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

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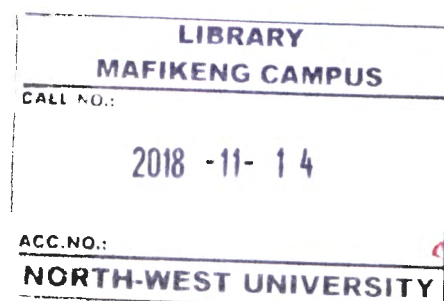


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Dissertation submitted in the fulfilment of the requirements for the *Master of Laws* at the North-West University

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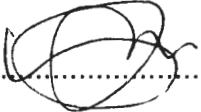
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DECLARATION

I hereby declare that the dissertation entitled:

Selected Challenges Associated with the Dismissal of Employees for Social Media-Related Misconduct in the South African Workplace, is my own work and all the sources used herein have been acknowledged. I have not at any time, submitted this work to any university for any qualification.

Signature of candidate.....

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DEDICATION

To my late grandmother, I thank you for the life lessons. Lastly, I thank God for the strength, for I can do all through him.

ABSTRACT

The research seeks to explore the adequacy of the regulation of social media-related misconduct in South Africa. In this regard, selected challenges associated with the dismissal of employees for social media-related misconduct in the South African workplace are highlighted. Accordingly, such challenges that specifically include the legislative gaps and Constitutional conflicts and/or flaws relating to social media-related misconduct dismissals are analysed. The research noted that various legislative challenges are still associated with the dismissal of employees for social media-related misconduct in South Africa. For instance, labour laws such as the Labour Relations Act 66 of 1995 does not adequately regulate cases for social media-related misconduct in the South African workplace. This research discusses Constitutional conflicts and/or flaws relating to the employees' rights to dignity, privacy, freedom of expression and freedom of association in relation to unlawful dismissals for social media-related misconduct in the workplace. The researcher recommends that adequate social media legislation should be enacted in South Africa to combat the misuse of social media in the South African workplace during working hours.

Keywords: Social media misconduct, dismissal, employees, employers, legislative gaps, Constitutional conflicts.

LIST OF ABBREVIATIONS

BCEA	Basic Conditions of Employment Act 75 of 1998
CCMA	Commission for Conciliation, Mediation and Arbitration
COIDA	Compensation for Occupational Injuries and Diseases Act 130 of 1993
EEA	Employment Equity Act 55 of 1998
Fordham J.Corp and Fin.L.	Fordham Journal of Corporate and Financial Law
LRA	Labour Relations Act 66 of 1995
N.C. L. Rev	North Carolina Law Review
N Ky L Rev	Northern Kentucky Law Review
Nw.J. L. and Soc.Pol'y	Northwestern Journal of Law and Social Policy
OHSA	Occupational Health and Safety Act 85 of 1993
PAIA	Promotion of Access to Information Act 2 of 2000
PDA	Protected Disclosure Act 26 of 2000
PEPUDA	Protection of Equality and Prevention of Unfair Discrimination Act 4 of 2000
PER	Potchefstroom Electronic Law Journal
POPI	Protection of Personal Information 4 of 2013

RICA	Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002
Rutgers L Rev	Rutgers Law Review
SA Merc LJ	South African Mercantile Law Journal
SACJ	South African Computer Journal
SAHRC	South African Human Rights Commission
SALJ	South African Law Journal
U. Pa. J. Const. L	University of Pennsylvania Journal of Constitutional Law
Wash. L. Rev.	Washington Law Review

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CHAPTER ONE

RESEARCH OUTLINE AND CONTEXT

1.1 Introduction

Social media is defined as social interactions between one person and another using technology such as the internet and cell phones through any combination of words, pictures, videos, electronic mail (email) sharing, documents or audio.¹ Social media also constitutes mobile and web-based technologies that allow people to interact by both sharing and consuming information through social media platforms or email communications.² For the purposes of this research, electronic communication via email is regarded as social media because employees also communicate and share information through email in the workplace. Social media communications include the use of web-based and mobile technology to make communications into an interactive dialogue between one person and another.³ For the purposes of this research, the definition of "social media-related misconduct" include the improper and/or unlawful use of social media by employees in the workplace during office hours to the detriment of their employers, employers' business or other persons. Examples of such misuse of social media could include any posting of racist, defamatory, false, controversial, derogatory, malicious and/or misleading statements on social media platforms by employees against their employers or other persons. Consequently, social media-related misconduct by employees outside the workplace or office working hours is beyond the scope of this research. There is currently no legislation that specifically defines social media-related misconduct and/or indicate whether such misconduct is treated the same or different from other types of misconduct that are enumerated in the Schedule 8 of the Code of Good Practice of

¹ Smith MC "The Interaction of Social Media and the Law and How to Survive the Social Media Revolution" 2012 *New Hampshire Bar Journal* 24-39.

² Kietzmann JH, Kristopher H, McCarthy IP and Silvestre BS "Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media" 2011 *Business Horizons* 241-251.

³ Merriam-Webster Online Dictionary 2016 *Social Media Definition* <http://www.merriam-webster.com/dictionary/social%20media> accessed 13 June 2016 1.

the *Labour Relations Act*.⁴ Notwithstanding the fact that employers can also violate their employees' right to privacy⁵ by unlawfully monitoring their social media platforms in a bid to combat social media-related misconduct, this research mainly focuses on the dismissal of employees for their misuse of social media during office working hours. In this regard, the researcher submits that a specific legislation that outlaws the misuse of social media in the South African workplace should be enacted to carefully balance the employees' Constitutional rights to privacy and freedom of expression and the protection of the employer's own rights and business.

Social media platforms such as blogs, social networking and video sharing have become popular and are now present in almost every workplace.⁶ The abuse of social media platforms by employees has culminated in many cases of dismissals for social media-related misconduct in the South African workplace.⁷ In this regard, it must be noted that the study is mainly limited to the regulation and combating of social media-related misconduct in the South African workplace during office working hours. Moreover, a detailed discussion on balancing the rights of the employee and employer when regulating social media-related misconduct in the South African workplace during office working hours is beyond the scope of this dissertation. Thus, any social media-related misconduct that is done in South Africa outside office working hours is beyond the scope of this dissertation.

This research discusses the Constitutional and legislative challenges and/or problems associated with the dismissal of employees for social media-related misconduct in the South African workplace. For the purposes of this research, the regulation of social media-related misconduct is discussed mainly in terms of the LRA. There are

⁴ *Labour Relations Act* 66 of 1995 (LRA) as amended by the *Labour Relations Amendment Act* 6 of 2014.

⁵ See related comments by Balule BT and Otlhogile B "Balancing the Right to Privacy and the Public Interest: Surveillance by the State of Private Communications for Law Enforcement in Botswana" 2015 *Statute Law Review* 1, 2, who correctly submitted that there is a general concern in many jurisdictions that the state and other persons unlawfully use surveillance systems and other measures to arbitrarily monitor private communications which in turn interferes with the affected individuals' right to privacy.

⁶ Lewis R 2012 *Workplace Challenges Associated with Employees Social Media Use* <http://www.acc.com/legalresources/quickcounsel/wcawesmu.cfm> accessed 12 March 2016 1.

⁷ Celliers FQ "The Role of and Effect of Social Media in the Workplace" 2013 *N Ky L Rev* 567-592.

various forms of misconduct that employees can commit through social media⁸ in the South African workplace. In this regard, the legal consequences of such misconduct are further examined.⁹ Moreover, this research discusses labour-related legislation in relation to the regulation of social media in the South African workplace. The Constitutional rights to dignity,¹⁰ privacy¹¹, freedom of expression¹² and freedom of association¹³ are also discussed in this research. This follows the fact that employees and other persons can easily contravene the stated Constitutional rights on social media platforms. Thereafter, possible recommendations to enhance the regulation of social media-related misconduct in the South African workplace are provided.

1.2 Background of the Research

The growth of social media platforms in South Africa began in 1990 when internet access was made possible through computers by the South African government.¹⁴ The abuse of social media by employees has culminated into various social media-related misconduct in the South African workplace.¹⁵ As a result, the social media-related misconduct has resulted in various challenges for both employees and employers in South Africa.¹⁶ In South Africa, the employer-employee relationship is mainly regulated by the LRA. The LRA was enacted pursuant to the Constitution, which states that national legislation must be enacted to regulate employment issues.¹⁷ In today's world, the most effective, efficient and immediate way of conveying one's ideas and thoughts is through the internet.¹⁸ There is an estimated number of 11.8 million Facebook users, 7.2 million users of YouTube and 6.6 million

⁸ Davey R "Dismissal for Social Media Misconduct" 2012 *De Rebus* 1-94.

⁹ Celliers 2013 *N Ky L Rev* 575.

¹⁰ Section 10 of the *Constitution of the Republic of South Africa*, 1996 (Constitution).

¹¹ Section 14 of the Constitution.

¹² Section 16 of the Constitution.

¹³ Section 18 of the Constitution.

¹⁴ Van Eeden, Taljaard C and Borchardt S 2013 *Democracy and the Media Go Hand in Hand* <http://www.voices-of-theworld.org/politics-and-economy/democracy-and-the-media-go-hand-in-hand> accessed 10 February 2016 1.

¹⁵ Naito A "A Fourth Amendment Status Update: Applying Constitutional Privacy Protection to Employees' Social Media Use" 2012 *U. Pa. J. Const. L* 849-883.

¹⁶ Naito 2012 *U. Pa. J. Const. L* 851.

¹⁷ Section 23 of the Constitution.

¹⁸ *Braithwaite v McKenzie* 2015 (1) SA 270 (KZP).

users of other social media platforms in South Africa.¹⁹ This could suggest that the influence of social media on the modern society is growing. These technological advances have also influenced the conduct of employees in the workplace.²⁰ Consequently, companies run the risk of vicarious liability for discrimination, harassment and defamation on social media where an employee's conduct occurs during the course and scope of his or her employment.²¹ In the past years, several employees were dismissed for their comments on social media platforms.²² Consequently, the use of social media has culminated into new Constitutional and legislative challenges for both employees and employers in the South African workplace.²³ The LRA provides guidelines for dismissal for general misconduct in the workplace.²⁴ However, the LRA does not provide for social media-related misconduct regulation in the South African workplace.²⁵ Moreover, the *Basic Conditions of Employment Act*,²⁶ does not provide such employees with the same right in respect of social media conduct.²⁷ Nonetheless, in terms of the BCEA, every employee has the right to discuss his or her conditions of employment with his fellow employees, employer or any other person.²⁸

In terms of the *Regulation of Interception of Communications and Provision of Communication-Related Information Act*,²⁹ any person may intercept any communication if he or she is a party to the communication, unless such communication is intercepted for purposes of committing an offence.³⁰ The RICA further provides that any person may authorise or give anyone else written

¹⁹ Fourie LE *The Role of Social Media as an Information Source in the Decision Making of Students when Selecting a University* (Business Management-dissertation University of South Africa 2015) 5.

²⁰ Davey 2012 *De Rebus* 80.

²¹ Davey 2012 *De Rebus* 80.

²² Vries M and Moosa N "The Laws Around Social Media: Student Feature" 2015 *Without Prejudice* 1-92.

²³ Lewis 2012 <http://www.acc.com/legalresources/quickcounsel/wcawesmu.cfm> accessed 12 March 2016 1.

²⁴ Item 7 Schedule 8 Code of Good Practice: Dismissal of the LRA.

²⁵ Item 7 Schedule 8 Code of Good Practice: Dismissal of the LRA.

²⁶ *Basic Conditions of Employment Act* 11 of 2002 (BCEA).

²⁷ Potgieter M *Social Media and Employment Law* (Juta Cape Town 2014) 43.

²⁸ Section 78(1)(b) of the BCEA.

²⁹ *Regulation of Interception of Communications and Provision of Communication-Related Information Act* 70 of 2002 (RICA).

³⁰ Section 4(1) of the RICA.

permission to monitor or intercept any data communication unless it is for the purposes of unlawful conduct.³¹ Therefore, if an employee's communication is intercepted without his or her prior consent, this could constitute a violation of his or her right to privacy.³² In other words, if employers are allowed to monitor private communications of their employees without their prior consent, that could give rise to an infringement or violation of such employees' right to privacy.³³ Nonetheless, no provision in the RICA expressly provide for the regulation of social media-related misconduct in the South African workplace.³⁴

In *Smith v Partners in Sexual Health (non-profit)*,³⁵ an organisation's chief executive officer accessed an employee's private e-mail account while she was on leave and found e-mails between her and former employees as well as e-mails between the employee and persons outside the organisation which referred to internal matters of the business of the employer. The employer initially gained access to the employee's account accidentally but subsequent access was intentional. The employee was charged with a number of offences, including bringing the employer's name into disrepute. In Smith's defence at a disciplinary inquiry, she contended that the employer accessed her emails in violation of her right to privacy and in contravention of the RICA. The Commission for Conciliation, Mediation and Arbitration³⁶ found that the intentional access on the second occasion contravened the RICA and the evidence obtained through this access was inadmissible because of an infringement of the employee's Constitutional right to privacy. The CCMA held that the employee's dismissal for social media-related misconduct was procedurally and substantively unfair.

The *Employment Equity Act*³⁷ does not expressly provide for the regulation of social media-related misconduct in the South African workplace.³⁸ The Constitution states

³¹ Section 5(1) of the RICA.

³² Potgieter *Social Media and Employment Law* 88.

³³ Potgieter *Social Media and Employment Law* 88.

³⁴ Potgieter *Social Media and Employment Law* 88.

³⁵ *Smith v Partners in Sexual Health (non-profit)* (2011) 32 ILJ 1470 (CCMA).

³⁶ The Commission for Conciliation, Mediation and Arbitration (CCMA).

³⁷ Section 6(1) of the *Employment Equity Act* 55 of 1998 (EEA). In this regard, section 187(1)(f) read with (2) of the LRA would have been the correct provision to deal with dismissals based

that everyone has the right to freedom of expression.³⁹ Freedom of expression includes: (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research.⁴⁰ However, the right to freedom of expression is limited in terms of the Constitution.⁴¹ There is a close connection between the right to freedom of expression and the right of human dignity in that one's right to dignity may be violated when an employee or another person makes derogatory remarks on social media platforms against such person.⁴² These rights closely relates to social media as their contravention occur on social media platforms.⁴³ In *Le Roux and Others v Dey*,⁴⁴ O' Regan J submitted that the right to freedom of expression could not trump the right to human dignity.⁴⁵ However, both the right to human dignity and the right to freedom of expression should receive equal protection.⁴⁶ The court held that freedom of expression is not above any other Constitutional rights.⁴⁷ Although, the case does not directly deal with social media-related misconduct, it deals with the contravention of rights on social media platforms.

The Constitution guarantees an individual's right to dignity,⁴⁸ privacy,⁴⁹ freedom of expression⁵⁰ and the right to freedom of association.⁵¹ However, these rights are easily contravened on social media platforms in South Africa. Moreover, these rights are limited in terms of the Constitution.⁵² This entails that such rights are not

on social media related discriminatory grounds. However, social media-related misconduct is not expressly prohibited or treated as a misconduct under the LRA.

³⁸ Potgieter *Social Media and Employment Law* 88.

³⁹ Section 16(1) of the Constitution.

⁴⁰ Section 16(1) of the Constitution.

⁴¹ Section 36 of the Constitution.

⁴² Dahms-Jansen L 2015 *Social Media in the Workplace Balancing Rights to Privacy with Freedom of Expression* <http://Bowman Gilfillan.co.za/FileBrowser/ContentDocuments/Social> accessed 10 April 2016 1.

⁴³ Davey 2012 *De Rebus* 80.

⁴⁴ *Le Roux and Others v Dey* 2011 (3) SA 274 (CC) (*Le Roux case*).

⁴⁵ *Le Roux case* 45. *S v Mamabolo (E TV and Others Intervening)* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 441 CC 41 (*Mamabolo case*).

⁴⁶ *Le Roux case* 45 and *Mamabolo case* 41.

⁴⁷ *Le Roux case* 45 and *Mamabolo case* 41.

⁴⁸ Section 10 of the Constitution.

⁴⁹ Section 14 of the Constitution.

⁵⁰ Section 16 of the Constitution.

⁵¹ Section 18 of the Constitution.

⁵² Section 36 of the Constitution.

absolute since the limitation clause restricts them.⁵³ The limitation clause in the Constitution states that rights in the Bill of Rights may be limited only in terms of the law of general application.⁵⁴ The limitation clause also states that rights in the Bill of Rights may be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁵⁵

The Constitution states that everyone has an inherent right to dignity and such right should be respected and protected.⁵⁶ In *Cliff v Electronic Media Network (Pty) Ltd*,⁵⁷ Mr Cliff's position as a judge in the television programme called South African Idols,⁵⁸ was terminated after he posted a tweet on a social media platform, namely Twitter. The tweet was construed as racist, or in support of racism.⁵⁹ The case was brought on an urgent basis because of M-net's intention to terminate their relationship with Mr Cliff as a judge for the 2016 Idols season. M-net later dismissed Mr Cliff. Thereafter, the court ordered the reinstatement of Mr Cliff to his job as the remarks that he had made had nothing to do with racism. This case usefully reveals that innocent comments made by employees on social media could erroneously give rise to their dismissal for social media-related misconduct in the South African workplace.

Every individual has the right to privacy including the right not to have their person or home searched,⁶⁰ their property searched,⁶¹ their possessions seized,⁶² or the privacy of their communications infringed.⁶³ The right to privacy is supported by the

⁵³ Woolman S & Botha H 2006 *Limitations* http://www.chr.up.ac.za/chr_old accessed 12 May 2016 1.

⁵⁴ Section 36(1) of the Constitution.

⁵⁵ Section 36(1) of the Constitution.

⁵⁶ Section 10 of the Constitution.

⁵⁷ *Cliff v Electronic Media Network (Pty) Ltd* [2016] 2 All SA 102 (GJ) (*Cliff* case).

⁵⁸ The South African Idols is a television show on the South African television network M-Net, based on the popular British show *Pop Idol*. The show has contests to determine the best singer in South Africa.

⁵⁹ *Cliff* case 1, which states that "the beginning of the breakdown in relations between Cliff and M-Net was a racist and derogatory statement by one Penny Sparrow on her Facebook page, in which she referred to black people as monkeys". This was met with widespread anger and outrage and immediately sparked a public outcry, particularly on social media.

⁶⁰ Section 14(a) of the Constitution.

⁶¹ Section 14(b) of the Constitution.

⁶² Section 14(c) of the Constitution.

⁶³ Section 14(d) of the Constitution.

Protection of Information Act,⁶⁴ which stipulates that one's personal information is important.⁶⁵ This entitles both the employee and employer the right to protect and control their personal information. The POPI states that the processing of information should be lawful and/or in a manner that does not infringe upon the data subject.⁶⁶ However, the POPI does not clearly provide how the conduct of employees on social media in the workplace should be regulated.⁶⁷

In *Bernstein v Bester*,⁶⁸ Justice J Ackerman held that a person's right to privacy may be easily violated when they move public places such as their workplace⁶⁹ although privacy is recognised in a personal realm.⁷⁰ The employee's right to privacy should be safeguarded against intrusions by the employer.⁷¹ This will prevent employees from losing their privacy as they enter the workplace.⁷²

1.3 Statement of the Problem

Currently, the South African workplace has no specific legislation that regulates the misuse of social media.⁷³ The current regulatory framework as contained in the LRA and other related legislation is not adequate enough to combat the misuse of social media in the South African workplace. For instance, the LRA does not define social media-related misconduct. Moreover, the only examples of misconduct found in the LRA include gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination.⁷⁴ Thus, the Code of Good

⁶⁴ *Protection of Personal Information Act* 4 of 2013 (POPI). The POPI ensures that all South African institutions conduct themselves in a responsible manner when collecting, processing, storing and sharing another entity's personal information.

⁶⁵ Section 2 of the POPI.

⁶⁶ Chapter 9 of the POPI.

⁶⁷ HR Works 2012 *Social Media in the Workplace* <http://www.hrworks.co.za/articles/225-social-media-in-the-workplace> accessed 12 March 2016 1.

⁶⁸ *Bernstein v Bester* 1996 (2) SA 751 (CC) (*Bernstein case*).

⁶⁹ *Bernstein case* 67.

⁷⁰ *Bernstein case* 67.

⁷¹ Antoniades L *Social Networks in the Workplace* (LLM-dissertation University of Pretoria 2015) 10.

⁷² McGregor M "The Right to Privacy in the Workplace: General Case Law and Guidelines for Using Internet and E-mail" 2004 *SA Merc LJ* 638-650.

⁷³ Davey 2012 *De Rebus* 80.

⁷⁴ Item 3(4) Schedule 8 Code of Good Practice: Dismissal of the LRA.

Practice does not expressly indicate whether social media-related misconduct should be treated as any other general misconduct that is outlawed in the LRA. This Code also fails to provide any guidelines on the regulation of social media-related misconduct in the South African workplace during office working hours. The LRA also fails to indicate whether social media-related misconduct is treated the same or different for other types misconduct that are enumerated in its Code of Good Practice as stipulated in Schedule 8 of the LRA. Thus, it is very difficult for employees who are dismissed for social media-related misconduct to rely on sections 187 and 188 of the LRA. This has given rise to several unconstitutional and unlawful dismissals of employees as well as the infringement of the employer's rights in the South African workplace during office working hours.⁷⁵ In addition, there is no other South African labour statute that provides specific guidelines on the regulation of social media in the workplace. This has culminated into various problems such as the unfair dismissal of employees for social media-related misconduct on the one hand as well as the rampant misuse of social media by employees to the detriment of their employers in the South African workplace to date.⁷⁶

Furthermore, the frequent use of social media by employees has also increased the Constitutional conflicts between employers and their employees in the South African workplace. Consequently, several employees have been dismissed for their alleged defamatory or incriminating information posts on social media platforms in the South African workplace during office working hours.⁷⁷ In this regard, a number of cases of employees who faced dismissal for their alleged social media-related misconduct in the workplace illustrates the need for a specific social media legislation in South Africa and/or the need to amend the current labour laws to specifically regulate such misconduct.⁷⁸ Such legislation should adequately provide the regulation of social

⁷⁵ Davey 2012 *De Rebus* 80.

⁷⁶ Davey 2012 *De Rebus* 80.

⁷⁷ Du Toit 2016 *Social Media: Guidelines on the Policy for Employees using Social Media for Non-Business Purposes* <http://www.labourguide.co.za/most-recent/1358> accessed 14 July 2016 1.

⁷⁸ Raitt R 2015 *Navigating the Grey Areas around Social Media Law* <http://www.mediaupdate.co.za/socialmedia/78602/navigating-the-grey-areas-around-social-media-law> accessed 10 February 2016 1.

media in the South African workplace and the penalties to be imposed on the offenders.⁷⁹ The legislation should also define what can be described as a valid reason to dismiss an employee for social media-related misconduct in South Africa.⁸⁰ Concisely, the research exposes the lacunae in the current labour laws, which do not expressly prohibit social media-related misconduct in the South African workplace. This gives rise to a host of problems such as the unlawful dismissals of employees, infringement of employees' rights to privacy, dignity, freedom of expression and freedom of association as well as the infringement of the employer's own interests. It is hoped that such legislation will combat unlawful dismissals of employees for social media-related misconduct in South Africa.⁸¹

1.4 Aims and Objectives

1.4.1 Aims

This research examines the problems associated with the dismissal of employees for social media-related misconduct in the South African workplace. The research also examines the manner in which social media-related misconduct cases are dealt with by the South African courts. Additionally, the research explores the adequacy of the regulation of social media-related misconduct in South Africa.

1.4.2 Objectives

In order to achieve the aims of this research, the researcher:

- (a) analyses the challenges associated with the dismissal of employees for social media-related misconduct in the South African workplace; and
- (b) examines the relevant case law where the courts granted the dismissal of employees for social media-related misconduct.
- (c) provides recommendations on how to combat social media-related misconduct in the South African workplace during office working hours.

⁷⁹ Davey 2012 *De Rebus* 80.

⁸⁰ Davey 2012 *De Rebus* 80.

⁸¹ Raitt 2015 <http://www.mediaupdate.co.za/socialmedia/78602/navigating-the-grey-areas-around-social-media-law> accessed 10 February 2016 1.

1.5 Rationale for the study

This research examines the violation of the Constitutional rights of employees and employers because of social media-related misconduct in the South African workplace. The research also analyses the legislative challenges that are associated with social media-related misconduct in the South African workplace. This follows the fact that there are no clear guidelines or provisions in the LRA and other related legislation on the regulation of social media-related misconduct in the South African workplace during office working hours. The LRA should be amended to provide clear guidelines and/or provisions that prohibit the misuse of social media by employees in the South African workplace during office working hours. Accordingly, this research exposes the need for enacting adequate legislation that specifically deals with social media-related misconduct to curb arbitrary social media-related dismissals of employees in the South African workplace during office working hours. Although the research does not provide a specific hypothesis, the researcher hopes that such specific legislation will enhance the combating of social media-related problems in the South African workplace.

1.6 Limitation of the study

This research mainly focuses on the dismissal of employees for social media-related misconduct under the LRA. This research is limited to social media-related misconduct in the workplace during working hours, therefore any other misconduct in the LRA is beyond the scope of this research. Consequently, reference to other related legislation such as the EEA, BCEA, PEPUDA, RICA and the POPI was made where necessary, for comparative purposes. The research mainly deals with social media-related misconduct during working hours in the South African workplace. In other words, this research mainly focuses on social media-related misconduct or the improper and/or unlawful use of social media by employees in the workplace during office hours to the detriment of their employers, employer's business or other persons. Consequently, social media-related misconduct by employees outside the workplace or office working hours is beyond the scope of this research. The research also focuses on the employer and employee's Constitutional rights to dignity,

privacy, freedom of expression and freedom of association. This follows the fact the aforesaid rights are easily affected by social media-related misconduct in South Africa.⁸² The researcher does not do a comparative study of countries that have relatively good social media-related laws such as China⁸³ and the United States of America⁸⁴ because of space and time limitations to the dissertation. In addition, the researcher does not provide a specific heading for hypothesis due to the same reason. Although the research does not provide a specific heading for literature review because of space and time constraints, the researcher employed various primary and secondary sources that are relevant to the topic in the entire dissertation. A detailed discussion on balancing the rights of the employee and employer when regulating social media-related misconduct in South African workplace during office working hours is beyond the scope of this dissertation. Lastly, the research mainly discusses social media-related misconduct in the context of labour law rather delict and/or other related fields.

1.7 Research Methodology

The research employs a qualitative research method. For the purposes of this research, various primary sources such as legislation and secondary sources such as relevant journal articles, textbooks and case law that are relevant to the topic are utilised in the entire dissertation. Notably, primary sources are original sources that the information is initially based upon.⁸⁵ Secondary sources explain, interpret and analyse primary sources.⁸⁶ These employed sources provide the relevant evidence and background knowledge for this research.⁸⁷ Such primary and secondary sources

⁸² Singh BL *The South African Employer's Regulation of Internet Misuse in the Workplace* (LLM-dissertation University of KwaZulu-Natal) 31.

⁸³ Chin YC 2013 *Regulating Social Media* http://journalism.hkbu.edu.hk/doc/Regulating_social-Media.pdf accessed 21 March 2016 1.

⁸⁴ Bertot JC, Jaeger PT and Hansen D "The Impact of Polices on Government Social Media Usage: Issues, Challenges, and Recommendations" 2011 *Government Information Quarterly* 30-40.

⁸⁵ University of KwaZulu-Natal Library 2012 *South African and Foreign Sources* <http://library.ukzn.ac.za/content.php?pid=446457> accessed 15 May 2016 1.

⁸⁶ University of KwaZulu-Natal Library 2012 <http://library.ukzn.ac.za/content.php?pid=446457> accessed 15 May 2016 1.

⁸⁷ University of KwaZulu-Natal Library 2012 <http://library.ukzn.ac.za/content.php?pid=446457> accessed 15 May 2016 1.

were accessed from the library and the Internet.⁸⁸ In this regard, the dates available in the footnotes and bibliography are the dates on which the researcher accessed the websites provided. For the purposes of this research, the *Potchefstroom Electronic Law Journal* referencing style is used as it is the referencing style required for use by the university.

1.8 Structure of the dissertation

This research has five chapters as indicated below:

Chapter One outlines the background of study, statement of the problem, aims and objectives, rationale of the study, limitation of the study and the research methodology.

Chapter Two analyses the dismissals of employees because of social media-related misconduct in South Africa. The chapter also discusses various forms of misconduct that can be committed through social media by employees as well as the legal consequences for such misconduct.

Chapter Three outlines the legislative challenges that are associated with the dismissal of employees for social media-related misconduct in the South African workplace.

Chapter Four outlines and analyses the Constitutional challenges for social media-related misconduct in the South African workplace.

Chapter Five provides conclusions and recommendations on how to combat social media-related misconduct in the South African workplace.

⁸⁸ University of KwaZulu-Natal Library 2012 <http://library.ukzn.ac.za/content.php?pid=446457> accessed 15 May 2016 1.

CHAPTER TWO

DISMISSAL ON THE BASIS OF SOCIAL MEDIA-RELATED MISCONDUCT

2.1 Introduction

Misconduct occurs when an employee culpably disregards the rules for the workplace that are given or indicated by express or implied terms of that employee's employment contract and the employer's disciplinary code.⁸⁹ Misconduct is the most common justification for employee dismissals in South Africa.⁹⁰ Dismissals for misconduct occur when employees are deemed to have breached a material term of their employment contract by the employer.⁹¹ Furthermore, an employer may dismiss employees for misconduct when such employees have caused a hostile working environment for the employer and other employees.⁹²

The *Labour Relations Act*⁹³ provides three grounds that may render the termination of employment legitimate.⁹⁴ Such grounds include the conduct of the employee, the capacity of the employee, and the operational requirements of the employer's business.⁹⁵ Dismissal on the ground of negative or unlawful conduct of the employee is generally dismissal for misconduct.⁹⁶ Dismissal of such employees is because of their contravention of disciplinary rules and/or refusing to follow instructions of their employer.⁹⁷ Furthermore, the dismissal relating to unlawful conduct comes into effect because of an employee's unconventional behaviour that compromises the employment relationship with the employer.⁹⁸ Dismissal relating to the capacity of employees refers to instances where employees are incapable to perform their

⁸⁹ Grogan J *Dismissal* 5th ed (Juta Cape Town 2013) 143.

⁹⁰ Grogan *Dismissal* 142.

⁹¹ Grogan *Dismissal* 142.

⁹² Grogan *Dismissal* 142.

⁹³ *Labour Relations Act* 66 of 1995 (LRA).

⁹⁴ Item 2(2) Schedule 8 Code of Good Practice: Dismissal of the LRA.

⁹⁵ Item 2(2) Schedule 8 Code of Good Practice: Dismissal of the LRA.

⁹⁶ Grogan *Dismissal* 79.

⁹⁷ Grogan *Dismissal* 79.

⁹⁸ Grogan *Dismissal* 79.

workplace duties for reasons beyond their control such as being physically incapable to perform a task due to injury or sickness.⁹⁹

Dismissal for operational requirements of the employer occurs when an employee's employment post becomes redundant to the needs of the employer's business.¹⁰⁰ The operational requirements are effected for various reasons such as economic downturn or financial challenges of the employer.¹⁰¹ In assessing the fairness of the dismissal, the employer or judges and arbitrators should seek to answer the following questions:

- a) was there contravention of any rule regulating conduct in the workplace?;
- b) was such rule reasonable and valid?;
- c) was the employee aware of the rule or reasonably expected to have been aware of it?; and
- d) was dismissal the appropriate sanction for the contravention of the rule?¹⁰²

This chapter analyses the dismissal of employees for their social media-related misconduct. The procedural and substantive fairness for such dismissal is also discussed in accordance with the South African employment laws. Moreover, this chapter analyses the various misconduct that may be committed through social media and their legal implications. This is done to expose the need for a robust regulatory prohibition on social media-related misconduct in the South African workplace.

2.2 Definition of key terms and concepts

As indicated above,¹⁰³ misconduct occurs when an employee culpably disregards the rules for the workplace that are given or indicated by express or implied terms of that employee's employment contract and the employer's disciplinary code.¹⁰⁴ The definition of misconduct does not adequately outline what a misconduct is for the

⁹⁹ Grogan *Dismissal* 80.

¹⁰⁰ Grogan *Dismissal* 80.

¹⁰¹ Grogan *Dismissal* 79.

¹⁰² Item 7 Schedule 8 Code of Good Practice: Dismissal of the LRA.

¹⁰³ See paragraph 2.1 above.

¹⁰⁴ Grogan *Dismissal* 143.

purposes of social media-related misconduct in South Africa. However, the stated definition of misconduct does not cause confusion, as it is relatively clear and can be understood by a layperson. This could suggest that employers and the relevant courts can consistently apply the definition of misconduct.

The definition of "Social media-related misconduct" include the improper and/or unlawful use of social media by employees in the workplace during office hours to the detriment of their employers, employers' business or other persons. "Social media" is defined as social interactions between one person and another using technology such as the internet and cell phones through any combination of words, pictures, videos, email sharing, documents or audio.¹⁰⁵ Social media also constitutes mobile and web-based technologies that allow people to interact by both sharing and consuming information through social media platforms or email communication.¹⁰⁶ The definition is adequate as it fully describes what social media constitutes.

"Social media communication" is defined as the use of web-based and mobile technology to make communications into an interactive dialogue between one person and another.¹⁰⁷ The definition of social media communication is adequate because it clearly stipulates how and who interacts through social media communication. Nonetheless, this definition does not clearly state instances or examples where employees use social media communication in the workplace.

"Social media misconduct" occurs, *inter alia*, where employees post derogatory comments on social media platforms that are published to a wide audience. Such conduct may result in the dismissal of employees for social media-related misconduct in the South African workplace.¹⁰⁸ The definition of social media

¹⁰⁵ Smith MC "The Interaction of Social Media and the Law and How to Survive the Social Media Revolution" 2012 *New Hampshire Bar Journal* 24-39.

¹⁰⁶ Kietzmann JH, Kristopher H, McCarthy IP and Silvestre BS "Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media" 2011 *Business Horizons* 241-251.

¹⁰⁷ Merriam-Webster Online Dictionary 2016 *Social Media Communication* <http://www.merriam-webster.com/dictionary/social%20media> accessed 13 June 2016 1.

¹⁰⁸ Davey R 2016 *Off Duty Misconduct in the Age of Social Media* <http://www.golegal.co.za/off-duty-misconduct-in-the-age-of-social-media/> accessed 24 February 2016 1.

misconduct is not adequate. For instance, this definition does not explain or indicate whether derogatory comments could include racial, prejudicial and defamatory comments by employees on social media. Furthermore, the definition of social media-related misconduct should outline all the consequences of social media-related misconduct in the South African workplace.

“Workplace” means the place or places where the employees of an employer work.¹⁰⁹ The workplace definition is not adequate. This definition should be revised and broadened to indicate the various types of workplace where employees are required to provide services in relation to their employment contracts. For the purposes of this research, the term “workplace” refers to a place of employment for employees where they work or conduct their duties during normal office hours. Given this background, social media-related misconduct by employees outside the workplace or office working hours is beyond the scope of this research.

“Dismissal” entails that an employer has terminated a contract of employment of an employee with or without notice.¹¹⁰ The definition of dismissal is adequate as it is outlined in the LRA. Dismissal also occurs when an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or does not renew it.¹¹¹ For instance, where the employer refuses to allow an employee to resume work after she: (a) took maternity leave;¹¹² or (b) was absent from work for up to four weeks before the expected date, and up to eight weeks after the actual date of the birth of her child.¹¹³ Dismissal also occurs when an employer who dismissed employees for the same reasons offers to re-employ one of them but refuses to re-employ other employees.¹¹⁴ Dismissal also occurs when an employee terminates a contract of employment with or without notice because the new employer provides the employee with conditions or circumstances at work that are

¹⁰⁹ Section 213 of the LRA.

¹¹⁰ Section 186(1)(a) of the LRA.

¹¹¹ Section 186(1)(b) of the LRA.

¹¹² Section 186(1)(c)(i) of the LRA.

¹¹³ Section 186(1)(c)(ii) of the LRA.

¹¹⁴ Section 186(1)(d) of the LRA.

less favourable to the employee than those provided by the old employer.¹¹⁵ The definition of dismissal need not be hindered as it is outlined in all instances how a dismissal may occur.

“Termination of employment” occurs where a contract of employment is terminated at the instance of a party to the contract that has to be on notice.¹¹⁶ The definition is not adequate because an employee may face dismissal without prior notice from the employer. Furthermore, an employee may recuse himself or herself from his or her duties without informing the employer, which is a form of termination of employment. The definition should be amended to indicate that termination of employment can be effected without notice either from the employer or the employee.

“Social media abuse” occurs, *inter alia*, where employees use social media inappropriately by posting material that may be defamatory, racist and prejudicial to the employer and other persons.¹¹⁷ The definition of social media abuse is adequate as it provides ways in which employees could abuse social media without taking into consideration the consequences of their social media comments or posts. Employees should take responsibility for their social media abuse and they must face discipline or sanctions.

The “employer” is defined as a legal entity that controls and directs employees to perform their duties in the workplace in terms of the express or implied terms of the employment contract. The employer is obliged to pay remuneration to employees.¹¹⁸ The definition of an employer is adequate since it states the meaning of the employer and the obligations that could occur under the employment contract. The definition does not need amendment, as it does not cause any confusion. On the other hand, the “employee” is any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive

¹¹⁵ Section 186(1)(f) of the LRA.

¹¹⁶ Section 37(1) of the *Basic Conditions of Employment Act 75 of 1998* (BCEA).

¹¹⁷ Personnel 2016 *Computer Misuse* <http://www.personneltoday.com/hr-practice/computer-misuse/> accessed 10 September 2016 1.

¹¹⁸ Gelms J “High-Tech Harassment: Employer Liability under Title VII for Employee Social Media Misconduct” 2012 *Wash. L. Rev* 249-279.

a remuneration from the employer.¹¹⁹ The definition of an employee is clear and adequate. For instance, the definition satisfactorily outlines the employee's duties in the workplace.

An "employment relationship" is defined as the legal link between employers and employees where reciprocal rights and obligations are created between them.¹²⁰ The definition of the employment relationship is adequate because it gives clear indication of what an employment relationship entails. The employment relationship cannot exist without the reciprocal rights and obligations from employers and employees because such rights and obligations assist in carrying on of the business of the employers to benefit both the employers and employees.

2.3 The procedural and substantive fairness of social media-related dismissals under the South African employment laws

2.3.1 The Labour Relations Act

The dismissal of employees for general misconduct should be procedurally and substantively fair.¹²¹ Dismissal of an employee for general misconduct would be unfair if no procedure for substantive fairness was followed.¹²² Substantive fairness entails that a termination of employment by the employer should be reasonable.¹²³ A reasonable dismissal could occur when an employee had contravened a rule contained in the disciplinary code of the employment contract of the employer. Therefore, such employees can be dismissed for general misconduct in the South African workplace.¹²⁴ However, there are instances where no mention of an existing social media policy or code of conduct entailing that employees should not express opinions on social media platforms about his working conditions was made, but the

¹¹⁹ Section 1(a) of the BCEA.

¹²⁰ International Labour Organisation 2016 *Employment Relationship* http://ilo.org/ifpdial/areas-of-work/labour-law/WCMS_CON_TXT_IFPDIAL_EMPREL_EN/lang--en/index.htm accessed 16 March 2016 1.

¹²¹ Section 188 of the LRA.

¹²² Section 188(2) of the LRA.

¹²³ Commission for Conciliation, Mediation and Arbitration 2016 *The Disciplinary Procedure for Misconduct* <http://www.labourguide.co.za/discipline-dismissal/642> accessed 14 June 2016 1.

¹²⁴ Item 7 Schedule 8 Code of Good Practice: Dismissal of the LRA.

employee was dismissed.¹²⁵ The dismissal of an employee for misconduct would be unfair if the employee did not breach any disciplinary codes.¹²⁶ Failure by the employer to give reasons for dismissing an employee for social media-related misconduct would be unfair.¹²⁷ Furthermore, the dismissal of an employee for social media-related misconduct would be unfair if it infringes the fundamental rights of that employee.¹²⁸ Procedural fairness generally refers to a disciplinary hearing held to allow the employee to state his or her defence.¹²⁹ The LRA does not provide for procedural and substantive fairness for social media-related misconduct. The LRA should therefore, be amended to enact provisions for procedural and substantive fairness for social media-related misconduct in the South African workplace.

2.3.2 *The Employment Equity Act*

The *Employment Equity Act*¹³⁰ provides that every employer must take the necessary steps to eliminate any form of discrimination. Such steps could include the adoption of an anti-discrimination policy in the workplace by all employers.¹³¹ The employer should further prohibit unfair discrimination directly or indirectly against any employee based on the grounds such as race, gender, sex, pregnancy and other grounds.¹³² If a dismissal constitutes any form of discrimination, the dismissal would be both procedurally and substantively unfair¹³³ unless the dismissal is based on an inherent requirement of the particular job or on age where an employee has reached the normal or agreed retirement age.¹³⁴ In this regard, other tests and standards in terms of the Code of Good Practice of the LRA must be considered before the dismissal is regarded as procedurally and substantively unfair. The employer must

¹²⁵ *Beurain v Martin NO & Others* (1) (2014) 35 ILJ 2443 (LC) (*Beurain case*).

¹²⁶ *Beurain case* 5.

¹²⁷ Item 2(4) Schedule 8 Code of Good Practice: Dismissal of the LRA.

¹²⁸ Item 2(3) Schedule 8 Code of Good Practice: Dismissal of the LRA.

¹²⁹ Mugabe K 2014 *Substantive and Procedural Fairness in Employment Law* <http://www.polity.org.za/article/substantive-and-procedural-fairness-in-employment-law-2014-07-16> accessed 19 May 2016 1.

¹³⁰ The *Employment Equity Act* 55 of 1998 (EEA).

¹³¹ Section 5 of the EEA.

¹³² Section 6 of the EEA.

¹³³ Section 6 of the EEA read with section 187(1) of the LRA; Adonis T *The Employment and Promotion Process: Legal Regulation and Practice* (MPhil-dissertation University of Cape Town 2015) 28.

¹³⁴ Section 188(2) of the LRA.

not discriminate the employee based on his or her political views and/or sexual orientation that is posted on social media platforms.¹³⁵ The courts must discourage employee dismissals based on their sexual orientation or political views obtained on social media platforms.¹³⁶ Such dismissals would be discriminatory and unfair on the affected employee.¹³⁷ However, the enforcement of employee rights in this regard is difficult since the EEA does not make any provision for procedural and substantive fairness in respect of employee dismissals for social media-related misconduct.

2.3.3 *The Basic Conditions of Employment Act*

The BCEA provides that a contract of employment can be terminated when a party to the contract is notified of the termination of his or her employment contract.¹³⁸ Failure to notify the employee of the termination of the employment contract will constitute an unfair dismissal.¹³⁹ If a dismissal for social media-related misconduct is effected without prior notice, it would be a substantively unfair dismissal.¹⁴⁰ Employees may use social media platforms to discuss their working conditions.¹⁴¹ The dismissal for social media-related misconduct would be unfair if employees' communications discussed such conditions *bona fide*.¹⁴² The BCEA does not provide how procedural and substantive fairness should be considered in respect of dismissals for social media-related misconduct in the South African workplace. In this regard, it is submitted that the BCEA should be amended to clearly provide adequate provisions for social media-related misconduct dismissals in the South African workplace.

¹³⁵ Celliers FQ "The Role and Effect of Social Media in the Workplace" 2013 *N Ky L Rev* 567-592.

¹³⁶ Celliers 2013 *N Ky L Rev* 579.

¹³⁷ Celliers 2013 *N Ky L Rev* 579.

¹³⁸ Section 37(1) of the BCEA.

¹³⁹ Adonis *The Employment and Promotion Process* 28.

¹⁴⁰ Davey R "Dismissals for Social Media Misconduct" 2012 *De Rebus* 1-94.

¹⁴¹ Potgieter M *Social Media and Employment Law* (Juta Cape Town 2014) 88.

¹⁴² Potgieter *Social Media and Employment Law* 88.

2.3.4 *The Protection of Equality and Prevention of Unfair Discrimination Act*

The *Protection of Equality and Prevention of Unfair Discrimination Act*¹⁴³ states that no person may unfairly discriminate against any other person¹⁴⁴ on the grounds of race,¹⁴⁵ gender¹⁴⁶ and disability.¹⁴⁷ If it is established that an employer unfairly discriminated an employee and subsequently dismissed the employee for social media-related misconduct, such dismissal will be substantively and procedurally unfair.¹⁴⁸ The PEPUDA also does not have any provision for procedural and substantive fairness in respect of social media-related misconduct dismissals in the South African workplace. Accordingly, the PEPUDA should be amended to enact adequate provisions for procedural and substantive fairness in respect of social media-related misconduct dismissals in the South African workplace.

2.4 ***Problems Associated with Social Media Communications***

2.4.1 *Liability for Innocent Statements on Social Media*

Paul Chambers was amongst the first employees who abused his social media platform stating that:

"Crap. Robin Hood airport is closed. You've got a week and a bit to get your shit together otherwise I'm blowing the airport sky-high!".¹⁴⁹

This case illustrates that any social media post, even one intended as a joke, may have far-reaching consequences on the employee concerned. The consequence that may result could be dismissal for social media-related misconduct and reputational damage to the name of the employer. Chambers alone did not feel this and other related consequences. The Crown Prosecution Services was accused of wasting

¹⁴³ The *Protection of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (PEPUDA).

¹⁴⁴ Section 6 of PEPUDA.

¹⁴⁵ Section 7 of PEPUDA.

¹⁴⁶ Section 8 of PEPUDA.

¹⁴⁷ Section 9 of PEPUDA.

¹⁴⁸ Davey 2012 *De Rebus* 80.

¹⁴⁹ Davey R 2015 *Dismissal for Social Media-Related Misconduct* <http://BowmanGilfillan.co.za/dismissal-for-social-media-related-misconduct> accessed 12 April 2016 1.

public funds.¹⁵⁰ The district judge convicted and fined Chambers for posting derogatory comments on his social media platform. Furthermore, Chambers' appeal was dismissed on the basis that Chambers' electronic communication was menacing and that the airport staff were concerned by the derogatory comments. The Crown Prosecution Services was also accused of wasting public funds for convicting Chambers for two and a half years for what was considered as a joke by Chambers and his legal representative. In this regard, the senior prosecutor issued guidelines stipulating how posts on social media platforms should be dealt with.¹⁵¹

Recently, in South Africa, an employee (Carmen Hartmann) was dismissed for social media-related misconduct.¹⁵² Hartmann (an employee Netcare Linksfield Hospital) attacked President Jacob Zuma on social media, after his wife was admitted at the hospital for a medical procedure.¹⁵³ The employee breached the health profession rules by revealing the details of the medical treatment of Zuma's wife without the patient's consent. The employer stated that the employee had breached the Code of Practice of the Healthcare World, contravened legislation, company policies and that her conduct was contradictory to the values of commitment to maintaining confidentiality of patients. The employee was subsequently dismissed for social media-related misconduct. Although Hartmann's conduct was not expressly prohibited in the LRA Code of Good Practice, it is submitted that since Hartmann discussed the internal issues of her workplace on social media outside the office working hours, her dismissal for social media-related misconduct and contravening the Code of Practice of the Healthcare World was fair and justifiable.

¹⁵⁰ Davey 2015 <http://BowmanGilfillan.co.za/dismissal-for-social-media-related-misconduct> accessed 12 April 2016 1.

¹⁵¹ Davey 2015 <http://BowmanGilfillan.co.za/dismissal-for-social-media-related-misconduct> accessed 12 April 2016 1.

¹⁵² Malefane M 2017 *Nurse Fired over Zuma and Wife Facebook Rant* <http://www.sowetanlive.co.za/news/2017/03/07/nurse-fired-over-zuma-and-wife-facebook-rant> accessed 08 March 2017 1.

¹⁵³ Malefane 2017 <http://www.sowetanlive.co.za/news/2017/03/07/nurse-fired-over-zuma-and-wife-facebook-rant> accessed 08 March 2017 1.

Employees share various information on social media platforms and such information is seen by large numbers of people at a time.¹⁵⁴ One of the problems associated with social media posts is that many employees are ignorant of, or do not consider the consequences of their posts.¹⁵⁵ The statements made on social media platforms by employees, for instance, on Facebook may constitute an unlawful conduct when employees post derogatory comments about the employer and other employees.¹⁵⁶ For instance, employers can suspend their employees for inappropriate, racist or insensitive social media posts.¹⁵⁷ Such statements may also warrant disciplinary sanctions such as dismissals against the offenders.¹⁵⁸ In this regard, if an employee face dismissal or suspension for their inappropriate, racist or insensitive social media posts, such dismissal will be fair and justifiable.

In *Cliff v Electronic Media Network (Pty) Ltd*,¹⁵⁹ Mr Cliff was released from his duty on the Idols show¹⁶⁰ for commenting during the Penny Sparrow race debacle.¹⁶¹ Cliff allegedly tweeted that people did not understand freedom of speech.¹⁶² This led other people to make assumptions that he supported Sparrow's right to label black beachgoers as monkeys. Cliff lodged an urgent application in the High Court in Johannesburg¹⁶³ and M-Net was ordered to re-instate him.¹⁶⁴ This case clearly shows that an employee may be suspended for exercising his or her Constitutional right to freedom of expression on social media platforms. Put differently, Cliff was dismissed

¹⁵⁴ Hoy JS *Employee Behaviour in Social Media* (Master of Business Administration University of Pretoria 2012) 2.

¹⁵⁵ Vries M and Moosa N "The Laws Around Social Media: Student Feature" 2015 *Without Prejudice* 1-94.

¹⁵⁶ Davey 2015 <http://www.golegal.co.za/off-duty-misconduct-in-the-age-of-social-media/> accessed 24 February 2016 1.

¹⁵⁷ Shange N 2016 *Yes, Your Boss Can Fire You for Social Media Posts* <http://www.News24.com/SouthAfrica/News/yes-your-boss-can-fire-you-for-social-media-posts-attorney-20> accessed 10 March 2016 1.

¹⁵⁸ Davey 2012 *De Rebus* 80.

¹⁵⁹ *Cliff v Electronic Media Network (Pty) Ltd* [2016] 2 All SA 102 (GJ). See the introduction in paragraph 1.2 in Chapter One of this dissertation.

¹⁶⁰ The South African Idols is a television show on the South African television network M-Net and the show has participants who compete to be selected as a best singer in South Africa.

¹⁶¹ The Penney Sparrow debacle came to the fore when Sparrow made comments on her social media platform and referred to black people as monkeys. Sparrow was dismissed by her employer for social media-related misconduct, as the comments were seen as racist.

¹⁶² *Cliff* case 1.

¹⁶³ *Cliff* case 2.

¹⁶⁴ *Cliff* case 36.

by his employer for his alleged racist social media posts, which brought the employer's name into disrepute. Cliff's dismissal was not fair and justifiable since he did not directly contravene any Code of Good Practice by the employer or the LRA. Therefore, it is imperative that social media-related misconduct should be regulated to combat such unfair dismissals.¹⁶⁵ Such social media legislation and/or regulation should be aimed at mainly curbing the misuse of social media by employees as well as protecting the employer's own business interests.

In *Radebe v JD Group (Pty) Ltd*,¹⁶⁶ an employee was dismissed for posting insulting statements on his Facebook page after having been confronted by his employer regarding his lack of time keeping and not being productive as required in terms of his employment contract. The Commission for Conciliation, Mediation and Arbitration¹⁶⁷ stated that the applicant should have exhausted internal measures instead of addressing his issues on a social media platform. The CCMA also said that employees represent the company in that they are the face and voice of their companies. The employee's conduct indicated that he had no regard to possible risks that could occur to the company due to his comments. The dismissal was subsequently upheld. This case shows that social media can be wrongly used as an outlet by employees to try and address their workplace problems.¹⁶⁸ This usually gives rise to a conflict of interest in relation to the protection and balancing of the employer's rights to dignity and good name (business interests) and the employee's right to freedom of expression which empowers them to freely share their grievances.¹⁶⁹ The dismissal was fair and justifiable because the employee's social media-related misconduct had put the company's name into disrepute. Accordingly, it is submitted that both the employees and employers should use internal measures to address their workplace problems rather than social media platforms.¹⁷⁰

¹⁶⁵ Davey 2012 *De Rebus* 80.

¹⁶⁶ *Radebe v JD Group (Pty) Ltd* [GAJ12297-14] (*Radebe* case).

¹⁶⁷ The Commission for Conciliation, Mediation and Arbitration (CCMA).

¹⁶⁸ Potgieter *Social Media and Employment Law* 88.

¹⁶⁹ Davey 2012 *De Rebus* 80.

¹⁷⁰ Potgieter *Social Media and Employment Law* 88.

Similarly, in *Motloun v The Market Theatre Foundation*,¹⁷¹ an employee was dismissed for what the CCMA described as a hate speech statement on Facebook, which had a negative impact on the employer. The employee abused social media to foster hate speech. The employee overstepped her boundaries of freedom of expression by her comments on social media.¹⁷² The dismissal was justified because the employee had advocated for hate speech that is prohibited by the Constitution.¹⁷³

The Radebe and Motloun cases indicate that employees sometimes do not consider the consequences of their actions on social media platforms. As a result, dismissals of employees for their innocent but reckless comments on social media platforms will be substantively and procedurally fair.¹⁷⁴

2.4.2 Liability for Derogatory Statements on Social Media

Derogatory statements made on social media platforms by employees may fairly result in the dismissal of such employees.¹⁷⁵ The CCMA accepted that derogatory posts made by employees on social media platforms may warrant dismissal when such posts are made carelessly by the employees concerned.¹⁷⁶ Fairness should be promoted when dealing with social media-related misconduct in the South African workplace.¹⁷⁷ In *Media Workers Association of SA obo Mvemve v Kathorus Community Radio*,¹⁷⁸ an employee criticised the organisation's board on social media and claimed its station manager was a criminal. The CCMA found that the employee was fairly dismissed as he had posted unfounded allegations on Facebook without verifying them first. The employee made statements that were not true and this

¹⁷¹ *Motloun v The Market Theatre Foundation* [GAJB4458-11] 71.

¹⁷² Davey 2012 *De Rebus* 80.

¹⁷³ Section 16(2) of the *Constitution of the Republic of South Africa*, 1996 (Constitution).

¹⁷⁴ *R case (RFBC 35099 31 August 2015) 1*.

¹⁷⁵ Davey R 2015 *Understanding and Managing the Risks of Social Media in the Workplace* <http://BowanGilfillan.co.za/understanding-and-managing-risks-of-social-media-in-the-workplace> accessed 10 May 2016 30.

¹⁷⁶ Davey 2015 <http://BowanGilfillan.co.za/understanding-and-managing-risks-of-social-media-in-the-workplace> accessed 10 May 2016 28.

¹⁷⁷ Davey 2015 <http://BowanGilfillan.co.za/understanding-and-managing-risks-of-social-media-in-the-workplace> accessed 10 May 2016 28.

¹⁷⁸ *Media Workers Association of SA obo Mvemve v Kathorus Community Radio* (2010) 31 ILJ 2217 (CCMA) (*Media Workers case*).

constituted social media-related misconduct. The conclusion reached by the CCMA was accurate, fair and justified as derogatory remarks could tarnish the reputation of the employer and result in loss of profit for the employer.¹⁷⁹

As stated earlier,¹⁸⁰ in *Smith v Partners in Sexual Health (non-profit)*,¹⁸¹ the employer accidentally accessed the employee's email intentionally and unfairly. The employee was charged with a number of offences, including bringing the employer's name into disrepute. The CCMA held that the intentional access of the email contravened the provisions of the *Regulation of Interception of Communications and Provision of Communication-Related Information Act*.¹⁸² Although the Smith case did not expressly deal with social media-related misconduct, the CCMA held that the employee's dismissal was procedurally and substantively unfair.

However, it is clear that employees can be held accountable or dismissed for their social media-related misconduct. Nonetheless, the dismissal of the employee in the *Smith* case was unfair in that the employer had accessed the employee's e-mail account without the knowledge or prior consent from the employee.¹⁸³ Therefore, there is need for careful regulation of social media-related misconduct to protect both the employee's rights and the employer's interests in the workplace. This could be done by enacting a specific social media legislation or amending the LRA and other related labour laws to expressly prohibit employees from misusing social media in the workplace to the detriment of their employers. In the same vein, such legislation should also prohibit employers from adopting any policies or Codes of Good Practices that unlawfully interferes with their employees' rights to freedom of expression, privacy, dignity and freedom of association in the workplace.¹⁸⁴ Failure

¹⁷⁹ Hornung MS "Think Before You Type: A Look at E-mail Privacy in the Workplace" 2006 *Fordham J.Corp and Fin.L* 115-160.

¹⁸⁰ See paragraph 1.2 in Chapter 1 of this dissertation.

¹⁸¹ *Smith v Partners in Sexual Health (non-profit)* (2011) 32 ILJ 1470 (CCMA) (*Smith* case). See the related comments in paragraph 1.2 in the introduction of Chapter One of this dissertation.

¹⁸² The *Regulation of Interception of Communications and Provision of Communication-Related Information Act* 70 of 2002 (RICA).

¹⁸³ *Smith* case 4. See further related comments in paragraph 1.2 in the introduction of Chapter One of this dissertation.

¹⁸⁴ Dahms-Jansen L 2015 *Social Media in the Workplace Balancing Rights to Privacy with Freedom of Expression* <http://BowmanGilfillan.co.za/social-media-in-the-workplace-balancing-rights-to-privacy-with-freedom-of-expression> accessed 10 April 2016 1.

to do so would result in unfair consequences and dismissals of employees for social media-related misconduct.¹⁸⁵

In *Beurain* case, the applicant was an employee of Groote Schuur Hospital who posted some complaints on his Facebook social media platform.¹⁸⁶ The complaints related to the condition of the Groote Schuur Hospital toilets. He further stated that the health of staff members and employees was being compromised. He was told to stop posting such complaints but he, nonetheless, continued with his allegations regarding the bad condition of the Groote Schuur Hospital toilets. Thereafter, he was subsequently dismissed for such misconduct.¹⁸⁷ Beurain argued that his dismissal was unfair¹⁸⁸ and he relied on the *Protected Disclosure Act*¹⁸⁹ and the LRA as a defence. The court had to evaluate whether the employee made a protected disclosure as defined in the PDA.¹⁹⁰ The court relied on *Tshishonga v Minister of Justice and Constitutional Development and another*¹⁹¹ which held a belief that a protected disclosure was made depends upon what the employee deems to be a reasonable disclosure. Furthermore, if no obligation on the employer arises to believe that an employee has made a protected disclosure, the employee's belief that he or she made a protected disclosure cannot be reasonable.¹⁹² The judge held that the applicant's dismissal was not automatically unfair,¹⁹³ but did consider whether his dismissal was unfair.¹⁹⁴ It was held that the applicant's dismissal was fair and his claim was accordingly dismissed. Although the *Tshishonga* case did not deal with social media-related misconduct, it shows that an employee may face dismissal for social media-related misconduct for making a reckless protected

¹⁸⁵ Dahms-Jansen 2015 <http://BowmanGilfillan.co.za/social-media-in-the-workplace-balancing-rights-to-privacy-with-freedom-of-expression> accessed 10 April 2016 1.

¹⁸⁶ *Beurain* case 2.

¹⁸⁷ *Beurain* case 2.

¹⁸⁸ Section 187(1)(f) of the LRA.

¹⁸⁹ Section 2 of the *Protected Disclosure Act* 26 of 2000 (PDA).

¹⁹⁰ *Beurain* case 17.

¹⁹¹ *Tshishonga v Minister of Justice and Constitutional Development* (2007) 28 ILJ 195 (LC) (*Tshishonga* case).

¹⁹² *Tshishonga* case 185.

¹⁹³ *Beurain* case 36.

¹⁹⁴ *Beurain* case 40.

disclosure on a social media platform.¹⁹⁵ In this regard, the dismissal of the employee was fair and justified.

The *Tshishonga* case indicated further that not all dismissal cases for social media-related misconduct are unfair on the affected employees. Nonetheless, there is no social media legislation in South Africa.¹⁹⁶ Moreover, social media is not expressly treated as a self-regulatory practice in South Africa. Accordingly, it is submitted that there is need for careful regulation of social media-related misconduct to curb the abuse of social media communications and the arbitrary dismissals of employees in respect thereof.

2.5 Examples of Employee Misconduct through Social Media

Every employee has the responsibility to manage his or her social media platform.¹⁹⁷ There are consequences for social media-related misconduct.¹⁹⁸ Such misconduct occurs in various ways as discussed below.

2.5.1 Cyber bullying by employees

Cyber bullying could occur when the Internet, cell phones or other devices are used to send or post content that is intended to harm or embarrass another person on social media platforms.¹⁹⁹ The examples of cyber bullying include malicious or threatening emails or short message service communications (sms) sent to the victim's phone and offensive comments posted about an employee or employer on social media platforms.²⁰⁰ Cyber bullying has a negative impact on the employee-

¹⁹⁵ A protected disclosure is a disclosure made to: (a) a legal adviser; (b) an employer; (c) a member of Cabinet or of the Executive Council of a province; (d) a person or body; and (e) a any other person or body but does not include a disclosure in respect of which the employee concerned commits an offence by making that disclosure or made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice.

¹⁹⁶ Oosthuizen V 2016 *How Far is Too Far for Employees on Social Media?* www.labourguide.co.za/most-recent/2166 accessed 24 June 2016 1.

¹⁹⁷ Dahms-Jansen 2015 <http://BowmanGilfillan.co.za/social-media-in-the-workplace-balancing-rights-to-privacy-with-freedom-of-expression> accessed 10 April 2016 1.

¹⁹⁸ Davey 2015 *De Rebus* 80.

¹⁹⁹ Piotrowski C "From Workplace Bullying to Cyberbullying: The Enigma of E-Harassment in Modern Organizations" 2012 *Organization Development Journal* 44-53.

²⁰⁰ Henry Attorneys 2011 *Pay for Cyber-bullying and Harassment* www.henryattorneys.co.za/2011/09/pay-for-cyber-bullying-and-harassment accessed 31 June 2016 1.

employer relationship in that it may affect the overall productivity of the employer's business²⁰¹ when an employee's morale and self-confidence is destroyed by cyber bullying on social media.²⁰²

2.5.2 Harassment

Harassment is an act where one person subjects the other to hostile or prejudicial remarks or actions.²⁰³ In terms of the *Protection of Harassment Act*,²⁰⁴ harassment means directly or indirectly engaging in conduct that the respondent knows or ought to know causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonable means.²⁰⁵ For instance, engaging in verbal, electronic or any other communication aimed at offending the complainant or causing hostility and prejudice to that person.²⁰⁶ Harassment through electronic communication is provided for in the Harassment Act. Electronic communication that is hostile and prejudicial to others can occur on social media.²⁰⁷ An employer may be held liable for harassment perpetrated by his employee towards other employees or persons through social media while using the employer's name in the South African workplace.²⁰⁸ This constitutes a serious misconduct that may lead to the dismissal of the perpetrator for social media-related misconduct in the South African workplace.

In *Bramford v Energiser (SA) Ltd*,²⁰⁹ employees circulated pornographic and sexual offensive material using the company's electronic system.²¹⁰ The arbitrator submitted that the employee's actions were not socially acceptable and that the jokes and material sent between the employees were so offensive that they also

²⁰¹ Potgieter M *Social Media and Employment Law* (Juta Cape Town 2014) 89.

²⁰² Potgieter *Social Media and Employment Law* 89.

²⁰³ The Free Dictionary 2016 *Harassment* <http://www.thefreedictionary.com/harassment> accessed 30 June 2016 1.

²⁰⁴ *Protection from Harassment Act* 17 of 2011 (Harassment Act).

²⁰⁵ Section 1(a) of the Harassment Act.

²⁰⁶ Section 1(a)(ii) of the Harassment Act.

²⁰⁷ Section 1 of the Harassment Act.

²⁰⁸ Whitear-Nel N and Subramanien D "A Fresh Perspective on South African Law Relating to the Risks Posed to Employers when Employees Abuse the Internet" 2013 *South African Journal of Labour Relations* 9-23.

²⁰⁹ *Bramford v Energiser (SA) Ltd* 2000 12 BALR 1251 (P) (*Bramford case*).

²¹⁰ *Bramford case* 4.

held a racial connotation one should seek to avoid in the new South African society.²¹¹ The arbitrator further submitted that although employees may enjoy this in private, such practices cannot be condoned in the South African workplace.²¹² The arbitrator was correct in making the decision that distributing sexual and offensive material is not acceptable and could form social media-related misconduct. In this regard, the dismissal of the employees was fair and justified because both the court and the CCMA rejected their defence of unlawful invasion of privacy by the employer. Both the CCMA and the court correctly held that the conduct of the employees was offensive and damaging the reputation of the employer.

2.5.3 Employee productivity and evaluation

Productivity is defined as an evaluation by an employer on the efficiency of an employee or group of employees.²¹³ Employees gain access to company equipment such as computers and the internet to complete their given tasks more efficiently and effectively.²¹⁴ However, spending excessive time on social media platforms affects the productivity of employees.²¹⁵ Wasted time on social media platforms could result in the loss of profit for the employer.²¹⁶ Excessive use of social media platforms by employees in the workplace can result in a loss of productivity on the part of the employer.²¹⁷ The excessive and unlawful use of social media in the workplace can also overburden the employer's computer systems.²¹⁸ This has prompted other employers to block access to social media sites at their workplaces.²¹⁹ However, this does not prevent employees from accessing social

²¹¹ *Bramford* case 20.

²¹² *Bramford* case 46.

²¹³ TechTarget 2016 *Employee Productivity* <http://whatis.techtarget.com/definition/employee-productivity> accessed 23 October 2016 1.

²¹⁴ Baker D, Buoni N, Fee M and Vitale C "Social Networking and Its Effects on Companies and Their Employees" 2011 *Neumann Business Review* 1-14.

²¹⁵ Baker et al 2011 *Neumann Business Review* 4.

²¹⁶ Baker et al 2011 *Neumann Business Review* 4.

²¹⁷ Baker et al 2011 *Neumann Business Review* 4.

²¹⁸ Linklaters 2014 *Social Media and the law* www.linklaters.com/pdfs/mkt/london/tmt-social-media-report.pdf accessed 21 June 2016 10.

²¹⁹ Linklaters 2014 www.linklaters.com/pdfs/mkt/london/tmt-social-media-report.pdf accessed 21 June 2016 10.

media through their smartphones.²²⁰ Moreover, the employees always have some ways to get around the controls of their employer's computers in order to gain access to blocked websites in the workplace.²²¹ According to Peacock,²²² employers are concerned that their employees are always wasting time on social media platforms in the course of their working hours.²²³ This has resulted in low productivity and security risks on the company, especially, when employees share private and non-public data of the company to external persons. Employers could face lawsuits, a decline in employee morale and even bad publicity because of social media-related misconduct of their employees.²²⁴ This will be detrimental on the business of the employer and could result in the loss of profit.²²⁵

2.6 The Legal Consequences for Social Media-Related Misconduct

A large number of people can see social media comments simultaneously and as such, several people at a time can view derogatory comments made on social media platforms by employees. This could give rise to reputational damage and vicarious liability on their employer.²²⁶ According to Merrill,²²⁷ social media has created many opportunities for employees to abuse computer systems of their employers and other people's fundamental rights.²²⁸ The derogatory posts on social media may lead to defamation on the part of the employer.²²⁹ For instance, false derogatory posts by

²²⁰ Davey 2015 *De Rebus* 80.

²²¹ Baker et al 2011 *Neumann Business Review* 9.

²²² Peacock L 2008 *Employers Watch Facebook Usage, Employers' Law* <http://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?> accessed 12 May 2016 1.

²²³ Baker et al 2011 *Neumann Business Review* 9.

²²⁴ Baker et al 2011 *Neumann Business Review* 4.

²²⁵ Baker et al 2011 *Neumann Business Review* 9.

²²⁶ Cavico FJ, Mujtaba BG, Muffler SC and Samuel M "Social Media and Employment-At-Will: Tort Law and Practical Considerations for Employees, Managers and Organizations" 2013 *New Media and Mass Communication* 25-41.

²²⁷ Merrill T, Latham K, Santalesa R and Navetta D "Social Media: The Business Benefits May Be Enormous, but can the Risks – Reputational, Legal, Operational be Mitigated" 2011 *Ace Limited* 7.

²²⁸ Davey 2015 <http://BowanGilfillan.co.za/understanding-and-managing-risks-of-social-media-in-the-workplace> accessed 10 May 2016 28.

²²⁹ Davey 2015 <http://BowanGilfillan.co.za/understanding-and-managing-risks-of-social-media-in-the-workplace> accessed 10 May 2016 28.

employees against their employers can be defamatory and may damage the reputation of the employer's business.²³⁰

2.6.1 Reputation of the business

Employees play a significant role on the business and its reputation.²³¹ In other words, employees' social media conduct can have a positive or negative impact on the business of their employer.²³² For instance, a model, Jessica Leandra Dos Santos made derogatory comments on her social media platform and stated that she dealt with an "arrogant and disrespectful kaffir" inside Spar. She further stated that she should have punched him.²³³ This commentary raised many concerns of racism and her employer (Quick Trim South Africa) terminated her employment contract.²³⁴ Her employment was terminated because of her social media-related misconduct that affected the business reputation of her employer.²³⁵ The public also complained and suggested that the sponsors should terminate their relationship with her because of her social media-related comments.²³⁶ The public assumed that the employer supported the statements made by Jessica on social media. Consequently, the reputation of the employer's business was grossly affected.²³⁷ Eventually, Jessica faced dismissal for social media-related misconduct, which caused reputational damage on her employer. The dismissal was fair and justified because her conduct had negatively affected the profits and business reputation of the employer.

²³⁰ Mushwana G and Bezuidenhout H "Social Media Policy in South Africa" 2014 *Southern African Journal of Accountability and Auditing Research* 63-74.

²³¹ Mushwana and Bezuidenhout 2014 *Southern African Journal of Accountability and Auditing Research* 64.

²³² Mushwana and Bezuidenhout 2014 *Southern African Journal of Accountability and Auditing Research* 64.

²³³ Naik S 2012 *Model's Racist Rant Costs Her* <http://www.iol.co.za/saturday-star/models-racist-rant-costs-her-1290648> accessed 13 March 2016 1.

²³⁴ Naik 2012 <http://www.iol.co.za/saturday-star/models-racist-rant-costs-her-1290648> accessed 13 March 2016 1.

²³⁵ Davey 2015 *De Rebus* 80.

²³⁶ Pillay Verashni 2012 *Jessica Leandra and The Racist Tweet* <http://mg.co.za/article/2012-05-04-jessica-leandra-and-the-racist-tweet> accessed 13 March 2016 1.

²³⁷ Potgieter *Social Media and Employment Law* 89.

2.6.2 Vicarious liability

Vicarious liability occurs when the employer is strictly liable for the delict committed by its employee. This usually occur when the employer in question is not at fault or directly involved in that delict.²³⁸ An employer can be responsible for the wrongful actions of its employees, if proven that employees executed such actions during the course of their employment.²³⁹ The origin of the doctrine of vicarious liability is based on public policy and the notion that a person who is wrongfully injured should not be left without a claim.²⁴⁰ The misconduct of employees on social media may expose employers to the risk of vicarious liability.²⁴¹ This results in reputational damages to the employer, especially, where the employee's social media-related misconduct occurs during the course and/or scope of his or her employment.²⁴²

In *Minister of Police v Rabie*,²⁴³ the Appellate Division held that the determination of whether an employee acted within the scope of his or her employment includes both a subjective and an objective enquiry. The court submitted that although the police sergeant's wrongful acts of assaulting Mr Rabie (detainee) while he was off duty were not directly linked to his employer, the employer was vicariously liable to pay damages to the affected persons because he purported to act within the scope of his employment. It was also held that in assessing whether the conduct falls outside the scope of employment, reference has to be made to the intention of the employee. However, if there is no link between the employee's conduct in serving his own interests and the business interests of the employer, then the employer may not be held liable. This is an objective test. The court further held that an employer could be liable for the conduct of his or her employees, which he or she did not consent to, if such conduct was executed during the course of their employment. The employers should only be held liable if the risk was typical of the specific

²³⁸ Knobel JC *Law of Delict* 6th ed (LexisNexis Durban 2010) 365.

²³⁹ Knobel *Law of Delict* 365.

²⁴⁰ Le Roux R "Vicarious Liability: Revisiting an Old Acquaintance" 2003 *International Law Journal* 1879-1883.

²⁴¹ Davey 2015 <http://BowanGilfillan.co.za/understanding-and-managing-risks-of-social-media-in-the-workplace> accessed 10 May 2016 28.

²⁴² Knobel *Law of Delict* 365.

²⁴³ *Minister of Police v Rabie* 1986 (1) SA 117 (A) 134 (*Rabie* case).

employment activity. A typical risk would be reasonably foreseeable by a reasonable employer.²⁴⁴ The *Rabie* case did not deal directly with social media-related misconduct. Nonetheless, it shows that an employer may be vicariously liable for the conduct of his or her employee.

2.6.2.1 The requirements of vicarious liability

There are three requirements for vicarious liability as follows:

(a) the employer-employee relationship should exist at the time when the delict is committed.

This requirement is less problematic when establishing the vicarious liability of the employer. However, a detailed discussion of this element falls outside the focus of this study. The employer-employee relationship is determined in terms of both the LRA and the BCEA. The LRA defines an employee as any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration.²⁴⁵ Therefore, if an employee makes comments on social media about the business of the employer, it must be established whether there was an employment relationship prior to, or when such comments were made.²⁴⁶

(b) the employee's conduct must constitute a delict.

A delict is defined as the wrongful and culpable act of a person that causes harm to another person.²⁴⁷ Wrongfulness, fault, causation, harm and an act are the elements that must be present in order to classify conduct as a delict.²⁴⁸ For instance, a delict can be committed through social media, where an employee posts wrongful

²⁴⁴ Murray S *The Extent of an Employer's Vicarious Liability When an Employee Act Within The Scope of Employment* (LLM-dissertation North-West University 2012) 3.

²⁴⁵ Section 213 of the LRA.

²⁴⁶ Potgieter *Social Media and Employment Law* 88.

²⁴⁷ Law Blog SA 2013 *Law of Delict Study Guide Questions and Answers* http://lawblogs.files.wordpress.com/2014/01/questions_and_answers_study_guide_2013.pdf accessed 11 May 2016 2.

²⁴⁸ Law Blog SA 2013 http://lawblogs.files.wordpress.com/2014/01/questions_and_answers_study_guide_2013.pdf accessed 11 May 2016 2.

derogatory comments on a social media platform that may cause harm to another person during office working hours. This could constitute a social media-related misconduct. However, it must be noted that the employee may only incur delictual liability for social media-related misconduct if all the elements of a delict are proved.²⁴⁹

(c) an employee should act within the scope of employment.

Bezuidenhout NO v Eskom,²⁵⁰ illustrates that an employer can limit the scope of the employment duties of employees. In this case, an employee provided a lift to a hitchhiker in a clearly marked vehicle of Eskom against the clear instruction from his employer not to do so without express authority from his superiors. The employee was on call and negligently caused an accident, which resulted in the hitchhiker suffering severe head injuries. The case is not directly linked to social media-related misconduct but it provides a good example of instances where employers may be exempted from vicarious liability of their employees. The court stated that an employee's task must be viewed broadly and not reduced to specific activities. Eskom was subsequently not found liable because the employee acted against instruction. Therefore, the employee's conduct had no bearing on his employer's interest. This case illustrates how vicarious liability is determined. Vicarious liability can also arise because of social media-related misconduct when employees defame or insult other persons using computers and other resources of their employers during office hours.²⁵¹ The *Employment Equity Act*²⁵² states that the employer must have policies to regulate the conduct of employees in the workplace, for instance, a social media policy. The employer may be held vicariously liable for an employee's social media-related misconduct if the employer fails to establish policies on social media misconduct in the workplace.²⁵³ Nonetheless, social media policies alone may not adequately protect employers from incurring vicarious liability for their

²⁴⁹ Potgieter *Social Media and Employment Law* 89.

²⁵⁰ *Bezuidenhout v Eskom* 2003 3 SA 83 (SCA).

²⁵¹ Singh BL *The South African Employer's Regulation of Internet Misuse in the Workplace* (LLM-dissertation University of KwaZulu-Natal 2015) 24.

²⁵² *Employment Equity Act* 55 of 1998 (EEA).

²⁵³ Singh *The South African Employer's Regulation* 24.

employees' social media-related misconduct. Employers should provide other awareness measures apart from Codes of Good Practice and social media policies. This could curb social media-related misconduct by ensuring that their employees are aware of what constitutes such misconduct and its negative effects to the employer and other persons.

2.6.3 Copyright and trade mark infringements

A copyright refers to rights to works that are original and eligible for copyright such as literary works, musical works and artistic works.²⁵⁴ The creator is granted the privilege to protect his or her artistic products, against piracy and other unlawful conduct by other persons.²⁵⁵ Companies must protect their own trademarks and copyrights when using social media to promote their brands. The company's trademarks, copyrights and other intellectual property rights are as valuable as the products or services that they offer.²⁵⁶ Employers can be held liable for copyright infringements that were committed by their employees on social media platforms.²⁵⁷ In this regard, employees can be dismissed for their copyright infringements on social media platforms and other related misconduct.²⁵⁸ Companies should comply with general principles of advertising, namely, honesty, decency and truthful presentation, with the aim of consumer protection.²⁵⁹ Social media-related misconduct can be committed by the employee who make a misrepresentation regarding the product of, or business of the employer on a social media platform.²⁶⁰

In *King v South African Weather Service*,²⁶¹ Mr King made a copyright claim against his employer (South African Weather Services) on the basis that he had developed a

²⁵⁴ Section 2 of the *Copyright Act* 98 of 1978 (Copyright Act).

²⁵⁵ The Free Dictionary 2016 *Copyright* <http://legal-dictionary.thefreedictionary.com/copyright> accessed 24 June 2016 1.

²⁵⁶ Steinman ML and Hawkins M "When Marketing Through Social Media, Legal Risks Can Go Viral" 2010 *Intellectual Property and Technology Law Journal* 1.

²⁵⁷ Singh *The South African Employer's Regulation* 27.

²⁵⁸ Singh *The South African Employer's Regulation* 27.

²⁵⁹ Mischke C "Social Networks, Privacy and Dismissal- Facebook, Twitter et al: The Employer's Reputational Risk" 2011 *Contemporary Labour Law* 11-17.

²⁶⁰ Davey 2012 *De Rebus* 80.

²⁶¹ *King v South African Weather Service* (716/2007) [2008] ZASCA 143 (*King case*).

computer program.²⁶² King was an employee of the Weather Bureau, which was taken over by the South African Weather Services. This automatically meant that King became an employee of the South African Weather Services.²⁶³ A dispute arose involving the source codes of the computer programs and King refused to hand them over to the South African Weather Services.²⁶⁴ This resulted in his dismissal for insubordination.²⁶⁵ It is submitted that the dismissal of King was unfair since he was dismissed for refusing to hand over ideas that he developed at his own accord. King would have been guilty of social media-related misconduct, had he addressed his grievances on social media. In this regard, the dismissal would have been fair since his conduct would have infringed the trademark of the employer. This case is crucial since it provides important precedent that social media-related misconduct could also result in copyright and trademark infringements in the South African workplace. Moreover, the misconduct would have further resulted in copyright infringement as revealing information pertaining to the employer could be seen as copyright or trademark infringement.²⁶⁶

Social media platforms enables employees to access various resources ranging from books, music, movies pictures and other forms of media during their working hours in the workplace.²⁶⁷ Copyright laws²⁶⁸ such as the Copyright Act protect many of these resources.²⁶⁹ The Copyright Act prohibits the unlawful distribution of resources that breach copyright laws.²⁷⁰ The Copyright Act protects literary and artistic works that are even found on social media.²⁷¹ Consequently, any copyright infringement committed by employees on social media may lead to their dismissal by their employers for social media-related misconduct.

²⁶² *King case 1.*

²⁶³ *King case 2.*

²⁶⁴ *King case 2.*

²⁶⁵ *King case 2.*

²⁶⁶ Davey 2012 *De Rebus* 80.

²⁶⁷ Mischke 2011 *Contemporary Labour Law* 11.

²⁶⁸ Singh *The South African Employer's Regulation* 27.

²⁶⁹ Section 2 of the Copyright Act.

²⁷⁰ Singh *The South African Employer's Regulation* 27.

²⁷¹ Singh *The South African Employer's Regulation* 27.

2.6.4 Insider Trading

Insider trading is defined as a practice by which one person armed with price-sensitive non-public (confidential) information, concludes a transaction in securities or financial instruments to which that information relates without sharing that information with others, to the detriment of such persons or other innocent and unwitting investors.²⁷² Insider trading is a form of market abuse. Therefore, it is an offence to commit insider trading in South Africa.²⁷³ If it is established that the employee committed insider trading on social media by revealing confidential information about his or her employer's listed securities he or she may be found guilty of social media-related misconduct.²⁷⁴ Insider trading constitutes a serious breach of the employment relationship hence such conduct may result in the dismissal of employees if such insider trading was directly perpetrated on social media platforms.²⁷⁵

2.6.5 Restraints of trade and confidentiality

A trademark is defined as a mark that is intended to be used by one person in the course of trade, which distinguishes his goods from other same kind of goods.²⁷⁶ *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a SABMark International*²⁷⁷ dealt with a restraint of trade. The applicant had a tendency to alter words and images of trademarks then proceeding to have them printed on t-shirts with the aim of selling them to make profit. The respondent in this case was the owner of the trademark, "Carling Black Label", which is one of the leading beer brands in South Africa. Laugh it Off Promotion used the "Carling Black Label" trademark by simply changing the wording from "Carling Black Label" to

²⁷² Chitimira H "Overview of the Market Abuse Regulation under the Financial Markets Act 19 of 2012" *Obiter* 254-263.

²⁷³ Davis D et al (eds) *Companies and other Business Structures in South Africa* 3rd ed (Oxford University Press South Africa Cape Town 2013) 223-224; sections 78 and 82 of the Financial Markets Act 19 of 2012.

²⁷⁴ Steinman 2010 *Intellectual Property and Technology Law Journal* 1.

²⁷⁵ Davey 2015 <http://BowanGilfillan.co.za/understanding-and-managing-risks-of-social-media-in-the-workplace> accessed 10 May 2016 27.

²⁷⁶ Section 9(1) of the *Trade Marks Act* 194 of 1993 (Trade Marks Act).

²⁷⁷ *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a SABMark International* 2005 (8) BCLR 743 (CC) (Laugh It Off Promotion case).

“White Black Labour Guilt” on their products. If Laugh it Off Promotion committed this misconduct on social media, it would have been liable for social media misconduct.²⁷⁸ Moreover, Laugh it Off Promotion would have been dismissed for social media-related misconduct if it was the employee of the South African Breweries International. Such dismissal would have been warranted by the fact that the employee breached a restraint of trade by altering words and images of trademarks of the South African Breweries International.²⁷⁹ The Laugh it Off Promotion case did not directly deal with social media-related misconduct but it shows how a restraint of trade may be breached in South Africa.

The restraints and confidentiality agreements protects organisations from employees who may:

- a) abandon their employer in favour of establishing a similar business in competition or with the client of the employer;
- b) approach the clients or customers of the employer for the business to be set up during or after working hours;
- c) convince the existing members of staff to abandon the employer in favour of the new business venture as established by the employee, during the course of the employment or after resignation;
- d) use protected confidential information belonging to the employer and use it to cause damage to the business of the employer.²⁸⁰

The employees could be found guilty of restraint of trade if they conduct themselves in the above-mentioned ways.²⁸¹ The breach of the restraint of trade could result in social media-related misconduct if employees post or engage in prohibited conduct on their social media platforms.²⁸²

²⁷⁸ Steinman 2010 *Intellectual Property and Technology Law Journal* 3.

²⁷⁹ Davey 2015 <http://BowanGilfillan.co.za/understanding-and-managing-risks-of-social-media-in-the-workplace> accessed 10 May 2016 20.

²⁸⁰ Potgieter *Social Media and Employment Law* 78.

²⁸¹ Potgieter *Social Media and Employment Law* 78.

²⁸² Potgieter *Social Media and Employment Law* 78.

In *Experian South Africa v Haynes*,²⁸³ the applicant conducted business in the credit information industry.²⁸⁴ The case did not directly deal with social media-related misconduct. It dealt with businesses that provided products and services to its customers who were juristic persons such as banks, parastatals, government departments, manufacturing companies and sole proprietors.²⁸⁵ On 31 October 2011, the first respondent resigned from the applicant's employment,²⁸⁶ upon which he took up employment with the competitor.²⁸⁷ The confidentiality agreement signed by the first respondent stated that he would not directly or indirectly take employment with the competitor, during the period of the restraint. The employee breached the confidentiality agreement between him and his first employer by working for the competitor. The conduct of this employee could have resulted in social media-related misconduct if he addressed his grievances on social media.²⁸⁸

2.6.6 Breach of fiduciary duties

Fiduciary duties are directed at an employee to act solely in the best interests of the employer.²⁸⁹ The employee has to abide by the duties imposed on him or her even where the duties conflict with his/her interests in the workplace.²⁹⁰ The employee is prohibited from placing himself in a position where his interests conflict with his duty to the employer.²⁹¹ A dismissal of the employee could be justified when his or her action causes a breakdown on the employer-employee relationship.²⁹² An employee's social media-related misconduct may lead to the breakdown of the employer-employee relationship when he or she breaches the fiduciary duties through social media.

²⁸³ *Experian South Africa v Haynes* (48711/2011) [2012] ZAGP JHC 105; 2013 (1) SA 135 (GSJ); (2013) 34 ILJ 529 (GSJ) (18 May 2012) (*Haynes* case).

²⁸⁴ *Haynes* case 3.

²⁸⁵ *Haynes* case 3.

²⁸⁶ *Haynes* case 8.

²⁸⁷ *Haynes* case 9.

²⁸⁸ Steinman 2010 *Intellectual Property and Technology Law Journal* 6.

²⁸⁹ Davey 2012 *De Rebus* 80.

²⁹⁰ Singh *The South African Employer's Regulation* 32.

²⁹¹ Davey 2015 <http://BowanGilfillan.co.za/understanding-and-managing-risks-of-social-media-in-the-workplace> accessed 10 May 2016 20.

²⁹² Shange 2016 <http://www.News24.co.za/SouthAfrica/News/yes-your-boss-can-fire-you-for-social-media-posts-attorney-20160202> 10 March 2016 1.

2.7 Employer's role in combating social media-related misconduct

Employers must have adequate and clear policies, measures and/or Codes of Good Practices on social media-related misconduct in the South African workplace during office working hours. Such policies, measures and/or Codes of Good Practices must clearly prohibit social media-related misconduct and practices that give rise to such misconduct and its negative consequences on the part of the employer and other related parties. Moreover, employers must ensure that their social media-related misconduct regulations, Codes of Good Practices and other related policies are drafted carefully in compliance with the LRA and other related laws. This would avoid arbitrary violation of the employee's right to privacy,²⁹³ dignity,²⁹⁴ freedom of expression²⁹⁵ and freedom of association.²⁹⁶ Such regulations, Codes of Good Practices and other related policies must not unduly interfere with the employees' bona fide use of social media. This follows the fact that social media is crucially important because it enables the free flow of useful information between employees and employers in the workplace.²⁹⁷ Moreover, proper use of social media could also play a pivotal role in enabling the employees to express their *bona fide* personal opinions and/or grievances with others for them to be addressed. Thus, the social media-related misconduct regulations of employers should adequately combat the misuse of social media without violating the employees' aforesaid rights.²⁹⁸ Employers must guard and assess the risks of unlawfully encroaching on their employees' Constitutional rights to privacy, freedom of expression and freedom of association.²⁹⁹ Conversely, employees must not violate their employer's business interests and reputation through social media-related misconduct in the workplace during office working hours.

²⁹³ Section 14 of the Constitution.

²⁹⁴ Section 10 of the Constitution.

²⁹⁵ Section 16 of the Constitution.

²⁹⁶ Section 18 of the Constitution.

²⁹⁷ Balule BT "Promoting and Safeguarding Media Pluralism in Botswana: An Assessment of Legal Risks" 2015 *Commonwealth Law Bulletin* 1, 1.

²⁹⁸ Balule 2015 *Commonwealth Law Bulletin* 2.

²⁹⁹ See related comments by Balule 2015 *Commonwealth Law Bulletin* 2; Lefever K, Lievens E, and Valcke P "Risk-Based Regulation in the Media Sector: To Measure is to Know" 2012 *JAIIO – SID* 1, 3.

2.8 Conclusion

Dismissal of employees for social media-related misconduct should be procedurally and substantively fair. The fairness of a dismissal is determined using three grounds, namely, the conduct of the employee, the capacity of the employee and the operational requirements of the employer's business. If these grounds are not proven, such dismissal will be unfair. The scope of procedural and substantive fairness was analysed in accordance with the different labour laws in this chapter.³⁰⁰ Accordingly, dismissals for social media-related misconduct must be both procedurally and substantively fair. It was noted that social media-related misconduct could give rise to various legal consequences on the part of the employer. In the same vein, employees can also be held liable for making derogatory statements on social media platforms. In this regard, examples of social media-related misconduct were discussed in order to outline their consequences. Given this background, it is submitted that there is need for careful regulation of social media-related misconduct in South Africa.

³⁰⁰ See paragraph 2.3 in this Chapter.

CHAPTER THREE

LEGISLATIVE CHALLENGES ASSOCIATED WITH DISMISSALS OF EMPLOYEES FOR SOCIAL MEDIA-RELATED MISCONDUCT

3.1 Introduction

The International Labour Organisation (ILO)³⁰¹ is a committee of the United Nations that has influenced the South African labour legislation since South Africa ratified ILO conventions to align its legislation with the ILO international standards. South Africa is a member state of the ILO and is obliged to enact labour legislation that is consistent with the ILO international standards. South Africa also has to uphold the ILO principles on the rights to freedom of association, to engage in collective bargaining, to equality at work and to eliminate forced labour and child labour.³⁰² The principles of a non-sexist, non-racial and equality based democratic society influence the South African labour legislation as such legislation aims to eradicate sexism, racism and inequality amongst employers and employees.³⁰³ In South Africa, the *Labour Relations Act*,³⁰⁴ the *Basic Conditions of Employment Act*,³⁰⁵ and the *Employment Equity Act*³⁰⁶ regulate the employment relationship between the employer and employee. Furthermore, the *Promotion of Equality and Prevention of Unfair Discrimination Act*,³⁰⁷ the *Occupational Health and Safety*,³⁰⁸ and *Compensation for Occupational Injuries and Diseases Act*.³⁰⁹ For instance, the right to fair labour practices is one of the fundamental rights of employees that is

³⁰¹ The International Labour Organisation (ILO).

³⁰² Bhoola U 2002 National Labour Law Profile: South Africa www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919 accessed 12 February 2016 1.

³⁰³ Bhoola 2002 http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919 accessed 12 February 2016 1.

³⁰⁴ *Labour Relations Act* 66 of 1995 (LRA) as amended by *Labour Relations Amendment Act* 6 of 2014.

³⁰⁵ *Basic Conditions of Employment Act* 75 of 1997 (BCEA) as amended by the *Basic Conditions of Employment Amendment Act* 11 of 2002.

³⁰⁶ *Employment Equity Act* 55 of 1998 (EEA).

³⁰⁷ *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (PEPUDA).

³⁰⁸ *Occupational Health and Safety Act* 85 of 1993 (OHSA).

³⁰⁹ *Compensation for Occupational Injuries and Diseases Act* 130 of 1993 (COIDA).

regulated by the South African labour laws.³¹⁰ However, the fact that the aforesaid legislation has been enacted does not guarantee the proper regulation and protection of employees and employers' rights in the workplace during office working hours. This is exacerbated by the fact that the current South African labour laws do not have clear steps or guidelines that could be employed in relation to the dismissal of employees for social media-related misconduct in the workplace. In this regard, it is submitted that the courts should adjudicate on social media-related misconduct cases in accordance with the Constitution. The Constitution states that when interpreting the Bill of Rights, the courts must consider international law.³¹¹ It must be noted that misconduct by employees differs from other forms of misconduct. Nonetheless, the LRA and other related South African labour laws do not expressly provide whether social media-related misconduct is prohibited or treated substantially different from other types of misconduct that are enumerated in the Schedule 8 of the Code of Good Practice of the LRA.

This chapter analyses the legislative challenges associated with the dismissal of employees for social media-related misconduct in the workplace. This is done by examining the adequacy of the relevant legislation pertaining to the employer-employee relationship in South Africa. To this end, the employee's right to fair labour practices is discussed in light of the employer's right to dismiss his or her employees for social media-related misconduct.

3.2 The Labour Relations Act

The LRA was the first labour-related legislation to be promulgated³¹² and enacted in South Africa and has been amended by the *Labour Relations Amended Act*.³¹³ The LRA is the primary labour legislation that governs labour-related matters in South

³¹⁰ Bhoola 2002 http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919 accessed 12 February 2016 1.

³¹¹ Section 39 of the *Constitution of the Republic of South Africa, 1996* (Constitution).

³¹² Smit P and Van Eck BPS "International Perspectives on South African's Unfair Dismissal Law" 2010 *Comparative and International Law Journal of South Africa* 46-67.

³¹³ LRA was enacted in 1995 and amended by the *Labour Relations Amendment Act 6 of 2014*.

Africa.³¹⁴ The LRA provides that it is not appropriate to dismiss an employee for a first time offence.³¹⁵ However, an exception is made for the misconduct that is serious enough and of such gravity that it renders the employment relationship intolerable, therefore, warranting a dismissal.³¹⁶ For instance, dishonesty or wilful damage to the property of the employer, physical assault on the employer, a fellow employee, client or customer and gross insubordination.³¹⁷ The LRA does not expressly provide for social-media abuse and/or treat it as a general misconduct as stipulated in Schedule 8 of the Code of Good Practice. In *Scientific and Industrial Research v Fijen*,³¹⁸ the Appellate Division held that it is well established that the relationship between employer and employee is “in essence one of trust and confidence”. It also held that, at common law, conduct that is clearly inconsistent with such trust and confidence entitles the “innocent” party to cancel the agreement. Given this *status quo*, the amendment of the LRA is imperative to expressly prohibit social media-related misconduct in the workplace. This approach could enable employers to evade liability for unlawful dismissals of their employees for social media-related misconduct in the workplace. The express prohibition of social media-related misconduct in the LRA could also help employees to avoid committing such misconduct ignorantly. Such prohibition could also enhance trust and confidence in the employer-employee relationship in the workplace.

However, there are numerous cases where employees faced dismissal for social media-related misconduct.³¹⁹ Furthermore, some employees were dismissed in

³¹⁴ Botha MM *Employee Participation and Voice in Companies: A Legal Perspective* (LLD-dissertation North West University 2015) 16.

³¹⁵ Item 3(4) Schedule 8 Code of Good Practice: Dismissals of the LRA.

³¹⁶ Item 3(4) Schedule 8 Code of Good Practice: Dismissals of the LRA.

³¹⁷ Item 3(4) Schedule 8 Code of Good Practice: Dismissals of the LRA.

³¹⁸ *Council for Scientific and Industrial Research v Fijen* [1996] 6 BLLR 685 (AD) 691I.

³¹⁹ *Sedlick v Krisray (Pty) Ltd* (2011) 8 BALR 879 (CCMA), the employee did not restrict the Facebook settings and the posts he made could be seen by everyone. The employee was dismissed as a result of derogatory Facebook status updates. The employee challenged the fairness of the dismissal at the CCMA. The CCMA held that the employee was fairly dismissed; *Fredericks v Jo Barkett Fashions* [2011] JOL 27923 (CCMA), the employee was dismissed for making derogatory comments on Facebook. The CCMA held that the employer was entitled to intercept the posts made by the employee. The CCMA held further that the employee was fairly dismissed as the privacy of the employee had not been infringed when the employer accessed their Facebook posts and in *Media Workers Association of SA obo Mvemve v Kathorus Community Radio* (2010) 31 ILJ 2217 (CCMA), a radio station employee criticised

violation of the LRA requirements on misconduct-related dismissals. In *R v VL*,³²⁰ the arbitrator concluded that a post on a social media platform by an employee did not constitute any impairment to the name of the employer. The court held further that the employee's intention was simply to seek support from fellow friends and family. When deciding whether to impose the penalty of dismissal or not, the employer should in addition to the gravity of the misconduct, consider various factors. Such factors could include the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.³²¹ The misconduct occurs when an employee culpably fails to consider or abide by the rules of his or her workplace.³²² Such rules arise from an implied or express term within an employee's contract of employment.³²³ Various disciplinary codes that all employers are obliged to comply with are outlined in the LRA.³²⁴ Nonetheless, such codes merely serve as guidelines for employers to regulate employees' conduct in the workplace.³²⁵ The guidelines set out in the LRA are not mandatory as they only serve to assist employers to deal with all issues such as conflicts encountered in the workplace instead of imposing unreasonable rules on employees that are not set out in the LRA. The unreasonable rules could be working during weekends without any remuneration for the services rendered by the employee.

In *Edcon Ltd v Pillemer NO and others*,³²⁶ it was emphasised that the employer must put forth evidence to support the allegation that dismissal is an appropriate sanction.³²⁷ This would require evidence that the trust relationship between the

the organisation's board and claimed its station manager was a criminal. The CCMA held that the employee was fairly dismissed as he had posted unfounded allegations on Facebook without having addressed these internally first.

³²⁰ *R v VL* (NBCRFI) (RFBC 35099 31 August 2015) (*R* case). The employee had challenged her dismissal for the posts that she had made on Facebook. She stated that she had been retrenched by a senior employee, after serving duties of employment over a period of 20 years. Furthermore, she stated that the dismissal was done without prior notice.

³²¹ Item 3(5) Schedule 8 Code of Good Practice: Dismissals of the LRA.

³²² Grogan J *Dismissal* 5th ed (Juta Cape Town 2013) 143.

³²³ Grogan *Dismissal* 143.

³²⁴ Schedule 8 of the LRA.

³²⁵ *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd* (1998) 19 ILJ 635 (LC) (*Moropane* case).

³²⁶ *Edcon Ltd v Pillemer NO and others* [2010] 1 BLLR 1 (SCA) (*Edcon* case).

³²⁷ *Edcon* case 8.

employer and employee had broken down.³²⁸ Thus, an employer can dismiss an employee fairly if proved that there was transgression, which had the effect or impact that made the sanction of dismissal appropriate.³²⁹ Any person who is seeking to establish whether a dismissal for misconduct is unfair should consider whether:

(a) the employee has breached a rule which serves to regulate the conduct of the employee in the workplace; or (b) which proves that there was an existence of that rule.³³⁰ Many rules that employers rely on in dealing with cases involving misconduct, have their origin in the implied common law duties of the employee.³³¹ For instance, the duty to abide by the given instructions from the employer.³³² Employers do not have to notify the employees of every rule in the workplace. However, it is submitted that employees must be made aware that social media abuse or misconduct will have negative consequences against the offenders.³³³

In *Warren Thomas Griffith v VWSA*,³³⁴ the Commission for Conciliation Mediation and Arbitration,³³⁵ held that an employee can be dismissed for disobeying a lawful instruction and abusing company facilities such as the unauthorised use of internet and e-mail systems. The CCMA held that a person with the employee's intelligence and experience should appreciate the fact that intentional disregard of the employer's instructions would constitute a misconduct. In addition, an ordinary person can understand the meaning of "undesirable" and pornography would fall into this realm.³³⁶ The case did not deal directly with social media-related misconduct but it shows that dismissals for disobeying a rule and/or abusing the computer systems of the employer to unlawfully access and misuse social media

³²⁸ *Edcon case 9.*

³²⁹ Smit N "How do you Determine a Fair Sanction? Dismissal as Appropriate Sanctions in Cases of Dismissal for (Mis) conduct" 2011 *Dejure* 49-73.

³³⁰ Grogan *Dismissal* 143.

³³¹ Grogan *Dismissal* 143.

³³² Grogan *Dismissal* 143.

³³³ Grogan *Dismissal* 144.

³³⁴ *Warren Thomas Griffith v VWSA*, CCMA case no. KN EC 16174, 9-11 (unpublished) (*Warren case*).

³³⁵ The Commission of Conciliation, Mediation and Arbitration (CCMA).

³³⁶ *Warren case* 8-11.

platforms in the workplace can be treated as social media-related misconduct that gives rise to fair and justifiable dismissals of such employees. Had the employee unlawfully used the employer's computer systems to access social media platforms in the workplace and post the pornographic material, such employee could be fairly and justifiably dismissed for social media-related misconduct in the workplace.

However, notwithstanding the fact that some rules and/or standards are well established and known to employees,³³⁷ the non-disclosure on the part of the employer of conduct that constitutes misconduct could have a negative effect on the part of employees as some would not be aware of certain conduct that is prohibited. Thus, it is imperative that employees be informed of social media rules in the workplace. The LRA does not indicate whether any employee is allowed to make comments on a social media platform in the company's name at his or her workplace without permission from his or her employer. Prior to the dismissal of an employee based on contravening a rule, it must be established that the rule was valid.³³⁸ If it is found that such a rule was unlawful or unreasonable, the employees are allowed to disregard such a rule.³³⁹

It must be noted that an establishment of whether an employee has breached a rule is two-fold.³⁴⁰ Firstly, such a rule should be carefully interpreted in order to indicate all the offences.³⁴¹ Secondly, it must be established whether there was a contravention of a rule. It should also be proved whether the employee's conduct had breached that rule.³⁴² The onus of proving that a rule was contravened in the workplace rests with the employer.³⁴³ In this regard, it is not clear whether an employee who was dismissed for social media-related misconduct should also prove that the dismissal was unfair under the LRA.³⁴⁴ It is also not clear whether the

³³⁷ Item 3(1) of Schedule 8 of the Code of Good Practice of the LRA.

³³⁸ Grogan *Dismissal* 144.

³³⁹ Grogan *Dismissal* 144.

³⁴⁰ Grogan *Dismissal* 145.

³⁴¹ Grogan *Dismissal* 145.

³⁴² Grogan *Dismissal* 145.

³⁴³ See Item 7 of Schedule 8 of the Code of Good Practice: Dismissals of the LRA; Grogan *Dismissal* 146.

³⁴⁴ Section 186(1) and (2) of the LRA; Potgieter M *Social Media and Employment law* (Juta Cape Town 2014) 71.

employer should prove that there was a valid rule in the workplace prohibiting social media misconduct just like other general misconducts that are stated in item 7 of Schedule 8 of the Code of Good Practice of the LRA.³⁴⁵ In terms of the LRA, the failure on the part of the employer to prove on a balance of probabilities that the dismissed employee contravened a valid rule that existed in the workplace will result in such dismissal being substantially unfair.³⁴⁶

Knowledge of a rule entails that if employees were aware of a rule in the workplace, they can be disciplined correctly for contravening such a rule.³⁴⁷ An appropriate sanction is also an important requirement when assessing whether a dismissal for misconduct was unfair.³⁴⁸ The courts usually have some challenges in deciding whether a dismissal or a lesser sanction can be imposed for a proven offence.³⁴⁹ The courts are required to ascertain if employers that have the responsibility to dismiss employees do so fairly and reasonably.³⁵⁰ This approach should also apply to the dismissal of employees for social media-related misconduct in order to combat unfair dismissals for such misconduct.³⁵¹

The aforesaid guidelines are not always exercised as provided in the LRA. For instance, some misinterpretation could occur regarding the use of these guidelines by employers.³⁵² The LRA does not have guidelines on how social media-related misconduct should be regulated.³⁵³ Accordingly, the LRA should be amended to enact proper guidelines for social media-related misconduct regulation in South Africa. The LRA merely places an obligation on the employer to establish rules or codes relating to the conduct of employees in the workplace that helps to create certainty and consistency.³⁵⁴ Although employers are entitled to protect their

³⁴⁵ Potgieter *Social Media and Employment law* 71.

³⁴⁶ Section 186(1) read with (2) of the LRA.

³⁴⁷ Grogan *Dismissal* 149.

³⁴⁸ Item 7(b)(iv) of the Schedule 8 Code of Good Practice: Dismissals of the LRA.

³⁴⁹ Grogan *Dismissal* 155.

³⁵⁰ Grogan *Dismissal* 155.

³⁵¹ Potgieter M *Social Media and Employment law* 60.

³⁵² Celliers FQ "The Role and Effect of Social Media in the Workplace" 2013 *N Ky L Rev* 567-592.

³⁵³ Celliers 2013 *N Ky L Rev* 569.

³⁵⁴ Item 3(1) Schedule 8 Code of Good Practice: Dismissals of the LRA.

interests, employees' rights should also be considered when making such rules.³⁵⁵ Moreover, the disciplinary codes established by the employer in the workplace in accordance with the LRA do not include social media-related misconduct.³⁵⁶ In this regard, it is submitted that the LRA should be amended to enact provisions that obliges employers to develop disciplinary codes on social media use in the workplace.³⁵⁷

It is not clear whether employers can invoke misconduct disciplinary measures against employees that engage in social media-related misconduct in accordance with the relevant labour laws.³⁵⁸ This follows the fact that misuse of social media by employees is not expressly classified as a misconduct under the LRA's Code of Good Practice and other related laws. Consequently, an employee's employment may be terminated for social media-related misconduct if such misconduct was serious enough to justify the termination.³⁵⁹ However, some employees were dismissed without an offence that justifies such a dismissal. For instance, in *Smith v Partners in Sexual Health (non-profit)*,³⁶⁰ the employee was charged with a number of offences because the employee discussed internal issues on her e-mail with other people which made reference to the employer including bringing the employer's name into disrepute. This occurred after the employer discovered e-mails between the employee and former employees, as well as persons outside the organisation, which made reference to internal matters. Nonetheless, the CCMA held that the employee's dismissal was procedurally and substantively unfair. Normal rules of fairness and equity apply equally to virtual labour relations.³⁶¹ Accordingly, the LRA should be amended to adequately deal with social media-related misconduct and make

³⁵⁵ Celliers 2013 *N Ky L Rev* 570.

³⁵⁶ Celliers 2013 *N Ky L Rev* 571.

³⁵⁷ Van Wyk J and Heyns M 2012 *To Name or Not to Name, That is The Question* http://www.werksmans.com/wpcontent/uploads/2013/04/150_JN5313_Werksmans_Brief_To_name_or_not_to_name accessed 12 July 2016 1.

³⁵⁸ Item 3(2) Schedule 8 Code of Good Practice: Dismissals of the LRA.

³⁵⁹ Burrows T 2013 *Social Media Changes the Disciplinary Landscape* <http://mg.co.za/author/tracy-burrows> accessed 12 January 2016 1.

³⁶⁰ *Smith v Partners in Sexual Health (non-profit)* (2011) 32 ILJ 1470 (CCMA). Also see paragraph 1.2 on the introduction in Chapter One and paragraph 2.4.2 in Chapter Two of this dissertation.

³⁶¹ Davey R 2015 *Dismissal for Social Media Misconduct* <http://BowmanGilfillan.co.za/dismissal-for-social-media-misconduct> accessed 14 July 2016 1.

provision for sanctions for such misconduct in the workplace. This will combat challenges experienced in the workplace due to social media-related misconduct. This status quo is worsened by the fact that the LRA does not have any provision on social media-related misconduct. This presents a regulatory challenge to employers in relation to social media-related misconduct in the workplace during office working hours since no specific guidelines and/or provisions are contained in the LRA to help employers to deal with such misconduct lawfully and fairly. This challenge has given rise to many unfair dismissals of employees for social media-related misconduct in the South African workplace.

3.3 The Basic Conditions of Employment Act

The BCEA was promulgated in 1997 and it came into effect on 1 December 1998. The *Basic Conditions of Employment Amendment Act* amended the BCEA.³⁶² The BCEA aims at preventing employers from imposing unreasonable terms and conditions of employment in order to exploit their employees.³⁶³ The BCEA discourages such exploitation by protecting employees against unlawful dismissals.³⁶⁴ Thus, employers may only dismiss employees if such dismissal is effected lawfully.³⁶⁵

The BCEA states that every employee is entitled to discuss his or her working conditions with his or her fellow employees or employers.³⁶⁶ Employees enjoy protection where any information shared is only concerned with their conditions of employment.³⁶⁷ However, the BCEA does not expressly prohibit social media-related misconduct. Furthermore, the BCEA does not expressly provide whether a mere discussion of employees' working conditions through social media during office working hours could constitute social media-related misconduct. This provides a challenge to both employees and employers since employees could be unfairly

³⁶² The BCEA was amended by the *Basic Conditions of Employment Amendment Act* 11 of 2002. Section 7 of the BCEA.

³⁶³ Giles Files 2015 *Social Media: Valid Reason to dismiss* www.gilesfiles.co.za/dispute-resolution-3/social-media-valid-reason-to-dismiss/ accessed 25 May 2016 1.

³⁶⁴ Giles Files 2015 www.gilesfiles.co.za/dispute-resolution-3/social-media-valid-reason-to-dismiss/ accessed 25 May 2016 1.

³⁶⁵ Section 78(1)(b) of the BCEA.

³⁶⁶ Celliers 2013 *N Ky L Rev* 587.

dismissed for their innocent social media discussions relating to their working conditions. On the other hand, the employers may suffer reputational damage through their employees' social media discussions relating to confidential and sensitive information on their working conditions.

3.4 The Employment Equity Act

The EEA was enacted in 1998 and amended in 2013.³⁶⁸ The EEA imposes a duty on employers to eliminate unfair discrimination.³⁶⁹ The EEA outlines the different forms of unfair discrimination as well as the penalties that may be imposed on the offenders in this regard.³⁷⁰ Employers should take reasonable steps to prevent all forms of discrimination in their workplaces.³⁷¹ Employers who do not comply with the duty to eliminate unfair discrimination in the workplace may be held liable for damages, where it is established that they discriminated or allowed discrimination to be committed by their employees on social media platforms.³⁷² The main aim of EEA is to regulate the relationship between the employers and employees in relation to discrimination or affirmative measures in the workplace.³⁷³

Employers are required not to discriminate employees on any ground including race, gender, sex, pregnancy, marital status, family responsibility, or on any other arbitrary ground.³⁷⁴ An employer could become liable for discrimination if an employee access social media in the workplace using the internet facilities of the employer to commit social media-related misconduct, which is discriminatory, such as racial, sexist or prejudicial comments without the employer's consent.³⁷⁵

When an employee has committed social media-related misconduct in the form of discrimination, an employer will not be liable if he or she has taken reasonable steps

³⁶⁸ See *Employment Equity Amendment Act* 47 of 2013.

³⁶⁹ Section 5 of the EEA.

³⁷⁰ Singh BL *The South African Employer's Regulation of Internet Misuse in the Workplace* (LLM-dissertation University of KwaZulu-Natal 2015) 28.

³⁷¹ Section 5 of the EEA.

³⁷² Singh *The South African Employer's Regulation* 28-29.

³⁷³ Section 2 of the EEA.

³⁷⁴ Section 5 of the EEA.

³⁷⁵ Singh *The South African Employer's Regulation* 29.

to eliminate the discriminatory conduct.³⁷⁶ Such steps could include the adoption of policies that condemns discriminatory conduct and the misuse of social media in the workplace during office hours.³⁷⁷ Nonetheless, the failure of the EEA to expressly outlaw social media-related misconduct has provided new regulatory and discriminatory challenges for employers and employees in the workplace respectively. A misconduct could easily be committed through social media, where an employee posts comments on social media that discriminate other employees. If it is found or proven that an employee has made comments that are discriminatory on social media, such comments could constitute social media-related misconduct.³⁷⁸

Access to a job applicant's Facebook could allow the employer to obtain information such as political affiliation or sexual orientation of that applicant.³⁷⁹ Investigating a job applicant's sexual orientation or political views posted on Facebook could negatively influence the selection or appointment of that applicant.³⁸⁰ This could amount to unfair discrimination by the employer. Therefore, it is submitted that employers should refrain from unlawfully accessing information of potential job seekers that is posted on their social media platforms in order to discriminate them based on such information.³⁸¹ However, if an applicant posts negative information relating to the potential employer on a social media platform, this could constitute social media-related misconduct.

The improper use of a prospective employee's personal information by an employer must be prohibited as it violates the employee's right to privacy.³⁸² Such conduct on the part of the employer could also breach privacy laws that may be found in other different legislation³⁸³ such as the *Regulation of Interception of Communications and*

³⁷⁶ Singh *The South African Employer's Regulation* 29.

³⁷⁷ Singh *The South African Employer's Regulation* 30.

³⁷⁸ Vorster G 2012 *SA Law Protects against Employer Facebook Prying* <http://businesstech.co.za/news/internet/11749/> accessed 15 May 2016 1.

³⁷⁹ Vorster 2012 <http://businesstech.co.za/news/internet/11749/> accessed 15 May 2016 1.

³⁸⁰ Vorster 2012 <http://businesstech.co.za/news/internet/11749/> accessed 15 May 2016 1.

³⁸¹ Vorster 2012 <http://businesstech.co.za/news/internet/11749/> accessed 15 May 2016 1.

³⁸² Celliers 2013 *N Ky L Rev* 579.

³⁸³ Celliers 2013 *N Ky L Rev* 579.

*Provision of Communication-Related Information Act*³⁸⁴ and the *Protection of Personal Information Act*.³⁸⁵ The breach of such legislation can occur as a result of the employer viewing an employee's social media platforms without his or her knowledge or consent.³⁸⁶ An employer may regard the information found on the employee's social media platforms as social media-related misconduct if it is defamatory and discriminatory nature. The employers face several challenges regarding the regulation and use of social media in the workplace.³⁸⁷ In this regard, the EEA should be amended to enact provisions on how social media-related misconduct should be regulated in the workplace and the circumstances that could lead to the dismissal of employees in respect thereof. The EEA should also be amended to enact adequate provisions on the penalties for social media-related misconduct. The absence of such penalties provides new regulatory challenges for employers when dealing with social media-related misconduct by their employees in the workplace during office working hours.

3.5 The Promotion of Equality and Prevention of Unfair Discrimination Act

The PEPUDA commenced on 13 June 2003. PEPUDA was established to: (a) promote the equal treatment of people,³⁸⁸ (b) eliminate unfair discrimination,³⁸⁹ and (c) prevent and eliminate hate speech.³⁹⁰ PEPUDA prohibits the publication, propagation, advocacy and communications of hate speech that aims to cause hurt, incite harm and propagate hatred.³⁹¹ An employee of the Market Theatre in Johannesburg was dismissed for social media-related misconduct.³⁹² The dismissal

³⁸⁴ *Regulation of Interception of Communications and Provision of Communication-Related Information Act* 70 of 2002 (RICA).

³⁸⁵ *Protection of Personal Information Act* 4 of 2013 (POPI).

³⁸⁶ Celliers 2013 *N Ky L Rev* 579.

³⁸⁷ Celliers 2013 *N Ky L Rev* 584.

³⁸⁸ Cassim F "Regulating Hate Speech and Freedom of Expression on the Internet: Promoting Tolerance and Diversity" 2015 *SACJ* 330-356.

³⁸⁹ Section 6 of PEPUDA.

³⁹⁰ The 10 of PEPUDA.

³⁹¹ Section 10(1) of PEPUDA.

³⁹² Legal Brief 2011 *Hate Speech on Facebook Gets Employee Fired* <http://legalbrief.co.za/story/hate-speech-on-facebook-gets-employee-fired/> accessed 10 November 2015 1.

occurred after a disciplinary committee at his workplace found him guilty of advocating hate speech on Facebook.³⁹³ The employee had posted derogatory comments about Jewish directors in the South African film industry.³⁹⁴ In 2014, a telecommunication firm Ericsson South Africa terminated the employment contract of an employee for posting racist comments on social media.³⁹⁵ The employee made racist comments on social media after being involved in a taxi accident and she addressed her frustrations on social media. The employer found that she had breached the Ericsson South Africa's ethics code, resulting in the immediate termination of her contract. In 2013, For Him Magazine³⁹⁶ (South African edition) magazine³⁹⁷ employees were dismissed for making comments on "corrective rape" on Facebook.³⁹⁸ These comments were regarded as social media-related misconduct.

The comments by the Ericsson South Africa and FHM (South African edition) magazine employees were found by the respective companies to be offensive and hurtful, resulting in their employees' dismissal. PEPUDA allows the use of publications or communications for *bona fide* purposes such as to market the employer's business and to establish good relations with other social media users.³⁹⁹ It can be concluded that PEPUDA promotes tolerance amongst *bona fide* internet users.⁴⁰⁰ Nonetheless, PEPUDA should be amended to enact provisions on the regulation of social media-related misconduct in the workplace. This could curb the misuse of social media platforms by employees in the workplace.⁴⁰¹ Such provisions will also combat the arbitrary dismissals of employees by employers for their alleged social media-related misconduct.⁴⁰² PEPUDA has no penalties for social media-related

³⁹³ Legal Brief 2011 <http://legalbrief.co.za/story/hate-speech-on-Facebook-gets-employee-fired/> accessed 10 November 2015 1.

³⁹⁴ Legal Brief 2011 <http://legalbrief.co.za/story/hate-speech-on-Facebook-gets-employee-fired/> accessed 10 November 2015 1.

³⁹⁵ Sowetanlive 2014 *Ericsson Employee Fired after Racist Rant on Facebook* <http://www.sowetanlive.co.za/news/2014> accessed 10 March 2015 1.

³⁹⁶ For Him Magazine (FHM).

³⁹⁷ FHM (South African edition) magazine is a men's magazine publication.

³⁹⁸ Mail and Guardian 2013 *FHM Fires Rape Comment Writers* <http://mg.co.za/article/2013-07-19-fhm-fires-rape-comment-writers> accessed 15 March 2015 1.

³⁹⁹ Section 12 of PEPUDA.

⁴⁰⁰ Cassim 2015 *SACJ* 333.

⁴⁰¹ Cassim 2015 *SACJ* 333.

⁴⁰² Davey R "Dismissals for Social Media Misconduct" 2012 *De Rebus* 1-94.

misconduct. Accordingly, PEPUDA should be amended to include penalties for social media-related misconduct. Its failure to provide specific penalties for social media-related misconduct provides employers and the courts with new regulatory challenges in relation to their determination of fair and appropriate penalties against employees who face dismissal or other disciplinary procedures for social media-related misconduct.

3.6 Occupational Health and Safety Act

The OHS Act was promulgated in 1993 and came into force on the 1 January 1994. The OHS Act seeks to ensure that a safe and healthy working environment is accessible to all employees.⁴⁰³ Therefore, an employer has a legal duty to his employees to create a safe and healthy working environment.⁴⁰⁴ Any form of social media-related misconduct in the workplace creates a workplace that is hostile and psychologically damaging to both employers and employees.⁴⁰⁵ The employer must take the necessary steps to curb social media-related misconduct in the workplace.⁴⁰⁶ An employer who fails to take the necessary steps to ensure a safe and healthy work environment contravenes the OHS Act.⁴⁰⁷ An employer who fails to comply with the OHS Act could be fined an amount not exceeding R100 000 and/or up to two years imprisonment.⁴⁰⁸ Be that as it may, the OHS Act does not expressly provide for the regulation of social media-related misconduct in the workplace. The OHS Act does not have penalties for social media-related misconduct. Therefore, OHS Act should be amended to provide specific penalties for social media-related misconduct in the workplace.⁴⁰⁹ Thus, specific penalties for social media-related misconduct could ameliorate possible adjudication and determination challenges that the employers face in relation to dismissal cases for social media-related misconduct in the workplace during office working hours.

⁴⁰³ Singh *The South African Employer's Regulation* 31.

⁴⁰⁴ Section 8(1) of the OHS Act.

⁴⁰⁵ Singh *The South African Employer's Regulation* 31.

⁴⁰⁶ Singh *The South African Employer's Regulation* 31.

⁴⁰⁷ Singh *The South African Employer's Regulation* 31.

⁴⁰⁸ Section 23 of the OHS Act.

⁴⁰⁹ Celliers 2013 *N Ky L Rev* 588.

3.7 Compensation for Occupational Injuries and Diseases Act

The COIDA regulates compensation schemes for employees who suffer injuries and diseases while executing their occupational duties at their workplaces. COIDA provides that employees are eligible for compensation for any work-related injuries sustained in the workplace due to negligence or fault on the part of the employer.⁴¹⁰ The employee has to show a causal connection between the injury sustained and that it occurred during the course of the employment to successfully rely on COIDA.⁴¹¹ Some employees have previously successfully claimed psychological injury in the form of post-traumatic stress disorder as injury and received their compensation.⁴¹² However, these cases did not include any element of social media-related misconduct.⁴¹³

The right to claim compensation from the employer should be allowed if an employee suffered psychological injury.⁴¹⁴ The employees' psychological injuries could have occurred as a result of the material they have been exposed to, or received on the employer's internal system or that was displayed on a computer screen.⁴¹⁵ The COIDA does not provide that employees may claim for compensation for unlawful social media-related misconduct dismissals from the employer. This follows the fact that such arbitrary social media-related dismissals may cause psychological injuries to other employees in the workplace. The COIDA does not have penalties for social media-related misconduct. Accordingly, the COIDA should be amended to enact provisions that give effect to psychological injuries that may be caused by arbitrary social media-related misconduct dismissals in the South African workplace. The COIDA should also be amended to enact provisions for social media-related misconduct penalties. The main challenge is that there are no factors or guidelines that could be considered by employers and the courts when determining whether psychological injuries or other negative effects that stems from the

⁴¹⁰ Section 5 of COIDA.

⁴¹¹ Section 5 of COIDA.

⁴¹² *Urquhart v Compensation Commissioner* (2006) 27 ILJ 96 (E).

⁴¹³ *Urquhart v Compensation Commissioner* (2006) 27 ILJ 96 (E).

⁴¹⁴ Section 50 of COIDA.

⁴¹⁵ Section 50 of COIDA.

employee's social media-related misconduct are treated as any other injuries that covered by the COIDA.

3.8 The Protected Disclosure Act

The *Protected Disclosure Act*⁴¹⁶ came into force on the 16 February 2001. The PDA provides procedures for employees to make protected disclosures where employers commit unlawful or irregular conduct in public and private sectors in the workplace.⁴¹⁷ The PDA protects employees who disclose certain information from reprisals or occupational detriment when they make a protected disclosure.⁴¹⁸ A protected disclosure is defined as disclosure of information relating to the unlawful conduct of the employer by the employees.⁴¹⁹ The employees who make a protected disclosure have reason to believe that the information concerned shows the following:

- (a) that a criminal offence has been committed, is being committed or is likely to be committed;
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
- (d) that the health or safety of an individual has been, is being or is likely to be endangered;
- (e) that the environment has been, is being or likely to be damaged;
- (f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; or
- (g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed.⁴²⁰

⁴¹⁶ *Protected Disclosure Act* 26 of 2000 (PDA).

⁴¹⁷ Section 2(1)(a) of the PDA.

⁴¹⁸ Section 2(1)(a) of the PDA.

⁴¹⁹ Section 1 of the PDA.

⁴²⁰ Section 1 of the PDA.

The PDA provides that a protected disclosure made by an employee should not lead to occupational dismissal by his or her employer.⁴²¹ Therefore, if an employee were to make a protected disclosure using social media, it would be unfair to dismiss such an employee for social media-related misconduct.⁴²² Any such protected disclosure by the employee must be made in good faith.⁴²³ Failure to make a protected disclosure in good faith may result in social media-related misconduct on the part of the employee. Nonetheless, strict rules and procedures stipulated in the PDA must be followed before a social media-related disclosure is treated as a protected disclosure. For instance, protected disclosures are usually done to certain bodies or parties under the PDA.⁴²⁴ In this regard, it must be noted that mere accusations that are made by an employee against the employer on a social media platform do not automatically qualify as protected disclosure as contemplated in the PDA.⁴²⁵ This status *quo* is worsened by the fact that the PDA does not provide penalties for social media-related misconduct in the workplace. It is submitted that the PDA should be amended to enact provisions that expressly prohibit malicious and unlawful protected disclosures via social media platforms in the workplace. The absence of such prohibition presents a regulatory challenge for employers as some employees may post malicious and unlawful protected disclosures via social media platforms in the workplace and escape liability under the PDA.

3.9 The Regulation of Interception of Communications and Provision of Communication-Related Information Act

The RICA came into effect on the 1 July 2011.⁴²⁶ The RICA repealed and replaced the *Interception and Monitoring Prohibition Act*.⁴²⁷ The IMP prohibited the

⁴²¹ Section 3 of the PDA.

⁴²² Ashurst 2016 *Misconduct by Social Media Global Perspective* <https://www.ashurst.com/en/news-and-insights/legal-updates/misconduct-by-social-media-a-global-perspective/> accessed 13 July 2016 1.

⁴²³ Section 6(1)(a) of the PDA.

⁴²⁴ Sections 5 to 8 of the PDA.

⁴²⁵ Sections 5 to 9 of the PDA.

⁴²⁶ Adams and Adams 2013 *What is RICA?* <http://www.polity.org.za/article/what-is-rica-2013-08-23> accessed 13 March 2016 1.

⁴²⁷ The *Interception and Monitoring Prohibition Act* 127 of 1992 (IMP). The Act prohibited the interception of certain communications and the monitoring of certain conversations. It also provided for the interception of postal articles and communications and the monitoring of

interception of confidential information.⁴²⁸ However, the IMP could not be used in the private sphere such as the workplace since employers and employees could not use its provisions.⁴²⁹ The pre-amble of RICA discusses the regulation of the interception and monitoring of communications.⁴³⁰ The RICA also discusses the execution of directions and entry warrants by law enforcement officers.⁴³¹ The RICA defines interception as acquiring contents of any communication through the use an interception device.⁴³² The interception device serves to avail to a person a portion or all of the contents of a communication that excludes the sender or recipient of the communication.⁴³³ In the employment context, the employer could intercept the social media communications of the employee to evaluate whether there was any form of social media-related misconduct committed.⁴³⁴

The RICA⁴³⁵ provides that no person may intentionally and unlawfully intercept or attempt to intercept or hire any other person to intercept at any place in South Africa, any communication in the course of its occurrence or transmission. It is evident that no person may intentionally acquire or access the contents of another person's communication by using an interception or monitoring device.⁴³⁶ A violation of the privacy of an employee may occur⁴³⁷ as the RICA allows statutory exemption for intercepting the communications of the employee by the employer in the

conversations in the case of a serious offence or if the security of the Republic of South Africa is threatened and to provide for matters connected therewith.

⁴²⁸ Section 2 of the IMP.

⁴²⁹ Mischke C "Social networks, Privacy and Dismissal-Facebook, Twitter et al : The Employer's Reputational Risk" 2011 *Contemporary Labour Law* 11-17.

⁴³⁰ Luck R "Walking a Fine Line Between Crime Prevention and Protection of Rights" 2014 *De Rebus* 1-94.

⁴³¹ Luck 2014 *De Rebus* 1.

⁴³² Section 1 of the RICA.

⁴³³ Section 1 of the RICA.

⁴³⁴ Pistorius T "Monitoring, Interception and Big Boss in the Workplace: Is the Devil in the Details?" *PER 2009* 1-26.

⁴³⁵ Section 2 of the RICA.

⁴³⁶ Mischke 2011 *Contemporary Labour Law* 13.

⁴³⁷ Poore M "A Call for Uncle Sam to get Big Brother Out of Our Knickers: Protecting Privacy and Freedom of Speech Interests in Social Media Accounts" 2013 *N Ky L Rev* 507-527.

workplace.⁴³⁸ Consequently, this could negatively affect the employees' right to privacy in the workplace.⁴³⁹

The RICA also provides that any law enforcement officer may intercept any communication if he or she is:

- (a) a party to the communication; and
- (b) satisfied that there are reasonable grounds to believe that the interception of a communication of another party to the communication is necessary.⁴⁴⁰

Within this context, one might notice that an employer is a party with interest in the communication. Employers have several legitimate reasons to monitor employees' social media use.⁴⁴¹ For instance, productivity concerns and the employer's fiduciary responsibility to stockholders to protect assets belonging to the company.⁴⁴² Employers monitor communications to ensure that physical assets such as property and files are secured.⁴⁴³ The loss of these assets could result in a decrease in company value and confidence in the investment community due to social media-related misconduct.⁴⁴⁴ The RICA permits an employer to intercept any indirect communication in the course of carrying on business.⁴⁴⁵

Modiba suggests that an employer must seek prior consent from employees to intercept their social media communications.⁴⁴⁶ The employees must sign a written agreement in respect of such consent.⁴⁴⁷ Pistorius⁴⁴⁸ argues that consent from employees can be obtained through express written electronic consent. In *Goosen v*

⁴³⁸ Section 3 of the RICA.

⁴³⁹ Poore 2013 *N Ky L Rev* 507.

⁴⁴⁰ Section 4(2) of the RICA.

⁴⁴¹ Friedman BA and Reed LJ "Workplace Privacy: Employee Relations and Legal Implications of Monitoring Employee E-mail Use" 2007 *Employ Respons Rights Journal* 75-83.

⁴⁴² Friedman and Reed 2007 *Employ Respons Rights Journal* 76.

⁴⁴³ Friedman and Reed 2007 *Employ Respons Rights Journal* 76.

⁴⁴⁴ Friedman and Reed 2007 *Employ Respons Rights Journal* 76.

⁴⁴⁵ Section 6(1) of the RICA.

⁴⁴⁶ Modiba M "Intercepting and Monitoring Employees E-mail Communications and Internet Access" 2003 *SA Merc LJ* 363-371.

⁴⁴⁷ Modiba 2003 *SA Merc LJ* 366.

⁴⁴⁸ Pistorious 2009 *PER* 7.

Carolines Frozen Yoghurt Parlour (Pty) Ltd and another,⁴⁴⁹ in his disciplinary inquiry, the applicant recorded the telephone conversation of his employer without consent of the employer and the chairperson of the inquiry. The applicant was subsequently dismissed after the inquiry. The employer had to prove that there was no fair hearing and that the chairperson was biased.⁴⁵⁰ Furthermore, the employer stated that the telephone conversation was recorded unlawfully and thus infringed his right to privacy. The court held that the interception of the employer's communications without prior consent was an infringement of his right to privacy. The researcher submits that the court's verdict was correct and the employee's dismissal was fair and justified. Similarly, had the employee intercepted the employer's communications on a social media-platform without prior consent and thereafter, dismissed for social media-related misconduct, the dismissal would have been fair and justified.

Some employers justify the interception of the social media communications of employees as guarding their business interests such as the right to a good name.⁴⁵¹ The RICA provides the requirements to establish the unauthorised use of the computer system and to establish the existence of facts.⁴⁵² For instance, the employer may check the unauthorised sites visited by employees. If the internet has been used for unauthorised purposes and exposing any risks and illegitimate use of the computer system of employers, that could amount to a misconduct.⁴⁵³ In *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens (KZD)*,⁴⁵⁴ dismissal of employees was confirmed by the CCMA based on social media-related misconduct. The plaintiff in the action had sued the defendant for R126 700, being the purchase price for a woodwork machine, the defendant had argued otherwise and pleadings

⁴⁴⁹ *Goosen v Carolines Frozen Yoghurt Parlour (Pty) Ltd and another* 36 (1995) 16 ILJ 396 (IC) (*Goosen case*).

⁴⁵⁰ *Goosen case* 399.

⁴⁵¹ Singh *The South African Employer's Regulation* 34.

⁴⁵² Section 6(1) of the RICA.

⁴⁵³ Whitear-Nel N and Subramanien D "A Fresh Perspective on South African Law Relating to the Risks Posed to Employers When Employees Abuse the Internet" 2013 *South African Journal of Labour Relations* 9-23.

⁴⁵⁴ *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens (KZD)*, (unreported case no 6846/2006, 3-8-2012) (*CMC Woodworking case*).

were exchanged.⁴⁵⁵ The court allowed substituted services⁴⁵⁶ and the applicant sent the defendant a notice to settle the matter through Facebook, wherein the comments were considered as defamatory. The court granted interdicts against the applicant ordering him to remove offensive or the defamatory content on social media. The courts may also grant extension of the claim for damages as a result of defamatory comments on a social media platform by employees or other persons.⁴⁵⁷

Employers or other users can access the content or information posted on a social media platform by employees.⁴⁵⁸ The employer can obtain this information when he or she intercepts the communication of the employee.⁴⁵⁹ Some information may be detrimental to the employee, if it is established that it concerns the employer when it defames the employer's company name.⁴⁶⁰ Monitoring by employers is detrimental to employees' privacy,⁴⁶¹ for instance, when employers monitor activities of employees beyond social media communications, the right to privacy of employees may be violated.⁴⁶² Employees believe that privacy will not exist in the workplace if the employers' ability to monitor employees' activities is not restricted.⁴⁶³ It is for such reasons that there should be social media regulation to avoid the conflicting interests of employers and their employees.

⁴⁵⁵ *CMC Woodworking* case 4.

⁴⁵⁶ *CMC Woodworking* case 5. Substituted services is ordered when the defendant is believed to be in the Republic of South Africa but one of the normal forms of service set out in the rules cannot be effected. The court then gives directions authorising some form of 'substituted service'.

⁴⁵⁷ Whitear-Nel and Subramanien 2013 *South African Journal of Labour Relations* 18.

⁴⁵⁸ Chapman C 2009 *The History and Evolution of Social Media* <http://www.webdesignerdepot.com/2009/10/the-history-and-evolution-of-social-media/> accessed 12 February 2016 1.

⁴⁵⁹ Cilliers 2013 *N Ky L Rev* 584.

⁴⁶⁰ Chapman 2009 <http://www.webdesignerdepot.com/2009/10/the-history-and-evolution-of-social-media/> accessed 12 February 2016 1.

⁴⁶¹ Hornung MS "Think Before You Type: A Look at Email Privacy in the Workplace" 2006 *Fordham J. Corp. & Fin. L.* 115-160.

⁴⁶² Friedman and Reed 2007 *Employ Respons Rights Journal* 81.

⁴⁶³ Hornung 2006 *Fordham J. Corp. & Fin. L.* 116.

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*,⁴⁶⁴ Langa DP held that:

“When people are in their offices, in their cars or on mobile phones, they still retain a right to be left alone by the State unless certain conditions are satisfied”.

This statement shows that employees’ right to privacy should be protected in the workplace. This guarantees the employee’s right to privacy although this right is limited to a certain extent by the limitation clause as provided for in the Constitution.⁴⁶⁵ In *Phillip Neethling v Southern African Fruit Terminals*,⁴⁶⁶ an employer obtained information in a folder marked "personal" from an employee's work computer. The employer did not have an electronic communication policy that permits him to obtain an employee’s information without consent. The CCMA held that the evidence obtained invaded the employee's privacy and that employees are entitled to use work computers for personal purposes. The evidence obtained by the employer was disregarded. The case did not directly deal with social media-related misconduct, but it shows how the employer can violate an employee’s privacy in the workplace.

It can be concluded from this case that employers can encroach upon the right to privacy of employees although it is not right to do so unless the employee gives prior consent.⁴⁶⁷ The employer should respect the privacy of his or her employees particularly regarding the internet communications of employees, unless there is a sound reason to believe that there is misuse of social media communications from the employee.⁴⁶⁸ Thus, the RICA should balance the interests of both the employers

⁴⁶⁴ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2000 BCLR 1079 (CC).

⁴⁶⁵ Section 36 of the Constitution.

⁴⁶⁶ *Phillip Neethling v Southern African Fruit Terminals* (unreported case) CCMA Durban, Case No.KN-4881-04.

⁴⁶⁷ Section 5(1) of the RICA.

⁴⁶⁸ Ciocchetti CA “The Eavesdropping Employer: A Twenty-First Century Framework for Employee Monitoring” 2001 *American Business Law Journal* 285-369.

and employees.⁴⁶⁹ For instance, the RICA should be amended to provide specific penalties for social media-related misconduct against employees. On the other hand, it must prohibit unlawful interceptions of employees' social media communications by employers to avoid conflict of interests and other related challenges in the South African workplace. This could curb the unfair and unlawful dismissals of employees for social media-related misconduct in the South African workplace.

3.10 The Protection of Personal Information Act

The POPI protects individuals' personal information, which is processed by private and public bodies in South Africa.⁴⁷⁰ However, the personal information that is on social media platforms is not adequately regulated under POPI.⁴⁷¹ The POPI defines personal information as any text, voice, sound or image message sent over an electronic communications network that is stored in the network.⁴⁷² The POPI prohibits the negligent disclosure of private information by employees.⁴⁷³

The personal information of the data subject may only be processed if the following is done:

- (a) the data subject consents to the processing;
- (b) processing is necessary to carry out actions for the conclusion or performance of a contract to which the data subject is a party;
- (c) processing complies with an obligation imposed by law on the responsible party;
- (d) processing protects the legitimate interest of the data subject and
- (e) processing is necessary for pursuing the legitimate.⁴⁷⁴

⁴⁶⁹ Davey 2012 *De Rebus* 80.

⁴⁷⁰ Vries M and Moosa N "The Laws Around Social Media: Student Feature" 2015 *Without Prejudice* 1-92.

⁴⁷¹ Vries and Moosa 2015 *Without Prejudice* 40.

⁴⁷² Section 1 of the POPI.

⁴⁷³ Swales L "Protection of Personal Information: South Africa's Answer to the Global Phenomenon in the Context of Unsolicited Electronic Messages (spam)" 2016 *SA Merc LJ* 49, 50-84.

⁴⁷⁴ Section 11(1) of the POPI.

The employer should use the requirements stated above to process personal information of the employee only if there is reason to believe that the employee has committed a social media-related misconduct in the workplace.⁴⁷⁵ The employee should give consent to the processing of such personal information.⁴⁷⁶

The POPI allows personal information to be processed if the employee gives consent.⁴⁷⁷ The POPI further provides that a person who intentionally and without authority interferes with data in a way which causes such data to be modified, destroyed or causes it to be ineffective, is guilty of an offence.⁴⁷⁸ Therefore, if an employer interferes with the social media profiles of the employee in the workplace, the employer may be guilty of an offence.⁴⁷⁹ The processing of personal information of the employee by the employer without consent must be sanctioned by the courts.⁴⁸⁰

In *Smith case*,⁴⁸¹ the employer accessed and processed the personal information of the employee without consent from such employee. According to Roos,⁴⁸² it is accepted that data processing an individual's personal information causes a threat to an individual's right to privacy.⁴⁸³ Therefore, the employee's right to retain personal information was violated. The POPI does not have specific provisions on social media-related misconduct and does not have penalties for social-media related misconduct. Furthermore, the POPI does not provide how collecting, processing and use of personal information on social media platforms should be dealt with.⁴⁸⁴ The POPI should be amended to specifically regulate social media-related misconduct in the workplace. Employees should also guard against the information that they post

⁴⁷⁵ Singh *The South African Employer's Regulation* 34.

⁴⁷⁶ Section 5(1) of the RICA.

⁴⁷⁷ Padayachee C *Employee's Right to Privacy versus The Employer's Right to Monitor Electronic Communications in the Workplace* (LLM-dissertation University of KwaZulu-Natal 2015) 68.

⁴⁷⁸ Section 86(2) of the POPI.

⁴⁷⁹ Celliers 2013 *N Ky L Rev* 580.

⁴⁸⁰ Celliers 2013 *N Ky L Rev* 580.

⁴⁸¹ *Smith v Partners in Sexual Health (non-profit)* (2011) 32 ILJ 1470 (CCMA) See related comments in the introductions in Chapters One and Two of this dissertation.

⁴⁸² Roos A "Data Protection: Explaining the International Backdrop and Evaluating the Current South African Position" 2007 *SALJ* 400-436.

⁴⁸³ Roos 2007 *SALJ* 421.

⁴⁸⁴ Vries and Moosa 2015 *Without Prejudice* 40.

on social media platforms.⁴⁸⁵ In this regard, employees should exercise caution to avoid incurring social media-related misconduct penalties or sanctions from their employers. The absence of provisions that expressly deal with social media-related misconduct in the POPI presents both employers and employees with compliance challenges that could result in unfair dismissals and employers failing to combat misuse of social media by employees in the workplace without interfering with their personal information.

3.11 Electronic Communications and Transactions Act

The *Electronic Communications and Transactions Act*⁴⁸⁶ regulates electronic communications and transactions in the public interest for employers and employees⁴⁸⁷ by removing and preventing barriers to electronic communications and transactions in South Africa.⁴⁸⁸ The ECTA defines personal information as amongst others information relating to the race, gender, sex, pregnancy, marital status, national, disability, religion, conscience, belief, culture, language and birth of the individual.⁴⁸⁹ The employer may lawfully collect the personal information of the employee.⁴⁹⁰

However, an employer can only collect information that is reasonably necessary to the lawful purpose.⁴⁹¹ An employer may not access all the information on the employee's social media platform as it may amount to the invasion of such employee's privacy in cases where the employee did not give consent to access such information. The ECTA also stated that a data controller must have the express written permission of the data subject.⁴⁹² Such permission is needed prior to the collection, collation, processing or disclosure of any personal information on that data subject unless it is indicated otherwise in the legislation.⁴⁹³ An employer would be

⁴⁸⁵ Vries and Moosa 2015 *Without Prejudice* 40.

⁴⁸⁶ *Electronic Communications and Transactions Act* 25 of 2002 (ECTA).

⁴⁸⁷ Section 2(1) of the ECTA.

⁴⁸⁸ Section 2(1)(d) of the ECTA.

⁴⁸⁹ Section 1(a) of the ECTA.

⁴⁹⁰ Celliers 2013 *N Ky L Rev* 580.

⁴⁹¹ Celliers 2013 *N Ky L Rev* 580.

⁴⁹² Section 51(1) of the ECTA.

⁴⁹³ Section 51(1) of the ECTA.

guilty of an offence if he or she collects data without the written permission of the employee from social media platforms and uses such information to dismiss an employee for social media-related misconduct.

There is uncertainty whether the information published on social media platforms still retain legal protection or not.⁴⁹⁴ The uncertainty is created because information posted on social media platforms is sometimes accessible to the public.⁴⁹⁵ Possibilities exists that an employer may access personal information belonging to the employee publicly where the employer has access to the personal information of such employee on social media platforms.⁴⁹⁶ Access to social media platforms may be obtained from service providers.⁴⁹⁷ An employer can dismiss an employee if it is found that an employee committed social media-related misconduct such as posting defamatory comments about the employer and/or other employees. Service providers cannot be held accountable where the employer when accessing personal information of the employee causes any infringements.⁴⁹⁸

The ECTA does not have specific provisions for social media-related misconduct. The ECTA also does not provide any penalties for social media-related misconduct. It is for these reasons that the ECTA should be amended to include provision on the regulation of social media-related misconduct. This will curb the unlawful interception of personal information on social media by employers that may lead to dismissal for social media-related misconduct. Furthermore, additional penalties should provide for non-compliance with the conditions set by ECTA for social media-related misconduct. This will curb potential challenges involving the imposition of harsh penalties and/or unfair dismissals of employees for social media-related misconduct in the South African workplace.

⁴⁹⁴ Celliers 2013 *N Ky L Rev* 581.

⁴⁹⁵ Celliers 2013 *N Ky L Rev* 581.

⁴⁹⁶ Celliers 2013 *N Ky L Rev* 582.

⁴⁹⁷ Celliers 2013 *N Ky L Rev* 582.

⁴⁹⁸ Celliers 2013 *N Ky L Rev* 582.

3.12 The Promotion of Access to Information Act

The *Promotion of Access to Information Act*⁴⁹⁹ gives effect to the Constitutional right of access to any information held by the State. Furthermore, it protects employers and employees' rights by allowing access to information that is held by others. The PAIA states that an individual may request or gain access to any record, including personal information⁵⁰⁰ that is held by the public entity.⁵⁰¹ Furthermore, if the record is required for the exercise of any of the requestor's rights.⁵⁰² An employer may gain access to an employees' personal information on social media to protect his or her rights such as a right to a good name. Subsequently, an employer may dismiss an employee for social media-related misconduct if the personal information obtained amounts to social media-related misconduct in the workplace such as posting defamatory comments about the employer.

The PAIA prohibits access to a third party's personal information, if such access violates the third party's rights.⁵⁰³ When employers request information of the prospective employee's social media platforms without consent, it infringes upon the employee's right to privacy. Employers must comply with the provisions of the PAIA when making a request for an applicant or employee's personal information.⁵⁰⁴ PAIA does not provide regulation on social media. Accordingly, the PAIA should be amended to expressly prohibit social media-related misconduct in the South African workplace and provide the relevant penalties in respect thereof. This could prevent employers from unlawfully accessing their employees' personal information on social media platforms and curb the challenges involving the dismissals of employees for social media-related misconduct in the South African workplace.

⁴⁹⁹ *Promotion of Access to Information Act* 2 of 2000 (PAIA).

⁵⁰⁰ Section 11(2) of the PAIA.

⁵⁰¹ Section 1 of the PAIA. Public body means: (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or (b) any other functionary or institution when; (i) exercising a power or performing a duty in terms of the Constitution or a provincial Constitution; or (ii) exercising a public power or performing a public function in terms of any legislation.

⁵⁰² Section 11(1) of the PAIA.

⁵⁰³ Section 34(1) of the PAIA.

⁵⁰⁴ Celliers 2013 *N Ky L Rev* 581.

3.13 Film and Publications Act

The *Film and Publications Act*⁵⁰⁵ provides that a person that distributes hate speech on social media with knowledge that he or she is advocating for hate speech is guilty of an offence.⁵⁰⁶ Furthermore, the hatred advocated for on social media has to be based on race, ethnicity, gender or religion and constitute incitement to cause harm.⁵⁰⁷ The FPA makes exception for publication that is made *bona fide*⁵⁰⁸ but it does not afford the same provisions for social media-related misconduct. In *Dauth and Brown and Weirs Cash and Carry*,⁵⁰⁹ an employee was dismissed for sending racist email to other employees through the company's email facility. The employee made derogatory comments regarding Jewish shareholders and directors of the employer's business. The employee argued that he was in a state of diminished responsibility because of a drug prescription intake for depression and related illnesses. The CCMA held that the email remarks relating to Jews was "a gross and sickening example of racism". The CCMA held that the dismissal of the employee was fair. The case did not directly deal with social media-related misconduct but shows how employees may advocate for hate speech. The hate speech may lead to dismissal for social media-related misconduct in the South African workplace.

Recently, an employee (Riaan Lucas) of South African Wine Institute was scrutinised on social media for posting a racist photograph.⁵¹⁰ The photograph related to the death of former Springbok rugby player Joost van der Westhuizen. Such photograph was posted on Facebook soon after the announcement of Van der Westhuizen's death.⁵¹¹ Lucas wrote: "Joost is vrek" (Joost is dead) with a photograph that read "Me when I hear a white man has died RIP Joost". The employee removed the post after other social media users questioned him about it. This conduct could be

⁵⁰⁵ *Films and Publications Act* 65 of 1996 (FPA).

⁵⁰⁶ Section 29(1)(c) of the FPA.

⁵⁰⁷ Section 29(1)(c) of the FPA.

⁵⁰⁸ Section 29 of the FPA.

⁵⁰⁹ *Dauth and Brown and Weirs Cash and Carry* 2002 (8) BALR 837 (CCMA) (*Dauth case*).

⁵¹⁰ Nienaber M 2017 *Racist Joost Meme Shocks* <http://www.news24.com/SouthAfrica/News/racist-joost-meme-shocks-20170207> accessed 10 February 2017 1.

⁵¹¹ Nienaber 2017 <http://www.news24.com/SouthAfrica/News/racist-joost-meme-shocks-20170207> accessed 10 February 2017 1.

regarded as social media-related misconduct and could warrant a dismissal, as it entails racist comments.⁵¹²

The FPA does not make provision and penalties for social media-related misconduct. However, the FPA should provide for social media-related misconduct and enact penalties for hate speech advocated through social media by employees. Furthermore, the FPA should be amended to provide a defence on cases pertaining to social media-related misconduct when an employer assumes that an employee has advocated hate speech on social media. Moreover, the provision of specific penalties for social media-related misconduct in the FPA could enable both the employer and employee to know prohibited conduct and/or practices to avoid unfair dismissals and related problems in the workplace.

3.14 Conclusion

The use of social media in the workplace is increasing⁵¹³ and this has created several regulatory challenges in the South African workplace. For instance, when employers monitor social media activities of employees without prior consent, this can be regarded as an infringement of their right to privacy in the workplace. Furthermore, employers must not request their prospective employees' information on social media platforms as this could be discriminatory, especially, when the employer fails to hire such persons based on their social media posts. As indicated above, various legislation deals with the employment relationship in the South African workplace. However, the current labour laws do not have specific provisions for social media-related misconduct. Consequently, these laws should be amended to enact adequate provisions on the regulation of social media-related misconduct in South Africa. This could combat legislative and Constitutional challenges that are associated with the arbitrary social media-related misconduct dismissals in the South African workplace.⁵¹⁴ The aforesaid labour legislation and the related legislation should be

⁵¹² Nienaber 2017 <http://www.news24.com/SouthAfrica/News/racist-joost-meme-shocks-20170207> accessed 10 February 2017 1.

⁵¹³ Celliers 2013 *N Ky L Rev* 592.

⁵¹⁴ Celliers 2013 *N Ky L Rev* 592.

amended to provide penalties for social media-related misconduct in the South African workplace.

CHAPTER FOUR

CONSTITUTIONAL CHALLENGES ASSOCIATED WITH THE DISMISSAL OF EMPLOYEES FOR SOCIAL MEDIA-RELATED MISCONDUCT

4.1 Introduction

The South African Constitution⁵¹⁵ is the supreme law of the Republic and any law or conduct that is inconsistent with it is invalid.⁵¹⁶ A dismissal for social media-related misconduct would be an unfair dismissal if it does not constitute a serious misconduct.⁵¹⁷ A serious misconduct is conduct that could warrant a dismissal *prima facie* such as when an employee posts defamatory, racial and prejudicial remarks about an employer or other employees on his or her social media platform.⁵¹⁸ Such misconduct could subsequently damage the name of the employer and other employees in the workplace. The Constitution states that everyone has the right to fair labour practices.⁵¹⁹ An unfair dismissal is a dismissal where an employer fails to provide a justifiable reason for the dismissal of the employees.⁵²⁰ Such justifiable reasons usually relate to the conduct or capacity of an employee⁵²¹ or the operational requirements of the employer.⁵²² Therefore, dismissal of employees without justifiable reasons would constitute an unfair labour practice in terms of the South African Constitution. This chapter analyses the rights to dignity,⁵²³ privacy,⁵²⁴ freedom of expression⁵²⁵ and freedom of association⁵²⁶ in relation to the Constitutional challenges associated with the dismissal of employees for social media-related misconduct in South Africa. To this end, Constitutional challenges such as employers' intrusion of employees' personal social media use which affects

⁵¹⁵ *Constitution of the Republic of South Africa, 1996* (Constitution).

⁵¹⁶ Section 1 of the Constitution.

⁵¹⁷ Section 2 of the Constitution.

⁵¹⁸ Davey R "Dismissals for Social Media Misconduct" 2012 *De Rebus* 1-94.

⁵¹⁹ Section 23(1) of the Constitution.

⁵²⁰ Section 188(a) of the *Labour Relations Act 66 of 1995* (LRA).

⁵²¹ Section 188(a)(i) of the LRA.

⁵²² Section 188(a)(ii) of the LRA.

⁵²³ Section 10 of the Constitution.

⁵²⁴ Section 14 of the Constitution.

⁵²⁵ Section 16 of the Constitution.

⁵²⁶ Section 18 of the Constitution.

the employee's rights to freedom of expression, dignity, freedom of association and privacy by restricting the use of social media in the workplace are discussed.⁵²⁷

4.2 Constitutional Rights Affected by the Dismissal of Employees for Social Media-Related Misconduct

4.2.1 The right to privacy under the Constitution

The right to privacy is a Constitutionally protected right in South Africa.⁵²⁸ There is a two-stage enquiry done by the courts for the protection of the right to privacy in South Africa. This enquiry is conducted to assess whether there was a violation of the right to privacy.⁵²⁹ The scope of the right to privacy is analysed to determine whether conduct, in this context social media-related misconduct, has infringed the right to privacy.⁵³⁰ If it is established that there was an infringement, it is determined whether such infringement is justifiable in accordance with the limitation clause.⁵³¹ The right to privacy is protected by *actio iniuriarum* to remedy the breach of such right by offenders under common law.⁵³² The common law protection of the right to privacy involves a single enquiry by the courts that assesses whether the invasion of privacy is unlawful.⁵³³

A person's right to privacy entails that a person should have control over his or her affairs, free of unsolicited intrusions by employers and other employees.⁵³⁴ The intrusions may arise when an employee is monitored in the workplace. The employer sometimes views the information obtained from monitoring the employee as social media-related misconduct.⁵³⁵ Privacy can be defined as an individual condition of life

⁵²⁷ Abril PS, Levin A and Del Riego A "Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee" 2012 *American Business Law Journal* 63-124.

⁵²⁸ Section 14 of the Constitution.

⁵²⁹ Currie I and De Waal J *The Bill of Rights Handbook* 6th ed (Juta Cape Town 2013) 2915.

⁵³⁰ Currie and De Waal *The Bill of Rights Handbook* 295.

⁵³¹ Section 36 of the Constitution.

⁵³² Currie and De Waal *The Bill of Rights Handbook* 295.

⁵³³ Currie and De Waal *The Bill of Rights Handbook* 295.

⁵³⁴ Neethling J, Potgieter JM and Visser PJ *Neethling's Law of Personality* 2nd ed (Lexis Nexis Durban 2005) 31.

⁵³⁵ Davey 2012 *De Rebus* 80.

that is characterised by seclusion from the public and publicity.⁵³⁶ The establishment of the right to privacy has its origins in the proclamations stated in more than a century ago by Brandeis and Warren.⁵³⁷ Brandeis and Warren submit that privacy is an individual's absolute right to be left alone.⁵³⁸

In South Africa, the right to privacy enjoys protection in terms of both the common law and the Constitution. However, the right to privacy was not always consistently protected in the South African workplace.⁵³⁹ The need to protect the right to privacy in South Africa can be traced back as early as 1950s.⁵⁴⁰ The *actio iniuriarum* was recognised by the Roman jurists who discovered a number of remedies for the impairment to Constitutional rights.⁵⁴¹ The *actio iniuriarum* was provided for a wrong that could be interpreted as an impairment of the right to privacy such as invasions of the sanctity of another person's home.⁵⁴² However, in those days there were no social media platforms, therefore, an employee could not be dismissed for social media-related misconduct.⁵⁴³

Prior to the advent of social media, employees would voice their objections at social gatherings, usually at the end of the workday or during a break at work.⁵⁴⁴ Nowadays, derogatory remarks, which at one time may have been made in person and are sometimes posted on an employee's social media page.⁵⁴⁵ In the 19th century, employers adopted a *laissez-faire* approach⁵⁴⁶ to employees' use of social

⁵³⁶ *Bernstein v Bester* 1996 2 SA 751 (CC) 94.

⁵³⁷ Baum KJ "E-mail in the Workplace and the Right of Privacy" 1997 *Villanova Law Review* 1-32.

⁵³⁸ Baum 1997 *Villanova Law Review* 32.

⁵³⁹ Gondwe M *The Protection of Privacy in the Workplace: A Comparative Study* (LLD-dissertation University of Stellenbosch 2011) 52.

⁵⁴⁰ Burchell J "The Legal Protection of Privacy in South Africa: A Transplantable Hybrid" 2009 *Electronic Journal of Comparative Law* 1-26.

⁵⁴¹ Burchell 2009 *Electronic Journal of Comparative Law* 6.

⁵⁴² Burchell 2009 *Electronic Journal of Comparative Law* 6.

⁵⁴³ Mangan D "A Platform for Discipline: Social Media Speech and the Workplace" 2015 *Osgoode Legal Studies Research* 1-26.

⁵⁴⁴ Mangan 2015 *Osgoode Legal Studies Research* 3.

⁵⁴⁵ Mangan 2015 *Osgoode Legal Studies Research* 3.

⁵⁴⁶ *Laissez-faire* approach means the unwillingness to get involved or influence other people's activities.

media⁵⁴⁷ because there was no abuse of social media by employees in the South African workplace. Consequently, employees were encouraged by employers to become comfortable and familiar with new technologies and to explore the World Wide Web and/or other relevant internet-related technologies.⁵⁴⁸ Two reasons were cited for the adoption of the *laissez-faire* approach. Firstly, some employers held that the *laissez-faire* approach could enable the employees to perform their workplace duties much better.⁵⁴⁹ Secondly, the *laissez-faire* approach was adopted because employers were ignorant of the inherent risk that social media imposes on their workplace duties and businesses of the employers.⁵⁵⁰ Moreover, various intrusions and/or contraventions of employees' right to privacy by employers were not prevalent yet since employers were not monitoring the activities of their employees on social media platforms in the workplace.⁵⁵¹ However, employers that monitor social media activities of their employees⁵⁵² in the workplace during office working hours easily violate the employees' right to privacy.⁵⁵³

If the employer invades the plaintiff's right to privacy, a careful assessment of such an invasion of the right to privacy has to be made by the court. Watermeyer AJ rejected the argument that the right to privacy should be equated with the right to dignity.⁵⁵⁴ Nonetheless, the courts or any tribunal must carefully assess all the relevant factors when determining the appropriate sanctions against employers that violate their employees' right to privacy while trying to combat social media-related misconduct in the workplace. This could be supported in part, by the fact that the *O'Keefe* case became the *locus classicus* for the recognition of an independent right

⁵⁴⁷ Pistorius T "Monitoring, Interception and Big Boss in the Workplace: Is the Devil in the Details?" 2009 *PER* 1-26.

⁵⁴⁸ McGregor M "The Right to Privacy in the Workplace: General Case Law and Guidelines for Using the Internet and E-Mail" 2004 *SA Merc LJ* 638-650.

⁵⁴⁹ McGregor 2004 *SA Merc LJ* 638.

⁵⁵⁰ McGregor 2004 *SA Merc LJ* 638.

⁵⁵¹ Mangan 2015 *Osgoode Legal Studies Research* 3.

⁵⁵² Davey 2012 *De Rebus* 80.

⁵⁵³ Davey 2012 *De Rebus* 80.

⁵⁵⁴ *O'Keefe v Argus Printing and Publishing Company Ltd* 1954 (3) SA 244 (C) 40 (*O'Keefe* case).

to privacy in the South African law.⁵⁵⁵ Therefore, it must be noted that the right to privacy plays a crucial role in an individual's life. In this regard, the right to privacy is important to an employee and the employer should not violate it through unlawful measures aimed at curbing social media-related misconduct. Where such violations occur and the employee is dismissed, the dismissal will be unfair and unjustified. A fair dismissal would not amount to a violation of the employee's privacy because it would be justified. For instance, if the employee has posted derogatory comments about the employer on a social media platform, the employer will be entitled to dismiss that employee.⁵⁵⁶ It is submitted that the courts should consider the convictions of the society in determining whether some violations by the employer entail the impairment or violation of an employee's right to privacy.⁵⁵⁷

The Constitution states that everyone has the right to privacy,⁵⁵⁸ which includes the individual's right not to have their: (a) person or home searched;⁵⁵⁹ (b) property searched;⁵⁶⁰ (c) possessions seized;⁵⁶¹ and/or (d) privacy of their communications intercepted without prior consent or legal permission.⁵⁶² Therefore, when an employer unlawfully intercepts the social media communications of an employee, this can be regarded as an invasion or violation of the right to privacy of that employee.⁵⁶³

4.2.1.1 Right to privacy under common law

In terms of the South African common law, a person can rely on the law of delict for the protection of his or her right to privacy.⁵⁶⁴ A delict is the wrongful, culpable

⁵⁵⁵ Padayachee C *Employee's Right to Privacy versus the Employer's Right to Monitor Electronic Communications in the Workplace* (LLB-dissertation University of KwaZulu-Natal 2015) 13.

⁵⁵⁶ Davey 2012 *De Rebus* 80.

⁵⁵⁷ Padayachee *Employee's Right to Privacy versus the Employer's Right to Monitor* 13.

⁵⁵⁸ Section 14 of the Constitution.

⁵⁵⁹ Section 14(a) of the Constitution.

⁵⁶⁰ Section 14(b) of the Constitution.

⁵⁶¹ Section 14(c) of the Constitution.

⁵⁶² Section 14(d) of the Constitution.

⁵⁶³ Celliers FQ "The Role and Effect of Social Media in the Workplace" 2013 *N Ky L Rev* 567-592.

⁵⁶⁴ Papadopoulos S "Revisiting the Public Disclosure of Private Facts in a Cyberworld" 2009 *Obiter* 30-43.

conduct of any person that causes harm to another.⁵⁶⁵ In *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another*,⁵⁶⁶ the court held that a breach of the right to privacy could occur by an unlawful intrusion by an employer upon the personal privacy of the employee, or by unlawful disclosure of private facts about that employee. The court further held that the unlawfulness of an infringement of privacy is determined in light of the contemporary *boni mores* and the general sense of the community as perceived by the court.⁵⁶⁷ Thus, when the employees' right to privacy is infringed through unlawful workplace social media policies or if dismissed for social media-related misconduct by the employer, the employees may rely on common law remedies to recover their damages from the employer.

Social media is increasingly becoming a regular medium of communication. However, this has caused the protection of the right to privacy of both employees and employers to be relatively difficult in the workplace.⁵⁶⁸ In this regard, it is submitted that the employees' right to privacy is not absolute since it can be lawfully limited by the employer's policies that are aimed at curbing social media-related misconduct in the workplace. This view is supported by *Case v Minister of Safety and Security*,⁵⁶⁹ where the court held that the protection of the right to privacy is broad but it can be limited in appropriate circumstances.⁵⁷⁰ Moreover, section 36 of the Constitution enumerates the manner in which the right to privacy may be limited. The right to privacy may be limited in terms of the Constitution and such limitation must be reasonable and justifiable.⁵⁷¹ The limitation must be based on human dignity, equality and freedom, taking into account all relevant factors including:

- a) the nature of the right;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;

⁵⁶⁵ Neethling 2005 SALJ 1.

⁵⁶⁶ *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1991 (2) SA 11 (W) (*Financial Mail* case).

⁵⁶⁷ *O'Keeffe* case 45.

⁵⁶⁸ Antoniades L *Social Networks in the Workplace* (LLM-dissertation University of Pretoria 2015) 6.

⁵⁶⁹ *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC) (*Case* case).

⁵⁷⁰ *Case* case 106.

⁵⁷¹ Section 36(1) of the Constitution.

- d) the relation between the limitation and its purpose; and
- e) less restrictive means to achieve the purpose.⁵⁷²

Accordingly, the employee's right to privacy may be limited to a certain extent by the employer through social media policies, and such limitation may be justified when an employee's use of social media affected his or her employment duties and the business reputation of the employer.⁵⁷³

There is uncertainty whether information and communications normally considered private, but are published to the public could still enjoy legal protection in the workplace.⁵⁷⁴ According to Neethling,⁵⁷⁵ individuals should be entitled to decide for themselves what personal information may be intercepted, collected and used by employers. It is submitted that the determination of what personal information of the employee may be intercepted by the employer should be legally recognised.⁵⁷⁶ This legal recognition should provide that an employee must be allowed to determine the social media content that the employer is allowed to access.⁵⁷⁷ The employer should not recklessly use all the information obtained from social media platforms to dismiss an employee for social media-related misconduct unless such information is defamatory or harmful to other employees and/or the employer.⁵⁷⁸

The employment relationship between an employee and his or her employer is regarded as *sui generis*.⁵⁷⁹ Clarifying privacy is sometimes difficult to describe in the context of an employment relationship because of such uniqueness.⁵⁸⁰ Employees are usually under the belief that the information they post on social-media platforms is private, based on their privacy settings.⁵⁸¹ Employees also believe that their right

⁵⁷² Section 36(1) of the Constitution.

⁵⁷³ Dekker A "Vices or Device: Employee Monitoring in the Workplace" 2004 *SA Merc LJ* 622-637.

⁵⁷⁴ Celliers 2013 *N Ky L Rev* 581

⁵⁷⁵ Neethling, Potgieter and Visser *Neethling's Law of Personality* 10.

⁵⁷⁶ Neethling, Potgieter and Visser *Neethling's Law of Personality* 10.

⁵⁷⁷ Celliers 2013 *N Ky L Rev* 592.

⁵⁷⁸ Davey 2012 *De Rebus* 80.

⁵⁷⁹ *Sui Generis* means unique.

⁵⁸⁰ Dekker 2004 *SA Merc LJ* 626.

⁵⁸¹ Celliers 2013 *N Ky L Rev* 567.

to privacy will protect their information from falling into their employers' possession or being used for reprisals against them in the future.⁵⁸²

There has to be a link between the space, secrecy, seclusion, subject matter and privacy itself⁵⁸³ and this is evident from case law.⁵⁸⁴ This indicates that, as an employee interacts on social media, there are possibilities that his or her privacy may become lawfully limited in terms of the Constitution.⁵⁸⁵ It is questionable whether the reasonable expectancy of the right to privacy on social media platforms exist in the workplace context in South Africa or not.⁵⁸⁶ Everyone has the right not to have their private social media account hacked and personal information disseminated without their prior consent.⁵⁸⁷ A legitimate expectation of privacy entails two components, namely, a subjective and objective expectancy.⁵⁸⁸ The subjective component provides an explanation of the permissibility of waivers of privacy.⁵⁸⁹ An employee may not have an expectancy of privacy if consent was given explicitly or implicitly to having such privacy invaded by the employer or other persons.⁵⁹⁰ The infringement of privacy may not be considered, for instance, when an employee has allowed access to social media friends who then abuses his or her activities or posted information on social media.⁵⁹¹ This entails that an employee may not claim an invasion of privacy of his or her social media communications, if he or she gave prior consent to the alleged offenders. However, there are instances where consent is not granted either explicitly or implicitly but an invasion of privacy

⁵⁸² Facebook 2013 *Statement of Rights and Responsibilities* <http://www.Facebook.com/legal/terms> accessed 12 January 2016 1.

⁵⁸³ Papadopoulos 2009 *Obiter* 37.

⁵⁸⁴ *Bernstein v Bester* 1996 2 SA 751 (CC) 789, *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In Re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2000 BCLR 1079 (CC) 557.

⁵⁸⁵ Cheadle MH, Davis DM and Haysom NRL *South African Constitutional Law: Bill of Rights* (Butterworths Durban 2000) 76.

⁵⁸⁶ Snail ka Mtuze S 2016 *The Reasonable Use and Legal Risks Associated with Social Media – a Discussion of Cases and the Constitution* <http://www.snailattorneys.com/publications/> accessed 14 November 2016 1.

⁵⁸⁷ Snail ka Mtuze 2016 <http://www.snailattorneys.com/publications/> accessed 14 November 2016 1.

⁵⁸⁸ Currie and De Waal *The Bill of Rights Handbook* 298.

⁵⁸⁹ Currie and De Waal *The Bill of Rights Handbook* 298.

⁵⁹⁰ Currie and De Waal *The Bill of Rights Handbook* 298.

⁵⁹¹ Snail ka Mtuze 2016 <http://www.snailattorneys.com/publications/> accessed 14 November 2016 1.

still took place. As indicated,⁵⁹² In *Smith v Partners in Sexual Health (non-profit)*,⁵⁹³ the CCMA held that the access to an employee's private email was unlawful as the employee did not give consent to such interception. This constituted an invasion of the employee's right to privacy, which led to the employee's unlawful dismissal for social media-related misconduct. An email may constitute social media communication as employees use e-mail to share information, pictures and documents that can be published by the other employees or persons.⁵⁹⁴

In *Moonsamy v The Mailhouse*,⁵⁹⁵ the CCMA found that tape recordings recorded by the employer by way of interception, listening and recording device violated the privacy of the affected employee. The recording device was connected to the employee's telephone on the employer's premises and the tape recordings were regarded as an invasion of the employee's privacy. However, the CCMA observed that it is difficult to clarify the nature of the right to privacy of an employee on the premises of the employer during working hours. This case did not directly deal with social media-related misconduct but it showed how an employee's privacy can be violated by an employer in the workplace.

In *Cronje v Toyota Manufacturing*,⁵⁹⁶ an employee was dismissed because of a racist cartoon that was distributed at the workplace. The applicant received an e-mail that he printed out to other colleagues at a meeting. The e-mail consisted of a cartoon depicting an adult and a young gorilla, both with the head of President Robert Mugabe of Zimbabwe pasted on them. The caption stated "we want to grow bananas". He defended himself by stating that he did not regard the cartoon as racist but rather as a depiction of Zimbabwe as a banana republic. The human resources manager deposed that the respondent's internet and e-mail usage was unlawful and specifically outlawed the display of such content at the workplace. The manager also stated that the transmission of any offensive racial, sexual, religious or

⁵⁹² See paragraphs 1.2 and 2.4.2 in chapters 1 and 2 of this dissertation.

⁵⁹³ *Smith v Partners in Sexual Health (non-profit)* (2011) 32 ILJ 1470 (CCMA). Also see the introduction in Chapters One and Two of this dissertation.

⁵⁹⁴ Smith MC "The Interaction of Social Media and the Law and How to Survive the Social Media Revolution" 2012 *New Hampshire Bar Journal* 24-39.

⁵⁹⁵ *Moonsamy v The Mailhouse* (1999) 20 ILJ 464 (CCMA).

⁵⁹⁶ *Cronje v Toyota Manufacturing* (2001) 22 ILJ 735 (CCMA).

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

The right to privacy has to be reasonable enough to qualify for protection under the relevant laws and the Constitution. This is the objective component of a legitimate expectation of privacy on the part of the employee in the workplace.⁵⁹⁷ Reasonableness depends on what the courts may view as reasonable.⁵⁹⁸ One should assess whether the Constitutional right to privacy guarantees absolute privacy within the workplace premises.⁵⁹⁹ This is done to prevent the employers from violating their employees' right to privacy.⁶⁰⁰ Employers are allowed to monitor the electronic communication of their employees in the workplace. Monitoring is important to discourage illicit activity and to limit liability on the company.⁶⁰¹ However, this could negatively affect the employee's right to privacy. Monitoring also creates unnecessary stress that has a direct negative impact on the emotional and physical

⁵⁹⁷ Currie and De Waal *The Bill of Rights Handbook* 298.

⁵⁹⁸ Currie and De Waal *The Bill of Rights Handbook* 298.

⁵⁹⁹ Modiba M "Interpreting and Monitoring Employees' E-mail Communications and Internet Access" 2003 *SA Merc LJ* 363-371.

⁶⁰⁰ Modiba M 2003 *SA Merc LJ* 365.

⁶⁰¹ Hornung MS "Think Before You Type: A Look At Email Privacy In the Workplace" 2005 *Fordham Journal of Corporate and Financial Law* 115-160.

health of the employees.⁶⁰² Consequently, employees expect their employers not to access their e-mail communications unlawfully.⁶⁰³

4.2.2 *The right to freedom of expression*

Freedom of expression relates to the liberty that allows individuals to hold opinions and to receive or impart those opinions as information and ideas on other individuals.⁶⁰⁴ The significance of the right to freedom of expression was highlighted in *South African National Defence Union v Minister of Defence and Another*.⁶⁰⁵ The court held that freedom of expression lies at the heart of a democracy. The court also held that freedom of expression is valuable for many reasons. These reasons include its instrumental function as a guarantor of democracy and its implicit recognition and protection of the moral agency of individuals in our society. Furthermore, the right to freedom of expression facilitates the search on social media for truth about any matter by individuals and society. Social media platforms provide innovative ways for all South Africans to express their views freely. This plays an important role in safeguarding the right to freedom of expression.⁶⁰⁶ The right to freedom of expression also allows individuals to voice their opinions on topical societal issues on social media platforms.⁶⁰⁷ Preventing employees from mentioning the employer's name on a social media platform can be seen as violating the employees' right to freedom of expression.⁶⁰⁸ This is because the LRA recognises an employee's right to freedom of expression regarding the identity of his or her

⁶⁰² Hornung 2005 *Fordham Journal of Corporate and Financial Law* 166.

⁶⁰³ *Gouws v Score/Price & Pride Furnishers* 2001 11 BALR 1155 (CCMA); *Philander v CSC Computer Sciences* [2002] 3 BALR 304 (CCMA); *Dauth and Brown v Wier's Cash N Carry* 2002 23 ILJ 1272 (CCMA).

⁶⁰⁴ Freedom of Expression Institute 2007 *The Media and the Law* <http://www.fx.org.za/the-media-and-the-law> accessed 12 June 2016 1.

⁶⁰⁵ *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 CC (*SA National Union case*).

⁶⁰⁶ Davey R 2015 *Understanding and Managing the Risks of Social Media in the Workplace* <http://BowanGilfillan.co.za/understanding-and-managing-the-risks-of-social-media-in-the-workplace> accessed 15 March 2016 1.

⁶⁰⁷ Hastie L 2012 *Freedom of Expression versus the Right to Dignity* www.polity.org.za/article/freedom-of-expression-versus-the-right-to-dignity-2012-05-31 accessed 12 May 2016 1.

⁶⁰⁸ Van Wyk J and Heyns M 2012 *To Name or Not to Name, that is the Question* www.werksmans.com/wp-content/uploads/2013/04/150/_JN5313 accessed 12 January 2016 2.

employer.⁶⁰⁹ However, employees may face dismissal for social media-related misconduct for revealing the name of the employer on social media platforms recklessly and unlawfully.⁶¹⁰ It is crucial to note that the right to freedom of expression must be interpreted in light of other fundamental rights, as it is not an absolute right in South Africa.⁶¹¹

In *Braithwaite vs McKenzie*,⁶¹² Chetty J held that a significant risk to reputational integrity due to the defamatory statements that may be made on a social media platform.⁶¹³ The fact that the internet reaches a wide range of audiences instantly worsens the risk.⁶¹⁴ The judge also noted that, in the present world, the most effective, efficient and immediate way to voice one's opinions and ideas is through the internet, in the form of social media platforms.⁶¹⁵ Therefore, employees should use social media platforms carefully to avoid the consequences of social media-related misconduct.

In the recent case of *Robertson and Value Logistics*,⁶¹⁶ the applicant Lynn Robertson made comments on her social media platform that she got retrenched before the retrenchment process was finalised. Ms Robertson was called into a disciplinary hearing and later dismissed because her fellow employees became aware of the aforesaid comments on social media and alerted the employer. However, Ms Robertson took the matter to the National Bargaining Council where she stated that she was not well knowledgeable with the use of computers. The CCMA held that Ms Robertson's post on Facebook appeared to be an expression of hurt that she felt. The CCMA held further that it was not a critical attack of the respondent's integrity and that her dismissal was substantively unfair. The CCMA ordered that Ms Robertson be reinstated under the same terms she was working under prior to the

⁶⁰⁹ Van Wyk and Heyns 2012 www.werksmans.com/wp-content/uploads/2013/04/150/_JN5313 accessed 12 January 2016 2.

⁶¹⁰ Van Wyk and Heyns 2012 www.werksmans.com/wp-content/uploads/2013/04/150/_JN5313 accessed 12 January 2016 2.

⁶¹¹ *Le Roux and others v Dey* 2011 (3) SA 274 (CC).

⁶¹² *Braithwaite v McKenzie* 2015 (1) SA 270 (KZP) (*Braithwaite case*).

⁶¹³ *Braithwaite case* 28.

⁶¹⁴ *Braithwaite case* 28.

⁶¹⁵ *Braithwaite case* 28.

⁶¹⁶ *Robertson and Value Logistics* (2016) 37 ILJ 286 (BCA).

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

In the South African context, the scope of freedom of expression is based on the Constitution. The Constitution makes provision for the right to freedom of expression as a fundamental right. The Constitution states that everyone has the right to freedom of expression, which includes the following:

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.⁶¹⁷

The Constitution further states that freedom of expression cannot extend to expression that enlists propaganda of war, incitement of violence or even advocacy of hatred on the basis of race, ethnicity, gender, religion.⁶¹⁸ The freedom of expression that is prohibited constitute incitement to cause harm.⁶¹⁹ This entails that freedom of expression has to be within the boundaries of expression that does not fall within the advocacy of hate speech.⁶²⁰ The right to freedom of expression is limited to exclude the advocacy of hate speech and has to be balanced against other

⁶¹⁷ Section 16 of the Constitution.

⁶¹⁸ Section 16(2) of the Constitution.

⁶¹⁹ Section 16(2) of the Constitution. The researcher is aware of the new draft legislation, called the *Prevention and Combating of Hate Crimes and Hate Speech* Bill 698 of 2016 which gives effect to South Africa's obligations regarding prejudice and intolerance in terms of the international law. This Bill provides for the prosecution of persons who commit hate crimes and hate speech, however, the Bill does not make provision for hate speech which is advocated for on social media which constitutes social media-related misconduct. Accordingly; it is submitted that the Bill should be revised to enact adequate provisions for hate speech which is advocated on social media and provide penalties for such social media- related misconduct.

⁶²⁰ Freedom of Expression Institute 2007 <http://www.fxj.org.za/the-media-and-the-law> accessed 12 June 2016 1.

rights such as, human dignity and equality.⁶²¹ Careless exercise of the right to freedom of expression may infringe on the rights of other persons.⁶²² Therefore, employees must not recklessly post derogatory comments on their social media platforms because they will not be protected under the right to freedom of expression in South Africa.⁶²³ Reckless use of the right to freedom of expression may result in consequences that may warrant grounds for dismissal for social media-related misconduct.⁶²⁴

In *Dewoonarain v Prestige Car Sales (Pty) Ltd t/a Hyundai Ladysmith*,⁶²⁵ the employer laid charges against the employee for bringing the name of the company into disrepute. The charges were laid because of the employee's derogatory comments that were posted on a social media platform (Facebook). The employee posted, *inter alia*, that it is not enjoyable to work for and with Indians. The employee stated further that Indians treat their own race poorly. The employee did not mention the name of the employer and relied on the right to freedom of expression. The employer assumed that the Facebook comment directly referred to his board of directors and employees, as they were Indians. The CCMA held that the right to freedom of expression is not an absolute right and such reliance was rejected. Furthermore, the CCMA held that the right to freedom of expression must be balanced with the right of the employer to maintain its reputation. The CCMA also held that the irresponsible remarks made on the social media platform by the employee had the potential to harm the reputation of the employer's business. Therefore, the dismissal of the employee was found to be substantively fair. Hate speech is prohibited in terms of the Constitution, therefore, the employer was right

⁶²¹ Oosthuizen V 2016 *How Far is Too Far for Employees on Social Media?* <http://www.labourguide.co.za/most-recent/2166-how-far-is-too-far-for-employees-on-social-media> accessed 12 April 2016 1.

⁶²² Freedom of Expression Institute 2007 <http://www.fxi.org.za/the-media-and-the-law> accessed 12 June 2016 1.

⁶²³ Oosthuizen, 2016 <http://www.labourguide.co.za/most-recent/2166-how-far-is-too-far-for-employees-on-social-media> accessed 12 April 2016 1.

⁶²⁴ Dube T 2016 *The Risks of Freedom on Social Media in South Africa* <http://www.cnbcAfrica.com/news/southern-africa/2016> accessed 13 February 2016 1.

⁶²⁵ *Dewoonarain v Prestige Car Sales (Pty) Ltd t/a Hyundai Ladysmith* [2013] 7 BALR 689 (MIBC).

to dismiss the employee for social media-related misconduct.⁶²⁶ Employees should guard against violating other rights of the employer when they exercise their right to freedom on social media.⁶²⁷

In *Dutch Reformed Church Vergesig Johannesburg Congregation and Another v Rayan Soknunan t/a Glory Divinee World Ministries*,⁶²⁸ the defendant used the buildings owned by the applicant (also a religious body) for Christian religious services. The applicant decided to sell the buildings to an Islamic academy and the defendant could not match the offer for the premises. Therefore, Rayan Soknunan t/a Glory Divinee World Ministries was faced with the termination of its lease of the premises and subsequent eviction. Disgruntled with the process, the defendant launched a campaign to discredit the applicant and its leader, an ordained minister and to lobby against the sale of the church buildings.⁶²⁹ The Facebook posts included, *inter alia*, that the difference between Muslim leaders and Christian leaders is that when Muslim leaders believe they are fighting a righteous battle, they will be prepared to die. The Christian leaders will stand behind the shadows and spectate for the outcome. The court held that freedom of expression may often be robust, angry, vitriolic, and even abusive. This indicates that some persons abuse the right to freedom of expression to achieve motives that are not good. An employer may dismiss an employee if such an employee has exceeded the boundaries of freedom of speech and has committed social media-related misconduct in the workplace.⁶³⁰ However, the dismissal of employees for social media-related misconduct should not deprive them their right to express themselves on social media as long as such expression is *bona fide*.⁶³¹

⁶²⁶ Section 16(2) of the Constitution.

⁶²⁷ Davey 2012 *De Rebus* 80.

⁶²⁸ *Dutch Reformed Church Vergesig Johannesburg Congregation and Another v Rayan Soknunan t/a Glory Divinee World Ministries* [2012] ZAGPJHC 97; 2012 (6) SA 201 (GSJ) (14 May 2012) (*Dutch Reformed Church Case*).

⁶²⁹ *Dutch Reformed Church Case* 1-15.

⁶³⁰ Davey 2012 *De Rebus* 80.

⁶³¹ Davey 2012 *De Rebus* 80.

Employees have the right to express themselves but this has to be within the reasonable expectations of their working environment.⁶³² The advances in social media communications allow employees to voice their opinions to a broader audience on their social media platforms.⁶³³ Freedom of expression has become more important to both employers and employees in the South African workplace.⁶³⁴ In *Motloung v The Market Theatre Foundation*,⁶³⁵ the employee was dismissed because of a post on a social media platform that was described as hate speech, which had a negative impact on the employer. The CCMA noted that the reliance upon the right to freedom of expression did not entitle the employee to conduct himself in a manner that he did. The CCMA held that the employer was correct to dismiss the employee for the social media post containing hate speech and which was outlawed by the Constitution.⁶³⁶

The right to freedom of expression enables employees to engage in conversations on social media platforms and allows them to share their views without any fear. This enables all the people to attain the truth about topical issues.⁶³⁷ The right to freedom of expression allows employees to tolerate the views of others and protect them from abuse by their employers.⁶³⁸ Freedom of expression is an important component in any Constitutional democratic society.⁶³⁹ However, this right is restricted by the limitation clause.⁶⁴⁰ This causes a problem, in that employees are sometimes restricted from stating their views about matters relating to work on social media platforms.⁶⁴¹ The restriction is intended to protect employers from detrimental

⁶³² Dube 2016 <http://www.cnbc africa.com/news/southern-africa/2016> accessed 13 February 2016 1.

⁶³³ McGinley AC and McGinley-Stempel RP "Beyond the Water Cooler: Speech and the Workplace in an Era of Social Media" 2012 *Hofstra Labor and Employment Law Journal* 75-199.

⁶³⁴ McGinley and McGinley-Stempel 2012 *Hofstra Labor and Employment Law Journal* 78.

⁶³⁵ *Motloung v The Market Theatre Foundation* [GAJB4458-11] 2.

⁶³⁶ Section 16(2) of the Constitution.

⁶³⁷ Freedom of Expression Institute 2007 <http://www.fxi.org.za/the-media-and-the-law> accessed 12 June 2016 1.

⁶³⁸ Freedom of Expression Institute 2007 <http://www.fxi.org.za/the-media-and-the-law> accessed 12 June 2016 1.

⁶³⁹ McGinley and McGinley-Stempel 2012 *Hofstra Labor and Employment Law Journal* 75.

⁶⁴⁰ Section 36 of the Constitution.

⁶⁴¹ McGinley and McGinley-Stempel 2012 *Hofstra Labor and Employment Law Journal* 76.

consequences of social media-related misconduct.⁶⁴² The unlawful dismissal of employees for social media-related misconduct may contradict the right to freedom of expression as provided for in the Constitution. Employers on social media platforms can curtail freedom of expression.⁶⁴³ However, such restrictions may result in employees fearing to fully express their opinions on social media due to fear of reprisals and/or the fear to be dismissed for social media-related misconduct.

As stated earlier above, in *SA National Union* case,⁶⁴⁴ the court held that the Constitution acknowledges that people need to have the ability to form and express opinions and views freely on various issues.⁶⁴⁵ The court held further that everyone has the right to freedom of expression,⁶⁴⁶ which should be used responsibly. This right does not invade the rights of other individuals.⁶⁴⁷ According to Davis,⁶⁴⁸ the interpretation of the right to freedom of expression depends on the manner in which the right conforms within the Constitution. In *R v VL*,⁶⁴⁹ an employee challenged her dismissal for posting comments about her employer on Facebook. The employee stated on her social media platform that a senior employee had retrenched her without prior notice. Her employer contended that the post had put the employer's company name into disrepute and that it was factually incorrect. The CCMA held that the central issue related to whether her social media conduct constituted a justifiable reason to be dismissed for social media-related misconduct. The CCMA held that the post was an expression of hurt, the inaccuracy was of little relevance and there was no sufficient evidence of damage to the reputation of the employer. The CCMA also held that it was unfair that during a traumatic time the employee was prevented from discussing it. She was subsequently reinstated.

⁶⁴² McGinley and McGinley-Stempel 2012 *Hofstra Labor and Employment Law Journal* 76.

⁶⁴³ Freedom of Expression Institute 2007 <http://www.fxj.org.za/the-media-and-the-law> accessed 12 June 2016 1.

⁶⁴⁴ *SA National Union* case 7.

⁶⁴⁵ *SA National Union* case 7.

⁶⁴⁶ Section 16 of the Constitution.

⁶⁴⁷ McGinley and McGinley-Stempel 2012 *Hofstra Labor and Employment Law Journal* 76.

⁶⁴⁸ Cheadle H, Davis D and Haysom N *South African Constitutional Law, Bill of Rights* 11th ed (LexisNexis Durban 2013) 25.

⁶⁴⁹ *R v VL (NBCRFI)* (RFBC 35099 31 August 2015) 1.

The employee was entitled to express her views and not be terrorised, due to fear of losing her employment. Furthermore, a violation on the right to freedom of expression by the employer may occur when an employee cannot express his or her opinions or views in the workplace. The right to freedom of expression may give rise to disputes pertaining to employees' entitlement to express their views on social media platforms.⁶⁵⁰ It should be noted that employees must freely express their views on social media platforms without being deterred by their employers.⁶⁵¹ Employees should, however, be made aware that certain conduct that is derogatory or harmful to others on social media will have negative consequences against the offenders.⁶⁵² The right to freedom of expression does not amount to an exclusive right to defame others.⁶⁵³ However, the right to freedom of expression is important for the maintenance of any Constitutional democracy in any country.⁶⁵⁴ The right to freedom of expression is further important as it fosters open and free debate on issues pertaining to employment.⁶⁵⁵ The right to freedom of expression is limited by the Constitution⁶⁵⁶ and the limitation should be reasonable and justifiable.⁶⁵⁷ The limitation of the employees' right to freedom of expression should not hinder the enjoyment of this right and other related rights by employees.⁶⁵⁸ In this regard, it is submitted that employers should take appropriate steps to ensure that their employees' freedom of expression is not unlawfully violated through arbitrary social media policies during office working hours.⁶⁵⁹ The question that would then arise is what is deemed reasonable and justifiable in relation to the limitation of this right.

⁶⁵⁰ McGinley and McGinley-Stempel 2012 *Hofstra Labor and Employment Law Journal* 76.

⁶⁵¹ McGinley and McGinley-Stempel 2012 *Hofstra Labor and Employment Law Journal* 76.

⁶⁵² Snail Attorneys "Cyberlaw: Privacy and Social Media @ the Workplace" Unpublished contribution delivered at the *ACFE 2013 Conference* (16 October 2013) 4.

⁶⁵³ Snail Attorneys "Cyberlaw: Privacy and Social Media" 4.

⁶⁵⁴ Freedom of Expression Institute 2007 <http://www.fxj.org.za/the-media-and-the-law> accessed 12 June 2016 1.

⁶⁵⁵ Balule BT "Insult laws: A Challenge to Media Freedom in the SADC's Fledgling Democracies?" 2008 *XLI CILSA* 405, 426.

⁶⁵⁶ Section 36 of the Constitution.

⁶⁵⁷ Davey R 2015 *Understanding and Managing the Risks of Social Media in the Workplace* <http://BowanGilfillan.co.za/understanding-and-managing-the-risks-of-social-media-in-the-workplace> accessed 15 June 2016 1.

⁶⁵⁸ Balule 2008 *XLI CILSA* 427.

⁶⁵⁹ Balule 2008 *XLI CILSA* 427.

4.2.3 The right to dignity

The Bill of Rights is the cornerstone of democracy in South Africa.⁶⁶⁰ It enshrines the rights of all people in our country and affirms the democratic values such as human dignity.⁶⁶¹ The Constitution stipulates that everyone has an inherent right to dignity and the right to have their dignity respected and protected.⁶⁶² The right to a good name or reputation is recognised as an aspect of the South African common law.⁶⁶³ It is accepted that the right to a good name forms a crucial part of the right to dignity although it is not mentioned in the Bill of Rights in the Constitution.⁶⁶⁴ In *Garderner v Whitaker*⁶⁶⁵ the court held that the right to respect of one's dignity is something broader than the Roman Dutch concept of *dignitas*. Any infringement of the right to dignity is actionable in terms of the *actio iniuriarum*.⁶⁶⁶

Defamation is defined as the intentional publication of words or behaviour entailing another individual, which degrades that particular individual's status, good name or reputation.⁶⁶⁷ Defamation can happen through social media, when employees post defamatory comments on social media platforms.⁶⁶⁸ In this regard, any defamatory comments posted by employees on social media platforms in the workplace during office working hours against their employers may damage the personal and business reputation of such employers.⁶⁶⁹ The South African Human Rights Commission⁶⁷⁰

⁶⁶⁰ Davey 2015 <http://BowanGilfillan.co.za/understanding-and-managing-the-risks-of-social-media-in-the-workplace> accessed 15 June 2016 1.

⁶⁶¹ Davey 2015 <http://BowanGilfillan.co.za/understanding-and-managing-the-risks-of-social-media-in-the-workplace> accessed 15 June 2016 1.

⁶⁶² Section 10 of the Constitution.

⁶⁶³ Neethling J and Potgieter JM *Law of Delict* 6th ed (LexisNexis Durban 2010) 330.

⁶⁶⁴ Neethling and Potgieter *Law of Delict* 330.

⁶⁶⁵ *Garderner v Whitaker* 1995 2 SA 672 (E).

⁶⁶⁶ Currie and De Waal *The Bill of Rights Handbook* 256.

⁶⁶⁷ Neethling and Potgieter *Law of Delict* (2010) 331. The law of defamation forms part of the South African common law of delict and therefore a victim who institutes an action for defamation will have to prove that all the elements of a delict are present for example an act, either in the form of a publication of words or behaviour, an injury to personality (the defamatory effect of the words or behaviour), wrongfulness (the infringement of a person's right to a good name or reputation), either intention (*animus iniuriandi*) for actions against individuals or negligence as a form of fault.

⁶⁶⁸ Davey R 2015 *Dismissal for Social Media Misconduct* <http://BowanGilfillan.co.za/dismissal-for-social-media-misconduct> accessed 14 April 2016 1.

⁶⁶⁹ Balule BT "Striking a Balance Between Media Freedom and Protection of Reputation: The Defence of Reasonable Publication in Botswana" 2013 *XLVI CILSA* 1,1.

⁶⁷⁰ The South African Human Rights Commission (SAHRC).

accused Sunette Bridges, an Afrikaans music artist, of posting racial comments on her Facebook page. It argued that this amounted to hate speech in terms of the *Promotion of Equality and Prevention of Unfair Discrimination Act*.⁶⁷¹ The SAHRC alleged that the racial comments on Bridges' Facebook page facilitated racism, allowing such racism to flourish. Bridges denied the allegations that she incited violence or hate speech through her social media posts. She stated that she would continue to exercise her Constitutional right to freedom of speech and would work to expose the oppression of the white minority. The Equality Court held that the conformation of the controversial comments posted by other users on her page amounted to hate speech and harassment in terms of PEPUDA.⁶⁷² The court's decision was made on the basis that such freedom of expression ought not to be aimed at encouraging and spreading hatred against certain groups of people in South Africa.

The Equality Court mandated the settlement between the SAHRC and Bridges. It was agreed that Bridges would regularly monitor her Facebook pages. She was told to remove all content that amounted to hate speech, harassment, or incitement of violence. Furthermore, she was told to warn users of the court order, block those who posted offending comments and put up English and Afrikaans posts distancing herself from hate speech. The courts have been reluctant to interdict publications on social media platforms because of the conflicting right to freedom of expression.⁶⁷³ The Equality Court held that it is more feasible to focus on the conduct of the wrongdoer than to order Facebook to take down the offensive post. Therefore, users of Facebook pages bear an onus in taking responsibility for what is posted on their social media platforms to eliminate defamatory comments.⁶⁷⁴ There is little control on what is posted on social media by employees in the workplace and it has become difficult to monitor the activities of such employees by employers, as some

⁶⁷¹ *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (PEPUDA).

⁶⁷² Section 10 of PEPUDA.

⁶⁷³ Davey 2015 <http://BowanGilfillan.co.za/understanding-and-managing-the-risks-of-social-media-in-the-workplace> accessed 15 June 2016 1.

⁶⁷⁴ Davey 2015 <http://BowanGilfillan.co.za/understanding-and-managing-the-risks-of-social-media-in-the-workplace> accessed 15 June 2016 1.

employees do not take responsibility of their social media use.⁶⁷⁵ The consequences of failing to remove the defamatory comments on social media platforms may lead to an employee's dismissal for social media-related misconduct.

The Constitutional court affords juristic persons such as companies the right to a good reputation.⁶⁷⁶ In *Financial Mail* case, the applicant had recorded a private meeting of the respondent and its executives.⁶⁷⁷ The respondent sought an urgent application that prohibited the publishing company Financial Mail from publishing information that it obtained by recording a board meeting. The interdict was made on the basis that this act infringed the company's privacy, and that it was not justified by sufficient public interest because the information was obtained unlawfully. The court held that it was only proper that a corporation be afforded the usual legal processes to vindicate its reputation.⁶⁷⁸ Moreover, the company is entitled to protection from an unlawful invasion of privacy notwithstanding that it cannot consciously grasp such an invasion.⁶⁷⁹ A misguided comment or an incorrect fact can go viral once it is posted and resulting in possible brand damage.⁶⁸⁰ This allows the employers to dismiss employees for making defamatory publication about the company on social media platforms.

In *Herholdt v Wills*,⁶⁸¹ the applicant sought an urgent application against the respondent, interdicting and restraining the respondent from posting defamatory comments about the applicant.⁶⁸² The defamatory comments were posted on respondent's social media platform (Facebook).⁶⁸³ Failure to comply with the order

⁶⁷⁵ Davey 2015 <http://BowanGilfillan.co.za/understanding-and-managing-the-risks-of-social-media-in-the-workplace> accessed 15 June 2016 1.

⁶⁷⁶ *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A) 462 (*Financial Mail* case).

⁶⁷⁷ *Financial Mail* case 31.

⁶⁷⁸ *Financial Mail* case 462.

⁶⁷⁹ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motors Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 CC.

⁶⁸⁰ Davey R 2015 <http://BowanGilfillan.co.za/understanding-and-managing-the-risks-of-social-media-in-the-workplace> accessed 15 June 2016 1.

⁶⁸¹ *Herholdt v Wills* 2013 (2) SA 530 (GSJ) W (*Herholdt* case).

⁶⁸² *Herholdt* case 1.

⁶⁸³ *Herholdt* case 1. Amongst the posting were the following: I wonder too what happened to the person who I counted as a best friend for 15 years, and how this behaviour is justified.

would result in imprisonment of thirty days for the respondent.⁶⁸⁴ An open letter about the defamatory statements was published to Herholdt on Facebook for public consumption on 27 February 2012.⁶⁸⁵ The content thereof was defamatory in the eyes of the south Gauteng high court. The court cautioned and advised that defamatory postings be removed⁶⁸⁶ by the party responsible for the defamatory postings at the request of the aggrieved party.⁶⁸⁷ The dignity of the applicant was violated as a result of the defendants posting defamatory comments about the applicant with unfounded allegations.

In *O’Keeffe v Argus Printing and Publishing Company Ltd*,⁶⁸⁸ the plaintiff was a well-known radio personality consented to the publication of her photograph. The photograph was taken from close range for use by a newspaper for an article. The photograph was, however used in the press for advertising purposes. The plaintiff brought the action on the basis that the advertisement had violated her dignity. The defendant argued that the insult had to be present in an *injuria*. This case illustrates that some employees may be aware of the consequences that may follow, hence the employee in this case asked that her photograph be removed from publication. There was a ground to dismiss the employee for social media-related misconduct if the photograph was published. However, the photograph was not published on social media. The photograph may not only violate the dignity of the employee but also of the employer.

In *Isparta v Richter*,⁶⁸⁹ the plaintiff brought an action for defamation against the defendants as a result of the comments made by the defendants.⁶⁹⁰ The plaintiff and the second defendant were divorced but were still engaged in litigation concerning

Remember I see the broken-hearted faces of your girls every day. Should we blame the alcohol, the drugs, the church, or are there more reasons to not have to take responsibility for the consequences of your own behaviour? But mostly I wonder whether, when you look in the mirror in your drunken testosterone haze, do you still see a man?

⁶⁸⁴ *Herholdt case 1.*

⁶⁸⁵ *Herholdt case 2.*

⁶⁸⁶ *Herholdt case 43.*

⁶⁸⁷ *Herholdt case 43.*

⁶⁸⁸ *O’Keeffe case.*

⁶⁸⁹ *Isparta v Richter* 2013 6 SA 4529 (GP) (*Isparta case*).

⁶⁹⁰ *Isparta case 8.*

the payment of maintenance.⁶⁹¹ The first defendant posted several comments concerning the plaintiff on her Facebook and involved the second defendant.⁶⁹² The judge found that the postings made on the social media platform were defamatory.⁶⁹³ The court ordered the defendant to pay an amount of R40 000 in damages for defamatory comments she made.⁶⁹⁴ The amount was awarded to the plaintiff as a result of the defendants' refusal to make an apology and retract the defamatory comments on their Facebook wall.⁶⁹⁵ The conduct of the defendant constitutes social media-related misconduct and could warrant a dismissal in the workplace.⁶⁹⁶ The conduct of the defendants further violated the dignity of the plaintiff as they defamed her right to a good name.⁶⁹⁷

4.2.4 *The right to freedom of association*

The Constitution states that everyone has a right to freedom of association.⁶⁹⁸ The right to freedom of association prevents powerful social actors, in this context, the employer from deciding how employees may exercise their freedom of association through coercion.⁶⁹⁹ The right to freedom of association is a fundamental right⁷⁰⁰ that facilitates the realisation of other rights, rather than the right in itself.⁷⁰¹ Social media is a powerful tool that facilitates associations of relationships such as professional relationships for employees to discuss topical issues regarding work.⁷⁰² Employees' right to freedom of association should not be curtailed, as employees will

⁶⁹¹ *Isparta* case 9.

⁶⁹² *Isparta* case 12.

⁶⁹³ *Isparta* case 13.

⁶⁹⁴ *Isparta* case 41.

⁶⁹⁵ *Isparta* case 41.

⁶⁹⁶ Davey 2012 *De Rebus* 80.

⁶⁹⁷ Davey 2012 *De Rebus* 80.

⁶⁹⁸ Section 18 of the Constitution.

⁶⁹⁹ Currie and De Waal *The Bill of Rights Handbook* 397.

⁷⁰⁰ Budeli M "Workers' Right to Freedom of Association and Trade Unionism in South Africa: An Historical Perspective" 2009 *Southern African Society of Legal Historians, Fundamina: A Journal of Legal History* 57-74.

⁷⁰¹ Budeli 2009 *Southern African Society of Legal Historians, Fundamina: A Journal of Legal History* 57.

⁷⁰² Swire P "Social Networks, Privacy, and Freedom of Association: Data Protection vs. Data Empowerment" 2012 *N.C. L. Rev* 1371-1416.

not be able to freely associate with others through social media in the workplace.⁷⁰³ Social media has reshaped the nature of the workplace and of work performed⁷⁰⁴ and employees are more likely to associate on these platforms. When employers restrict the use of social media through working computers, it may violate employees' freedom of association with others.⁷⁰⁵ The associations between employees on social media platforms can lead to dismissal of employees for social media-related misconduct in the workplace.⁷⁰⁶

Social media allows good interactions amongst employees as they use it to form associations in the workplace.⁷⁰⁷ Social media further enables employees to engage in active, challenging and other issues pertaining to their employment, which could contribute to the proper functioning of the workplace.⁷⁰⁸ Nonetheless, such social media engagements by the employees must be done *bona fide* to avoid violating the employers' rights and business reputation. Restricting employees from using social media and dismissing them for social media-related misconduct could violate the right to freedom of association.⁷⁰⁹ Social media may play an important part in fostering associations for employees in the workplace.⁷¹⁰ Social media can also have a professional component,⁷¹¹ such as LinkedIn,⁷¹² which is often used by employees to achieve their professional objectives.⁷¹³ Employers who restrict the use of social media completely should be subjected to scrutiny, as they limit the right to freedom of association.⁷¹⁴ Consequently, the restriction on the right to freedom of association may cause a violation of the employees' right to freedom of association in the

⁷⁰³ Budeli 2009 *Southern African Society of Legal Historians, Fundamina: A Journal of Legal History* 57.

⁷⁰⁴ Bucher E, Fieseler C and Suphan A "The Stress Potential of Social Media in the Workplace" 2013 *Information, Communication and Society* 1639-1667.

⁷⁰⁵ Decker JR "Facebook Phobia! the Misguided Proliferation of Restrictive Social Networking Policies for School Employees" 2014 *Nw.J. L. and Soc.Pol'y* 163-205.

⁷⁰⁶ Decker 2014 *Nw.J. L. and Soc.Pol'y* 165.

⁷⁰⁷ Swire 2012 *N.C. L. Rev* 1377.

⁷⁰⁸ Balule 2008 *XLI CILSA* 412.

⁷⁰⁹ Swire 2012 *N.C. L. Rev* 1377.

⁷¹⁰ Swire 2012 *N.C. L. Rev* 1378.

⁷¹¹ Swire 2012 *N.C. L. Rev* 1378.

⁷¹² LinkedIn is a social network that described itself, as of late 2011, as the world's largest professional network on the Internet with more than 135 million members in over 200 countries and territories.

⁷¹³ Swire 2012 *N.C. L. Rev* 1378.

⁷¹⁴ Swire 2012 *N.C. L. Rev* 1380.

workplace. The dismissal for social media-related misconduct as a result of an employee's lawful exercise of his or her right to freedom of association through social media at the workplace is unfair.⁷¹⁵ The right to freedom of association enhances many developments in social media communications and the workplace.⁷¹⁶ The right also allows employees to form good relations amongst each other, which is crucial for the workplace environment.⁷¹⁷

4.3 Conclusion

All the citizens of South Africa must abide by the Constitution.⁷¹⁸ The abuse of social media by employees in the workplace has created Constitutional challenges and several employees were dismissed for social media-related misconduct in South Africa. Certain rights may be infringed or violated when employees are dismissed for social media-related misconduct. These rights include, *inter alia*, the right to dignity,⁷¹⁹ privacy,⁷²⁰ freedom of expression⁷²¹ and the right to freedom of association.⁷²² The right to privacy of employees may be violated when employers unlawfully intercepts the social media communications of employees. The right to privacy may be limited⁷²³ in certain circumstances such as when an employee misuses social media or defames the name of the employer to protect such an employer's interests. This entails that employees may be dismissed for their illicit social media-related misconduct.⁷²⁴ This dismissal could affect the reputation of the employee.⁷²⁵ The dignity of the employees should be respected and protected against any unlawful infringement by their employer. Employees should be allowed to exercise their right to freedom of expression in accordance with the

⁷¹⁵ Decker 2014 *Nw.J. L. and Soc.Pol'y* 165.

⁷¹⁶ Swire 2012 *N.C. L. Rev* 1415.

⁷¹⁷ Swire 2012 *N.C. L. Rev* 1377.

⁷¹⁸ Section 1 of the Constitution.

⁷¹⁹ Section 10 of the Constitution.

⁷²⁰ Section 14 of the Constitution.

⁷²¹ Section 16 of the Constitution.

⁷²² Section 18 of the Constitution.

⁷²³ Section 36 of the Constitution.

⁷²⁴ Davey 2015 <http://BowanGilfillan.co.za/understanding-and-managing-the-risks-of-social-media-in-the-workplace> accessed 15 June 2016 1.

⁷²⁵ Davey 2015 <http://BowanGilfillan.co.za/understanding-and-managing-the-risks-of-social-media-in-the-workplace> accessed 15 June 2016 1.

Constitution.⁷²⁶ Social media provides a platform for establishing desirable associations amongst employees.⁷²⁷ It is against this background that the researcher submits that all the relevant South African labour laws must be amended to address the Constitutional challenges caused by social media-related misconduct in the South African workplace.

⁷²⁶ Davey 2015 <http://BowanGilfillan.co.za/understanding-and-managing-the-risks-of-social-media-in-the-workplace> accessed 15 June 2016 1

⁷²⁷ Swire 2012 *N.C. L. Rev* 1384.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

This chapter provides overall conclusions on the selected challenges associated with the dismissal of employees for social media-related misconduct in the South African workplace. Moreover, this chapter analyses whether the legislative and the Constitutional challenges have been adequately addressed by the courts. For instance, it was noted that various legislative and Constitutional challenges are associated with the dismissal of employees for social media-related misconduct in the South African workplace.⁷²⁸ The problem is largely caused by a lack of regulation on social media in the workplace.⁷²⁹ In this regard, this research noted the importance of protecting the rights of employees and the interests of employers in the South African workplace.⁷³⁰ Furthermore, it was noted that there is a need to enhance the regulation of social media use in the South African workplace. Given this background, this chapter provided some recommendations that could be utilised by employers and other relevant authorities to combat social media-related challenges in the South African workplace.

5.2 Recommendations

Given the problems and challenges that are associated with the dismissal of employees for social media-related misconduct in the South African workplace, as discussed in this dissertation it is recommended that:

⁷²⁸ See paragraph 3.2 in Chapter Three and paragraph 4.2 in Chapter Four of this dissertation.

⁷²⁹ Davey R "Dismissals for Social Media Misconduct" 2012 *De Rebus* 1-94.

⁷³⁰ See paragraph 4.2 in Chapter Four of this dissertation.

(a) notwithstanding the possible effects of overregulation and/or double jeopardy, all labour-related legislation should be amended to expressly regulate the use of social media in the South African workplace

It is submitted that all the labour-related legislation should be amended to expressly outlaw the abuse of social media in the South African workplace. Thus, legislation such as the *Labour Relations Act*,⁷³¹ the *Employment Equity Act*,⁷³² the *Basic Conditions of Employment*,⁷³³ the *Protection of Equality and Prevention of Unfair Discrimination Act*,⁷³⁴ and the *Occupational Health and Safety Act* should be amended to enact provisions that expressly indicate conduct that amounts to social media-related misconduct in the South African workplace.⁷³⁵ Currently, these labour-related legislation do not have any provisions on the regulation of social media-related misconduct in the South African workplace.⁷³⁶ In this regard, it is submitted that:

- (i) the LRA should be amended to enact adequate provisions on the definition of social media-related misconduct in the South African workplace.
- (ii) the LRA should be further amended to enact adequate provisions on penalties for social media-related misconduct in the South African workplace. This will enable employers to use the appropriate legislation against their employees who commit social media-related offences. On the other hand, such penalties could also enable employees to get fair penalties in respect of their offences.
- (iii) the LRA should be amended to provide guidelines on how to prevent social media-related misconduct in the South African workplace.

It is further recommended that:

⁷³¹ *Labour Relations Act* 66 of 1995 (LRA).

⁷³² *Employment Equity Act* 55 of 1998 (EEA).

⁷³³ *Basic Conditions of Employment Act* 11 of 2002 (BCEA).

⁷³⁴ *Protection of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (PEPUDA).

⁷³⁵ *Occupational Health and Safety Act* 85 of 1993 (OHSA).

⁷³⁶ See paragraph 3.2 in Chapter Three of this dissertation.

- (i) the EEA should be amended to prohibit any unlawful dismissal of employees by employers for social media-related misconduct. The EEA should also outlaw the dismissal of employees for their *bona fide* information or comments that they post on social media platforms. This Act should also expressly prohibit employers from accessing their employees' social media platforms without their prior consent.⁷³⁷
- (ii) the EEA should also prohibit discriminatory and selective recruitment practices⁷³⁸ of employers that refuse to hire potential employees on the basis of *bona fide* information that is posted on their social media platforms.⁷³⁹

The BCEA should also be amended to enact provisions for the regulation of social media-related misconduct in South Africa. Such provisions should clearly provide conduct that will give rise to social media misconduct in the South African workplace.⁷⁴⁰ This could prevent employers from granting dismissals that are substantively unfair to employees who post their *bona fide* information or comments on social media platforms innocently. The same Act should also provide adequate sanctions against those who engage in social media misconduct.

The PEPUDA should also be amended to expressly prohibit social media-related misconduct in South Africa.⁷⁴¹ This could eliminate discriminatory and unfair dismissals of employees for social media-related misconduct in South Africa.⁷⁴²

Additionally, the OHSA should also include within its provisions what disciplinary action an employer should take against his or her employees for social media-related misconduct.⁷⁴³ The OHSA should stipulate that an employee may only be dismissed if he or she committed a social media-related misconduct which created a hostile

⁷³⁷ Section 5 of the EEA. The prohibited grounds include amongst others; race, gender, sex pregnancy, marital status, family responsibility, or on any other arbitrary ground.

⁷³⁸ Elefant C "The "Power" of Social Media: Legal Issues and Best Practices for Utilities Engaging Social Media" 2011 *Energy Law Journal* 1-56.

⁷³⁹ Elefant 2011 *Energy Law Journal* 12.

⁷⁴⁰ Davey 2012 *De Rebus* 80.

⁷⁴¹ Elefant 2011 *Energy Law Journal* 12.

⁷⁴² Celliers FQ "The Role and Effect of Social Media in the Workplace" 2013 *N Ky L Rev* 567-592.

⁷⁴³ Singh BL *The South African Employer's Regulation of Internet Misuse in the Workplace* (LLM-dissertation University of KwaZulu-Natal 2015) 31.

workplace for other employees.⁷⁴⁴ Section 23⁷⁴⁵ of the OHS Act should be further amended to state that employees who commit social media-related misconduct and violate the safety of other employees in the workplace should be fined or disciplined accordingly. The *Compensation for Occupational Injuries and Diseases Act*⁷⁴⁶ should be amended to enact adequate provisions for compensation in respect of an injury to the personality of an employee and/or to the good name of the employer due to social media-related misconduct. This could curb and deter unscrupulous persons from engaging in social media-related misconduct in the South African workplace.

Apart from amending all the legislation as stated above, the policy makers should also consider developing specific Code of Good Practice for social media-related misconduct in the workplace.

(b) *the LRA and other related legislation should be amended to provide adequate penalties for social media-related misconduct*

The LRA and all related legislation as discussed in this research,⁷⁴⁷ do not have any specific penalties for social media-related misconduct. Consequently, these statutes must be amended to enact adequate provisions for penalties that may be imposed on those unscrupulous persons that engage in social media misconduct. In this regard, it is submitted that the relevant authorities should consider the penalties that were previously imposed on the same offender for the same conduct under other statutes to avoid possible challenges associated with overregulation. This follows the fact that the LRA and other related statutes do not expressly provide whether their current sanctions and/or penalties are also applicable to employees who are found guilty of social media-related misconduct in the workplace during office working hours. This obscurity has resulted in several unfair suspensions and/or dismissals of employees for social media-related misconduct in the South African workplace.

⁷⁴⁴ Singh *The South African Employer's Regulation* 31.

⁷⁴⁵ Section 23 of the OHS Act states that no employer shall in respect of anything which he is in terms of this Act required to provide or to do in the interest of the health or safety of an employee, make any deduction from any employee's remuneration or require or permit any employee to make any payment to him or any other person.

⁷⁴⁶ *Compensation for Occupational Injuries and Diseases Act* 130 of 1993 (COIDA).

⁷⁴⁷ See paragraph 3.2 in Chapter Two of this dissertation.

(c) *the monitoring of social media communications of employees by their employers should be carefully restricted*

Employers usually monitor their employees' use of social media in the workplace without seeking prior permission from such employees.⁷⁴⁸ Only a few employees are made aware that their online communications are subject to oversight⁷⁴⁹ monitoring by their employers. Most employers monitor their employees' use of social media in the workplace⁷⁵⁰ in a bid to protect the companies against reputational damages and abuse of confidential information that belongs to such companies.⁷⁵¹ Although these reasons are justifiable, employers must conduct their monitoring with due regard to their employees' right to privacy.⁷⁵² Employers should not force their employees to grant them access to, or disclose information that gives them access to their employees' personal accounts on social media platforms.⁷⁵³ Employers that force or request access to their employees' social media platform accounts must be fined or disciplined accordingly.⁷⁵⁴

It is submitted that the monitoring of social media communications of employees by their employers should be carefully restricted to avoid intrusions and violation of the employees' right to privacy.⁷⁵⁵ This follows the fact that unlawful intrusions and infringement of the employee's right to privacy affects the employer-employee relationship and gives rise to low productivity.⁷⁵⁶ The restricted monitoring of social media activities in the workplace will assist the employees to have confidence in their employer and increase productivity.⁷⁵⁷ Restricted monitoring of social media

⁷⁴⁸ Elefant 2011 *Energy Law Journal* 17.

⁷⁴⁹ Elefant 2011 *Energy Law Journal* 17.

⁷⁵⁰ Elefant 2011 *Energy Law Journal* 17.

⁷⁵¹ Lam H "Social Media Dilemmas in the Employment Context" 2016 *Employee Relations* 420-437.

⁷⁵² Cicero HB "Are Employers the Modern Day Alice in Wonderland? Closing the Ambiguity in Federal Privacy Law as Employers Cyber-Snoop Beyond the Workplace" 2010 *Rutgers L Rev* 993-1021.

⁷⁵³ Park S "Employee Internet Privacy: A Proposed Act that Balances Legitimate Employer Rights and Employee Privacy" 2014 *American Business Law Journal* 779-841.

⁷⁵⁴ Park 2014 *American Business Law Journal* 802.

⁷⁵⁵ Park 2014 *American Business Law Journal* 802.

⁷⁵⁶ Park 2014 *American Business Law Journal* 802.

⁷⁵⁷ Park 2014 *American Business Law Journal* 802.

communications in the South African workplace could further create a good working environment, which is not hostile to both the employer and employees.

(d) employers should implement clear social media policies in the workplace

A social media policy is a corporate code of conduct that serves to regulate the manner in which employees utilise social media platforms in the workplace.⁷⁵⁸ All employers must have social media policies that guide, prevent and combat employees' misuse of social media in the workplace.⁷⁵⁹ However, such policies should not be too restrictive⁷⁶⁰ to ensure that employees conduct their duties effectively. An adequate social media policy should include the following elements:

(i) purpose of the social media policy

Social media policies should clearly indicate that they aim to regulate the use of social media in the South African workplace in order to combat social media-related misconduct.⁷⁶¹ The rationale for such regulation is that social media-related misconduct can negatively affect the performance of employees in the workplace as well as the reputation of the employer's business.⁷⁶²

(ii) definitions

Social media policies should include definitions of terms such as social media-related misconduct, social media platforms or networks and social media disclosures.⁷⁶³ The definitions will enable the employees to know conduct that amounts to social media misconduct in the South African workplace.

⁷⁵⁸ Swales L 2015 *Social Media Policy for the Workplace* <http://www.regulatorylawsa.com/2015/08/social-media-policy-for-workplace.html> accessed 12 February 2016 1.

⁷⁵⁹ Decker JR "Facebook Phobia! the Misguided Proliferation of Restrictive Social Networking Policies for School Employees" 2014 *Nw.J. L. and Soc.Pol'y* 163-205.

⁷⁶⁰ Decker 2014 *Nw.J. L. and Soc.Pol'y* 199-200.

⁷⁶¹ Potgieter M *Social Media and Employment Law* (Juta Cape Town 2014) 110.

⁷⁶² Potgieter *Social Media and Employment Law* 110.

⁷⁶³ Potgieter *Social Media and Employment Law* 110.

(iii) objectives

Any social media policy must establish adequate guidelines, which enables employees to exercise responsible social media engagement in their official and unofficial capacities.⁷⁶⁴ Such social media policies should equally prohibit both the employer and employees from violating the law through social media platforms.⁷⁶⁵

(iv) confidentiality

Confidentiality remains the most important asset of the employer's business.⁷⁶⁶ Employees must protect their employer's confidential information and failure to do so could result in severe losses or damages to the business and reputation of the employer.⁷⁶⁷ Therefore, social media policies must prohibit employees from disclosing confidential information of their employers on social media platforms.

(v) disclaimers

Social media policies should have a disclaimer, which stipulates that the authority to use the employer's company name is only allowed when promoting the interests of the employer.⁷⁶⁸ Therefore, employees must be prohibited from sharing their opinions about the business of the employer without such authorisation.⁷⁶⁹

(vi) penalties

Any social media policy of the employer should provide penalties for various social media-related misconduct. The social media policy should also state other consequences for social media misconduct such as disciplinary action, dismissal for social media-related misconduct and withdrawal of access to information resources on the part of the perpetrators.

⁷⁶⁴ Papadopoulos S and Snail S *Cyberlaw @ SA III: The Law of the Internet in South Africa* 3rd ed (Van Schaik Publishers Pretoria 2012) 350.

⁷⁶⁵ Potgieter *Social Media and Employment Law* 112.

⁷⁶⁶ Potgieter *Social Media and Employment Law* 116.

⁷⁶⁷ Potgieter *Social Media and Employment Law* 116.

⁷⁶⁸ Potgieter *Social Media and Employment Law* 116.

⁷⁶⁹ Potgieter *Social Media and Employment Law* 116.

(e) *employers must provide employee or staff training on their social media policies*

Employers must clearly inform and train their employees about their social media policy in the workplace.⁷⁷⁰ Employees must be aware of what constitute social media-related misconduct and the consequences for any breach to the social media policy.⁷⁷¹ The restrictions on the use of the computer systems of the employer to access social media platforms should also be outlined for employees in the workplace.⁷⁷² It is also imperative for employers to conduct employee training in order to consult with employees and assess such employees' social media use and understanding of company policies.⁷⁷³ During the training, employees should also be informed about the benefits of a good company reputation.⁷⁷⁴ For instance, a good company can result in profits for the business, which could lead to better salaries and more competitive packages for the employees.⁷⁷⁵ Employers should ensure that employees are made aware of their own personal reputation when interacting on social media platforms.⁷⁷⁶ Moreover, training employees to recognise how social media-related misconduct affects company reputation could enable them to use social media platforms wisely and become successful brand ambassadors for the company.⁷⁷⁷

(f) *there should be a balance on employers' interests and employees' Constitutional rights to privacy, dignity, freedom of expression and freedom of association in the workplace*

The Constitutional rights to privacy, dignity, freedom of expression and freedom of association of the employees can be infringed when employers monitor their employees' social media accounts without their permission. In this regard, any

⁷⁷⁰ Lam 2016 *Employee Relations* 430.

⁷⁷¹ Lam 2016 *Employee Relations* 430.

⁷⁷² Lam 2016 *Employee Relations* 430.

⁷⁷³ Lam 2016 *Employee Relations* 431.

⁷⁷⁴ Hoy JS *Employee Behaviour in Social Media Environments Impacting Corporate Reputational Risk* (Master of Business Administration-dissertation University of Pretoria 2012) 110.

⁷⁷⁵ Hoy *Employee Behaviour in Social Media* 110.

⁷⁷⁶ Hoy *Employee Behaviour in Social Media* 110.

⁷⁷⁷ Hoy *Employee Behaviour in Social Media* 109.

dismissal of employees for social media-related misconduct could be unfair and unconstitutional.⁷⁷⁸ However, these employee rights should be balanced against the interests of employers.⁷⁷⁹ Employers have ownership of computer systems that are used by employees in the workplace,⁷⁸⁰ and as such, they have a right to protect such computer systems by controlling the activities of employees that gives them access to social media platforms.⁷⁸¹ However, such control by employers could affect the employees' right to privacy in the workplace.⁷⁸² The extent to which an employee's private social media communications may be limited in the workplace remains an issue of debate.⁷⁸³ Employers restrict the right to freedom of expression of employees to protect their own interests by prohibiting negative communications by employees on their social media platforms.⁷⁸⁴ This could affect the employee's right to freedom of expression. On the other hand, employees who voice their opinions and comments that are derogatory to other employees and their employers on social media platforms could affect the employers and other relevant persons' rights to dignity, privacy and good name.⁷⁸⁵

The employer restrictions should not unduly curtail the right to freedom of expression of their employees.⁷⁸⁶ The right to freedom of expression should afford employees the ability to responsibly voice their opinions in the workplace.⁷⁸⁷ Thus, if employees abuse the right to freedom of expression on social media in the workplace, they may be fairly dismissed for social media-related misconduct. It is important that employees must be informed that their right to freedom of expression

⁷⁷⁸ Hoy *Employee Behaviour in Social Media* 107.

⁷⁷⁹ Pistorius T "Monitoring, Interception and Big Boss in the Workplace: Is the Devil in the Details?" 2009 *PER* 1-26.

⁷⁸⁰ Pistorius 2009 *PER* 4.

⁷⁸¹ Pistorius 2009 *PER* 4.

⁷⁸² See paragraph 4.2.1 in Chapter Four of this dissertation.

⁷⁸³ Pistorius 2009 *PER* 5.

⁷⁸⁴ McGinley AC and McGinley-Stempel RP "Beyond the Water Cooler: Speech and the Workplace in an Era of Social Media 2012 *Hofstra Labor and Employment Law Journal* 75-199.

⁷⁸⁵ McGinley and McGinley-Stempel 2012 *Hofstra Labor and Employment Law Journal* 78.

⁷⁸⁶ See paragraph 4.2.2 in Chapter Four of this dissertation.

⁷⁸⁷ Hastie L 2012 *Freedom of Expression versus the Right to Dignity* www.polity.org.za/article/freedom-of-expression-versus-the-right-to-dignity-2012-05-31 accessed 12 May 2016 1. Also see paragraph 4.2.2 in Chapter Four of this discussion.

does not entitle them to make derogatory comments about other employees and/or the employer on social media platforms in the workplace.⁷⁸⁸ Employees have the right to dignity, which is enshrined in the Constitution.⁷⁸⁹ However, if employees post defamatory comments on social media, they could be dismissed for social media-related misconduct in the workplace.⁷⁹⁰ Employers are entitled to the right to a good name, which is not considered by some employees when they make comments on social media. On the other hand, employees also have the right to freedom of association, which can be restricted by employers.⁷⁹¹ The restriction of the right to freedom of association should not deter employees from associating with other employees on social media platforms in the workplace.

Given this status quo, it is submitted that the interests of employers should be balanced with the abovementioned Constitutional rights of employees to prevent the conflicts that may arise in the workplace due to social media abuse by employees.

(g) *the prohibition on social media-related misconduct must be carefully and consistently enforced*

Currently, no legislation expressly deals with social media regulation in South Africa. Consequently, social media abuse has caused various misconduct such as defamation to the employer and other employees in the workplace.⁷⁹² This has resulted in the various dismissals of employees for social media-related misconduct in the South African workplace.⁷⁹³ Given this background, it is submitted that all the laws and/or prohibition on social media-related misconduct should be consistently enforced to combat such misconduct in the South African workplace.

⁷⁸⁸ Dube T 2016 *The Risks of Freedom on Social Media in South Africa* <http://www.cnbc africa.com/news/southern-africa/2016> accessed 13 February 2016

⁷⁸⁹ The *Constitution of the Republic of South Africa*, 1996 (Constitution).

⁷⁹⁰ See paragraph 4.2.3 in Chapter Four of this dissertation.

⁷⁹¹ See paragraph 4.2.4 in Chapter Four of this dissertation.

⁷⁹² Davey 2012 *De Rebus* 80.

⁷⁹³ See the introduction in paragraph 1.1 in Chapter One of this discussion.

5.3 Conclusion

Social media has become an integral part of how employees communicate with other persons in the workplace.⁷⁹⁴ However, social media abuse has resulted in both legislative and Constitutional challenges that are associated with the dismissal of employees for social media-related misconduct in the South African workplace.⁷⁹⁵ This research has outlined various social media-related misconduct committed by employees in the workplace. The research has also outlined the consequences that may ensue such misconduct, for example, employee dismissal for social media-related misconduct.⁷⁹⁶ The research also discussed the legislative and the Constitutional challenges associated with the dismissal of employees for social media-related misconduct in the workplace. In this regard, it was noted that social media is unregulated in South African labour laws and this has resulted in the abuse of social media in the workplace by employees.⁷⁹⁷ Moreover, employers are faced with difficulties on how to discipline employees for their abuse of social media in the workplace.⁷⁹⁸ In this regard, it is submitted that social media will continue to be used in the South African workplace and could create further challenges if it remains unregulated.⁷⁹⁹

⁷⁹⁴ Cavico FJ, Mujtaba BG, Muffler SC and Samuel M "Social Media and Employment-At-Will: Tort Law and Practical Considerations for Employees, Managers and Organizations" 2013 *New Media and Mass Communication* 25-41.

⁷⁹⁵ See the introduction in paragraph 1.1 in Chapter One of this dissertation.

⁷⁹⁶ See related discussion in paragraph 2.6 in Chapter Two of this dissertation.

⁷⁹⁷ Cavico et al 2013 *New Media and Mass Communication* 25.

⁷⁹⁸ Cavico et al 2013 *New Media and Mass Communication* 25.

⁷⁹⁹ Cavico et al 2013 *New Media and Mass Communication* 38.

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