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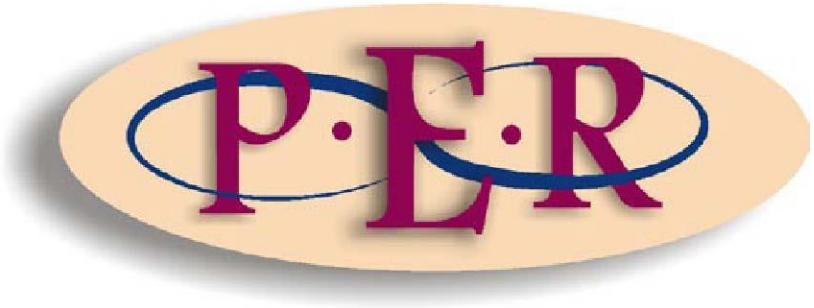
ISSN 1727-3781



2014 VOLUME 17 No 6

http://dx.doi.org/10.4314/pelj.v17i6.18

DEFAMATION ON FACEBOOK: *ISPARTA v RICHTER* 2013 6 SA 529 (GP)

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Those who make postings about others on the social media would be well advised to remove such postings immediately upon the request of an offended party. It will seldom be worth contesting one's obligation to do so. After all, the social media is about building friendships around the world, rather than offending fellow human beings. Affirming bonds of affinity is what being 'social' is all about.[1]

1 Introduction

In the case of *Isparta v Richter* 2013 6 SA 4529 (GP) the plaintiff instituted an action for defamation against the defendants following comments made by the first defendant on her "Facebook Wall". The first defendant "tagged"[2] the second defendant concerning the defamatory postings. For the first time in a South African court, damages were awarded for defamatory comments made on Facebook. The judge had to determine whether the alleged defamatory statements did indeed relate to the plaintiff and whether the comments, individually or collectively, could be considered defamatory. In the last instance, he had to decide what amount of damages would be appropriate for harm resulting from defamatory comments on Facebook.

In order to follow the reasoning of the court, the discussion starts off with a brief overview of Facebook, since in our experience not all lawyers are equally familiar with the workings of social network services. Since litigation involving Facebook, or any other social network service for that matter, is still very new in South African law, previous South African court cases involving Facebook are briefly discussed in order to set the scene for the current discussion. In the discussion of the facts in the

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1 Willis J in *Heroldt v Wills* 2013 2 SA 530 (GSJ) para 43.

2 The terms "Wall" and "tag" will be explained in the discussion below.

Isparta case it is also necessary to discuss defamation as a delictual claim in some detail. Lastly, the possible role of the *Electronic Communications and Transactions* Act 25 of 2002, which deals with electronic communications, is considered, even though it was not part of the final judgment in the *Isparta*-case. The question is asked if this Act could have played a role in this case. It is also asked if it is feasible to sue Facebook as the service provider instead of the individual user.

It is concluded that, taking into consideration postings by South African users on social network services in general and specifically on Facebook, it is evident that Facebook users should in the future be exceedingly careful not only about what they post but also with regards to being "tagged" by other users.

2 Facebook: a brief overview[3]

Facebook is an online social network/networking service that was launched in 2004 and became available worldwide in 2006.[4] A social networking service is a web-based service that allows the user to create a profile (by listing personal information which may include a user's name, gender, hometown, relationship status, birthday, profile picture, educational background, employment situation, lists of personal interests and contact details), to establish connections with other users (by inviting users to become "friends") and to access the websites of users that have accepted the invitation to be "friends". Various activities may be performed on Facebook, for example users may leave messages for friends (publicly or privately), upload photographs, "tag" themselves or other people in the photographs (identifying the person), update their "status", comment on other users' postings, "poke" a friend (clicking on a button resulting in a message being send to a friend that "you have been poked" by the user), indicate that they "like" a particular posting, and "subscribe" to specific users' public postings (without adding that user as a friend).

3 For a detailed discussion of Facebook, see Roos 2012 *SALJ* 375-402.

4 Facebook was initially available to American university students only. In 2006 it was opened to everybody that had a valid email address (Wikipedia 2014 http://wikipedia.org/wiki/History_of_Facebook).

All these activities are shown on a part of the website initially referred to as the user's "Wall". (These days it is called a Timeline, but since the judgement still refers to Wall, we will use that terminology.) Users may limit their "visibility" by using the "privacy settings" allowed by Facebook. "Visibility" refers to the extent to which the user's profile and postings may be accessed by other users or even by persons using a search application, such as Google. The privacy settings are continuously changing. At present a person may leave his or her profile open to the public, or may limit it to certain categories of people, such as his or her "friends and their friends", "friends only" (but people identified in a picture posted by the user – that is "tagged" in the picture - will also have access to the posting), or specific categories of friends grouped together as "acquaintances", "close friends" or "family". However, certain information in the profile remains visible to everyone even if the user utilises the most private of the privacy settings. This includes a user's name, profile picture (if one has been posted) and gender. A user may also "tag" another user to any postings on his or her Wall. The name of the tagged user will then appear at the end of the user's message as "with… (tagged user's name)". The message will then also appear on the tagged person's Wall. The tagged person's consent is not required before being tagged, but he or she may remove his or her name from the message.[5]

Facebook is a free service. Anyone over 13 years (or who says that s/he is older than 13) with a valid email address may join Facebook.

3 Facebook in the South African courts

The use of online social networking services has become ubiquitous in South African society. The most popular social networking service in South Africa is Facebook (9.4 million users) followed by Mxit (7.4 million users).[6] Social networking is used by

5 *Isparta v Richter* 2013 6 SA 529 (GNP) para 7.

6 World Wide Worx 2014 http://www.worldwideworx.com/wp-content/uploads/2013/10/Exec-Summary-Social-Media-2014.pdf. Interestingly, more than 80% of the users of these social networks access them through their mobile phones.

corporations for marketing purposes,[7] but also by individuals for social networking. (It should be pointed out that the term "social media" should not be considered as a synonym for "social networking" or "social network services", as is sometimes done in the reported cases.[8]) The growth in the use of social network sites brought with it many challenges for lawyers, as current legal systems are based on laws and precedents derived before the advent of social networking.[9]

South African courts are just starting to come to grips with legal issues arising from or involving social networking sites. In 2012 the first two cases were reported in which Facebook featured. In *Dutch Reformed Church v Rayan Sooknunan*[10] defamatory allegations were published by the defendant about the plaintiff on the defendant's Facebook page. The plaintiff's personal email address was also published on the webpage. Satchwell J interdicted the defendant from "uttering, stating, writing, publishing or in any other manner or mode" making defamatory allegations against the plaintiff. The defendant was not specifically ordered to remove the defamatory postings. The defendant was, however, directed to remove the plaintiff's email address from the Facebook page.[11]

In *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens*[12] Steyn J allowed the applicant to use Facebook to serve a court notice on the defendant in

7 Facebook is used by 93% of major brands. See World Wide Worx 2014 http://www.worldwideworx.com/wp-content/uploads/2013/10/Exec-Summary-Social-Media-2014.pdf.

8 Social media is a strategy or system that delivers content to others. It is a group of internet-based applications that allow the creation and exchange of user-generated content. It includes different types of media, such as videos, blogs and social network sites. Social network sites form part of the broader concept of social media. Social network sites are tools for connecting people with similar interests. Eg, LinkedIn is a social network, but YouTube, although part of the social media, is not a social network site. Some social network sites, such as Facebook, do both. They can deliver user-generated content and create connections between people. When Facebook is used by individuals to connect to friends, it is used for social networking. See Harthshorn 2010 http://www.socialmediatoday.com/content/5-differences-between-social-media-and-social-networking; Stelzner 2009 http://www.examiner.com/article/social-media-vs-social-networking-what-s-the-difference.

9 Go Legal 2013 http://www.golegal.co.za/citizen-rights/sa-law-adapts-stay-relevant-social-media-space.

10 *Dutch Reformed Church v Rayan Sooknunan* 2012 6 SA 201 (GSJ).

11 For a detailed discussion of the case in context, see Neethling 2014 http://www.litnet.co.za/Article/facebook-en-persoonlikheidsbeskerming.

12 *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 5 SA 604 (KZD).

circumstances in which the defendant's attorneys withdrew and the defendant consistently tried to evade service.[13] The notice was also to be published in a local newspaper.

Another two cases involving Facebook were reported in 2013. In both of these cases the plaintiff complained about remarks made on the particular defendant's Facebook page, which remarks the plaintiff considered as defamatory.

In the first of the two, *Heroldt v Wills,*[14] Willis J issued an interdict ordering the plaintiff to remove the defamatory posting from the Facebook page. The court was of the opinion that an interdict was a suitable remedy in the circumstances since "it would resolve the issue without the needless expense, drama, trauma and delay that are likely to accompany an action for damages in a case such as this".[15] Counter arguments were that the plaintiff ought to have taken up the issue with Facebook itself, making use of their violation policies. The defendant argued that an interdict was not a suitable remedy, because according to *Setlogelo v Setlogelo*[16] an interdict should be granted only in the absence of similar protection by any other ordinary remedy.

Another suitable remedy is of course the *actio iniuriarum.* In the case of *Media 24 v SA Taxi Securitisation*[17] it was stated that:

> [t]hough traditionally the function of the *actio iniuriarum* was to provide a *solatium* or solace money… for injured feelings, the position has become more nuanced in modern law. A natural person is not required to show sentimental loss. He or she will receive damages for defamation even in the absence of injured feelings.[18]

The judge in the *Heroldt v Wills* case was of the opinion though that in respect of infringements on Facebook the court ought to take an active stance against users, as opposed to a stance against Facebook. Such an approach by the courts would be

13 See Chauke 2013 *Without Prejudice* 100.
14 *Heroldt v Wills* 2013 2 SA 530 (GSJ).
15 *Heroldt v Wills* 2013 2 SA 530 (GSJ) para 39.
16 *Setlogelo v Setlogelo* 1914 AD 221 227.
17 *Media 24 v SA Taxi Securitisation* 2011 5 SA 329 (SCA).
18 *Media 24 v SA Taxi Securitisation* 2011 5 SA 329 (SCA) para 38.

more effective in curbing wrongdoing than purely relying on an administrative process.[19] Willis J was of the opinion that the common law needs to be developed in respect of the remedy available in cases like these. Willis argued that the law will lose credibility, legitimacy, acceptance and obedience if it does not take into account changing realities. When *Setlogelo* was decided in 1914 the electronic media were beyond the imagination of the court. The current situation, where published items can be posted and removed in an instant and with minimal cost, is qualitatively different from the scenario where newspapers are printed and distributed in hard copy.[20] Consequently the court considered the interdict to be an appropriate remedy.

The second case reported in 2013 which dealt with defamation on Facebook was *Isparta v Richter*.[21] As indicated, this was the first case dealing with defamation on Facebook where damages were awarded to the plaintiff. This case will be discussed in more detail below.

4 *Isparta v Richter*

4.1 Facts of the Isparta *case*

In *Isparta v Richter*,[22] the plaintiff sued the defendants for defamation arising from a posting of certain comments on the first defendant's Facebook Wall. The defendants did not lead any evidence in the case – only the version of the plaintiff was therefore recorded.[23] In the end, an award of R40 000 damages was awarded to the plaintiff because the defendants did not want to apologise or retract the defamatory comments on their Facebook Wall.[24]

The plaintiff and the second defendant were divorced but they are still engaged in litigation concerning *inter alia* the payment of maintenance.[25] The plaintiff has

19 Go Legal 2013 http://www.golegal.co.za/citizen-rights/sa-law-adapts-stay-relevant-social-media-space.
20 *Heroldt v Wills* 2013 2 SA 530 (GSJ) para 31.
21 *Isparta v Richter* 2013 6 SA 529 (GNP).
22 *Isparta v Richter* 2013 6 SA 529 (GNP).
23 *Isparta v Richter* 2013 6 SA 529 (GNP) para 8.
24 Versluis *Beeld* 1; Venter *Pretoria News* 1.
25 *Isparta v Richter* 2013 6 SA 529 (GNP) para 9.

remarried and the first and second defendants were married to each other. The plaintiff's second husband has a sixteen-year-old son who resides with them. The plaintiff also has a daughter aged six and a son of four years from her marriage to the second defendant; they also live with her.[26]

The first defendant posted several comments concerning the plaintiff on her Facebook Wall. In each case she tagged the second defendant.[27] The judge found that two of these postings were defamatory. In the first posting the first defendant ridiculed the plaintiff's alleged interest in her private life. She used the plaintiff's first name as well as the names of her two children.[28] The second defamatory posting appeared a bit later than the first. This posting referred to an incident where the sixteen-year-old boy was in the bathroom with his six-year-old sister. The posting read: "Aan alle mammas en pappas… wat dink julle van mense wat stief boeties toelaat om klein sussies (6) te bad elke aand net omdat dit die ma se lewe vergerieflik????" (English: To all moms and dads… what do you think about people who allow stepsons to bath little sisters (6) every evening because it makes the mother's life easier????) The posting attracted negative comments from viewers of the first defendant's Facebook wall.[29] The plaintiff, being the only person who gave evidence in court, explained the context of the bathroom scenario and this was accepted by the judge.[30]

The defendants admitted that the comments had been posted on the first defendant's Facebook Wall and that the second defendant had been tagged to the comments.[31] They offered no defence, apart from the fact that they were of the opinion that they had been entitled to publish anything they want about anybody,

26 *Isparta v Richter* 2013 6 SA 529 (GNP) para 10.
27 *Isparta v Richter* 2013 6 SA 529 (GNP) para 12.
28 *Isparta v Richter* 2013 6 SA 529 (GNP) para 13.
29 *Isparta v Richter* 2013 6 SA 529 (GNP) para 16.
30 *Isparta v Richter* 2013 6 SA 529 (GNP) para 17.
31 *Isparta v Richter* 2013 6 SA 529 (GNP) para 18.

because, they argued, Facebook is open for everybody to express their opinions ("Facebook is oop vir almal en almal se opinies").[32]

The plaintiff felt that both postings were defamatory of her. The first one belittled her and the second one was malicious and was aimed at damaging her reputation as a mother in that she would allow inappropriate interaction between her teenaged stepson and her young daughter.[33]

4.2 What is defamation?

Before discussing the court's decision, a brief overview will be given of defamation. Defamation is the wrongful and intentional publication of defamatory words or conduct that refers to the plaintiff.[34] "The common law elements of the delict of defamation are (a) the wrongful and (b) intentional (c) publication of (d) a defamatory statement (e) concerning the plaintiff."[35] Once a plaintiff establishes that a defendant has published a defamatory statement concerning the plaintiff, it is presumed that the publication was both wrongful and intentional. A defendant wishing to avoid liability for defamation must then raise a defence which rebuts either wrongfulness or intention.[36]

The general test for wrongfulness is the *boni mores* or the legal convictions of the community. This means that the infringement of a complainant's reputation should not only have taken place in fact, but also be objectively unreasonable.[37] In other words, the test of whether or not statements are defamatory is an objective one.[38] The application of the *boni mores* involves an *ex post facto* balancing of the interests of the plaintiff and the defendant in the specific circumstances, to determine whether the infringement of the plaintiff's interests was reasonable.[39] In this balancing pro-

32 *Isparta v Richter* 2013 6 SA 529 (GNP) para 41.
33 *Isparta v Richter* 2013 6 SA 529 (GNP) para 19.
34 Loubser *et al Law of Delict* 340.
35 *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 18.
36 See *Borgin v De Villiers* 1980 3 SA 556 (A.)
37 Neethling *et al Law of Personality* 135.
38 *National Education, Health and Allied Workers Union v Tsatsi* 2006 1 All SA 583 (SCA) 586 para 8.
39 Burns *Communications Law* 158.

cess, the conflict between the defendant's freedom of expression, on the one hand, and the plaintiff's right to a good name, on the other, has to be resolved.[40]

Although not a closed list, the most commonly raised defences to rebut wrongfulness are that the publication was true and in the public benefit;[41] that the publication constituted fair comment;[42] and that the publication was made on a privileged occasion.[43] In the case of media defendants, a fourth defence is available, namely that the publication of a defamatory statement, albeit false, was nevertheless reasonable in all the circumstances.[44]

In the case of defamation, a more specific test has been formulated by South African courts to determine the wrongfulness of the publication, as expressed by Judge Willis in *Heroldt v Wills*:[45]

> [T]he test for determining whether the words in respect of which there is a complaint have been defamatory is whether a reasonable person of ordinary intelligence might reasonably understand the words concerned to convey a meaning defamatory of the litigant concerned.

A plaintiff in a defamation action must also prove that the impugned statements are directed at him or her.[46] If a plaintiff is not directly referred to in a defamatory statement the plaintiff must indicate the circumstances which would have identified him or her to the addressees.

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40 *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) 1207. In *Khumalo v Holomisa* 2002 5 SA 401 (CC) O'Regan J held that the law of defamation seeks to protect the legitimate interest that persons have in their reputation. The law of defamation is therefore "one of the aspects of our law which supports the protection of the value of human dignity". Also see Burchell *Personality Rights* 179*;* Loubser *et al Law of Delict* 355.

41 See *M'Pherson v Daniels* 1829 Eng R 131; 1829 10 B&C 263; *Sutter v Brown* 1926 AD 155; *Johnson v Rand Daily Mail* 1928 AD 190; *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 3 SA 547 (A); *Kemp v Republican Press (Pty) Ltd* 1994 4 SA 261 (E).

42 See *Marais v Richard* 1981 1 SA 1157 (A); *Johnson v Beckett* 1992 1 SA 762 (A).

43 Privilege can either be an absolute privilege or a qualified privilege. See *May v Udwin* 1981 1 SA 1 (A).

44 *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) para 19.

45 *Heroldt v Wills* 2013 2 SA 530 (GSJ). See also *Mthembi-Mahanyele v Mail & Guardian* 2002 5 SA 401 (CC).

46 *Isparta v Richter* 2013 6 SA 529 (GNP) para 20.

The defendant must prove absence of the intention to injure. Media defendants need to prove that they did not act negligently.[47] However, as with wrongfulness, the court will presume that intention (or negligence) was present once the publication of defamatory material relating to the defendant was proved by the plaintiff. The defendant may rebut the presumption of intent by raising a defence that negates intent, such as mistake, provocation and jest.[48]

4.3 Was the plaintiff in **Isparta v Richter** *defamed?*

As already said, if the publication is found to be defamatory there are rebuttable presumptions that the publication is wrongful and that the publisher acted with intention to injure. In other words, the onus shifts to the defendant to justify his or her actions. In this instance, what was at issue was whether or not the postings referred to the plaintiff.

In the first defamatory posting the name "Louise" was used as well as the names of the two children. It was therefore easy to identify to whom the first defendant was referring in her posting. The second comment does not refer to the plaintiff by name. Hiemstra AJ referred to *Knupffer v London Express Newspapers Ltd*[49] in this regard, where Viscount Simon LC said:

> There are two questions involved in the attempt to identify the appellant as the person defamed. The first question is a question of law - can the article, having regard to its language be regarded as capable of referring to the appellant? The second question is a question of fact, namely, does the article in fact lead reasonable people, who know the appellant, to the conclusion that it does refer to him? Unless the first question can be answered in favour of the appellant, the second question does not arise…

The two questions in this case were therefore: (a) Can the words be regarded as capable of referring to the plaintiff? (b) Did the words in fact lead reasonable readers who know the plaintiff to the conclusion that they refer to her?[50] While only the first name of the plaintiff was posted on Facebook, Hiemstra J found that it was

47 Loubser *et al Law of Delict* 356.
48 Loubser *et al Law of Delict* 356.
49 *Knupffer v London Express Newspapers Ltd* 1944 All ER 495 (HL) 497.
50 *Isparta v Richter* 2013 6 SA 529 (GNP) para 23.

not necessary to use the plaintiff's surname, as the facts revealed that persons who read the post connected it with the plaintiff. In this regard two of the plaintiff's friends testified that they knew immediately that the comments referred to the plaintiff.[51] The court also indicated that the two postings should not be seen in isolation as they followed each other in a period of a few hours and the reasonable Facebook member would have understood that all the postings related to the same issues between the plaintiff and the defendant.[52] The judge ultimately found both statements defamatory, individually and collectively[53] and for the purpose of awarding damages he considered the combined effect of the comments.[54]

The second defendant, the husband, was also found to be liable, even though he was not the author of the postings. However, he knew about them and (when he was "tagged") he allowed his name to be coupled with that of the first defendant.[55] It is established law that not only the author of a defamatory publication is liable for defamation but everybody who repeats, confirms or draws attention to the defamatory statement will be held responsible for its publication.[56] When the husband was "tagged" he could have removed his name from that message if he wanted to distance himself from the publication. Since he did not remove the "tag", he associated himself with the message. It is suggested that anyone who "likes" or "shares" a defamatory posting can also be held liable for the defamation, since s/he confirms and repeats the posting.

In determining the amount of damages to be awarded Hiemstra AJ referred to case law[57] but added that an apology on Facebook would have gone a long way towards mitigating the plaintiff's damages. Yet, in this case the defendants had not apologised but continued to hold their view that they were entitled to publish

51 *Isparta v Richter* 2013 6 SA 529 (GNP) para 24.
52 *Isparta v Richter* 2013 6 SA 529 (GNP) para 28.
53 *Isparta v Richter* 2013 6 SA 529 (GNP) para 34.
54 *Isparta v Richter* 2013 6 SA 529 (GNP) para 36.
55 *Isparta v Richter* 2013 6 SA 529 (GNP) para 35.
56 *Hassen v Post Newspapers (Pty) Ltd* 1965 3 SA 562 (W) 564-565. Also see Loubser *et al Law of Delict* 343.
57 *Tsedu v Lekota* 2009 4 SA 372 (SCA); *Mogale v Seima* 2008 5 SA 637 (SCA); *Mthimunye v RCP Media* 2012 1 SA 199 (GNP).

anything about anybody.[58] An amount of R40 000 was deemed appropriate in the circumstances.[59] An order as to costs was also made on the magistrate's court scale, but including the costs of counsel.[60]

5 The role of the *Electronic Communications and Transactions Act* 25 of 2002 and the possible involvement of foreign law

The purpose of the *Electronic Communication and Transactions* Act 25 of 2002 (*ECT Act*) is to facilitate and regulate electronic communications and transactions.[61] It applies to all electronic communications and the questions arise whether it plays any role in communications by South African users of Social Network Services and whether the court in the *Isparta* case should have considered the applicability of the Act.

5.1 Section 15: Admissibility and evidential weight of data messages

Although not reported, it is evident from the heads of argument of the defendants in the *Isparta* case that the defendants objected to the plaintiff's use of electronically generated documents (printed pages from Facebook).[62] They argued that it was hearsay evidence and not in compliance with section 15 of the *ECT Act*.[63] They

58 *Isparta v Richter* 2013 6 SA 529 (GNP) paras 40-41.
59 *Isparta v Richter* 2013 6 SA 529 (GNP) para 41.
60 *Isparta v Richter* 2013 6 SA 529 (GNP).
61 See Coetzee 2004 *Stell LR* 501 for an overview of the Act.
62 See the plaintiff's heads of closing argument (*Isparta v Richter* 2013 6 SA 529 (GNP) paras 1.1-1.5.
63 Section 15 of the *ECT Act provides*:
Admissibility and evidential weight of data messages
(1) In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence-
(a) on the mere grounds that it is constituted by a data message; or
(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.
(2) Information in the form of a data message must be given due evidential weight.
(3) In assessing the evidential weight of a data message, regard must be had to-
(a) the reliability of the manner in which the data message was generated, stored or communicated;
(b) the reliability of the manner in which the integrity of the data message was maintained;
(c) the manner in which its originator was identified; and
(d) any other relevant factor.

submitted that the plaintiff should have attached a certificate from the service provider and the documents should have been endorsed and signed. The plaintiff rejected this and argued that there was no such requirement in the Act. Their heads of argument referred to *MTN Service Provider (Pty) Ltd v LA Consortium & Vending CC t/a LA Enterprises*[64] as authority. The plaintiff's argument must have been accepted by the court, given that the decision as reported does not refer to the issue of hearsay evidence.

5.2 Limitation of the liability of service providers in terms of the ECT Act *and the role of foreign legislation*

The question can also be asked if the plaintiff should rather have instituted action against the service provider, Facebook. In South African law (and in many other jurisdictions such as the UK and the USA) not only the author of a defamatory publication can be held liable for defamation but also the editor, printer, publisher, owner, distributors and vendors of the publication carrying the defamatory material.[65] Any intermediary on the Internet, such as a social network service, involved in distributing a defamatory publication may therefore be at risk of incurring liability for the defamation. Since such a situation would be untenable, many jurisdictions have introduced legislation to limit the liability of intermediaries for content provided by third parties.[66] In South Africa the liability of service providers is limited by the provisions of Chapter XI of the *ECT Act*. The Act distinguishes between service providers that act as mere conduits, those that cache information and those that act as hosts (such as social network services). Provided certain

(4) A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organisation or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.

64 *MTN Service Provider (Pty) Ltd v LA Consortium & Vending CC t/a LA Enterprises* 2011 4 SA 562 (W).

65 Neethling *et al Law of Personality* 134; Loubser *et al Law of Delict* 343.

66 In the USA, *Communications Decency Act* of 1996 (47 USC § 230) and in the UK the Defamation Act, 1996 and the *Electronic Commerce (EC Directive) Regulations*, 2002 limit the liability of service providers.

conditions are in place,[67] none of them can be held liable for damages if a third party uses their services to distribute a defamatory publication. However, as a condition for limited liability they must remove or disable access to the offending material if they receive a "takedown notification" from a complainant.[68] Service providers may avail themselves of the protection of Chapter XI only if they are members of a representative body recognised by the relevant Minister and if they have adopted and implemented the official code of conduct of the representative body.[69]

The question arises whether a South African complainant can give a takedown notification in terms of the *ECT Act* to Facebook. Since South African Acts do not have extra-territorial application, this would probably not be effective.

A further question is whether or not a South African complainant could institute an action for defamation against Facebook. Several additional issues then have to be considered, namely, would a South African court have jurisdiction to hear the matter against the foreign defendant; if so, which country's law would be applicable to determine the matter; would the conduct complained of meet the requirements for liability of that country; and if it did, would it be possible to enforce a judgement against the foreign defendant?[70] An analysis of all these issues is outside the scope of this discussion,[71] but a few general remarks can be made.

As to jurisdiction: Facebook is based in Palo Alto, California, in the United States of America. In the first South African case dealing with the question of defamation in cyberspace, *Tsichlas v Touch Line Media (Pty) Ltd,*[72] both parties were domiciled in South Africa, but in different divisions of the High Court. The Witwatersrand Local Division founded jurisdiction principally on the basis that the cause of action (publication of the defamatory material by downloading the material) occurred within the area of jurisdiction of the court, and the defendant (a juristic person) was

67 See ss 73, 74, and 75 of *the ECT Ac*t.
68 Section 77 of the *ECT Act*.
69 Section 72 of the *ECT Act*. See also Marx 2011c *Obiter* 539.
70 See Collier 2005 *Stell LR* 22; Van der Merwe *et al ICT Law* 434 *et seq.*
71 For an in-depth discssuion of all these issues, see Forsyth *Private International Law*. Also see *Burchell v Anglin* 2010 3 SA 48 (ECG).
72 *Tsichlas v Touch Line Media (Pty) Ltd* 2004 2 SA 112 (W).

present in the court's jurisdiction because it had a place of business, although not its principal place of business, within the court's area of jurisdiction.[73] To the best of the authors' knowledge, Facebook does not have a place of business in the jurisdictional area of any South African court. Although the publication of the defamatory material took place in South Africa when it was downloaded here, that would not seem to be sufficient to establish jurisdiction over Facebook.[74]

As to the proper law, in *Burchell v Anglin*[75] the Court had to decide whether foreign law (the law of defamation of Nebraska) was applicable or not. In this case the plaintiff was a South African and the defendant an American residing in Texas. The defendant made defamatory comments about the plaintiff's business to a company in Nebraska, resulting in loss of business from this company. The plaintiff claimed for damage suffered to the plaintiff's reputation and for a loss of profit. The court decided that the law of Nebraska was the applicable law, since that was where the delict was committed and was the jurisdiction with the most significant relationship to the parties and the delict.[76] If the defamation takes place in South Africa, for example because a defamatory statement is downloaded here, a court could decide that South African law is applicable, but that is by no means a certainty.

If American law is found to be applicable, notice should be taken of section 230 of the *Communications Decency Act*, 1996 (USA), which gives service providers a federal immunity to any cause of action that would make them liable for information that originates with a third party that uses the service.[77] In *Zeran v America Online Inc*[78] the court explained:

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73 For a discussion of the *Tsichlas v Touch Line Media (Pty) Ltd* 2004 2 SA 112 (W) case, see Collier 2005 *Stell LR* 21. Also see Marx 2011b *Obiter* 330.

74 Also see Marx 2011b *Obiter* 322, 329-330.

75 *Burchell v Anglin* 2010 3 SA 48 (ECG).

76 *Burchell v Anglin* 2010 3 SA 48 (ECG) para 121. For a discussion of this case, see Marx 2011a *Obiter* 224; Schulze 2010 *ASSAL* 179.

77 See § 230 of the *Communications Decency Act* of 1996 (codified at 47 USC); *Zeran v America Online Inc* 129 F 3d 327 (4th Cir 1997); *Barrett v Rosenthal* 40 Cal 4th 33, 146 P 3d 510, 51 Cal Rptr 3d 55 (Cal Sup Ct November 20, 2006).

78 *Zeran v America Online Inc* 129 F 3d 327 (4th Cir 1997) 330.

> [L]awsuits seeking to hold a service liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content – are barred. The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. ... Section 230 was enacted, in part, to maintain the robust nature of Internet communication ....

Even if a South African court would accept jurisdiction over a case involving Facebook, would apply South African law and would give judgement against Facebook, such a judgement would probably not be enforceable through an American court because of the federal immunity provided by section 230 of the *Communications Decency Act*, 1996 (USA).

What if a South African user simply approaches Facebook directly to ask for a removal of defamatory content, without invoking a statutory right to demand removal? In the light of Facebook's harmful content policy it seems improbable that Facebook will remove material that is merely defamatory. Facebook's policy on the publication of "harmful content" prohibits content "deemed to be directly harmful, but allow[s] content that is offensive or controversial".[79] "Harmful content" is defined as "anything organizing real world violence, theft, or property destruction, or that directly inflicts emotional distress on a specific private individual (eg bullying)".[80] Specifically included under "harmful content" are violence and threats,[81] self-harm,[82] bullying and harassment,[83] hate speech,[84] graphic content[85] and nudity and

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79 See Facebook 2013 https://www.facebook.com/notes/facebook-safety/controversial-harmful-and-hateful-speech-on- facebook/574430655911054.

80 See Facebook 2013 https://www.facebook.com/notes/facebook-safety/controversial-harmful-and-hateful-speech-on- facebook/574430655911054.

81 It is stated on Facebook: "Safety is Facebook's top priority. We remove content and may escalate to law enforcement when we perceive a genuine risk of physical harm, or a direct threat to public safety. You may not credibly threaten others, or organize acts of real-world violence. Organizations with a record of terrorist or violent criminal activity are not allowed to maintain a presence on our site. We also prohibit promoting, planning or celebrating any of your actions if they have, or could, result in financial harm to others, including theft and vandalism. See Facebook 2013 https://www.facebook.com/communitystandards."

82 It is stated on Facebook: "Facebook takes threats of self-harm very seriously. We remove any promotion or encouragement of self-mutilation, eating disorders or hard drug abuse. We also work with suicide prevention agencies around the world to provide assistance for people in distress." See Facebook 2013 https://www.facebook.com/communitystandards.

83 It is stated on Facebook: "Facebook does not tolerate bullying or harassment. We allow users to speak freely on matters and people of public interest, but take action on all reports of abusive behavior directed at private individuals. Repeatedly targeting other users with unwanted friend

pornography.[86] Harmful content can be reported to Facebook, in which case Facebook will remove such content.[87] However, harmful content does not include defamatory content. Given the high esteem attached to freedom of speech in American law it seems obvious that Facebook will not remove defamatory content upon a request to do so.

In conclusion, it seems as if the ECT Act does not have an impact on communications between South African users of Facebook. (Different considerations might apply to South African users and locally situated social networks such as Mxit). It is arguably also not feasible to sue Facebook itself for defamatory content published by a third party on Facebook or to approach Facebook to remove defamatory content.

6 Conclusion

It is suggested that South African users of Facebook will have to deal with each other in South African courts in cases of *iniuria* committed on Facebook. As Neethling[88] correctly points out, it is evident from case law that it is not necessary for

requests or messages is a form of harassment." See Facebook 2013 https://www.facebook.com/communitystandards.

84 It is stated on Facebook: "Facebook does not permit hate speech, but distinguishes between serious and humorous speech. While we encourage you to challenge ideas, institutions, events, and practices, we do not permit individuals or groups to attack others based on their race, ethnicity, national origin, religion, sex, gender, sexual orientation, disability or medical condition." See Facebook 2013 https://www.facebook.com/communitystandards.

85 It is stated on Facebook: "Facebook has long been a place where people turn to share their experiences and raise awareness about issues important to them. Sometimes, those experiences and issues involve graphic content that is of public interest or concern, such as human rights abuses or acts of terrorism. In many instances, when people share this type of content, it is to condemn it. However, graphic images shared for sadistic effect or to celebrate or glorify violence have no place on our site. When people share any content, we expect that they will share in a responsible manner. That includes choosing carefully the audience for the content. For graphic videos, people should warn their audience about the nature of the content in the video so that their audience can make an informed choice about whether to watch it." See Facebook 2013 https://www.facebook.com/communitystandards."

86 It is stated on Facebook: "Facebook has a strict policy against the sharing of pornographic content and any explicitly sexual content where a minor is involved. We also impose limitations on the display of nudity. We aspire to respect people's right to share content of personal importance, whether those are photos of a sculpture like Michelangelo's David or family photos of a child breastfeeding." See Facebook 2013 https://www.facebook.com/communitystandards.

87 See Facebook 2014 https://www.facebook.com/help/212722115425932.

88 Neethling 2014 http://www.litnet.co.za/Article/facebook-en-persoonlikheidsbeskerming.

the South African courts or legislature to develop or create new principles in order to protect the victims of defamation on Facebook, as all that is really necessary is to adapt established principles to the activities of users of Facebook. He goes on to say that the posting of private information about others on a Facebook Wall which is accessible to all users and thus in the public domain constitutes *prima facie* the wrongful violation of privacy. If such a posting is also defamatory or insulting, it will be *prima facie* wrongful and the *boni mores* of the community will be the yardstick to measure the wrongfulness. The onus is then on the defendant to rebut the presumption of wrongfulness by providing a ground of justification for the comments.

What some users of Facebook believed to be a platform for self-expression without legal restraint is clearly subject to legal rules regardless of whether the public agrees with that or not. Users of Facebook must now be exceedingly careful not only about what they post but also with regards to the posts on which they may be "tagged" or which they "like", as there is clearly no unfettered freedom of expression on social networks in South Africa.[89]

89 Go Legal 2013 http://www.golegal.co.za/citizen-rights/sa-law-adapts-stay-relevant-social-media-space.

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LIST OF ABBREVIATIONS

ASSAL	Annual Survey of South African Law
ECT ACT	Electronic Communications and Transactions Act
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review

DEFAMATION ON FACEBOOK: *ISPARTA v RICHTER* 2013 6 SA 529 (GP)

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SUMMARY

Litigation involving social media is still very new in South Africa and only a few reported cases can be found. In this case discussion, a brief overview is given of the few cases already reported, but in the main the case of *Isparta v Richter* 2013 6 SA 4529 (GP) is discussed. In this case a South African court for the first time awarded damages to the plaintiff for defamatory comments made on Facebook. The questions that confronted the judge were whether the alleged defamatory statements did indeed relate to the plaintiff and whether the comments, individually or collectively, could be considered defamatory. The issue whether the "tagging" of another user of Facebook makes that user liable for the defamatory comments of the tagger is also addressed in the case. The case discussion concludes with a reference to other issues that could play a role in litigation involving Facebook, namely the *Electronic Communications and Transactions Act* 25 of 2002 and foreign law.

KEYWORDS: Applicable law; apology; *boni mores*; defamation; ECT Act; electronic media; Facebook; fair comment; freedom of expression; freedom of speech; grounds of justification; harmful content; intent; internet; internet service provider liability; interdict; jurisdiction; Mxit; reasonable publication; reputation; privilege; social media; social networking service; takedown-notification; wrongfulness.

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