Social Media – a Clash between Freedom of Expression and Privacy

By Ivor Heyman

Our courts have recognized that freedom of expression is necessary to create and maintain a democratic society. Section 16 of the South African Constitution provides that everyone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research."

Our courts also recognize a right to privacy. Section 14 of the Constitution provides that everyone has the right not to have the privacy of their communications infringed. This right to privacy includes the autonomy to elect and direct when, how, to what extent and the purpose for which one's private information is used and disclosed. **National Media Ltd and Another v Jooste** 1996 (3) SA 262 (A).

The publication of communications on social media sites such as Facebook, Twitter, Instagram and Snapchat involves a clash between the rights of freedom of expression and privacy. A recent series of cases dealing with social media and internet communications has demonstrated that it is not always easy to balance these rights, and you need to be aware that our courts are more likely to order the removal of an offensive communication from a social media site than they would be from conventional news media.

The reason for this was articulated in **Heroldt v Wills** 2013 (2) SA 530 (GSJ) where the court explained that our courts have historically been reluctant to interdict publications in traditional media for fear of stopping the free flow of news and information because such interference could have a chilling effect on freedom of expression. The situation is different with social media. Our courts are more willing to order the removal of communications that may be controversial or cause offence from social media sites because "social media is about building friendships around the world, rather than offending fellow human beings." Heroldt v Wills at paragraph 43.

It appears that since **Heroldt v Wills** was decided, our courts have maintained their willingness to remove specific offensive social media communications, while preserving a party's freedom of expression to make future statements that may or may not be offensive. In **RM v RB** 2015 (1) SA 270 (KZP), RB made certain postings on her Facebook page relating to RM's care of their daughter and referring to his use of alcohol and drugs. RM alleged that the postings had defamed him as a father and were detrimental to his business reputation. He approached the high court for an urgent interdict ordering RB to (1) remove the messages from her Facebook page; (2) refrain from posting further defamatory statements about him on said page; and (3) refrain E from publishing defamatory statements about him in any other way.

The court was willing to order the removal of the existing statements about RM from RB's Facebook page, but was unwilling to order that RB refrain from posting further statements about him in the future. The court's reasoning was that, despite the possibility of defamatory postings on the internet posing a significant risk to the reputational integrity of individuals, to have granted the relief sought in (2) and (3) would have been too drastic a limitation and restraint on RB's freedom of expression.

Similarly, in **Waldis and Another v von Ulmenstein** 2017 (4) SA 503 (WCC), the applicants requested an interdict ordering the respondent to remove an allegedly defamatory Internet blog post in which the applicants were accused of fraudulently mislabelling their chocolate products. The applicants argued that the blog statements were untrue and made with the sole intention to defame. The respondent pleaded (i) truth and public interest; and (ii) fair comment. The applicants responded that public benefit was absent since the information was already in the public domain with similar allegations having already been reported in other publications, including Noseweek (a national magazine).

The court held that the matter had to be decided in the broader context of the right to freedom of expression. The mislabelling of applicants' chocolate products was a public health matter that fell squarely within the truthandpublicinterest and fair comment domains, and remained there even though the allegations in question were previously published in Noseweek. There were only two statements in the respondent's blog that possessed illocutionary force (i.e. had defamatory intent and no basis in truth). Since the court was dealing with an internet publication, it was willing to order that the offending passages be deleted — leaving the balance of the report untouched in the public interest.

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