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Social media in the education sector and particularly within the University context

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Objectives of discussion

- What is social media?
- The prevalence of social media in South Africa.
- The power of social media – the good, the bad and the ugly
- Why do not all institutions have a social media policy?
- How should Universities position themselves to deal with the positive and negative aspects of social media?
- University of Johannesburg Social Media Policy.

What is social media?

Social media unpacked

Social media provides a proverbial space/platform for mass gatherings of people, where they can communicate and interact with each other, share content and impart ideas; alternatively, just observe.

There are significant differences between the social media and traditional/conventional media.

Traditional media usually entails:

- Professional journalists and editors who are schooled in the rights and obligations of the press and the persons on whom they report;
- News reporting and editorial pieces are usually well considered, properly placed in context and vetted before publication;
- Journalists are bound by ethical codes and standards of conduct which require *inter alia* responsible journalism and affording the party on whom they are reporting to provide commentary on allegations raised against it;
- Mostly, it does not entail instantaneous world wide publication;



- Reporting, usually once-off, does not envisage an ongoing discussion with readers.

Nowadays, social media is used by millions of people around the world to express thought, views and opinion, be it from their devices at the workplace or their mobile devices after hours and whilst on the move.

The case law, which we will discuss, indicates that the speed with which the social media revolution has taken place has left employers, Universities, employees, students as well as our courts and law makers unprepared and, of necessity, adopting a reactive as apposed to a proactive approach.



What is social media?

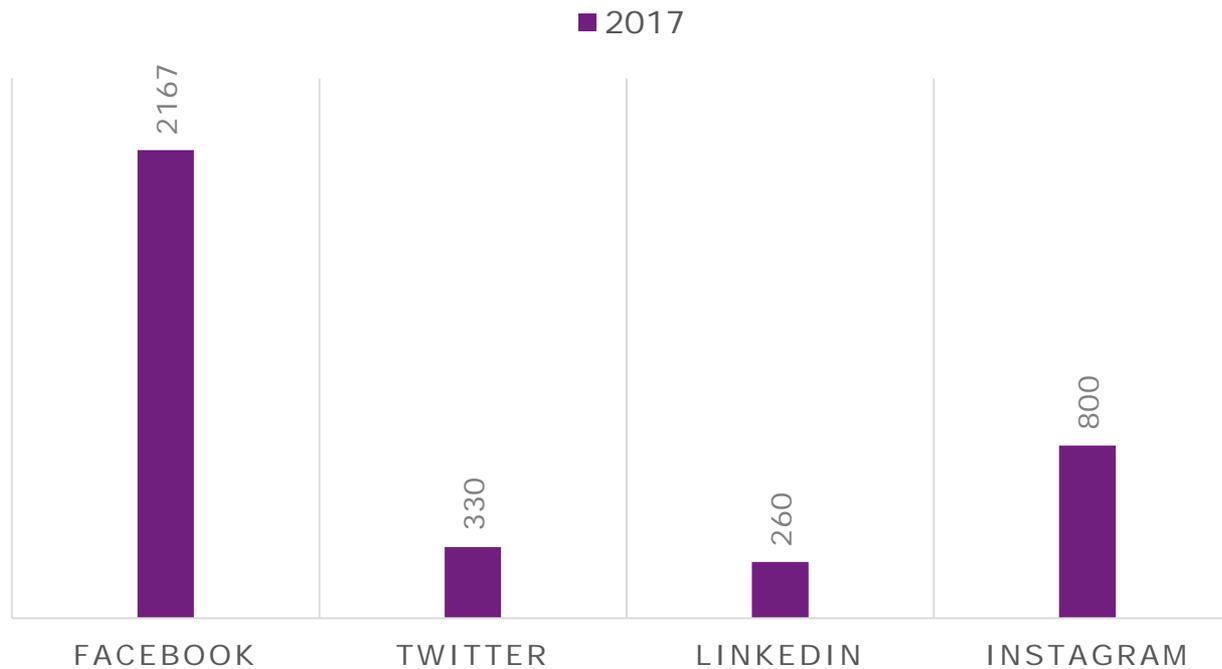
Social media unpacked

- Social media platforms are also referred to as Social Networking Services (“SNS”), which require an internet connection to be used.
- Typically have the following characteristics:
 - the starting point to using a SNS is for a user to create a **personal profile**. The user can choose what personal information to disclose, but since the purpose of social media is often to make contact, or renew contact and to create a social network, a user needs to give enough information to enable other users to find him or her and to decide whether she or he would like to join that user’s network;
 - Facebook and LinkedIn specifically encourage users to indicate where they studied or are studying, the name of their employer and the like. These features enable the readers of the user’s post to identify the user with the University either as a student or as an employee;
 - users can have private connections with individuals, and can view their activity as well as communicate with them;
 - users can view the activity of those who make their activities public, and can also engage the public themselves.
- Examples:
 - Facebook, Twitter, LinkedIn, Instagram, WhatsApp, Facebook Messenger, Pinterest, SnapChat, WeChat, Viber, Myspace, Weibo, Tumblr etc...

Statistical overview

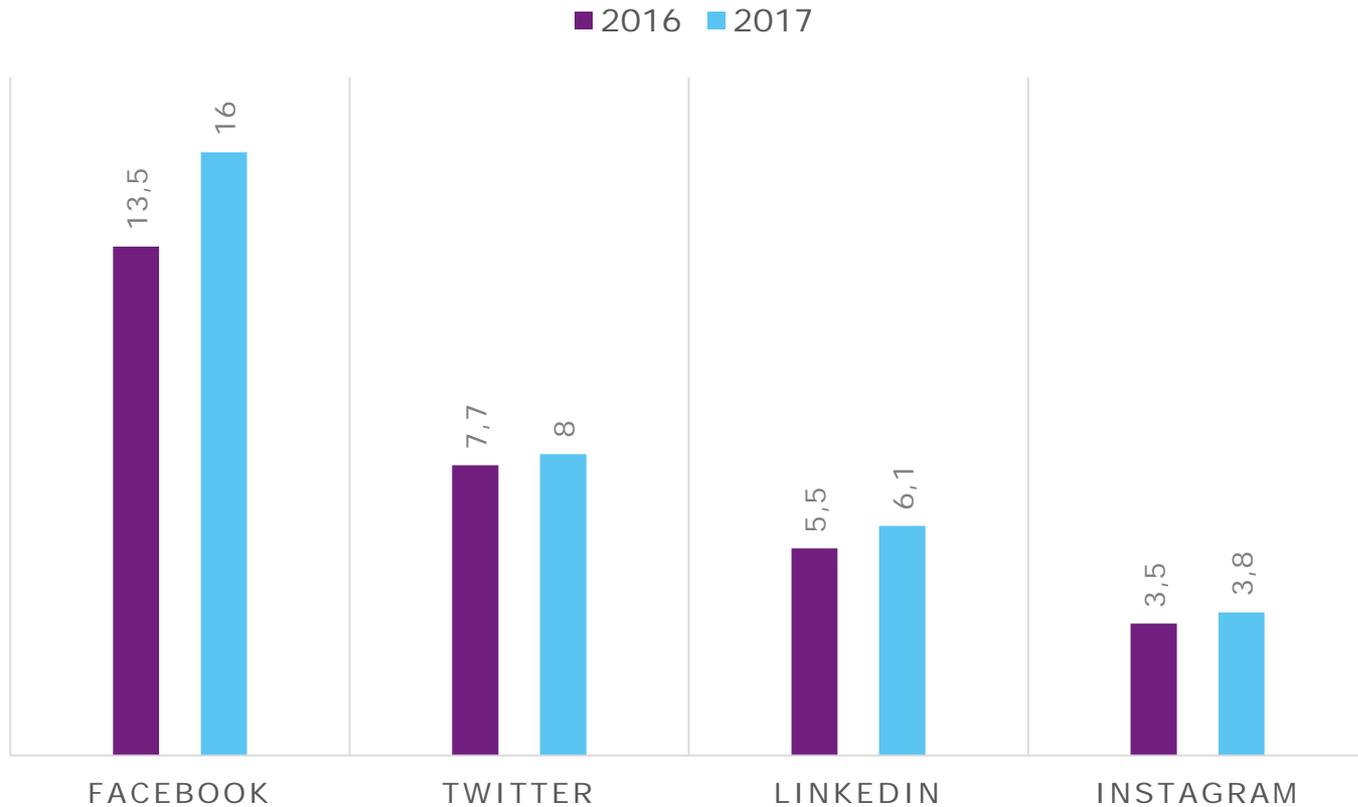
Social Media is on the rise

GLOBAL RANKINGS 2017 (IN MILLIONS)



Statistics available at: <https://www.smartinsights.com/social-media-marketing/social-media-strategy/new-global-social-media-research/>

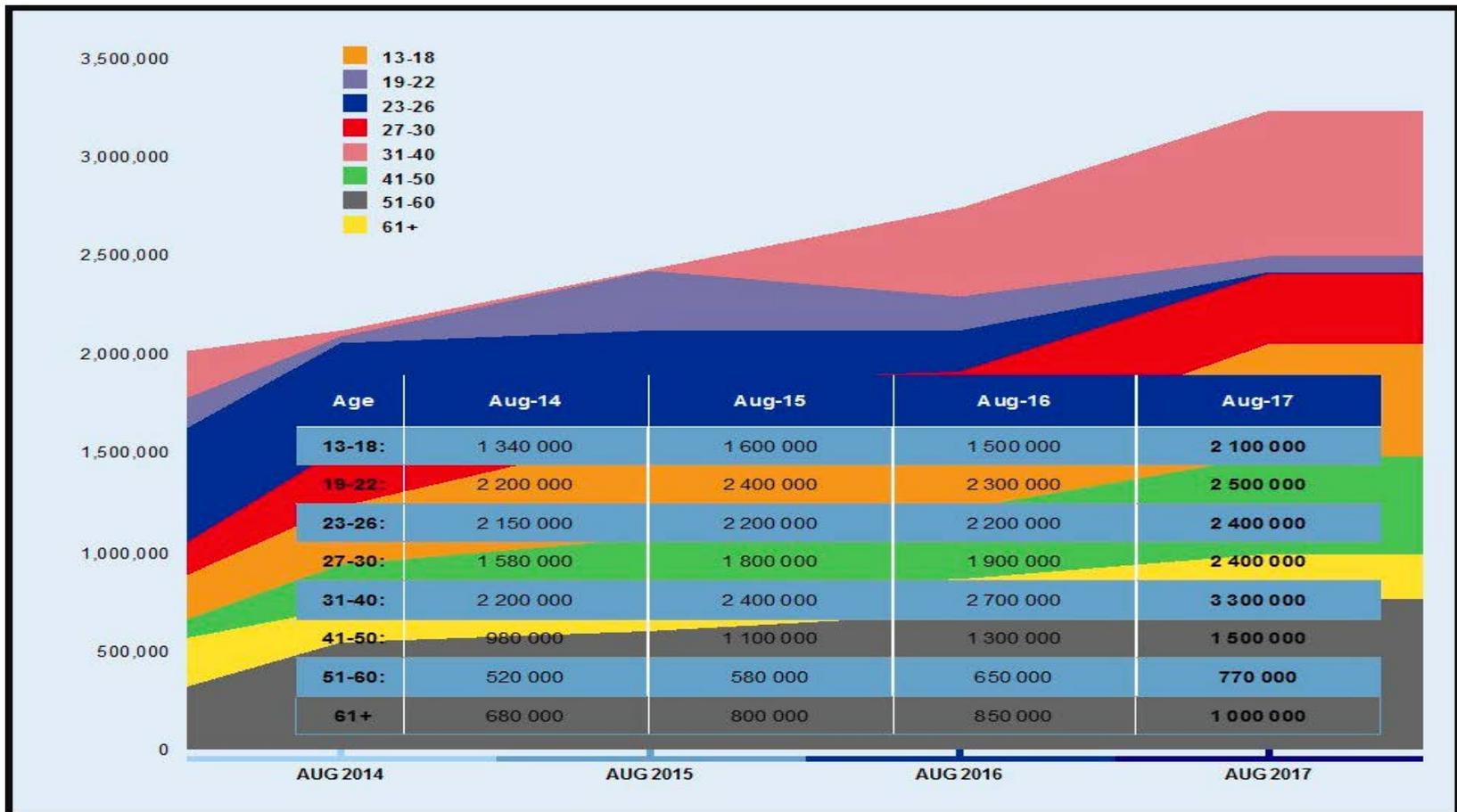
SOCIAL MEDIA USE IN SOUTH AFRICA (IN MILLIONS)



Statistics available at: <https://businesstech.co.za/news/internet/199318/how-many-people-use-facebook-twitter-and-instagram-in-south-africa/>

Statistical overview

Demographic of Facebook users in South Africa



Statistics available at: <https://businesstech.co.za/news/internet/199318/how-many-people-use-facebook-twitter-and-instagram-in-south-africa/>

Benefits and risks of social media

"As an instrument for spreading love, friendship, fun and laughter around the world, Facebook is incontestably a force for good... However, Facebook is fraught with dangers especially in the field of privacy"

Judge Willis, H v W (2013), South Gauteng High Court, Johannesburg

– Benefits

- Social media platforms are increasingly incorporated into business strategy;
- Many businesses and Universities have created their own Facebook business pages, twitter handles and the like;
- In economic terms, the Like button is a central element in the emerging reputation-based cluster of business models that power web-based companies. The more Likes a business gets on its posts and updates the greater value to its popularity and ultimately its reputation;
- In addition, business strategies may be tested for market approval by considering the number of Likes a product or strategy receives;

(Gerlitz and Helmond (2013) cited in the "*Social Significance of the Facebook Like Button*" V Eranti and M Lonkila [First Monday](#)).

- Social media is used by businesses to cultivate collaboration in the workplace;
- Technology now used by businesses to engage with customers and other stakeholders in order to improve customer experience and relations and to enhance brand image;

- Benefits continued...
- Social media uncovers intellectual capital amongst employees;
- Social media enhances employee motivation and satisfaction;
- Social media aid product development and knowledge management;
- Social media facilitates recruitment.

Employers increasingly encourage employees to use social media to reap the full business benefits for the employer.

See Mushwana and Bezuidenhout, Department of Auditing, University of Pretoria "*Social Media Policy in South Africa*"



Risks

- Social media is considered to be a business risk. Survey of US executives conducted by Deloitte and Forbes Insights found that social media is recognised as posing the fourth largest risk they will face in business.

- Negative material published to millions of people around the world can and does cause harm to the employer's economic interest.

- Negative material undermines the brand image and reputation of employers.

- Negative material undermines the image, reputation and career prospects of students and employees themselves.
 - Recent data from CareerBuilder indicates that most employers (60%) look to an applicant's social media for purposes of selection.

 - 49% of employers found postings about candidates that turned them off, whether it was inappropriate photos, evidence of drinking and/or drug use, or disparaging comments about previous employers (O'Connor *et al*).

The Harvard University incident in 2017



- The recent case of Harvard University rescinding admissions due to social media posts points to the fact that Universities likewise are scrutinising applicants' social media posts.
- Social media has created opportunities for abuse, including bullying.



Risks continued...

- Social media creates opportunities for employees to use it as an incorrect platform for resolving disputes;
- Copyright infringement;
- Breaches of privacy and confidentiality;
- Publication of defamatory statements;
- Vicarious liability;
- Social media may be used to participate in activities which constitute criminal acts;
- Social media may be used to harass, incite hatred and publish offensive material.

ANC v Penny Sparrow (01/16) [2016] ZAEQC 1



Penny Sparrow

These monkeys that are allowed to be released on New years Eve And new years day on to public beaches towns etc obviously have no education what so ever so to allow them loose is inviting huge dirt and troubles and discomfort to others. I'm sorry to say I was amongst the revellers and all I saw were black on black skins what a shame. I do know some wonderful thoughtful black people. This lot of monkeys just don't want to even try. But think they can voice opinions about statute and get their way dear oh dear . from now I. Shall address the blacks of south Africa as monkeys as I see the cute little wild monkeys do the same pick drop and litter. 😊

Sat at 1:30 PM • Like • 15



The Hargreaves Lansdown incident



***Tatro v The University of Minnesota 800 N.W. 2d
811 (2011)***

During November and early December 2009, Tatro posted the following on her Facebook page:

Amanda Beth Tatro Gets to play, I mean dissect, Bernie[2] today. Lets see if I can have a lab void of reprimanding and having my scalpel taken away. Perhaps if I just hide it in my sleeve....Amanda Beth Tatro Is looking forward to Monday's embalming therapy as well as a rumored opportunity to aspirate. Give me room, lots of aggression to be taken out with a trocar.[3]Amanda Beth Tatro Who knew embalming lab was so cathartic! I still want to stab a certain someone in the throat with a trocar though.[4] Hmm ... perhaps I will spend the evening updating my Death List # 5 and making friends with the crematory guy. I do know the code....Amanda Beth Tatro Realized with great sadness that my best friend, Bernie, will no longer be with me as of Friday next week. I wish to accompany him to the retort. Now where will I go or who will I hang with when I need to gather my sanity? Bye, bye Bernie. Lock of hair in my pocket.



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Andre Gray, English Premier League player suspended by Football Association following being charged with misconduct



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TWEETS 7,738 FOLLOWING 1,056 FOLLOWERS 305 FAVORITES 1,984

← ↻ 10 ★ 9 ...

  @Oreanda · May 18
No one has been stupid enough to accuse me of sexism but you have white supremacists brazen enough to accuse me of racism
[#StupidEvilFucks](#)

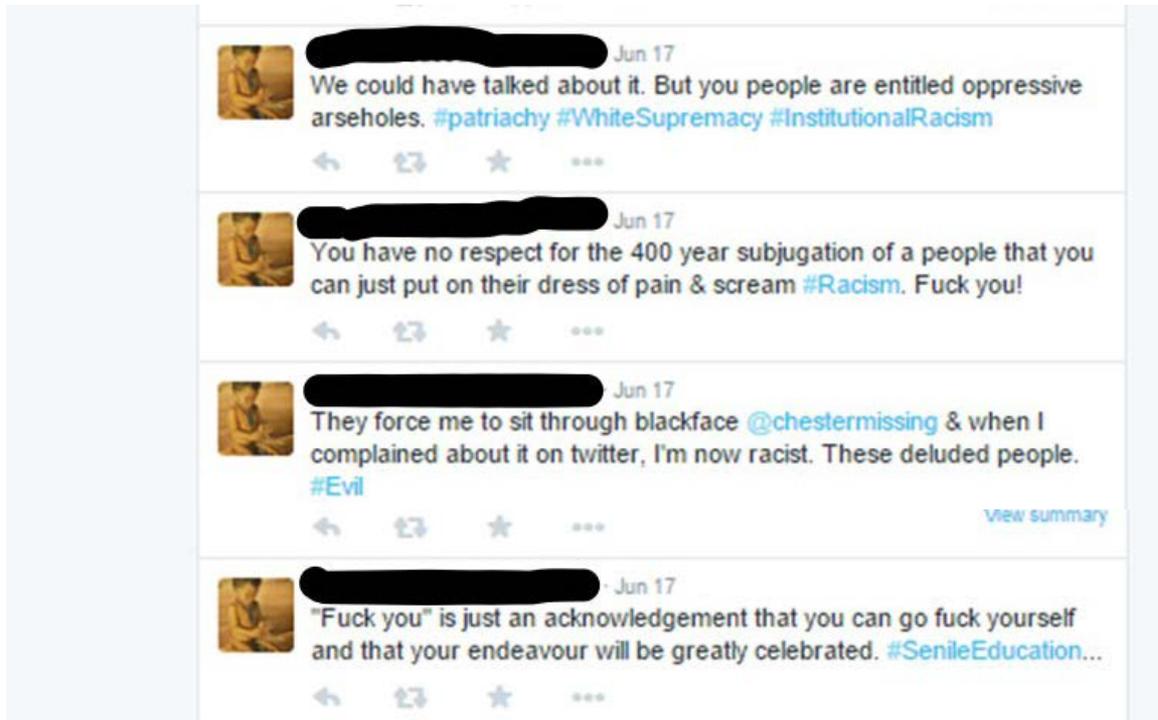
← ↻ ★ ...

  @Oreanda · May 18
Here's the secret to communicating with irrational, angry or crazy people ti.me/13BEfwm via [@TIMEIdeas](#)

← ↻ ★ ... [View summary](#)



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Jun 25

The Human family are a bunch of malicious, bigoted, racist and entitled trash.



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"The blood is on the hands of the #NRA. Next time, let it be YOUR sons and daughters. Shame on you. May God damn you"

University of Kansas Journalism Professor, David Guth tweeted in response to the Navy yard shooting in Washington DC that killed 13 people in September 2013.

"Dear Obese PHD applicants; If you didn't have the willpower to stop eating carbs, you won't have the willpower to do a dissertation #truth"

Professor Geoffrey Miller of University of New Mexico, visiting Professor to University of New York.



The use of emoticons: a new beast

- In various foreign jurisdictions courts have frequently been called upon to make a determination upon what individuals intended when sending a message including or consisting solely of so-called “emoticons” or “emojis”.
- For example, in Israel, a landlord received the following message from prospective tenants, being a couple, in respect of an apartment he was listing.



- The landlord believed that the couple had agreed to the rent for the apartment and that they were going to take it. The landlord subsequently removed the listing.
- When the couple stopped responding to the landlord, he instituted legal proceedings against them and submitted the emoticons into evidence which the court was required to consider. He successfully sued them for damages with the judge finding that the couple had negotiated in bad faith.
- It is manifest that emoticons can provide context to a situation, and this fact is something that needs to be taken into account by employers when drafting a social media policy and also for employers and employees when posting on social media platforms.

The consequences of irresponsible posting

Students

- Students have been suspended and disciplined, sometimes even to the point of expulsion;
- Prospective students have had their admissions rescinded;
- Students compromise their career prospects and may obliterate through a single posting a lifetime achievement;
- Their social standing and reputation and integrity, as well as that of their families in some instances, are severely tarnished;
- Students expose themselves to civil and criminal sanction;
- Students expose themselves to retaliatory acts of violence.

The consequences of irresponsible posting

Employees

- Employees face suspension together with the embarrassment, psychological and reputational consequences that arise from a suspension;
- As we shall see more fully when we delve into the case law, employees are more often than not dismissed;
- The employees own academic standing, reputation, integrity and credibility are compromised;
- An employee's employability in another position is severely curtailed;
- The employee exposes himself to civil and/or criminal liability;
- The employees exposes himself and possibly his family to risks of retaliation.

The consequences of irresponsible posting

The University

- The University is often placed in an untenable position after an irresponsible or radical posting is made;
- The University may suffer immeasurable reputational harm which in some instances have even led to calls for cessation of sponsorships or receipt of State Aid;
- Universities are likely to incur significant costs in enhancing security, closing off roads and otherwise dealing with riotous students galvanised by social media, not to mention costs in restoring damaged property (USNews.com reported that the University of California, Berkley, spent an estimated USD 1.2 million in 2017 in "*placing the campus on virtual lock down*" and "*securing the campus*" during talks presented by political commentators).
- Universities incur significant costs in disciplining and ultimately fending off litigation relating to the dismissal or expulsion of employees and students;
- The University incurs costs in replacing dismissed employees;

- The University inevitably expends resources in dealing with or attempting to mitigate the adverse consequence of irresponsible postings;
- The University is exposed to action and legal liability on the principle of vicarious liability.

Interesting case in point is Isparta / Richter and Oosthuizen, a decision of the Pretoria High Court delivered in September 2013

Facts:

Isparta (Plaintiff) and Oosthuizen (second Defendant) were divorced, and had two children born of the marriage. The second defendant remarried Richter, the first Defendant.

The first Defendant posted on her Facebook wall several comments that were found to be defamatory of the Plaintiff. In each case, she tagged the second Defendant on those comments.

The court found that although the second Defendant was not the author of the postings he knew about them and allowed his name to be coupled with that of the first Defendant. As such, he was found to be "*as liable as the first Defendant*".

Note: Universities must be aware that if they are tagged in comments they must take swift steps to actively and visibly disassociate itself from those comments.

Other important points to be gleaned from this case:

1. In one of the comments posted by the Plaintiff which was deemed to be the most serious, the Plaintiff was not referred to specifically by name. However, it was found that the statements in the post and its context were sufficient to cause a reasonable reader to infer that the first Defendant was speaking about the Plaintiff.
2. In assessing the damages to be paid to the Plaintiff, the court pointed out that an apology in the same medium (Facebook) would have gone a long way towards mitigating the Plaintiff's damages.

Why then do people publish such posts?

- Some are clearly malicious and intended to be hurtful.
- Many regret their posts and are deeply apologetic after the fact.

(Miller quickly apologised on Twitter and made his Twitter account private and then claimed his tweet was part of research; Guth acknowledged that he ought to be suspended).

- Many have indicated that no harm was intended, they merely wanted to be funny.
- Case law has shown that most people do not appreciate how widely their comments may be circulated, even beyond their initial audience.
- People often act hastily without thinking things through – people respond in real time and often in short, punchy ways. Twitter permits only 140 characters per tweet.
- Studies have shown that University students are woefully under-informed on their social media obligations and the consequences that may follow from their postings.

- A study entitled "*Suspended Because of Social Media? Students' Knowledge and Opinions on University Social Media Policies and Practices*" O'Connor, Schmidt and Drouin, published by Elsevier Limited in 2016, was conducted on 298 undergraduates at a mid-size mid-western public University in the USA. The findings are illuminating.
 - Although the University had a 6 page social media policy in place, 70% of students were unaware whether or not the University had a social media policy.
 - 58% of students were unaware whether they could be disciplined or expelled for their personal social media behaviour.
 - 43% believe that they had a right to privacy for their personal social media posts.
 - 37% believed that students had constitutional protection for their private social media posts.
- These results point to the fact that Universities need to do a better job of educating students and employees about social media, its impact and potential consequences.

The necessity of a social media policy within the higher education sector

- If you cannot un-ring the bell of irresponsible social media postings, it is obviously desirable to take all reasonable steps to prevent their posting in the first place.
- It is widely accepted that a social media policy is the first step a responsible University should take in addressing these potential consequences.
- The need for a social media policy extends beyond Universities to all employers. R Naidoo in *“Corporate Governance – an Essential Guide for all South African Companies”* 3rd Edition points out that:

*“Companies have to manage communication across multiple spheres with and between staff, with shareholders, with the board and with the public at large. A major power shift has occurred in and around companies. Whereas historically companies controlled their own agendas and could communicate when and as much (or as little) as they wished, today information is being democratised through social media so much that consumers, employees, shareholders and activists now effectively share control of company information. The power and proliferation of social media makes **a formal social media policy critical for all companies.**”*

- Social media policies set the standard for what the University considers to be acceptable use of social media by its stakeholders.
- The primary aim of a policy is to **guide and inform employees and students** of their common law obligations which they in any event owe towards their Universities, colleagues and third parties.

- In doing so, social media policies:
 - Protect the University's reputation;
 - Provide clarity on legal issues;
 - Raise awareness of the University's brand;
 - Maintain a global standard.



Not all Universities have a Social Media Policy. Why?

- Study conducted on all companies registered with the South African Chapter of the Institute of Internal Auditors revealed

72% of companies reported that "social media is perceived to pose a risk to the organisation"

However:

35% of companies had a Social Media Policy

48% did not have a Social Media Policy

17% were "unsure" whether the company had a Social Media Policy or not

- Mushwana and Bezuidenhout surmise that;
 - Social media is classified as a lower risk priority within the organisations surveyed.
 - Ownership and enforcement mechanisms of a social media policy are not clearly understood.
- In May 2015 Pomerantz, Hank and Sugimoto published an informative research article entitled "*The state of social media policies in higher education*". This article recounts a very comprehensive study of social media policies within all accredited, degree-granting colleges and Universities in the United States as registered on the Carnegie Foundation database. This database consists of 4635 institutions. Their analysis (admittedly 5 years ago) revealed that at that time less than 25% of institutions had an accessible social media policy, with doctorate-granting Universities having the greater percentage of social media policies.

Their findings reported as follows:

- Doctorate granting Universities 50.3%;
 - Masters colleges and Universities 32.1%;
 - Baccalaureate colleges 16.4%;
 - Associates colleges 8.7%;
 - Special focus institutions 8.6%.
- As a direct result of the publicity generated by Professor Geoffrey Miller's tweet, at the time of writing both the New York University and the University of New Mexico had finalised social media policies in place.
 - To date, not all University's in South Africa have social media policies in place.



- Constitutional right to freedom of expression.
- Perception of a chilling effect that a social media policy may have upon this constitutional right.

Defences raised by employees and students for their inappropriate posts on social media

- The constitutional right to privacy;
- The constitutional right to freedom of expression;
- Whistle-blowing;
- *"I used my personal profile, my personal device and on my own time"*;
- *"I did not mean what I typed"*.



The relevant and complete legal framework

"We have ancient, common law rights both to privacy and to freedom of expression. These rights have been enshrined in our Constitution. The social media have created tension for these rights in ways that could not have been foreseen by the Roman Emperor Justinian's legal team, the learned Dutch legal writers of the 17th century or the founders of our Constitution.

It is the duty of the courts harmoniously to develop the common law in accordance with the principles enshrined into our Constitution. The phase of the march of technological progress has quickened to the extent that the social changes that result therefrom require high levels of skill not only from the courts, which must respond appropriately, but also from the lawyers who prepare cases such as this for adjudication" **H v W [2013] 2 All SA 218 (GSJ)**

Misconduct outside the workplace

- Our common law has long recognised circumstances in which an employer may concern itself with an employee's conduct **outside of the workplace** or **after working hours**:
 - *NEHAWU obo Barnes v Department of Foreign Affairs* [2001] 6 BALR 539 (P);
 - *Malan v Bulbring N.O & Others* [2004] 25 ILJ 1737 (LC).

The **test** is whether the conduct adversely affects the employment **relationship**, not whether the conduct in issue was covered by the employment contract.

Constitutional rights

Section 10: Human Dignity

“Everyone has inherent dignity and the right to have their dignity respected and protected.”

Section 14: Privacy

“Everyone has the right to privacy, which includes the right not to have:

- Their person or home searched;
- Their property searched;
- Their possessions seized; or
- The privacy of their communications infringed.”

Section 16: Freedom of Expression

Section 16(1)-

Everyone has the right to freedom of expression which includes

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

Section 16(2)-

The right in subsection(1) does not extend to:

- a) Propaganda for war;
- b) Incitement of imminent violence; or
- c) Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Section 36: Limitation clause

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.

- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“PEPUDA”)

Section 10: Prohibition on hate speech

- (1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-
 - (a) be hurtful;
 - (b) be harmful or to incite harm;
 - (c) promote or propagate hatred.

- (2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.

PEPUDA continued...

Section 12: prohibition of dissemination and publication of information that unfairly discriminates

“No person may –

- (a) disseminate or broadcast any information;
- (b) publish or display any advertisement or notice,

That could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section”.

Dagane v SSSBC, & Others [2018] ZALCJHB 114 (16 March 2018)

Facts:

- South African Police Services (“SAPS”) member uploaded racist comments on the Facebook page of Julius Malema which included:

“Fuck this white racist shit? We must introduce Black apartheid. Whites have no ROOM in our heart and mind. Viva MALEMA.”

“When the Black Messiah (NM) dies, we’ll teach whites some lesson. We’ll commit a genocide on them. I hate whites.”

He was lawfully dismissed

SAPS did **not** have a social media policy. This did not prevent the employee’s dismissal.

- The court found the employee’s racist comments deplorable and not protected by freedom of speech.

Hotz v University of Cape Town [2017] (2) SA 485 (SCA)

"In guaranteeing freedom of speech, the Constitution also placed limits upon its exercise. Where it goes beyond a passionate expression of feelings and views and becomes the advocacy of hatred based on race or ethnicity and constituting incitement to cause harm, it oversteps those limits and loses its constitutional protection"

Prevention and Combatting of Hate Crimes and Hate Speech Bill, published 29 March 2018



- Criminalises hate speech;
 - Publishing, propagating or advocating hate speech;
 - Distributing or making available in an electronic form of hate speech;
 - Displaying any hate speech.

- Acknowledges the severity of emotional and psychological impact of hate crimes;

- Acknowledges hate speech extends beyond the victim to the group to which the victim belongs;

- Covers electronic communication, electronic representations and communication by means of data messages;

- The definition of “victim” is read to include a juristic person where appropriate;

- Criminal sanctions of three years and fine on first offence, or five years and fine thereafter;

- This law will have far-reaching consequences for society as a whole, including Universities;
- Universities are encouraged to educate their employees and students on the purpose and impact of the Bill and possible criminal implications that arise from hate speech.

What about irresponsible posting that does not constitute hate speech?

- Balancing of competing rights including:
 - Right to dignity and privacy;
 - Employees' common law obligation to promote and protect the interests of his employer;
 - Employees' common law obligation to retain a relationship of trust and confidence with his employer;
 - Employees' common law obligation to act with the utmost good faith towards his employer;
 - Duty to act with care and skill towards his employer;
 - Employees' common law obligation not to cause disharmony in the workplace.

ANC v Penny Sparrow (01/16) [2016] ZAEQC 1

"While recognising the freedom of expression is fundamental to a Constitutional Democracy, the Constitutional Court held that it was not a pre-eminent right ranking above all others, nor is it an unqualified right which automatically trumps the right to human dignity and it does not enjoy superior status in our law".

"The right to dignity is a core fundamental human right".

Khumalo & Others v Holomisa [2002] (5) SA 401 (CC)

"The right to privacy... recognises that human beings have the right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity. No sharp lines can be drawn between reputation, dignitas and privacy in giving effect to the value of human dignity in our Constitution".

H v W Case nr: 12/10142 South Gauteng High Court, Johannesburg

FACTS:

The respondent published a posting on Facebook entitled "*Letter to WH for public consumption*" which was highly defamatory and suggested that the applicant was a drug addict who did not care for his children. The respondent refused to remove the posting despite calls to do so. The court granted an interdict compelling the respondent to remove the posting.

"The Constitutional Court has also entrenched in our law the close link between human dignity and privacy".

The Court also spoke about the "*chilling effect*" of court orders on freedom of expression and reminded us that social media is not primarily news media.

In granting the interdict, the Court found that the applicant's right to privacy and dignity trumped the respondent's right to freedom of expression.

The Court also developed the common law with regard to a "*suitable alternative remedy*".

Rhodes University v SRC of Rhodes University & Others [2017] 1 ALL SA 617 (ECG)

- The court provided guidance on the so-called “*chilling effect argument of limiting a right*”, albeit in the context of the right to protest and freedom of assembly.
- Court rejected respondent’s argument holding that whilst certain laws may have a chilling effect on a fundamental right, those consequences are necessary and justifiable and may be outweighed by the rights of others.
- Speaking specifically on freedom of speech the court held:

*“The right of freedom of speech does **not** extend to the advocacy of hatred that is based on race or ethnicity and that constitutes incitement to cause harm... All rights are to be exercised in a manner that respects and protects the foundational value of human dignity of other people and the rights that other people enjoy under the constitution”*

Dyonashe v Siyaya Skills Institute (Pty) Ltd [2018] 3 BALR 280 (CCMA)

- Employee stated that he had watched a video where men were beating a woman at KFC during women's month.
- He then posted on his Facebook account “kill the boer, we need to kill these [racists that are beating a woman in women’s month]”.
- The posting occurred outside of the workplace and outside of working hours.
- Employee opened Facebook account when he did work at a client of his employer. Accordingly, his Facebook account reflected that he works for that client.
- Client informed employer of the discriminatory post.
- Employee argued that he did not mean to be racist by using term “boer” but referring to system of oppression that should be killed.
- Statements found to be derogatory.
- Fact that misconduct occurred off duty is neither here nor there. Derogatory comments have no place in society. It still affects the employment relationship.
- Dismissal was found to be fair.

PRIVACY

Fredericks / Joe Barkett Fashions [2011] JOL 27923 (CCMA) and
Sedick & Another / Krisray (Pty) Ltd [2011] 8 BALR 879 (CCMA)

FACTS:

- Employees published derogatory statements on their Facebook page of and concerning their managers.
- Employees alleged that their constitutional right to privacy was infringed in uplifting and relying upon posts from their wall.
- The CCMA rejected these arguments – the Facebook posts were in the public domain and anybody would have access to it; therefore, no infringement of privacy took place.
- The CCMA cautioned that social media is the wrong platform to address employment related concerns.

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

- Applicant (the employee) was dismissed for posting several derogatory remarks about his employer on his Facebook page after the employer, as part of a restructuring process, took a decision to train machine operators to work different machines.
- Applicant stated that the employer had no right to look at what he had posted on Facebook because it was private communication that cannot be intercepted.
- The commissioner referred to three arbitration awards, namely, *Sedick v Krisray (2011)*, *Fredericks v Jo Barkett Fashions (2012)* and *Media Workers Association of SA obo Mvenve & K Community Radio (2010)* at paragraph 16:
- *“These awards suggest that dismissal for critical comments placed on Facebook will be found fair (a) where an employee fails to restrict access to the site; (b) where the posting brings the employer into disrepute and (c) where the posting leads to the working relationship becoming intolerable”.*

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

- No invasion of privacy if employee does not use privacy options on Facebook. Implication exists that if employee does make posts private, then employer should not intrude.
- However, if the postings are defamatory and employer comes into possession of the postings by legitimate means, the right to sue for defamation and to initiate disciplinary proceedings could still be faced by the employee.
- In this case, the applicant failed to use privacy settings. Furthermore, the employer made a fake account and sent a friendship request to the applicant, which request the applicant accepted. In the circumstances, the commissioner found that the applicant cannot claim that his Facebook page was private.
- *"Those comments were in the public domain and everyone had access to these postings".*

Harvey v Niland & Others (Case 5021/2015) (ECG)

Facts:

- The employee in this case had left the employ of a CC. A former colleague of the employee concerned procured the password for his Facebook account. Posts from the employees Facebook account were submitted as part of an application to interdict the former employee from acting in a manner which caused the CC financial and reputational harm.
- The employee argued that his Facebook posts were inadmissible evidence because it was unlawfully obtained and constituted a violation of his right to privacy.
- The court rejected the defence pointing out that it has a discretion to allow into evidence information which cannot be obtained in any other manner, in order to protect the interests and rights of others.

WHISTLE-BLOWING

- Our courts have affirmed that social media is not the platform to raise protected disclosures.

Beaurain v Martin N.O. 2014 ILJ 2443 (LC)

Facts:

Hospital employee published an allegation on Facebook concerning health hazards in the hospital. He refused to remove the posts despite instructions to do so.

He raised a defence about protected disclosures which failed. His publications were not reasonable nor had he followed the correct procedure prescribed by the Protected Disclosure Act 26 of 2000.

Cantamessa v Edcon Group [2017] 4 BALR 359 (CCMA)

- Employee had vented on Facebook when she published a posting referring to the then president, Jacob Zuma, and the South African government as “stupid monkeys” in response to a decision taken to replace the Finance Minister.
- This post occurred just before the Penny Sparrow ordeal, and eventually found its way into the *Sowetan* newspaper under the headline “Racist monkey slur strikes again”.
- This Facebook post was brought to the attention of the employer by its client.
- The employer had a social media policy in place; however, it did not regulate employees using their own devices outside the workplace and in their private time. It only regulated employees who use the employer’s facilities to access the internet.
- The commissioner did not consider that any reasonable internet user would associate the employee’s post with the employer. Furthermore, because the employer’s social media policy did not cover an employee’s usage of private equipment for social media postings, the commissioner found that the employee’s dismissal was unfair and awarded 12 months’ remuneration as compensation.
- Amongst the things illustrated by this case, is that an employer should have a properly drafted social media policy in place

What should be contained in a University Social Media Policy?

Case study: University of Johannesburg

Application of the policy must be wide, and include students and employees

Stakeholders	All University employees, officials, persons who hold special UJ appointments, students (including students in residences or belonging to societies), alumni and associates who use social media for and on behalf of the University
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Students must be alert to the fact that the contents they post on SMPs may not contravene the regulations to which they subscribe when they register as students of the University, including the UJ Student Regulations.

Stakeholders must be educated on the potential wide circulation of their social media postings

Content uploaded to social media platforms are public, can be accessed globally, can be downloaded and further distributed, and is usually permanent, even if deleted.

Stakeholders must be reminded that their conduct across the board (not limited to social media usage) is assessed against the University's values and other rules

The University recognises that the conduct of Stakeholders when using such forms of communication is measured against existing norms and standards which, having regard to the unique features of social media platforms, include:

- the South African **Constitution**, especially the Bill of Rights contained in Chapter 2, and other relevant law;
- **the University's vision, mission, values and strategic objectives;**
- the University's prescriptions for brand use on any platform, that fall under the control and supervision of the Social Media Management Section of the University;
- **codes of conduct** and all other applicable rules, regulations, policies, practices and procedures of the University that govern the relations between the University and its employees, students and other Stakeholders, for example the University's Conditions of Service, the UJ Student Regulations and the Code of Conduct for Members of Council;
- **various policies** of the University that deal with the principles, procedures, and **practices of conflict resolution, for example the policy on whistle-blowing;**
- **the freedom of academic speech**, i.e. forms of speech that are defended by **lawful reasons and based in facts.**

Stakeholders must be cautioned that the right to freedom of speech is not absolute

...to seek to **uphold the right to freedom of expression** to the greatest extent possible, and **to strike the appropriate balance**, where necessary, between the enjoyment of the freedom with, amongst others, the rights and freedoms of others, bearing in mind that academic freedom receives special mention in the Constitution, which means that it lies at the core of the right to freedom of expression, and **should be limited only when reasonable and justifiable in terms of the Constitution**

Employees should be reminded of their common law obligations which play a role in assessing any limitation on freedom of speech

All employees are bound by the UJ Conditions of Service and the rules, regulations, policies, practices and Standard Operating Procedures that govern their conduct, including in respect of SMPs. All employment contracts also include express and tacit terms, and terms implied by law. Without limiting the generality of the aforesaid these require that:

- all employees must act **in, promote, and protect the interests of the University**;
- all employees must **retain a relationship of trust and confidence with the University** (i.e. employees stand in a fiduciary relationship to the University);
- all employees owe the University a **duty of utmost good faith**;
- all employees must act with **care and skill**;
- **employees' conduct may not cause disharmony in the workplace** (i.e. the University is entitled to insist on reasonably harmonious interpersonal relationships in the workplace). Within the University's context it is recognised that robust academic debate and intellectual engagement by themselves are acceptable and encouraged and are considered to be in line with the ethos of the University.
- are or are likely to be harmful, detrimental or injurious to the University, its image, brand, and reputation or the University's relationships with others or groups;

Stakeholders must be cautioned that their private posts may impact their relationship with the University

Employees should be aware that the lines between a “professional” social media persona and “private” or “personal” social media persona have become blurred. There is a growing body of legal precedent that acknowledges that employers may take disciplinary measures against employees and even dismiss them arising from expressions on supposedly “private” or “personal” SMPs in instances where they can be associated with their employer.

This Policy does not seek to regulate or interfere with the communication of Stakeholders with others which do not take place for and on behalf of the University, for example in general, non-official, public pages on SMPs that use “UJ” or “University of Johannesburg” in their title **unless reputational or brand damage can arise from such usage, and the authors can be associated with UJ**. The Policy also **alerts Stakeholders to the fact that the University may have a sufficient and legitimate interest in their communications with others which do not take place for and on behalf of the University** and the legal rights and remedies that the University may have according to the Law in this regard, and where the authors can be associated with UJ by a reasonable observer.

Stakeholders must be educated, with examples for clarification

Instances where the University may acquire legal rights and remedies in terms of the Law against employees arising from their expressions, include when **expressions wrongfully infringe upon the rights of the University, its Stakeholders, or others, or when inappropriate wrongful expressions are associated with the University. Examples** of these include expressions which. . .

Special mention of the University's trademarks should be mentioned

No person may use the UJ Brand, which includes, but is not limited to, its logos, slogans, corporate colours, trademarks, banners, wedge on SMPs or online platforms, unless prior written consent has been obtained from the Marketing and Brand Office of the University or is consistent with the templates provided by this Office.

Guidance on use of disclaimers

Disclaimers such as “these are my personal views” or “these comments should not be imputed to my employer” may, where appropriate, be considered to be mitigating factors, but **do not necessarily put an expression beyond the sufficient and legitimate interest of the University in terms of the Law**

Breaches of the Policy could lead to dismissal or exclusion

Under appropriate circumstances breaches of the Policy may be referred to the University's Human Resource Management Division, the Student Ethics and Judicial Services or the relevant Committee of Council for disciplinary action. Depending on the severity of the breach of the Policy, **disciplinary action may result in any permissible sanction being imposed including dismissal in the case of employees or expulsion in the case of students.**

Duty to report

Employees must report any breach of this Policy to the Social Media Management Section.

Ready assistance to all users is provided in a clear manner

Enquiries should be sent to the Social Media Manager or the Senior Manager of Marketing and Brand within the Division of Institutional Advancement. In the event that neither of these parties is available, the query should be submitted to one of the Social Media Co-ordinators and, in the case of a crisis, in the absence of the aforementioned Social Media Manager and Senior Manager, the Executive Director of Institutional Advancement should be contacted.

Designation of responsible persons and mechanism introduced for official social media publication

Responsible Persons for UJ SMPs include Content Loaders and Content Providers and may function as such within a division, department, faculty or support unit within the University...

No person will be allowed to post information that is **private, confidential or wrongfully infringes upon another person's rights** and that may amount to or promote hate speech or incite hatred.

Positive obligations are placed on the University – including continuous monitoring

Reports on the implementation of the Social Media Policy are monitored by the Division of Institutional Advancement.

Obligation on Policy review

The Policy is reviewed at least every three years.

Crous Estate Agency // Van der Schyff: the case of a departing employee

- In an unreported decision between Crous, an estate agency, and Mr Van der Schyff, its former employee, the High Court of Pretoria was called upon by Crous to order Mr Van der Schyff to remove the details of Crous as his employer from his LinkedIn profile.
- Mr Van der Schyff after resigning from the employ of Crous had failed to rectify his LinkedIn profile accordingly. This is so despite receiving a letter of demand from his erstwhile employer to do so.
- Crous contended that this misrepresentation by Mr Van der Schyff, i.e., that he was still employed by Crous, could cause harm to its reputation.
- The High Court subsequently ordered that Mr Van der Schyff remove the details of Crous from his LinkedIn page.
- Indeed, this is yet another aspect of social media usage that employers should address in its social media policy.

Concluding remarks

- Not all Universities and Higher Education Institutions alike in South Africa have a social media policy.
- As demonstrated, the necessity of implementing one is manifest.
- In fact, as of 2018, QS World University Rankings indicate that 9 out of the top 10 Universities in the world utilise social media policies. Available at: <https://www.topuniversities.com/qs-world-university-rankings>.
- A strategy going forward:



Questions?



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