

EMPLOYEES' RIGHT TO FREEDOM OF EXPRESSION THROUGH SOCIAL MEDIA IN SOUTH AFRICA¹

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Abstract

Dismissal for social media misconduct is a common practice in South African constitutional and labour laws. It generally occurs when employees exercise their right to freedom of expression in social media which sometimes affects the employers' right to a good name or reputation. Prior to the transition to democracy in 1994, employees experienced challenges in exercising their right to freedom of expression. Under the current constitutional era, this right is enshrined in the Bill of Rights and contains internal limitations and can also be limited by the law of general application. Nevertheless, there is no specific statute which deters the misuse of social media in South Africa. Employers often exercise disciplinary measures and dismiss employees for conducts that impede on their right to good name and reputation. It is often difficult for employers to dismiss employees as there are no specific guidelines on the regulation of social media misconduct with regard to the potential conflict between the employees' right to freedom of expression and the employers' right to dignity or good name in South African workplaces. This often leaves employers with no remedy when the conduct of the employees on social media, in their own personal capacity, has potential to damage the reputation of their employers either directly or indirectly. Employees should be responsible in the use of social media and always avoid any conduct that can damage the reputation of their employers. They can be held liable in case they damage the good name of their employers through social media.

Keywords: Freedom of expression, good name, reputation, social media misconduct, dismissal.

JEL Classification: K31, K33, K38

1. Introduction

South Africa is one of the countries around the world with a history of inequalities, unjustifiable limitation of fundamental human rights and discriminatory practices.⁴ Prior to the enactment of the *Constitution of the Republic of South Africa*⁵ (Constitution) in 1994, many civilians, including employees, were deprived of civil freedoms. Key among these was an individual's liberty to hold ideas and impart thoughts as information to other people. There was no legislation which contained and recognised the right to freedom of expression under the apartheid regime and the state was empowered to take measures against people who expressed their opinions against the government.⁶ The Constitution brought democracy in South Africa and ended authoritarian rule.⁷ In the constitutional era, the country is characterised by the principles of openness, transparency, accountability and justification of government actions⁸. The Constitution contains human rights under the Bill of Rights and persons are free from unjustified limitations of their basic rights. The right to freedom of expression is one of the liberties that were brought by democracy and people in South Africa have a right to freely express, hold and impart their ideas.⁹ However, this right is subject to limitations contained in sections 16 and 36 of the *Constitution*.

Whereas the contract of employment has always been regarded as the foundation of a relationship between the employers and employees, it does not allow companies to violate workers' right to express their views and thoughts in or outside the workplace in social media. A simple reality

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⁴ M.C. Marumogae, 'Disability Discrimination in the Workplace', 15 (1) *PER/PELJ* (2012), p. 344.

⁵ Constitution of the Republic of South Africa, 1996.

⁶ W.J. Van Wollenhoven, J.L. Beckmann, & A.S. Blignaut, 'Freedom of Expression and the Survival of Democracy: Has the Death Knell Sounded for Democracy in South African Schools?', *Journal of Education* (2006), pp. 119 – 140.

⁷ W.J. Van Wollenhoven, 'The Right to Freedom of Expression: The Mother of our Democracy', 18 (6) *PER/PELJ* (2015), p. 2301.

⁸ *Ibid.*

⁹ G. Parker, 'Injustice Due to Ignorance', available at <https://brill.com/view/book/edcoll/9781848884236/BP000003.xml> (accessed on 20 May 2022).

is that citizens, including workers, have the right to freedom of expression.¹⁰ The recognition of liberty to present one's views, ideas and thoughts is perceived as a tool that enables individuals and the society to hunt and search for the truth in any matter on platforms such as social media.¹¹ While the employers have duties and responsibilities to protect and promote the employees' right to freedom of expression, the *Labour Relations Act*¹² encourages employers to formulate rules which regulate the conduct of employees. Basically, employers derive the power to dismiss employees from these rules because all dismissals, arising from the conduct of employees, must be substantively and procedurally fair.¹³

Everyone, including employees, has liberty to hold, express and impart his or her perception, ideas and knowledge.¹⁴ On the other hand, employers are protected from conducts which bring the name of the company into disrepute. For this reason, there is often a clash between the employees' right to freedom of expression and the employers' right to a good name.¹⁵

The conduct of employees on the social media can conflict with the employers' right to dignity or good name in the workplace and this often constitutes a constitutional challenge. To that extent, there is no clear legislation on how social media misconducts can be addressed in South African workplace institutions. This means that the employers right to a good name can easily be infringed by employees in social media while exercising their right to freedom of expression. In the absence of legislative provisions, the employers are forced to impose disciplinary measures on employees for social media misconducts. This article investigates how the current legislative framework of the right to freedom of expression has historically developed and the importance it bears in a democratic society. Lastly, provide recommendations based on law reform on how to improve the current legal position.

2. Framework of the right to freedom of expression

Several authors who specialise in the constitutional and labour laws have argued timeously on the right to freedom of expression and the employer's right to a good name.¹⁶ Judging from this discussion, one can indeed conclude that there is a clash between these rights, particularly in social media misconduct. Section 16 of the *Constitution* guarantees everyone, including employees, the right to freedom of expression. However, this right is subject to internal boundaries and the limitation clause in the *Constitution*.¹⁷ As the right to freedom of expression is not absolute, the employees are protected from any form of unfair dismissal.¹⁸ It is for this reason that South African law accepts the approach that every misconduct, including the one which is committed over social media, is subject to the provisions of section 188 of the LRA, namely that they must be substantively and procedurally fair.¹⁹ Phungula²⁰ submits that it has become a norm, under the contemporary constitutional dispensation, that employees who face charges for comments made on social media rely on their constitutional right to freedom of expression.

¹⁰ Section 16 of the Constitution of the Republic of South Africa, 1996.

¹¹ K. Lekopanye and H. Chitimira, 'A Conspectus of Constitutional Challenges Associated with the Dismissal of Employees for Social Media Related Misconduct in the South African Workplace', 15 (1) *Rev. Direito GV* (2019), p. 20.

¹² Labour Relations Act 66 of 1995.

¹³ J. Grogan, *Dismissal* 5th ed. (Cape Town, Juta & Co, 2013), p. 78.

¹⁴ Section 16 of the Constitution of the Republic of South Africa, 1996.

¹⁵ B.T. Balule, 'Striking a Balance Between Media Freedom and Protection of Reputation: the Defence of Reasonable Publication in Botswana', 46 (1) *CILSA*, p. 4.

¹⁶ K. Lekopanye and H. Chitimira, 'A Conspectus of Constitutional Challenges Associated with the Dismissal of Employees for Social Media Related Misconduct in the South African Workplace', 15 (1) *Rev. Direito GV* (2019), p. 4; S. Nel, 'Social Media and Employee Speech: the Risk of Overstepping the Boundaries into the Firing Line', 49 (2) *CILSA* (2016), pp. 186 – 187.

¹⁷ Sections 16 and 36 of the Constitution of the Republic of South Africa, 1996.

¹⁸ J.R. Decker, 'Facebook Phobia! The Misguided Proliferation of Restrictive Social Networking Policies for School Employees', 9 (2) *Northwestern Journal of Law and Social Policy* (2014), pp. 164 – 165.

¹⁹ *Ibid.*

²⁰ S.P. Phungula, 'The class Between the Employee's Right to Privacy and Freedom of Expression and Privacy and Social Media Misconduct: What Justifies Employee's Dismissal to be a Fair Dismissal?', 41 (3) *Obiter* (2020), p. 506.

Scholars such as Reddy,²¹ Lekopanye and Chitimira²² argue that the clash between the employee's right to freedom of expression and the reputation of the employer in social media misconducts can be attributed to several factors which include, *inter alia*, the absence of legislative guidelines. On the other hand, Phungula²³ asserts this conflict to the courts and the Commission for Conciliation, Mediation and Arbitration (CCMA). He argues that a comprehensive approach and principles have not been developed to correct the clash of rights between the employers and employees in social media related misconduct.

The question now becomes, does the South African legal system empowers employers to formulate rules which prohibit employees to mention their name in social media platforms? In an attempt to approach this issue, Van Wyk and Heyns²⁴ argue that whereas there are legal principles in our law where the courts and Commissioners from the CCMA found the dismissal of employees for comments made in social media to be substantively and procedurally fair, workplace policies which prohibit employees from mentioning the name of the employers in social media are violations of the right to freedom of expression. To that extent, Iyer²⁵ cautions that employers should refrain from using the information obtained from the employees' social media recklessly to impose dismissal. The relevant test should be considered by employers to determine whether dismissal is the appropriate sanction. In other words, it should be clear from the onset that the remark was made intentionally and its content was derogatory, intended to bring the name of the employer into disrepute or affect other employees in their duties.²⁶ On the other hand, in *RM v RB*²⁷ the court found the dismissal of the employee who made comments which brought the name of the employer into disrepute to be substantively fair. This entails that whereas freedom of expression is a fundamental human right which is conferred to employees in the workplace, dismissal can still be imposed as the appropriate sanction because freedom of expression, just like any other right in the *Constitution*, is subject to limitations.

2.1. Contextual analysis of freedom of expression

The word "freedom" in law refers to the state of being free to enjoy social, political, economic rights and privileges.²⁸ It can also be defined as the ability to think, speak or act without hindrance interference or restraint from a dictatorial government.²⁹ In essence, freedom is characterised by the power of an individual to enjoy their fundamental human rights in the absence of unjustified and unreasonable limitations by the state or any person with powers to impose the limitations.

In the context of the employment relationship between the employers and employees, freedom can be regarded as the employees' ability to enjoy their constitutional rights and to fulfil their contractual duties without interference from the employers. Nevertheless, there are freedoms in the workplace that pose a negative impact on the business of the employer. Freedom of expression is among the privileges that can affect the name of the company.³⁰ However, employers that wish to deal with freedom of expression on social media for employees have to do so with great precaution as several statutes regulate the employment relationships.³¹ For instance, the right to freedom of

²¹ S. Reddy, 'Establishing a Test for Social Media Misconduct in the Workplace', 4 *TSAR* (2018), p. 792.

²² K. Lekopanye and H. Chitimira, 'A Conspectus of Constitutional Challenges Associated with the Dismissal of Employees for Social Media Related Misconduct in the South African Workplace', 15 (1) *Rev. Direito GV* (2019), p. 1.

²³ S.P. Phungula, 'The class Between the Employee's Right to Privacy and Freedom of Expression and Privacy and Social Media Misconduct: What Justifies Employee's Dismissal to be a Fair Dismissal?', 41 (3) *Obiter* (2020), p. 507.

²⁴ J. Van Wyk and M. Heyns, 'To Name or Not to Name That is the Question' (2012). Available at http://www.werksmans.com/wp-content/uploads/2013/04/150/_JN5313 accessed 25 September 2021.

²⁵ D. Iyer, 'An Analytical Look into the Concept of Online Defamation in South Africa', 32 (2) *Speculum Juris* (2018), p. 128.

²⁶ S. Nel, 'Freedom of Expression, anonymity and the Internet' in S. Papadopoulos & S. Snail (eds). *Cyberlaw@ SA III The Law of the Internet in South Africa* 3rd ed. (Pretoria, Van Schaik, 2012), p. 253.

²⁷ *RM v RB* 2015 1 SA 270 (KZP)

²⁸ Anon. <https://www.thefreedictionary.com/freedom> (accessed on 20 May 2022).

²⁹ *Ibid.*

³⁰ S.P. Phungula, 'The class Between the Employee's Right to Privacy and Freedom of Expression and Privacy and Social Media Misconduct: What Justifies Employee's Dismissal to be a Fair Dismissal?', 41 (3) *Obiter* (2020), p. 511.

³¹ A.C. Basson, *Essential Labour Law* 3rd ed. (Centurion, Labour Publication, 2007), p. 85.

expression is contained in both the LRA and the *Constitution*. Employers are not permitted to prevent employees from expressing their views and concerns in any platform.³² On the other hand, if the conduct of the employee damages or undermines the reputation of the employer, she or she can be legally dismissed.

Whereas freedom generally refers to the full enjoyment of fundamental human rights that should be enjoyed without arbitrary interference from the government and employers, it should also be understood in the context of “expression”. In this regard, the term “expression” relates to an action or the process where a person conveys his or her communication in words or any other medium.³³ This definition is important as it acknowledges that social media as a platform that can be used by any person, including employees, to impart or present their views and ideas.

According to the above definition of “freedom” and “expression” it can be deduced that freedom of expression denotes the liberty of an individual or a group of people to express their beliefs, thoughts, ideas and emotions without any interference from the government or employers in the workplace.³⁴ It is also a right that is granted to people to express what they think, impart knowledge and demand a better services. In effect, this right is significant because it is interlinked to the protection of other human rights such as the employee’s right to freedom of association and religion.

2.2. Synopsis of freedom of expression under common law

In South Africa, the right to freedom of expression has its origin from the time when the apartheid government was in control.³⁵ Homann submits that under the common law, the right to freedom of expression can be used for defences against *actio iniuriarum*.³⁶ Prior to the new constitutional era in 1994, the government controlled what could be published in the media.³⁷ In other words, there was an unjustified limitation on the right to freedom of expression in the media platform such as radios and newspapers as the publication and broadcast were subject to the strict rules implemented by the government.³⁸

Similarly, the development of labour laws showcased that the relationships between the employers and the employees, before the enactment of the LRA, were regulated by placats.³⁹ Basically, employers could limit the rights of employees and there were no legislative principles which prohibited the masters to infringe the servants’ rights.⁴⁰ However, the freedom of expression was not foreign in the common law and was not afforded to employees. In the context of unjustified limitation of the right to freedom of expression in the workplace and in the scope of this research article, one can conclude that this right was not violated because employees did not have access to social media devices as they did not exist in that era.⁴¹

2.3. Freedom of expression as a fundamental human right

South Africa became a democratic country in 1994. It enacted a constitution which is regarded as advanced since it entrenches the Bill of Rights. It is also recognised as the supreme law of the Republic as it empowers the Constitutional Court to declare any law or conduct that is inconsistent

³² K. Lekopanye and H. Chitimira, ‘A Conspectus of Constitutional Challenges Associated with the Dismissal of Employees for Social Media Related Misconduct in the South African Workplace’, 15 (1) *Rev. Direito GV* (2019), p. 28.

³³ Anon. <https://www.thefreedictionary.com/freedom> (accessed on 20 May 2022).

³⁴ L.H. Homann, *The Legal Implications of Defamatory Statements on Social Media Platforms in South Africa* (LLM Dissertation, North-West University, 2015), p. 97.

³⁵ *Ibid* 97.

³⁶ *Ibid* 97.

³⁷ P. Bouhoot, *The Freedom of Association Under Apartheid* (LLM Dissertation, University Western Cape, 2009), p. 33.

³⁸ *Ibid*, p. 62.

³⁹ R. Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* 1st ed. (Cape Town, Oxford University Press, 1996), p. 65.

⁴⁰ M.S.M. Brassey, *Employment Law* 1st ed. (Capet Town, Juta & Co, 1998), p. 57.

⁴¹ P. Bouhoot, *The Freedom of Association Under Apartheid* (LLM Dissertation, University Western Cape, 2009), p. 63.

with its provisions invalid.⁴² Before its incorporation, there was a systematic discrimination, oppression and unjustified limitation of human rights. The right to freedom of expression was one of the rights that were restricted unreasonably by the state.

In the contemporary constitutional dispensation, freedom of expression is an important right under the democratic rule. This issue was highlighted by the court in *South African National Defence Union v. Minister of Defence and Another*⁴³ which asserted that the right to freedom of expression should be seen as the pillar of democracy in the country. Van Vollenhoven⁴⁴ argues that the reason why this right is at the core of our constitutional democracy is that it tends to assure everyone, including employees, the right to enjoy freedom of speech and freedom from fear as common people of the world. Moreover, the *Constitution* has the effect that the Bill of Rights is a cornerstone of democracy in South Africa. It also provides that the fundamental human rights enshrine the privileges of all people in the country and that it affirms the democratic values of human dignity, equality and freedom.⁴⁵ It must be borne in mind that the right to freedom of expression is documented as a fundamental human right and it is subject to the direct and indirect application of the *Constitution*.⁴⁶

From a pure legal analysis, the direct vertical application entails that the state is bound to promote, protect and respect the rights contained in the Bill of Rights.⁴⁷ This means that the government cannot abuse its powers by limiting the employee's right to freedom of expression on social media unreasonably without adhering to internal limitations contained in section 16 or the limitation clause in section 36 of the Constitution. On the other hand, the direct horizontal application of the Constitution posits that the court must give effect to the Bill of Rights by applying and developing the common law in so far as legislation does not provide for that right.⁴⁸ On the same note, the indirect application of the *Constitution* has the impact that all laws, principles, norms and rules must be interpreted within the purview of the basic values of the Constitution.⁴⁹

2.4. The right to freedom of expression under the Constitution

Section 16 of the Constitution contains a significant right which protects the expression of all citizens in the country. This section states that everyone has the right to freedom of expression, which includes freedom of the press and other media.⁵⁰ The phrase "everyone" in this provision can be interpreted to include employees. However, it must be noted that section 16 does not expressly indicate that the right to freedom of expression extends to social media platforms. Reference is made only to the freedom of the press and other media. From a pure perspective, it can be argued that the intention of the drafters of the *Constitution* in using the phrase "other media" was to include platforms such as social media.

Section 16 (1) (a) of the Constitution further acknowledges that the right to freedom of expression is protected to the extent that it allows everyone to receive or impart information or ideas. Generally, freedom of expression encourages employees to voice out their opinions and perceptions. It is, thus, not unlawful nor unconstitutional for employees to express themselves in social media platforms.⁵¹ It is immaterial whether or not employers authorise the employees to receive or share the information over the internet. It is also not important if there is a rule which prohibits the employee from mentioning the name of the employer in social media because any workplace policy that is

⁴² Section 2 of the Constitution of the Republic of South Africa, 1996.

⁴³ *South African National Defence Union v Minister of Defence and Another* 1999 4 SA 496 (CC).

⁴⁴ W.J. Van Vollenhoven, 'The Right to Freedom of Expression: The Mother of our Democracy', 18 (6) *PER / PELJ* (2015), p. 2304.

⁴⁵ Section 7 of the Constitution of the Republic of South Africa, 1996.

⁴⁶ J. Neethling, J.M. Potgieter & P.J. Visser, *Deliktereg* 5th ed. (Durban, LexisNexis, 2006), p. 17.

⁴⁷ Section 7 of the Constitution of the Republic of South Africa, 1996.

⁴⁸ J. Neethling, J.M. Potgieter & P.J. Visser, *Deliktereg* 5th ed. (Durban, LexisNexis, 2006), p. 17.

⁴⁹ *Ibid* 17.

⁵⁰ Section 16 (1) (a) of the Constitution of the Republic of South Africa, 1996.

⁵¹ J. Van Wyk and M. Heyns, 'To Name or not to Name that is the Question', 2012. Available at http://www.werksmans.com/wp-content/uploads/2013/04/150/_JN5313 accessed 25 September 2021.

intended to prevent the employee from stating the employer's name on social media can be regarded as a violation of the right to freedom of expression.⁵²

Alternatively, the *Constitution* recognises the principle that everyone is entitled to freedom to receive or impart information, freedom of artistic creativity and academic freedom and freedom of academic research.⁵³ The general rule is that whereas freedom of expression is as significant as other fundamental rights in the Bill of Rights, employees can still be dismissed for their comments and posts online if they recklessly and unlawfully discuss the name of the employers in social media platforms.⁵⁴ A simple reality is that the courts or other tribunals must interpret the right to freedom of expression in light of other human rights since it is not absolute in South Africa.

2.5. Limitation of the right to freedom of expression

The right to freedom of expression is limited internally in section 16 (2) and 36 of the *Constitution* by the law of general application. These restrictions are normally referred to as internal limitations and boundaries in terms of the law of general application. In the context of the employment relationships, freedom of expression is also subject to these limitations. Conversely, section 16 of the *Constitution* specifies the circumstances under which the right to freedom of expression will not be tolerated and protected in South Africa. These include instances where this right is used as propaganda for war, incitement for imminent violence or as a form of hate speech.⁵⁵ The test that is regularly used by the courts and the CCMA to determine the wrongfulness of the publication of words or behaviour of the employees is whether such publication is against the *boni mores* of the society.⁵⁶

On the other hand, limitation of freedom of expression may only be imposed to the extent that it is reasonable and justifiable in an open and democratic society based on the right to human dignity, equality and freedom.⁵⁷ This entails that the employers who wishes to limit the conduct of the employees in social media must give effect to the principles of reasonableness, justification and due regards must be given to the founding values of the *Constitution*. The core principle is that the employers must put or formulate policies at the workplace that respect, protect and promote the values of the *Constitution*.

3. Implications of the right to freedom of expression in the workplace

3.1. Dismissal in terms of the LRA

The LRA is one of the statutes in South Africa that regulate the employment relationships between the employers and the employees. As a crucial statute in the field of labour law, it encompasses procedures and guidelines on the duties of the parties in the contract of employment and rules that must be imposed by the employer to effect dismissal.⁵⁸ From this viewpoint, an inference that can be drawn is that the employer's decision to dismiss an employee for misconduct that arises from social media related misconduct must adhere to the principles and legislative guidelines in the LRA.⁵⁹

Initially, section 188 of the LRA stipulates that the termination of employment contract is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's conduct or capacity; or is based on the employer's operational requirements. It also

⁵² Ibid.

⁵³ Section 16 (1) (a) of the *Constitution* of the Republic of South Africa, 1996.

⁵⁴ K. Lekopanye and H. Chitimira, 'A Conspectus of Constitutional Challenges Associated with the Dismissal of Employees for Social Media Related Misconduct in the South African Workplace', 15 (1) *Rev. Direito GV* (2019), p. 28.

⁵⁵ Section 16 (2) (a) – (c) of the *Constitution* of the Republic of South Africa, 1996.

⁵⁶ J. Neethling, J.M. Potgieter & P.J. Visser, *Deliktereg* 5th ed. (Durban, LexisNexis, 2006), p. 17.

⁵⁷ Section 36 of the *Constitution* of the Republic of South Africa, 1996.

⁵⁸ A.C. Basson, *Essential Labour Law* 3rd ed. (Centurion, Labour Publication, 2007), p. 84.

⁵⁹ S.P. Phungula, 'The class Between the Employee's Right to Privacy and Freedom of Expression and Privacy and Social Media Misconduct: What Justifies Employee's Dismissal to be a Fair Dismissal?', 41 (3) *Obiter* (2020), p. 507.

provides that a dismissal that is not effected in accordance with a fair procedure is unlawful.⁶⁰ Social media related misconduct falls within the ambit of dismissal for misconduct.⁶¹ As a result, an employee can only be dismissed for their comments and posts in social media if the substantive and procedural requirements contained in Schedule 8 item 7 of the Code of Good Practice in the LRA (Code of Good Practice) are met by the employer.⁶²

In principle, the Code of Good Practice provides that “any person who determines whether a dismissal for misconduct is fair should consider whether or not the employee contravened a rule or standard regulating conduct in or of relevance to the workplace”.⁶³ Nevertheless, this requirement is problematic because a rule which prohibits an employee from expressing their views can contravene the constitutional right to freedom of expression. Lekopanye and Chitimira posit that draconian anti-social media that prohibits employees from expressing their opinions delays the attainment of democracy in South Africa.⁶⁴ However, employees can still be dismissed in the absence of workplace rules which prohibits a conduct that brings the name of the employer into disrepute in social media.⁶⁵ This is illustrated in some cases decided by the courts.

In *Chemical Energy Paper Printing Wood & Allied Union obo Dietlof v Frans Loots Building Material Trust t/a Penny Pinchers*,⁶⁶ the dismissal of an employee who posted a racist mark about the employer was found to be substantively fair by the Commissioner from the CCMA. It is common cause that the respondent did not have rules and policies which prohibited employees from mentioning their names in social media.

Similarly, it could be tricky for employer to dismiss the employee if the social media related incidents occurred outside the premises of the employer and during the employee’s personal time at home.⁶⁷ However, Mainaakae argues that the test to determine the appropriateness of dismissal for misconduct outside the workplace is the principle of relevance and the legitimate interest of the employer in the conduct of the employee.⁶⁸ In other words, the conduct of the employee must be closely connected to the workplace to the extent that it affects the business of the employer.

The LRA under the Code of Good Practice also binds presiding officers to determine the substantive fairness of dismissal by assessing whether the rule contravened by the employee was valid or reasonable.⁶⁹ In this case, it would be unjustified for the employer to adopt a policy which does not allow employees to create social media account. It is also directed by the Code of Good Practice that the employee must be aware of the rule or should reasonably be expected to have been aware that the rule existed.⁷⁰ Subsequently, there must be consistency in the application of the rule. That is, the employer should impose a sanction based on how he applied the rule in previous similar occasions.⁷¹ Lastly, dismissal must be the appropriate sanction for the policy contravened by the employee.⁷² If all these requirements are fulfilled, then the employee can be legally dismissed for the misconducts related to social media.

⁶⁰ Section 188 (1) of Labour Relations Act 66 of 1995.

⁶¹ K. Lekopanye and H. Chitimira, ‘A Conspectus of Constitutional Challenges Associated with the Dismissal of Employees for Social Media Related Misconduct in the South African Workplace’, 15 (1) *Rev. Direito GV* (2019), p. 28.

⁶² Labour Relations Act 66 of 1995, Schedule 8 Item 7 (a) of the Code of Good Practice: Dismissal of the LRA.

⁶³ *Ibid.*

⁶⁴ K. Lekopanye and H. Chitimira, ‘A Conspectus of Constitutional Challenges Associated with the Dismissal of Employees for Social Media Related Misconduct in the South African Workplace’, 15 (1) *Rev. Direito GV* (2019), p. 25.

⁶⁵ S.P. Phungula, ‘The Clash Between the Employee’s Right to Privacy and Freedom of Expression and Social Media Misconduct: What Justifies Employee’s Dismissal to be a Fair Dismissal?’, 41 (3) *Obiter* (2020), p. 511.

⁶⁶ *Chemical Energy Paper Printing Wood & Allied Union Obo Dietlof v Frans Loots Building Material Trust t/a Penny Pinchers* (2020) 31 ILJ 2217 (CCMA).

⁶⁷ T.T. Mainaakae, *Dismissal for Misconduct Outside the Workplace* (LLM Dissertation, North-West University, 2017), p. 51.

⁶⁸ *Ibid.* 52.

⁶⁹ Labour Relations Act 66 of 1995, Schedule 8 Item 7 (b) (i) of the Code of Good Practice.

⁷⁰ Labour Relations Act 66 of 1995, Schedule 8 Item 7 (b) (ii) of the Code of Good Practice.

⁷¹ Labour Relations Act 66 of 1995, Schedule 8 Item 7 (b) (iii) of the Code of Good Practice.

⁷² Labour Relations Act 66 of 1995, Schedule 8 Item 7 (b) (iv) of the Code of Good Practice.

3.2. The employer's right to dignity

The employer's right to a good name stems from the constitutional provisions which state that everyone has an inherent right to dignity and to have their dignity respected and protected.⁷³ Defamation is one of the conducts that pose a risk to the right to dignity and some employees regularly infringe this right through intentional publication of words or behaviour that relate to the good name or reputation of the employer.⁷⁴ According to Nel,⁷⁵ defamation refers to an instance where the perpetrator publishes words or displays behaviour that is wrongfully and purposefully intended to damage the status, good name or reputation of another person. This definition fits well in social media related misconduct because some employees often tarnish the name of the employer in platforms like Facebook and Twitter.⁷⁶

The case of *Sedick v. Krisray (Pty) Ltd*⁷⁷ serves as a good example where the employer's name was brought into disrepute. Briefly, the facts of the case were that the employee was dismissed by the employer on the grounds that the applicant posted derogatory message about the respondent in social media. As such, the employee challenged the decision of the employer on the basis that the decision to terminate the contract of employment was both substantively and procedurally unfair.⁷⁸ The employer argued that the conduct of the employee tarnished the name of the business and that the dismissal was fair.

In deciding on the fairness of dismissal for the comments posted by the employee, the court held that: the internet and Facebook are a public domain unless access to such Facebook is restricted by its member ... the applicants had failed to restrict access to their Facebook pages and the commentary was wholly in the public domain.⁷⁹

In principle, the court held that the dismissal of the employee was fair because the conduct of the employee brought the name of the employer into disrepute.⁸⁰ It is submitted that this decision is correct as the comments that defamed the employer in social media and outside the workplace posed a risk to personal and business reputation of the employer.

However, it has been accepted that whereas there is a duty on the employee to uphold the name of the employer, it is not in all cases that conducts such as a post or comment made by the employee on the employer in social media would amount to misconduct.⁸¹ This is quite true as the court in *Timothy v. Nampark Corrugated Containers (Pty) Ltd*⁸² explained that the objective test had to be invoked by a reasonable decision maker to determine whether the conduct of the employee defamed the good name of the employer.⁸³ This test suggests that the presiding officer must examine all circumstances which include the nature of the conduct, the turpitude or seriousness thereof and an assessment of whether the charges against the employee could be sustained.⁸⁴

In that regard, it is advisable that employers should not abuse their disciplinary power in cases when their names are mentioned over social media and claim damage to its business. In *R v. VL*,⁸⁵ the employee published a statement on Facebook alleging, *inter alia*, that she had been retrenched by the employer after a clean record of 20 years in the company without prior notification. It was common cause that the employee was charged with gross misconduct on the basis that this kind of behaviour brought the name of the employer into disrepute. The court, in exercising its discretion to determine

⁷³ Section 10 of the Constitution of the Republic of South Africa, 1996.

⁷⁴ J. Neethling & J.M. Potgieter, *The Law of Delict* 6th ed. (Durban, LexisNexis, 2010), p. 330.

⁷⁵ S. Nel, 'Freedom of Expression, anonymity and the Internet' in S. Papadopoulos & S. Snail (eds). *Cyberlaw@ SA III The Law of the Internet in South Africa* 3rd ed. (Pretoria, Van Schaik, 2012), p. 251.

⁷⁶ L.H. Homann, *The Legal Implications of Defamatory Statements on Social Media Platforms in South Africa*, (LLM Dissertation, North-West University, 2015), p. 72.

⁷⁷ *Sedick v Krisray (Pty) Ltd* [2011] 8 BALR 879 (CCMA), para. 7

⁷⁸ *Sedick v Krisray (Pty) Ltd* [2011] 8 BALR 879 (CCMA), para 8.

⁷⁹ *Sedick v Krisray (Pty) Ltd* [2011] 8 BALR 879 (CCMA), para 50.

⁸⁰ *Sedick v Krisray (Pty) Ltd* [2011] 8 BALR 879 (CCMA), para 57.

⁸¹ T.T. Mainaakae, *Dismissal for Misconduct Outside the Workplace* (LLM Dissertation, North-West University, 2017), p. 54.

⁸² *Timothy v Nampark Corrugated Containers (Pty) Ltd* 2010 8 BLLR 830 (LAC)

⁸³ *Timothy v Nampark Corrugated Containers (Pty) Ltd* 2010 8 BLLR 830 (LAC), para 56.

⁸⁴ *Timothy v Nampark Corrugated Containers (Pty) Ltd* 2010 8 BLLR 830 (LAC), para 87.

⁸⁵ *R v. VL (NBCRFI Bargaining Council)*, case No. RFBC 35099 of 31 August 2015.

whether dismissal was the appropriate sanction, opined that it was important to consider the context in which the employer's name was mentioned in the post.⁸⁶ It also held that the employee's comment was purely a reflection of her sentiments rather than an intention to disrepute the business of the employer.⁸⁷ On this basis, the court found that the dismissal of the employee was substantively unfair.

3.3. The conflict between freedom of expression and the right to dignity in the workplace

The employer's right to freedom of expression and the employee's right to dignity often come in conflicts in the circumstances where the employees make a post or comment to express their thoughts, views and opinions in the workplace.⁸⁸ In retaliation to protect its reputation, the employer may believe that the only available and relevant sanction is to dismiss the employee. However, while the courts and Commissioners from the CCMA have had the opportunity to assess this conflict, there are no guidelines to assist employers and employees on how their rights can be protected in such cases.⁸⁹ In any event, the right to freedom of expression in the workplace tends to protect employees against excessive powers from the employer. It also ensures that employees present and tolerate the thoughts, views and ideas of others in the workplace.⁹⁰ In contrast, the employer's defence against the employee's freedom of expression in social media is to allege infringement of the right to dignity.

However, it is often transparent that when employees exercise their liberty to opinions and expression, the employer's right to dignity is violated.⁹¹ This causes a problem as both rights are contained in the Bill of Rights and equally important. In essence, the right to freedom of expression and the right to dignity are the cornerstone of democracy and there is no right which is superior to the other. Despite this, a balance must be struck by the employer and the employee to avoid constitutional challenges in social media related misconducts.⁹² In some cases a defamatory statement may be justifiable on the basis that an employee is merely exercising his or her freedom of expression. In other instances, the intention of the perpetrator can be of such a nature that its context is intended to impinge upon the employer's right to dignity.

In *Dewoonarain v. Prestige Car Sales (Pty) Ltd t/a Hyundai Ladysmith*,⁹³ the court dealt with the conflicting constitutional rights between the employer and employee arising from social media related misconduct. In this case, the employee made remarks on Facebooks uttering that "working for, and with Indians is not enjoyable".⁹⁴ The employee also posted that Indians treat their own poorly. The employee relied on the right to freedom of expression as a defence against the comments. Conversely, this argument was rejected by the CCMA on the ground that the right to freedom of expression is not absolute. The Commissioner held that the employee's right to freedom of expression had to be balanced against the right to dignity to maintain the good name and reputation of the employer.⁹⁵ It is submitted that this case provides a good balance as both the employer's right to dignity and employee's right to freedom of expression must be respected and protected.

4. Concluding remarks

Freedom of expression is indeed a significant right in South African workplace forums. It affords employees the liberty to express their views, opinions and ideas. On the other hand, the

⁸⁶ *R v. VL (NBCRFI Bargaining Council)*, case No. RFBC 35099 of 31 August 2015, para. 10.

⁸⁷ *R v. VL (NBCRFI Bargaining Council)*, case No. RFBC 35099 of 31 August 2015, para. 37.

⁸⁸ S.P. Phungula, 'The class Between the Employee's Right to Privacy and Freedom of Expression and Privacy and Social Media Misconduct: What Justifies Employee's Dismissal to be a Fair Dismissal?', 41 (3) *Obiter* (2020), p. 509.

⁸⁹ K. Lekopanye and H. Chitimira, 'A Conspectus of Constitutional Challenges Associated with the Dismissal of Employees for Social Media Related Misconduct in the South African Workplace', 15 (1) *Rev. Direito GV* (2019), p. 1.

⁹⁰ *Ibid* 32.

⁹¹ S.P. Phungula, 'The class Between the Employee's Right to Privacy and Freedom of Expression and Privacy and Social Media Misconduct: What Justifies Employee's Dismissal to be a Fair Dismissal?', 41 (3) *Obiter* (2020), p. 505.

⁹² *Ibid* 508.

⁹³ *Dewoonarain v. Prestige Car Sales (Pty) Ltd t/a Hyundai Ladysmith* 2013 7 BALR 689 (MIBC).

⁹⁴ *Dewoonarain v. Prestige Car Sales (Pty) Ltd t/a Hyundai Ladysmith* 2013 7 BALR 689 (MIBC), para 4.

⁹⁵ *Dewoonarain v. Prestige Car Sales (Pty) Ltd t/a Hyundai Ladysmith* 2013 7 BALR 689 (MIBC), para 42.

employer's right to dignity is equally important because it protects the good name and reputation of business enterprises. Even so, there are cases in South Africa where the employers' right to dignity and the employees' right to freedom of expression came into conflict. This has extended to the use of social media platforms.

Before the constitutional era in 1994, the right to freedom of expression was recognised. This right originated from the common law when the employment relationship between the employer and employee was regulated by placats.⁹⁶ Under the apartheid era, the government limited this right to the extent that any person who expressed an opinion which defamed the state was prosecuted. It is important to note that social media did not exist and could not affect the relationship between the employers and employees with regard to the freedom of expression.

There is no legislation that regulates social media and outlaws its misuse in South Africa. This deficiency has led employees to believe that they can post anything they want on the social media without considering the reputation and good name of their employers. Generally, the right to freedom of expression for the employees and the right to dignity for the employers often conflict when the employers wish to dismiss their employees for their comments made on social media.⁹⁷ The right to freedom of expression for employees does not include any comment or post made on social media that amounts to hate speech, incitement of imminent violence or propaganda for war. It can also be limited by a law of general application in terms of section 36 of the Constitution. The employees must take precaution in exercising their right to freedom of expression on the social media as they can be held liable for any comment or post made on the social media that infringes the right to dignity of their employers.

Unfortunately, social media related misconduct is a challenge in South African workplace. Employees are unlawfully dismissed and their freedom of expression is violated by draconian rules incorporated in the workplace to limit their liberties. The employers' right to dignity is also at risk because their employees abuse their communication in social media and bring the names of their employers into disrepute. Social media has potential to tarnish the reputation of business enterprises. This is caused by the lack of legislative guidelines to regulate the right to freedom of expression for employees on the social media. It is recommended that a new legislation should be enacted to regulate the use social media for employees in workplace and outlaw its misuse in South Africa. Alternatively, the current LRA should be amended to provide the use of social media in the workplace in order to maintain both rights of the employees and employers.

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⁹⁷ S.P. Phungula, 'The class Between the Employee's Right to Privacy and Freedom of Expression and Privacy and Social Media Misconduct: What Justifies Employee's Dismissal to be a Fair Dismissal?', 41 (3) *Obiter* (2020), p. 509.

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