



# Joubert Galpin Searle

Astute lawyers with business acumen

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# SOCIAL MEDIA LAW

**Tweet, Facebook, Email, SMS, WhatsApp**  
*Send or Forward and be damned?*

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# Introduction

- Social media use has revolutionised politics, economics and every day aspects of communication
- It is an untapped source of business and marketing for companies
- Does have the potential to do serious harm
- Employees constitute the face of our companies and often its voice as well



# Introduction Cont.

- Employer may be exposed to various risks including vicarious liability for discrimination, harassment and defamation
- SA has no current legislation dealing explicitly with social media
- Look to the common law, Constitution, consumer-, employment-, trade mark and copy right laws



# Defamation

- Human Dignity/ Privacy vs Freedom of Expression
- Requirements to prove defamation:
  - A statement/publication that is defamatory
  - That the publication refers to the plaintiff
  - Publication
- Publication:
  - email, FB post, Tweet, news paper, forwarding of email, tagging of FB post, re-Tweet



# Defamation Cont.

- Defamatory statement:
  - Test: whether a reasonable person of ordinary intelligence might reasonably understand the words in their ordinary and natural meaning, to convey a meaning that is defamatory of the specific person
  - Objective test
  - Court not only to look to what words say, but also what they imply
  - Can also be sketches or cartoons or a posting of a digital photograph





# Defamation Cont.

- About the specific person:
  - Directly or indirectly
  - If indirectly, the person must plead circumstances which would identify him as the addressee



# Defamation Cont.

- General nature of defamatory statements:
  - Allegations of dishonesty or that person has committed a crime
  - That person is guilty of disreputable conduct e.g. racist or sexist bias
  - Placing the person's moral character or lifestyle in a bad light
  - Allegations that a person is financially unstable (business), insane or corrupt



# Defamation Cont.

- Allegations calculated to cause disrespect, ridicule or hatred or makes others less or completely unwilling to associate with the person
- Allegations that the person is incompetent
- Meaningless abuses not *per se* defamatory



# H vs W 2013

- Background:
  - H separated from his wife and they started a divorce action
  - H's wife & children went to stay with W
  - W is a close friend of the family



# H vs W Cont.

- Facebook posting by W:

*"I wonder too what happened to the person who I counted as a best friend for 15 years, and how this behaviour is justified. Remember I see the broken hearted faces of your girls every day. Should we blame the alcohol, the drugs, the church, or are they 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?"*



# H vs W Cont.

- Court:
  - “If one wants to act against the wrongdoing, then act against the wrongdoers themselves”, not Facebook
  - Not good enough defense that the posting may be true, it must also be in the public benefit or public interest that they be published
  - Distinguish between “what is interesting to the public” as opposed to “what is in the interest to the public to be made known”



# H vs W Cont.

- Court Cont.
  - posting was not in public interest even if it may be true
  - based on the background and the words themselves, the posting was done with malice and respondent's views were not justified
- Order:
  - W to remove the posting
  - W to pay the legal costs



# ISPARTA vs RICHTER 2013

- Background:
  - Mrs Isparta and Mr Richter were previously married
  - Divorce was acrimonious and continuing litigation post-divorce
  - Both re-married to other people
  - The 2 children of Mrs Isparta & Mr Richter, 4 & 6yrs, lived with Mrs Isparta along with Mrs Isparta's 16yr old stepson, from her new husband
  - Mrs Isparta sent Mr Richter pictures of the children in the bath, where the 16yr old was also present



# ISPARTA vs RICHTER Cont.

- 1<sup>st</sup> Facebook Posting by the new Mrs Richter, who also tagged Mr Richter, her new husband:

*"Liewe L*

*Gelukkig weet ek jy kry die boodskap aangesien jy my facebook met valk oë dophou (en jy weet die skoen pas!). en aangesien ek niks het om weg te steek nie moet jy dit tog weet, in teendeel eks bly dat jy my doen en late so interessant vind. maar voor jy weer aantuigings maak oor dinge waarvan jy duidelik absoluut niks weet nie stel ek voor jy kry jou feite agter mekaar want die keer het jy op-geeindig met 'n bloedrooi gesig!!"*



# ISPARTA vs RICHTER Cont.

- 2<sup>nd</sup> Facebook Posting by the new Mrs Richter, again tagging Mr Richter:

*"Aan alle mammas en pappas...wat dink julle van mense wat stief tiener boeties toelaat om klein sus-sies (6) te bad elke aand. Net omdat dit die ma se lewe vergerieflik???"*

- Mrs Isparta took the new Mrs Richter & Mr Richter to court based on the Facebook postings



# ISPARTA vs RICHTER Cont.

- Court on identity of Mrs Isparta
  - Not necessary to name Mrs Isparta in postings
  - People who read it would know exactly who the new Mrs Richter spoke about in the postings
  - Where the facts of the case call for it, previous publications can be considered



# ISPARTA vs RICHTER Cont.

- Court on Defamatory nature of 1<sup>st</sup> posting
  - 1<sup>st</sup> statement does not constitute serious defamation, but was intended to place Mrs Isparta in a bad light
  - Regardless of the truth thereof, it was published in malice and deemed to be defamatory
- Court on Defamatory nature of 2<sup>nd</sup> posting
  - Implied that Mrs Isparta allows the 16yr old stepson to bathe the young daughter, creating an image or impression that Mrs Isparta encourages sexual deviation and even pedophilia



# ISPARTA vs RICHTER Cont.

- Court on Mr Richter:
  - He was tagged. He knew about the posting and allowed his name to be coupled with that of the new Mrs Richter
  - He is jointly and severally liable
- An apology on the same forum would have gone a long way
- Court Order:
  - Mr & new Mrs Richter to pay R 40 000-00 jointly and severally plus costs



# Recommendations

- Use privacy settings
- Have an email and social media strategy to include:
  - A clear guideline on acceptable and unacceptable social media use
  - Distinction between personal and professional social media use
  - What constitutes discrimination and harassment
  - Consequences for breach of social media policy



# Recommendations Cont.

- Employment Laws
- Privacy and Data Protection
- Copyright and Trademark Laws
- How to protect your social media platforms to prevent abuse
- Set up to identify people who post comments on your site e.g. request them to register before allowing them to post a comment



# Recommendations Cont.

- Publish guidelines and rules for posts
- Provide for a place to complain about abuse and act on the complaints
- Introduce a filtering system



# Conclusion

- Freedom of expression, like other Constitutional Rights, have limitations
- Social media is no longer a platform of unrestrained self-expression
- Users must be exceedingly careful with what they post and also posts of others that may include them (tagging)
- You will be judged by your FB site and Tweets



# Conclusion Cont.

*“After all, the social media is about building friendships around the world, rather than offending fellow human beings. Affirming bonds of affinity is what “social” is being all about.” Judge Willis*



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