 1 above).
[521] Ibid., Schedule 8, items 1(3), 3(4) & 7.
[522] Constitution (note 5 above) s 16.
[523] Ibid., s 14.

CHAPTER 6
THE RIGHT TO PRIVACY AS IT RELATES TO DEROGATORY COMMENTS POSTED BY EMPLOYEES ON SOCIAL MEDIA

6. INTRODUCTORY COMMENTS

As a defence to being dismissed for derogatory comments posted on social media, an employee may argue that her right to privacy[524] has been infringed upon. According to Davey 'the right to privacy is rapidly changing due to social media usage'[525] and 'the right to privacy may be relevant to discipline and dismissals for social media misconduct'.[526] The right to privacy[527] is relevant for social media misconduct because employees may cite the right to privacy[528] as a defence against being dismissed for derogatory comments posted on social media.

This perceived right to privacy[529] may lead employees to make derogatory comments on social media with the mistaken belief that they are protected.[530] The right to privacy[531] has an influence with regard to this topic, but a mistaken understanding of its application may equally have an influence, as will be discussed below.

Neethling et al define privacy as:

> '[a]n individual condition of life characterised by seclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has himself or herself determined to be excluded from the knowledge of outsiders and in respect of which he [or she] has the will that they be kept private'.[532]

[524] Ibid.
[525] Davey (note 35 above) 80**.**
[526] Ibid**.**
[527] Constitution (note 5 above) s 14.
[528] Ibid., s 14.
[529] Ibid.
[530] See RICA (note 573 below) s 4(1); *Sedick* (note 138 above) para 50; *National Union of Food* (note 161 above) para 16; and *Fredericks* (note 31 above) para 6.3 where it was held that the derogatory comments posted by employees on social media was accessible to anyone in the public domain because the privacy settings were not enabled on the employees' social media accounts (Employees' privacy settings on social media).
[531] Constitution (note 5 above) s 14.
[532] J Neethling et al *Neethling's Law of Personality* 2 ed (2015) 267.

From this definition, the right to privacy[533] protects personal facts of an individual which she wishes to be excluded from the public knowledge.[534] Personal facts could refer to a person's personal information such as information relating to the education, medical, financial, criminal or employment history of the person; and the personal opinions, views or preferences of the person.[535]

6.1 Right to privacy[536] in terms of the Constitution of South Africa

The employee cites the right to privacy from the South African Constitution[537] which is used as a defence against dismissal for derogatory comments posted on social media. Section 14 of the Constitution[538] states that 'everyone has the right to privacy, which includes the right not to have the privacy of their communications infringed'.[539]

Various judges and authors have explained the meaning and the importance of the right to privacy[540] as follows:

In the case of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*[541] Langa J held that:

> '[p]rivacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community'.[542]

In the case of *Deutschmann NO and Another: Shelton v Commissioner for the South African Revenue Service*[543] the High Court described privacy as 'an individual's condition of life characterised by seclusion from the public and publicity'.[544]

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[533] Constitution (note 5 above) s 14.
[534] Neethling et al (note 533 above) 267.
[535] The Protection of Personal Information Act 4 of 2013 (POPI).
[536] Constitution (note 5 above) s 14.
[537] Constitution (note 5 above).
[538] Ibid.
[539] Ibid., s 14.
[540] Ibid.
[541] 1998 (12) BCLR 1517 (CC).
[542] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC) para 13.
[543] 2000 (6) BCLR 571 (E).
[544] *Deutschmann NO and Another: Shelton v Commissioner for the South African Revenue Service* 2000 (6) BCLR 571 (E) para 9-2(1).

6.2 Limitation of the right to privacy[545] *in terms of the Constitution of South Africa*

In addition, various judges and authors have explained the limitations of the right to privacy[546] as follows:

In *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,*[547] the court explained that 'privacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core'.[548]

In the case of *Bernstein v Bester,*[549] Ackerman J held that:

> '[t]he courts have had to develop a test to determine the scope and content of the right to privacy. The "reasonable expectation of privacy" test comprises two questions. Firstly, there must at least be a subjective expectation of privacy and, secondly, the expectation must be recognized as reasonable by society'.[550]

In the context of an employee using the right to privacy[551] as a defence against being dismissed for derogatory comments posted on social media, the employee's right to privacy[552] will be determined not only by whether or not the employee subjectively believed that her privacy was infringed; but also by whether or not an expectation of privacy is objectively reasonable in terms of the legal convictions of the community.[553]

In *Bernstein v Bester,*[554] Ackerman J held further that:

> '[i]n the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from

[545] Ibid.
[546] Constitution (note 5 above) s 14.
[547] 2000 (10) BCLR 1079 (CC).
[548] *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 (10) BCLR 1079 (CC) para 18.
[549] 1996 (4) BCLR 449 (CC).
[550] *Bernstein v Bester* 1996 (4) BCLR 449 (CC) paras 76.
[551] Constitution (note 5 above) s 14.
[552] Ibid.
[553] *Bernstein* (note 551 above) paras 76.
[554] 1996 (4) BCLR 449 (CC).

> erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly'.[555]

Currie and De Waal explain that 'in the truly personal realm an expectation of privacy is more likely to be considered reasonable than a privacy expectation in the context of communal relations and activities'.[556]

In the case of *Gaertner and Others v Minister of Finance and Others*[557] Madlanga J held:

> '[t]his diminished personal space does not mean that once people are involved in social interactions or business, they no longer have a right to privacy. What it means is that the right is attenuated, not obliterated. And the attenuation is more or less, depending on how far and into what one has strayed from the inner sanctum of the home'.[558]

Nel explains that:

> '[t]he instant the employee enters into relationships with persons outside of this close intimate sphere, his or her activities acquire a social dimension and the right of privacy in this context becomes subject to limitation'.[559]

Social interaction includes the use of social media.[560] By using social media to post statements or comments, a person's right to privacy[561] becomes diminished and the layer of protection decreases.[562]

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[555] *Bernstein* (note 551 above) para 67.
[556] I Currie & J De Waal J *The Bill of Rights Handbook.* 6 ed. South Africa (2013).
[557] 2013 (CCT 56/13) ZACC 38.
[558] *Gaertner and Others v Minister of Finance and Others* 2013 (CCT 56/13) ZACC para 49.
[559] Nel (note 441 above).
[560] *Bernstein* (note 551 above) para 77.
[561] Constitution (note 5 above) s 14
[562] *Bernstein* (note 5 above) para 77.

This is because a person's comments posted on social media are regarded as communal relations.[563] The nature of social media sometimes gives the impression that people are in a private conversation or in other circumstances it emboldens people who post on social media with an unrealistic impression of anonymity.

Having briefly discussed above the judges and authors views on the limitations of the right to privacy,[564] it is worth assessing the limitation of the right to privacy[565] in terms of the Constitution.

In the context of the employee posting a derogatory comment about the employer on social media, an employer does not infringe on the employee's right to privacy by legitimately accessing the employee's derogatory comment posted on social media.[566] This is because when an employee posts a comment on social media and fails to enable the privacy settings on her social media account, that comment enters the public domain[567] and may still lawfully make its way to the employer.[568]

Therefore, the employee's right to privacy[569] cannot be infringed upon by the employer accessing the derogatory comment through legitimate means[570] and so the section 36 two-stage analysis becomes irrelevant.[571] This is because there is no breach of privacy and there is no need for the right to privacy[572] to be limited by section 36.[573]

It is submitted that it is irrelevant to take into account whether or not an employee has enabled privacy settings on social media. This is because a derogatory comment posted by the employee on social media may still make its way into the public domain and may be brought to the attention of the employer by someone taking a screenshot, re-posting, republishing or printing

[563] Ibid.
[564] Constitution (note 5 above) s 14.
[565] Ibid.
[566] Case law on fair dismissals (note 37 above).
[567] Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 (RICA), s 4 (1).
[568] Employees' privacy settings on social media (note 531 above).
[569] Constitution (note 5 above) s 14.
[570] Employees' privacy settings on social media (note 531 above).
[571] Constitution (note 5 above) s 36.
[572] Ibid., s 14.
[573] Ibid., s 36.

the derogatory comments made by the employee.[574] There is also the possibility of other employees informing the employer about the derogatory comments posted by the employee on social media.[575]

Having briefly discussed the limitation of the right to privacy[576] in the context of the Constitution, it is necessary to make mention of the right to privacy in terms of the common law and other South African legislation.

6.3 Right to privacy in terms of the common law

For an infringement of the right to privacy to succeed in terms of the common law *actio iniuriarum*, the following elements must be proved namely: impairment of the applicant's privacy, unlawfulness, wrongfulness and intention.[577]

6.3.1 Impairment of the applicant's privacy

An infringement of the right to privacy will occur if another person becomes aware of the private facts of the individual without her permission.[578] In the scenario of an employee posting derogatory comments about her employer on social media, other person/s on the social media platform will become aware of the private facts of the employer without the employer's permission.

6.3.2 Unlawfulness

Currie and De Waal explain that:

> '[t]here are two elements to unlawfulness; the infringement must be subjectively contrary to an individual's will and must also be objectively unreasonable in the sense of being contrary to the contemporary *boni mores* and the general sense of justice of the community as perceived by the court'.[579]

[574] Employees' privacy settings on social media (note 531 above).
[575] *Fredericks* (note 31 above) para 4.1.
[576] Constitution (note 5 above) s 14.
[577] Roos A 'Privacy in the Facebook Era: A South African Legal Perspective' (2012) 129 (2) *The South African Law Journal* 396
[578] Ibid.
[579] Currie & De Waal (note 557 above) 296.

In the scenario of an employee posting derogatory comments about her employer on social media, the comment posted on social media may be contrary to the employer's will and may also be objectively unreasonable, which will mean that the posting of the derogatory comment on social media is unlawful.

6.3.3 Wrongfulness

In relation to the element of wrongfulness, Roos explains that 'a *de facto* infringement of privacy will only be wrongful if the infringement is considered unreasonable by the *boni mores* or the legal convictions of the community'.[580]

In the scenario of an employee posting derogatory comments about her employer on social media, the comment posted on social media will be wrongful if it is so unreasonable that it goes against the boni mores of the South African community.

6.3.4 Intention

Currie and De Waal explain that:

> '[i]ntention in the form of *animus iniuriandi* is required to establish a breach of privacy. *Animus iniuriandi* is presumed once wrongful infringement of privacy has been established by the plaintiff; the defendant must then rebut the presumption'.[581]

In the scenario of an employee posting derogatory comments about her employer on social media, in most cases it will be clear that the employee intends to breach the privacy of the employer by publicly posting derogatory comments about the employer on social media.

Having briefly discussed the common law position of the right to privacy, it is necessary to make mention of the current legislation on privacy in South Africa.

6.4 Laws on privacy in South Africa

In terms of section 49 of the Regulation of Interception of Communications and Provision of Communication-related Information Act[582] it is an offence to monitor or intercept electronic

[580] Roos (note 578 above) 396.
[581] Currie & De Waal (note 557 above) 296.
[582] Act 70 of 2002.

communications. This Act[583] also provides that 'any person may intercept any communication if he/she is a party to the communication, unless such communication is intercepted by such person for purposes of committing an offence'.[584]

This Act[585] does not necessarily apply to social media because when a person posts a comment on social media, everyone will become a party to that communication as it is not an offence for a person to republish, repost or screenshot a social media post.[586]

Section 86 of the Electronic Communications and Transactions Act[587] states that a person who intentionally accesses data without authority or permission is guilty of an offence. The Electronic Communications and Transactions Act[588] may not necessarily apply to social media because the Act[589] deals with the access of data and not social media postings.[590]

The Protection of Personal Information Act[591] aims to give effect to the right to informational privacy.[592] Personal information relates to a natural person or juristic person and includes information relating to the education or medical, financial, criminal or employment history of the person; and the personal opinions, views or preferences of the person.[593]

This Act deals with the protection of personal information from the public.[594] If a person posts personal information on social media, then that person loses the protection of personal information because information posted on social media may not remain private.[595]

In relation to the Protection of Personal Information Act,[596] the South African Law Reform Commission states that 'data or information protection forms an element of safeguarding a

[583] RICA (note 568 above).
[584] Ibid., s 4(1).
[585] RICA (note 568 above).
[586] Ibid., s 4(1).
[587] Act 25 of 2002
[588] Ibid.
[589] Electronic Communications and Transactions Act 25 of 2002.
[590] Ibid., s 86.
[591] Act 4 of 2013.
[592] POPI (note 536 above) 3.
[593] Ibid 14.
[594] Ibid.
[595] Ibid.
[596] Act 4 of 2013.

person's right to privacy'.[597] However, it provides only for the legal protection of a person in instances where 'his or her personal information is being collected, stored, used or communicated by another person or institution'.[598]

The Protection of Personal Information Act[599] does not provide any guidelines on the use of social media. Roos explains that 'data protection law is related to privacy but is a narrower concept in that it relates only to the processing of personal information'.[600]

Nyoni and Velempini explain that:

> '[t]he new Act is likely to face a number of challenges since many Internet-based companies operate outside the jurisdiction of South Africa. It is not easy to see an immediate solution to this challenge of policing international digital cyberspace. A central problem is that behaviour on the Web cannot be controlled'.[601]

Most of the laws dealing with the right to privacy[602] in South Africa do not directly apply to the protection of the right to privacy[603] on social media. However, it is necessary to discuss the right to privacy[604] as it relates to derogatory comments posted on social media.

6.5 Right to privacy[605] as it relates to derogatory comments posted on social media

The following cases provide examples of how the courts have dealt with an employee's defence of the right to privacy[606] for dismissals based on derogatory comments posted on social media:

The case of *Sedick and another/ Krisay (Pty) Ltd.*[607] serves as a prime example of how the courts have determined whether or not dismissal was fair in situations where derogatory comments have been posted by employees on social media.

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[597] South African Law Reform Commission 'Discussion Paper 109 Project 124 October 2005 Privacy and Data Protection' *ISBN 0-621-36326-X*.
[598] Ibid., iv.
[599] Act 4 of 2013.
[600] Roos (note 578 above) 378.
[601] P Nyoni & M Velempini 'Data Protection Laws and Privacy on Facebook' (2015) 17 (1) *South African Journal of Information Management* <http://dx.doi.org/10.4102/sajim.v17i1.636> (accessed 15 July 2016) 10.
[602] Constitution (note 5 above) s 14.
[603] Ibid.
[604] Ibid.
[605] Ibid.
[606] Ibid.
[607] 2011 (8) BLLR 979 (CCMA).

In this case, the employees were charged with 'bringing the company's name into disrepute by posting derogatory statements in the public domain'.[608] The employer went onto the employees' Facebook page to add the employees as friends.[609] Upon accessing the employees' Facebook page, the employer was able to read the posts on the employees' Facebook pages as the privacy settings had not been enabled.[610] The employer found derogatory comments posted about the management of the company as well as comments by other employees.[611]

Although the name of the company and employers were not explicitly mentioned on the employees' Facebook page, the public would still have been able to make that connection.[612] The employer stated that the employees' posts on Facebook were serious enough to warrant dismissal because of the following factors: [613]

i. the employees represented the company;[614]
ii. the employees had dealings with customers and suppliers;[615]
iii. the comments posted on Facebook could be accessed by anyone;[616] and
iv. the comments encouraged participation from other employees.[617]

The employees claimed that their right to privacy[618] had been infringed upon when the employer accessed their Facebook page,[619] and that the posts did not directly refer to the employers.[620] In making a decision as to whether or not the employees' privacy[621] had been infringed upon when the employer accessed the employees' Facebook pages,[622] Bennet J applied the Regulation of Interception of Communications and Provision of Communication-related Information Act.[623]

[608] *Sedick* (note 138 above) para 12.
[609] Ibid., para 24.
[610] Ibid., para 25.
[611] Ibid.
[612] Ibid., para 29.
[613] Ibid., para 34.
[614] Ibid.
[615] Ibid.
[616] Ibid.
[617] Ibid.
[618] Constitution (note 5 above) s 14.
[619] *Sedick* (note 138 above) para 42.
[620] Ibid., para 39.
[621] Constitution (note 5 above) s 14.
[622] *Sedick* (note 138 above) para 47.
[623] Act 70 of 2002.

Bennet J stated that social media sites such as Facebook are on the internet, which means that they are in the public domain, but users are entitled to restrict access to their social media accounts.[624] The employees' right to privacy[625] had not been infringed upon because they had failed to restrict access to their Facebook pages.[626]

Therefore, in applying the Act[627] any person may be a party to the communication on a social media account because it is in the public domain.[628] This implies that had the employees enabled the privacy settings on their social media account, the employees could have relied on the right to privacy.[629]

Bennet J held that any person will be entitled 'to intercept, that is, to read, download and print these communications in whole or in part'.[630] The comments posted by the employees were available to the public in the same manner in which other materials are published for public access. The employees could therefore not rely on their right to privacy.[631]

In reaching his judgment Bennet J took into account the following factors:

i. privacy;[632]
ii. the content of the comments posted on social media;[633]
iii. the circumstances surrounding the comments posted on social media;[634]
iv. the breach of good faith by taking into account the employer's reputation;[635] and
v. whether or not the work relationship had become intolerable.[636]

It was held that the dismissal was fair.[637] In conclusion Bennet J stated that:

[624] *Sedick* (note 138 above) para 48.
[625] Constitution (note 5 above) s 14.
[626] *Sedick* (note 138 above) para 50.
[627] RICA (note 568 above).
[628] Ibid., s 4(1).
[629] Constitution (note 5 above) s 14.
[630] *Sedick* (note 138 above) para 50.
[631] Ibid., para 50.
[632] Ibid.
[633] Ibid., para 53.
[634] Ibid.
[635] Ibid.
[636] Ibid.
[637] Ibid.

> '[t]his case emphasises the extent to which employees may and may not rely on the protection of statute in respect of their postings on the Internet. The Internet is a public domain and its content is, for the most part, open to anyone who has the time and inclination to search it out. If employees wish their opinions to remain private, they should refrain from posting them on the Internet'.[638]

The case of *Fredericks v Jo Barkett Fashions*[639] involved the posting of derogatory comments on Facebook by an employee.[640] The employer was informed that the employee posted derogatory comments about the employer on social media. The employer accessed the employee's Facebook page and found derogatory comments made about the employer.[641] The employer stated that the derogatory comments had a negative impact on other employees and customers which may result in a loss of revenue for the company.[642] The employee cited the right to privacy[643] as a defence against dismissal for posting derogatory comments on social media and further stated that such dismissal was unfair and too harsh a sanction.[644]

Ramushowana J assessed the employee's defence of right to privacy[645] by looking at the provisions of the Regulation of Interception of Communication and Provision of Communication-related Information Act.[646] It was held that the employee's defence could not be upheld because she had failed to enable the privacy settings on her account, which meant that anyone could view and have access to her Facebook page.[647]

This implies that had the employee enabled the privacy settings on her account, the employee could have relied on the right to privacy.[648] In addition to determining whether or not the employee's privacy had been infringed upon, Ramushowana J examined whether or not the employee had breached a workplace rule.[649] It was held that the dismissal was fair.[650]

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[638] Ibid., para 62.
[639] 2011 JOL 27923 (CCMA).
[640] *Fredericks* (note 31 above) para 4.1.
[641] Ibid.
[642] Ibid.
[643] Constitution (note 5 above) s 14.
[644] *Fredericks* (note 31 above) para 5.1.
[645] Constitution (note 5 above) s 14.
[646] Act 70 of 2002.
[647] *Fredericks* (note 31 above) para 6.3.
[648] Constitution (note 5 above) s 14
[649] *Fredericks* (note 31 above) para 6.1.
[650] Ibid., para 6.4.

The case of *National Union of Food, Beverage, Wine, Spirits and Allied Workers Union obo Arendse v Consumer Brands Business Worcester, a Division of Pioneer Foods (Pty) Ltd*[651] involved an employee who was dismissed for breaching his employer's IT (Information Technology) policy by posting derogatory comments about his employer.[652] The employee cited the right to privacy as a defence against being dismissed for his comments posted on Facebook.[653]

De Vlieger-Seynhaeve J held that in the instance where an employee does restrict access to his Facebook page, 'the comments posted may fall into a zone of privacy into which an employer should not intrude'.[654] However the employee may face dismissal or defamation charges if the comments are defamatory and the 'employer comes into possession of the publication by legitimate means'.[655]

De Vlieger-Seynhaeve J held that dismissal would be fair with regard to 'critical comments placed on Facebook'[656] in the following circumstances:

i. 'where an employee fails to restrict access to the site';[657]
ii. 'where the posting brings the employer into disrepute';[658] and
iii. 'where the posting leads to the working relationship becoming intolerable'.[659]

However, this three-step test in determining whether or not the dismissal of the employee was fair was not followed.[660] De Vlieger-Seynhaeve J 'with respect' followed only the first leg of the test and decided that the dismissal was fair because the employee had failed to restrict access to his Facebook account.[661]

[651] 2014 (7) BALR 716 (CCMA).
[652] *National Union of Food* (note 161 above) para 3.
[653] Ibid., para 16.
[654] Ibid.
[655] Ibid.
[656] Ibid.
[657] Ibid.
[658] Ibid.
[659] Ibid.
[660] Ibid., para 17.
[661] Ibid.

It is submitted that the tests proposed in the cases of *Sedick,*[662] *National Union of Food* [663] and *Fredericks*[664] are not adequate in determining whether or not dismissals for derogatory comments posted on social media are fair. This is because the employee's right to privacy[665] for derogatory comments posted on social media is an unsatisfactory defence and the courts have not indicated whether or not an employee's right to privacy[666] would be protected had the employee enabled the privacy settings on social media.[667]

Nel states that:

> '[t]o date, the CCMA has to date [*sic*] adopted a blanket approach – a person who does not protect his or her personal information on social media and whose privacy settings are not engaged, does not have a right to complain, should that post come to the notice of his or her employer. They are deemed to have waived their right to privacy'.[668]

Instead, the courts should apply the two-step test that is already provided for in the Labour Relations Act,[669] which is whether or not there has been a breach of a workplace rule[670] and a breach of good faith.[671] By following this two-step test as provided for in the Labour Relations Act,[672] the courts will be able to determine whether or not dismissals for derogatory comments posted on social media are fair.

Nel states that:

> '[o]ne can conclude that, as long as the employer follows the correct procedures and that the evidence used against the employee has not been illegally obtained, a dismissal under these circumstances could be fair'.[673]

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[662] *Sedick* (note 138 above).
[663] *National Union of Food* (note 161 above).
[664] *Fredericks* (note 31 above).
[665] Constitution (note 5 above) s 14.
[666] Ibid.
[667] Employees' privacy settings on social media (note 531 above).
[668] Nel (note 441 above) 205.
[669] LRA (note 1 above).
[670] Ibid., Schedule 8, item 7.
[671] Ibid., Schedule 8, items 1(3) & 3(4).
[672] LRA (note 1 above).
[673] Nel (note 441 above) 208.

Vries and Moosa explain that 'social media does not come without its risks and, unfortunately, one of the most significant risks is the threat to privacy'.[674] The moment a person logs onto a social media account that person's privacy comes under threat.[675] This is because if an employee has not enabled privacy settings on her social media account, then her online presence or comments posted on social media become available to the public in cyberspace.[676] Furthermore, people in cyberspace can 'like' or share the post on social media.

Roos explains that 'an individual's right to privacy will come under threat on social media in the following ways':[677]

i. 'when the user reveals personal information on his or her webpage';[678]
ii. 'when the SNS [Social Networking Services] operator receives information from the user or third parties and processes it';[679]
iii. 'when third parties gain access to the user's personal information';[680] and
iv. 'the launch of 'Facebook places' in August 2011 added a fourth threat to privacy'.[681]

Facebook's founder, Mark Zuckerberg stated that:

> '[p]eople have really gotten comfortable not only sharing more information and different kinds, but more openly and with more people. That social norm is just something that has evolved over time'.[682]

A few authors[683] have expressed that privacy on social media platforms such as Facebook does not guarantee the privacy of the user as discussed below:

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[674] Vries & Moosa (note 500 above) 38.
[675] Ibid.
[676] Nyoni & Velempini state that 'privacy therefore concerns the control individuals have over information relating to them. This control is linked to users' ability to decide on the amount of visibility and online presence.' See Nyoni, & Velempini (note 602 above) 3.
[677] Roos (note 578 above) 386.
[678] Ibid.
[679] Ibid.
[680] Ibid.
[681] Ibid.
[682] B Johnson 'Privacy No Longer a Social Norm, Says Facebook founder' (2010) *The Guardian* <https://www.theguardian.com/technology/2010/jan/11/facebook-privacy> (accessed 20 August 2017).
[683] Roos states that 'the internet is a very public place, and Facebook clearly warns subscribers that their privacy cannot be guaranteed'. See Roos (note 578 above) 398 while Acquisti & Gross state that 'nobody is literally forced to join an online social network, and most networks we know about encourage, but do not force users to reveal [information]'. See Acquisti & Gross (note 686 below).

Shahim states that:

> '[p]rivacy settings on Facebook are by no means fool proof and this is clearly spelt out on the website. Thus, users should be cautious in assuming that strangers are unable to access their profile and information due to their privacy settings'.[684]

One of the main aims of Facebook is to communicate with friends, family, and colleagues. Social media platforms such as Facebook encourage users to make new friends or gain followers in cyberspace. Due to the nature of social media platforms, users are further encouraged to be visible and to have an online presence.

Acquisti and Gross provide reasons why users share so much information on social media, such as:

i. 'changing cultural trends';[685]
ii. 'familiarity and confidence in technology';[686]
iii. 'lack of exposure or memory of the misuses of personal data by others can all play a role in this unprecedented information revelation'.[687]

Roos suggests that one of the reasons why individuals reveal information on social media is because 'people will usually do what everyone else is doing'.[688]

Grimmelman is of the view that:

> '[f]acebook systematically delivers signals suggesting an intimate, confidential, and safe setting and people don't think about privacy risks in the way that perfectly rational automata would'.[689]

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[684] C Shahim 'To Post or Not to Post' (2013) *Without Prejudice* 93.
[685] A Acquisti & R Gross 'Imagined Communities: Awareness, Information Sharing, and Privacy on the Facebook' (2006) 4258 *Privacy Enhancing Technologies Workshop (PET)* < https://vpn.ukzn.ac.za/proxy/72899352/https/link.springer.com/chapter/10.1007%2F11957454_3 > (accessed at 10 July 2016).
[686] Ibid.
[687] Ibid.
[688] Roos (note 578 above) 392.
[689] J Grimmelman 'Saving Facebook' (2009) *Iowa* 1160.

Roos explains that:

> '[a]nother mistake people make is to assume that when one is talking to a friend on Facebook, one is in a private space, and since no one but one's friend is listening, one can speak freely. Unlike in a restaurant, eavesdroppers on Facebook are invisible. When we speak to people in person, non-verbal communication is used to indicate that we expect them to *keep* quiet about what we are discussing - we lean towards them or lower our voice. In the electronic environment, these non-verbal cues are absent'.[690]

The use of the descriptor of 'friends' on Facebook is disarming in respect of persons that one may never have met or who are mere acquaintances. Users of social media are often of the view that their social media accounts are private in the sense that they act as a personal diary. This is an unreasonable assumption because there is a difference between posts on a social media account and entries in a personal diary.

A person's posts on social media are available to the public to view, like, comment or repost, whereas a person's entries in a personal diary may remain hidden and kept away from the public. If a person writes personal thoughts in a personal diary or a journal that amounts to the personal life of a person with which other people cannot interfere.[691]

However, if a person makes photocopies of her personal thoughts from her diary and distributes them to the public, then in this instance other people will have a right to interfere because that person has made her private life public[692].

Social media acts as a 'public diary' where people make their personal thoughts available to the public whether or not they have made use of the privacy settings. This is because whether or not the employee enables privacy settings on social media, the employer could still gain access to those posts through another means and the employee could still be faced with dismissal for derogatory posts.

[690] Roos (note 578 above) 392.
[691] Neethling et al (note 533 above) 267.
[692] Ibid.

Snail states that 'it may be argued that if a friend makes a screen dump of a Facebook account page he or she may not necessarily be infringing [on] your privacy, as you had given them access'.[693] Vries and Moosa explain that even if privacy settings are set it should always be kept in mind that any 'friend can easily share or screenshot your post'[694] and that 'anything posted online may make its way into the public domain'.[695] The friends and followers who have access to the user's posts are at liberty to share those posts as there are no laws in place preventing the republishing, re-posting or taking a screenshot of social media posts.

Milo and Stein suggest that even though one is in a public space it will be protected if that person can establish that there is a legitimate expectation of privacy.[696] This cannot be applied in the context of social media as Milo and Stein explain that a legitimate expectation of privacy is in relation to private facts and not personal statements or comments posted on social media.[697] Therefore a person cannot have a legitimate expectation of privacy on social media because that person has disclosed her thoughts, comments or opinions to the public willingly and at her own risk.

Nyoni and Velempini explain that:

> '[t]he activities of users can be easily tracked online without the awareness or permission of users, thereby violating the privacy rights of users. Depending on how this information is used, it can later damage or ruin one's reputation, costing one employment or a political office'.[698]

Roos is of the opinion that an individual's right to privacy[699] should be protected if that person has enabled privacy settings on social media[700] this is because:

> '[i]nformation revealed to "friends only" should be treated as information that has been published to a limited number of persons, and any distribution of that information by third

[693] Snail (note 475 above) 18.
[694] Vries & Moosa (note 500 above) 40.
[695] Ibid.
[696] D Milo & P Stein *A Practical Guide to Media Law* (2013) 51.
[697] Ibid.
[698] Nyoni & Velempini, (note 602 above) 3.
[699] Constitution (note 5 above) s 14.
[700] Roos (note 578 above) 401.

> parties to a wider audience should be considered an invasion of the right to privacy that should have legal consequences'.[701]

However, in contrast to Roos, it is submitted that the right to privacy[702] is not an adequate defence against dismissal. This is because the individual has consented to publication of those comments on social media and there are no laws prohibiting third parties from accessing an individual's social media account, republishing, reposting or saving a screenshot of the comment/post.

Various authors have made the following comments in support of the submission that the right to privacy[703] is an inadequate defence for derogatory comments posted on social media:

Nel states that 'the user who leaves messages on a Facebook page cannot rely on an expectation of privacy if the settings of his or her Facebook account have not been set on private',[704] while Nyoni and Velempini acknowledge that 'many individuals risk their privacy by willingly posting personal and damaging information online'.[705]

Singh explains that:

> '[t]he moment that a comment or remark is posted online, there is no turning back. Therefore, the ability to delete unsavoury posts and even the author's account, does not create a guarantee that the actual post will be deleted from virtual or actual reality'.[706]

According to Davey 'publications in social media have legal implications and it is essential that care is taken to avoid liability and damage',[707] while Roos explains 'the users of SNSs (Social Networking Services) should also realise that although they are communicating in cyberspace, their actions have real world consequences'.[708] Therefore, the consequence of employees communicating derogatory comments in cyberspace may result in dismissal by the employer.

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[701] Ibid.
[702] Constitution 1996 (note 5 above) s 14.
[703] Ibid.
[704] Nel (note 441 above) 205.
[705] Nyoni & Velempini, (note 602 above) 3.
[706] S Singh 'Think Twice before you Tweet' (2016) *Employment Alert Cliffe Dekker Hofmeyr* 2.
[707] Davey (note 439 above) 3.
[708] Roos (note 578 above) 401.

Nel advises that:

> '[d]ue to the nature of the Internet, it is suggested that as a rule of thumb, no user of a social network site should post any information that he or she is not willing to have displayed on a public notice board for all to see, irrespective of whether privacy settings are used or not. There are too many ways in which the information can become known – for instance, when one of the close 'friends' may disclose the information to co-employees or the employer'.[709]

Nel further advises that 'it is clear that the general trend is that there is nothing private about anything said on any social media pages, despite what employees might say or raise in their defence,'[710] while Vries and Moosa caution that what 'what you would not say to or in front of your employer, you should not post on any social media site'.[711]

Shahim advises that 'the old adage "if you have nothing good to say then don't say anything at all", should serve as inspiration before updating your Facebook status or tweeting!',[712] while Davey cautions that 'when using social media steer clear of racist, defamatory or controversial postings, salacious tweets and malicious statements'.[713]

In applying the defence of the right to privacy[714] for derogatory comments posted on social media, the court in the case of Costa*/Nu Metro Theatres*[715] held that:

> '[i]t is now established law that an employee may be disciplined for misconduct that takes place outside working hours provided the misconduct negatively impacts on the employment relationship'.[716]

With regard to social media whether a comment was posted during or outside the workplace, that post will be published and available in the public domain. Once a comment is in the public domain, the employer will be able to access the comment and act in accordance with the Labour

[709] Nel (note 441 above) 206.
[710] Ibid., 208.
[711] Vries & Moosa (note 500 above) 40.
[712] Shahim (note 685 above) 93.
[713] Davey (note 439 above) 12.
[714] Constitution (note 5 above) s 14.
[715] 2005 (10) BALR 1018 (BCEISA).
[716] *Costa/Nu Metro Theatres* (note 129 above) 1027.

Relations Act[717] by dismissing the employee. When something is posted on social media, it does not matter whether or not the employee posted the comment in the privacy of his home, as the comment will be available publicly.

It is submitted that one's right to privacy[718] in relation to social media will be affected only if one's social media has been hacked and if someone unlawfully obtains private information or private facts of a person without their consent.

Snail explains that:

> '[w]ith reference to social media accounts everybody has the right not to have his private social media account hacked and personal information disseminated, or particulars views expressed to the public without their prior consent'.[719]

The right to privacy[720] should therefore not be extended to protecting one's comments or posts on social media which are lawfully accessible to third parties and which can be reposted, republished, or saved by third parties.

[717] LRA (note 1 above) & Employers' right to dismissal (note 41 above).
[718] Constitution (note 5 above) s 14.
[719] Snail (note 475 above) 18.
[720] Constitution (note 5 above) s 14.

CHAPTER 7
CONCLUSION

7. INTRODUCTORY COMMENTS

This dissertation has highlighted that there has been an increase in dismissals for derogatory comments posted by employees on social media. Most importantly, it has raised the question as to whether or not the Labour Relations Act[721] is fit for purpose in relation to derogatory comments posted by employees on social media.

7.1 Provisions of the Labour Relations Act 66 of 1995 which may be applied to dismissals for derogatory comments posted on social media

After analysing the various provisions of the Labour Relations Act[722] some of the provisions in the Labour Relations Act[723] may still be applied to dismissals for derogatory comments posted by employees on social media which are as follows:

7.1.1 Misconduct[724]

Item 3(5) of Schedule 8 of the Labour Relations Act[725] may still be applied and adjusted accordingly to the factors[726] that the employer will take into account when dismissing an employee for derogatory comments posted on social media.

Item 2(2) of Schedule 8 of the Labour Relations Act[727] lists 'the conduct of the employee' as one of the grounds[728] for dismissal. This ground[729] will apply to dismissals for derogatory comments posted on social media. This is because the act of posting a derogatory comment on social media amounts to conduct on the part of an employee.

[721] LRA (note 1 above).
[722] Ibid.
[723] Ibid.
[724] Ibid., Schedule 8, items 3(4), 3(5), 3(6) & 7.
[725] LRA (note 1 above).
[726] Ibid., Schedule 8, item 3(5).
[727] LRA (note 1 above).
[728] Ibid., Schedule 8, item 2(2).
[729] Ibid.

If the employer dismisses the employee on this ground[730] in terms of the Act,[731] it must be determined whether or not such conduct[732] (the posting of derogatory comments on social media) amounts to misconduct[733] in terms of the Labour Relations Act.[734] Misconduct[735] in terms of the Labour Relations Act[736] encompasses a breach of good faith[737] as well as a breach of a workplace rule.[738]

7.1.2 Breach of good faith[739]

The concept of breach of good faith[740] is a 'subjective test' that the courts will take into account when determining whether or not dismissals for misconduct[741] are fair. The factors that the courts will take into account are as follows:

i. the reputation of the employer;[742]
ii. the working relationship becoming intolerable;[743]
iii. the consequences of the misconduct;[744] and
iv. a number of other factors depending on the situation of the case.

7.1.3 Breach of a workplace rule[745]

The concept of breach of a workplace rule[746] is an 'objective test' that the courts will take into account in the form of 'a check list'[747] in terms of the Act.[748] The factors that the courts will take into account are as follows:

[730] Ibid.
[731] LRA (note 1 above).
[732] Ibid., Schedule 8, item 2(2).
[733] Ibid., Schedule 8, items 3(4), 3(5), 3(6) & 7.
[734] LRA (note 1 above).
[735] Ibid., Schedule 8, items 3(4), 3(5), 3(6) & 7.
[736] Act, 1995 (note 1 above).
[737] Ibid., Schedule 8, items 1(3) & 3(4).
[738] Ibid., Schedule 8, item 7.
[739] Ibid., Schedule 8, items 1(3) & 3(4).
[740] Ibid.
[741] Ibid., Schedule 8, items 3(4), 3(5), 3(6) & 7.
[742] Ibid., Schedule 8, items 1(3) & 1(4).
[743] Ibid.
[744] Ibid.
[745] Ibid., Schedule 8, item 7.
[746] Ibid.
[747] Ibid.
[748] LRA (note 1 above).

i. whether or not the employee has contravened a workplace rule pertaining to social media misconduct;[749]
ii. whether or not the workplace rule was valid or reasonable;[750]
iii. whether or not the employee was aware of the workplace rule;[751]
iv. whether or not the workplace rule has been consistently applied;[752] and
v. whether or not dismissal was an appropriate sanction.[753]

It is submitted that both the concept of good faith[754] and the concept of the workplace rule[755] are still valid and applicable in determining whether or not dismissals for derogatory comments posted on social media are fair. This is because misconduct[756] entails a subjective test (breach of good faith[757]) and an objective test (breach of a workplace rule[758]) which, if co-applied will adequately determine whether or not dismissals for derogatory comments posted on social media are fair.

7.2 Shortcomings in the Labour Relations Act 66 of 1995

The following provisions of the Act[759] have not kept pace with social media and problems have arisen in applying the current legislation[760] to dismissals for derogatory comments posted on social media:

The Act[761] does not provide a definition of misconduct[762] nor does it provide a definition on social media misconduct. The Act[763] provides a few examples of serious misconduct,[764] but it does not mention social media misconduct as an example of serious misconduct. This may lead to uncertainty in determining whether or not the Act[765] may be applied to this new phenomenon

[749] Ibid., Schedule 8, item 7(a).
[750] Ibid., Schedule 8, item 7(b)(i).
[751] Ibid., Schedule 8, item 7(b)(ii).
[752] Ibid., Schedule 8, item 7(b)(iii).
[753] Ibid., Schedule 8, item 7(b)(iv).
[754] Ibid., Schedule 8, items 1(3) & 3(4).
[755] Ibid., Schedule 8, item 7.
[756] Ibid., Schedule 8, items 3(4), 3(5), 3(6) & 7.
[757] Ibid., Schedule 8, items 1(3) & 3(4).
[758] Ibid., Schedule 8, item 7.
[759] LRA (note 1 above).
[760] Ibid.
[761] Ibid.
[762] Ibid., Schedule 8, items 3(4), 3(5), 3(6) & 7.
[763] LRA (note 1 above).
[764] Ibid., Schedule 8, item 3(4).
[765] LRA (note 1 above).

of social media and more specifically to dismissals for derogatory comments posted on social media.

7.3 Shortcomings in court decisions

In analysing the cases, it seems that the courts have become side tracked by issues such as the right to privacy[766] in determining whether or not dismissals for derogatory comments posted on social media are fair. The courts have also been inconsistent in applying the concept of breach of good faith[767] and breach of the workplace rule[768] to determine whether or not dismissals for derogatory comments posted on social media are fair.

In the case of *Fredericks*[769] the court applied only the objective test of determining whether there had been a breach of a workplace rule[770] but did not determine the subjective test of whether there had been a breach of good faith.[771]

In the cases of *Sedick*[772]and *National Union of Food,*[773] the court applied only the subjective test of determining whether there had been a breach of good faith[774] but did not determine the objective test of whether there had been a breach of the workplace rule.[775]

7.4 Social media policy

The workplace rule[776] would generally be a rule prohibiting the employees from posting derogatory comments on social media. It was therefore submitted that this workplace rule[777] may take the form of a social media policy which businesses may implement in the workplace.

This social media policy will assist the courts in applying the objective test more adequately. It will provide clear guidance to employees on what conduct is acceptable and what conduct is

[766] Constitution (note 5 above) s 14.
[767] LRA (note 1 above) Schedule 8, items 1(3) & 3(4).
[768] Ibid., Schedule 8, item 7.
[769] *Fredericks* (note 31 above).
[770] LRA (note 1 above) Schedule 8, item 7.
[771] Ibid., Schedule 8, items 1(3) & 3(4).
[772] *Sedick* (note 138 above).
[773] *National Union of Food* (note 161 above).
[774] LRA (note 1 above), Schedule 8, items 1(3) & 3(4).
[775] Ibid., Schedule 8, item 7.
[776] Ibid.
[777] Ibid.

not acceptable on social media as well as the consequences thereof. More importantly dismissal for derogatory comments posted on social media will be justified.

Along with the risks of non-implementation of a social media policy by businesses, this dissertation has highlighted that there are tensions in our law that have been created by the rise of social media. These tensions arise when the employees often cite constitutional rights such as the right to freedom of expression[778] and the right to privacy[779] as a defence to being dismissed for derogatory comments on social media.

7.5 The right to freedom of expression[780] as it relates to derogatory comments on social media

In an analysis of the right to freedom of expression,[781] the courts have not specifically dealt with the right to freedom of expression[782] as a defence against dismissals for derogatory comments posted on social media. However, this dissertation has briefly highlighted that the right to freedom of expression[783] may be limited by the following factors:

i. the common law remedy of defamation;
ii. the employer's right to dignity;[784] and
iii. the application of the Labour Relations Act.[785]

7.6 The right to privacy[786] as it relates to derogatory comments on social media

In an analysis of the right to privacy[787] the employee's right to privacy[788] for derogatory comments posted on social media has been found to be an unsatisfactory defence[789] against dismissals for derogatory comments posted on social media. The courts in the cases of

[778] Constitution (note 5 above) s 16.
[779] Ibid., s 14.
[780] Ibid., s 16.
[781] Ibid.
[782] Ibid.
[783] Ibid.
[784] Constitution (note 5 above) s 10.
[785] LRA (note 1 above).
[786] Constitution (note 5 above) s 14.
[787] Ibid.
[788] Ibid.
[789] Case law on fair dismissals (note 37 above).

Sedick,[790] *Fredericks*[791] and *National Union of Food*[792] have also not indicated whether or not an employee's right to privacy[793] would have been protected had the employee enabled the privacy settings on social media.[794]

7.7 Concluding comments

The courts should apply the two-step test that is provided for in the Labour Relations Act,[795] which is whether or not there has been a breach of a workplace rule[796] and a breach of good faith.[797] By following this two-step test as provided for in the Labour Relations Act[798] the courts will be able to determine whether or not dismissals for derogatory comments posted on social media are fair.

In addition, a definition and an example of social media misconduct should be included as a form of serious misconduct in item 3(4) of Schedule 8 of the Labour Relations Act.[799] This would remove all uncertainty in the applicability of the Labour Relations Act[800] to dismissals for derogatory comments posted on social media. Most importantly businesses and employers should be encouraged to implement a social media policy as a workplace rule.[801] By implementing the above propositions, the Labour Relations Act[802] would bring itself into line with the recent exponential rise in the use of social media and would adequately be fit for purpose.

[790] *Sedick* (note 138 above).
[791] *Fredericks* (note 31 above).
[792] *National Union of Food* (note 161 above).
[793] Constitution (note 5 above) s 14.
[794] Employees' privacy settings on social media (note 531 above).
[795] LRA (note 1 above).
[796] Ibid., Schedule 8, item 7.
[797] Ibid., Schedule 8, items 1(3) & 3(4).
[798] LRA (note 1 above).
[799] Ibid.
[800] Ibid.
[801] Ibid., Schedule 8, item 7.
[802] LRA (note 1 above).

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31 January 2018

TO WHOM IT MAY CONCERN:

EDITING OF LLM (BUSINESS) DISSERTATION
PREPARED BY SHERILYN MUNIAN (JANUARY 2018)

I, **Adrienne Mavis Pretorius**, a sole proprietor trading as **Gemini Editing Services**, hereby declare that I was asked by **SHERILYN MUNIAN**, a student of the University of KwaZulu-Natal, Howard College Campus (student number 212508299), to edit and proofread her LLM (Business) dissertation as a third-party editor.

I am a professional editor with 31 years' experience in the field, and have the necessary qualifications and experience to carry out these tasks.

I confirm that in acting as a third-party editor for the dissertation submitted by the abovenamed student, **SHERILYN MUNIAN**, I have complied with all professional requirements for editorial help for postgraduate research theses/dissertations. My work with regard to this dissertation was confined to the following areas:

* Checking of the various elements of the tables of contents
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I have advised the student that this completed form **must** accompany her dissertation when she submits it for examination, and that **this declaration will be made available to the examiners**. I have further advised **SHERILYN MUNIAN** to keep a copy for her records.

Yours faithfully

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