Social Media Misconduct and Defamation Insights From

Booysen v Major [2021] ZAWCHC 273

1 Introduction

Social media has become a cornerstone of personal and professional communication in the digital era, significantly reshaping workplace dynamics (Grogan *Dismissal* (2013) 145). This is particularly true in South Africa, where, according to the Global Social Media Statistics Research Summary 2024, 93,5 per cent of Internet users actively engage on these platforms (Chaffey "Global Social Media Statistics Research Summary" (2014) https://www.smartinsights.com/social-media-marketing/social-media-strategy/new-global-social-media-research/ (accessed 2024-02-22)). This widespread usage has necessitated the establishment of employer regulations to safeguard corporate reputation and prevent legal complications. However, these regulations often intersect with employees' constitutional rights, creating the need for a delicate balance to be struck. Social media misconduct outside the workplace is one of the most pressing issues arising from this digital revolution (Letseka *Lesotho Labour Laws and Social Media Misconduct* (2022) 66). The term "social media misconduct" refers to any action or behaviour by employees on digital platforms that could harm the employer's reputation or disrupt the trust relationship between employee and employer. Disciplinary actions for such misconduct are inconsistent and often controversial, including severe consequences, including termination of employment.

This note focuses on the landmark South African case of *Booysen v Major* ([2021] ZAWCHC 273). This case revolved around an employee's defamatory social media posts. The court's ruling in this case, which highlighted the importance of employer social media policies and the potential consequences of non-compliance, is a significant development in the field of labour law and social media policies. This note critiques the current state of labour laws, social media policies, and the handling of social media misconduct outside the workplace in South Africa. It argues that regular updates to these policies are necessary to keep pace with social media's ever-evolving nature and to balance employer interests with employee rights. The note also examines the potential constitutional issues affected by implementing policies addressing social media misconduct.

The note is structured as follows: it starts with the case's factual background, followed by the findings. The note then discusses social media misconduct and how it intersects with freedom of expression. The segment

https://doi.org/10.17159/76vbfx24

thereafter analyses the case and how it relates to social media misconduct. The implications of the *Booysen v Majo*r case could shape future legal developments in this area, such as the introduction of more specific laws or guidelines regarding social media use in the workplace, making it a significant case. The note explores these potential future legal developments in more detail.

2 Factual matrix

The case of *Booysen v Major* centres on allegations of rape made by June Dolly Major against Melvin Booysen, an Anglican priest. Major accused Booysen of raping her in 2002 and publicly shared these allegations in 2016 (*Booysen v Major supra* par 2). In March 2021, Major shared another social media post that gained significant attention, prompting Booysen to file an urgent application (*Booysen v Major supra* par 2). Booysen denied the allegations and argued that Major's posts were harming his reputation and causing him irreparable damage (*Booysen v Major supra* par 4–5, 12, 17, 22, 24). He sought an urgent court order to prevent Major from posting information about him on social media platforms (*Booysen v Major supra* par 15–16, 21). Major used her social media to voice her allegations against Booysen and to foster a support community for other victims of sexual abuse (*Booysen v Major supra* par 19, 21, 42). Booysen contended that Major's posts were defamatory and detrimental to his reputation (*Booysen v Major supra* par 4–5).

3 Findings

On 30 August 2021, the High Court of South Africa (Western Cape Division, Cape Town) issued a judgment in the case of Melvin Booysen versus June Dolly Major. The case centred on the allegations of rape made by June Dolly Major against Melvin Booysen that she had publicly posted on social media (*Booysen v Major supra* par 2). The court found that Melvin Booysen had withheld crucial information when he sought urgent relief from the court (*Booysen v Major supra* par 21, 23). He had been aware since 2017 of the social media posts identifying him as a rapist but failed to disclose this information during his court application (*Booysen v Major supra* par 21). This act of misleading the court was deemed severe enough to warrant the dismissal of his application on that basis alone (*Booysen v Major supra* par 16). While the court acknowledged that the applicant's reputation had been damaged by these online posts since 2017, it found that the nature of the posts had evolved (*Booysen v Major supra* par 22). They transitioned from merely identifying him as a rapist to discussing an 18-year history of the case. Consequently, the court determined that the irreparable harm the applicant feared was non-existent, as his congregation had been discussing the issue for years without a noticeable impact on his reputation (*Booysen v Major supra* par 22). Furthermore, the court concluded that the applicant had satisfactory alternative remedies, including that of filing a defamation lawsuit. Thus, pursuing damages at a later date was deemed an appropriate course of action (*Booysen v Major supra* par 25). The court found that the balance of convenience did not favour the applicant (*Booysen v Major supra* par 28).

Granting his application would cause more harm to the respondent and the 8 000 individuals who had either shared their experiences or felt encouraged to speak out about their abuse (*Booysen v Major supra* par 28). Consequently, the court ordered the dismissal of the application with costs, on an attorney-and-client scale, owing to the applicant's withholding of information (*Booysen v Major supra* par 31).

4 Social media misconduct vs freedom of expression (defamation)

4 1 Social media misconduct

Social media-related misconduct, a globally acknowledged issue, lacks a universally agreed-upon definition, particularly insofar as it transpires outside the workplace. Such misconduct encompasses harmful social media activities that can negatively impact the workplace, such as offensive posts, harassment, or unauthorised sharing of confidential information. (Chitimira *Dismissal and Related Problems of Social Media-Related Misconduct in South African Workplace* (2021) 233). The definition is fluid, evolving with the ever-changing social media landscape where new platforms and trends frequently emerge (Letseka *Lesotho Labour Laws and Social Media Misconduct* 66). This dynamism means that what is acceptable on one platform may be deemed inappropriate on another, adding complexity to defining this misconduct.

In today's interconnected world, an employee's online behaviour can significantly affect their employer's reputation (Dube and Zhu "The Disciplinary Effect of Social Media: Evidence From Firms' Responses to Glassdoor Reviews" 2021 *Journal of Accounting Research* 1784). A controversial social media post, even made outside work hours, can rapidly escalate into a corporate public relations issue if associated with an employee. Blending personal and professional lives has created a grey area where an employee's social media activities can become a workplace concern (Van der Merwe, Roos, Pistorius, Eiselen, Nel, Erlank and Mabeka *Information and Communication Technology Law* (2021) 620). Determining which posts are controversial enough to be considered as misconduct is another evolving aspect of this definition.

Despite increased awareness of the challenges posed by social media-related misconduct, many labour laws, including the South African Labour Relations Act (66 of 1995), do not explicitly address this issue (Chitimira *Dismissal and Related Problems of Social Media-Related Misconduct in South African Workplace* 234). This legal vacuum further complicates the definition of social media-related misconduct and determining when an employee's social media activities become a workplace concern. The lack of clear legislation underscores the need for comprehensive workplace policies that define acceptable online behaviour and outline the consequences of misconduct. However, the lack of a specific definition in labour law does not mean that social media-related misconduct is unpunishable. Existing laws on

https://doi.org/10.17159/76vbfx24

harassment, defamation and privacy can be applied to social media-related misconduct, and employers' codes of conduct can provide a framework for addressing it (Reddy "Establishing a Test for Social Media Misconduct in the Workplace" 2018 *Journal of South African Law* 790).

A comprehensive social media policy is crucial for companies, as highlighted by the case of *Sidumo v Rustenburg Platinum Mines Ltd* (2008 (2) BCLR 158 (CC)) and Du Toit (Du Toit "Social Media: Guidelines on the Policy for Employees Using Social Media for Non-Business Purposes: Labour" 2013 1 *Professional Accountant* 24). Employers must establish and communicate conduct rules, separate from employment contracts, to guide employees' online behaviour (Du Toit 2013 *Professional Accountant* 25). Breaches could lead to justified termination (*Sidumo v Rustenburg Platinum Mines Ltd supra* par 20). However, according to Kenan, nearly half of all businesses still lack a social media policy (Kenan *Social Media Policy: A Guide For Your Organization* (2023) https://sproutsocial.com/insights/social-media-policy/ (accessed 2024-10-02)). Creating a social media policy is just the first step. Employees need to be aware of it and understand what is considered inappropriate on social media and the consequences of such behaviour (Du Toit "Social Media: Guidelines on the Policy for Employees Using Social Media for Non-Business Purposes" (date unknown) https://labourguide.co.za/general/social-media-guidelines-on-the-policy-for-employees-using-social-media-for-non-business-purposes (accessed 2024-11-10)). Employers should clarify that posting inappropriate content, even outside of working hours, will not be tolerated. This is crucial to prevent incidents like those in *Cantamessa v Edcon Group* ([2017] 4 BALR 359 (CCMA)). A social media policy should supplement the company's electronic communications policy, and should outline principles for employees' official and private social media use when their affiliation with the employer is known (Du Toit https://labourguide.co.za/general/social-media-guidelines-on-the-policy-for-employees-using-social-media-for-non-business-purposes). It should provide guidelines for non-business use, including the appropriate use of company equipment, confidentiality of company information, restrictions on using the company name or logo on private profiles, and prohibitions on discussing company-related matters (Du Toit https://labourguide.co.za/general/social-media-guidelines-on-the-policy-for-employees-using-social-media-for-non-business-purposes). Employees should also be advised to block unknown users and respect the company's code of conduct.

4 2 Freedom of expression (defamation)

Cornish suggests that employees increasingly turn to social media to voice their dissent (Cornish and Tranter *Law in Context* (2020) 22). This perspective aligns with Phungula's belief that, in the current constitutional era, employees often rely on their constitutional right to freedom of expression when facing allegations related to their social media comments (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?" 2020 *Obiter* 506). Section 16 of South Africa's Constitution, a fundamental pillar of a democratic society,

guarantees this freedom. Rautenbach and Venter support this view, stating that this section safeguards all forms of communication, including press freedom and the right to receive and share information or ideas (Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* (2018) 389–392).

However, while essential, the right to freedom of expression has limitations (s 36 of the Constitution), particularly in relation to employee social media use. As Burchell highlights, these limitations can be legally imposed, considering the employer's right to a positive reputation and business interests (Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) 139). There is a delicate line between safeguarding freedom of expression and maintaining a positive reputation. It is also widely recognised that employees have a common-law obligation to act in their employer's best interest (Coetzer "Watching What You Say Will Keep the Dismissal Away" (2019) https://www.golegal.co.za/freedom-expression-employment/ (accessed 2024-01-10)). However, the tension between an employee's right to freedom of expression and potential harm to an employer's reputation owing to social media misconduct can be attributed to several factors. These include an absence of explicit social media policies in the workplace and of legislative guidelines, as observed by scholars like Reddy (Reddy 2018 *Journal of South African Law* 792).

Internationally, South Africa's approach to social media misconduct is expected to align with the principles of freedom of expression outlined in international treaties and agreements. For example, article 19 of the Universal Declaration of Human Rights (UN General Assembly A/RES217(III) (10 December 1948)) acknowledges the right to freedom of expression without undue restrictions, including on social media platforms. By contrast, the International Covenant on Civil and Political Rights (UN General Assembly 999 UNTS 17 (1966). Adopted: 16/12/1966; EIF: 23/03/1976), which South Africa has ratified, supports the right to freedom of expression but also recognises the need for limitations to protect the rights and security of others. Achieving this delicate balance between allowing individuals to express their opinions freely and mitigating the potential harm caused by online content is a challenge shared by South Africa and the international community, as scholars like Gelashvili have pointed out (Gelashvili "Hate Speech on Social Media: Implications of Private Regulation and Governance Gaps" (2018) https://lup.lub.lu.se/student-papers/search/publication/8952399 (accessed 2024-10-23)). Therefore, while freedom of expression is vital, it must be exercised responsibly, considering the potential impact on others and the broader community – more specifically, its potential for defamation.

In the South African legal landscape, Internet defamation is incorporated into the broader defamation law. The civil offence of defamation entails deliberately violating a person's right to uphold a positive reputation (Van der Merwe *et al* 2021 *Information and Communication Technology Law* 533). Notably, defamation is not confined to traditional means of communication but also extends to modern platforms. As a result, standard defamation law rules apply to potentially damaging content disseminated on social media

https://doi.org/10.17159/76vbfx24

platforms like Facebook, MySpace and Twitter (Van der Merwe *et al* 2021 *Information and Communication Technology Law* 533).

In the landmark case of *National Media Ltd v Bogoshi* ([1998] ZASCA 94; 1998 (4) SA 1196 (SCA); [1998] 4 All SA 347 (A)), the court established the defence of reasonable publication. This provision enables media organisations to evade defamation liability, provided they can prove that the publication of the statements was reasonable, considering the context and circumstances. Furthermore, in *Braithwaite v McKenzie* (2015 (1) SA 270 (KZP)), Judge Chetty underscored the substantial risk that potential defamatory remarks on social media platforms pose to a person's reputation (*Braithwaite v McKenzie supra* par 28). He pointed out that the Internet's ability to spread information quickly to a vast audience exacerbates this risk (*Braithwaite v McKenzie supra* par 28). In another case, *Radebe v JD Group (Pty) Ltd* [GAJB 12297-14], an employee was dismissed for his inappropriate comments on Facebook, which he posted in reaction to management's complaints about his consistent lateness. The decision to dismiss the employee was upheld and deemed reasonable and justified. Similarly, in *Motloung v The Market Theatre Foundation* [GAJB4458-11], an employee was dismissed for posting hate speech on Facebook that negatively impacted the employer. The CCMA found that the employee had misused social media to propagate hate speech in the workplace.

By contrast, in *Robertson v Value Logistics* ((2016) 37 *ILJ* 286 (BCA)), Lynn Robertson was dismissed for prematurely announcing her retrenchment on social media before the retrenchment process was completed. However, the CCMA ruled that her comments did not severely damage the respondent's integrity, and that her dismissal was substantively unfair. In a different scenario in *Cliff v Electronic Media Network (Pty) Ltd* ([2016] ZAGPJHC 2; [2016] 2 All SA 102 (GJ)), Gareth Cliff was removed from his position on the Idols show owing to his comments during the Penny Sparrow racial controversy. He was dismissed for his perceived racist comments on social media, which tarnished the reputation of his employer.

Defamation can also be directed towards legal entities. As Parsons notes, defamation affecting a legal entity is only recognisable when the entity's reputation, considered an asset, is negatively impacted (Parsons *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (1951) 202*)*. The liability for defamation extends beyond the original author of the statement, implicating anyone involved in promoting or sharing defamatory content on social media platforms (Neethling and Potgieter *Law of Delict* (2015) 402; *Hassen v Post Newspapers (Pty) Ltd* 1965 (3) SA 562 (W) 564–565). For instance, the case of Hepburn, an employee of Barloworld Equipment, underscored how the misuse of emojis can significantly disrupt workplace dynamics and potentially lead to defamation situations.

South Africa's defamation law balances the right to reputation and freedom of expression. It extends to online platforms and social media, and employees can face legal and professional repercussions for defamatory comments. The law also acknowledges the potential for defamation to damage a legal entity's reputation. Using emojis and other digital communication tools can also result in defamation.

5 Analysis

The *Booysen v Major* case explores, in clear terms, the intricate dynamics between social media misconduct, defamation and freedom of expression. While social media platforms empower individuals to share their experiences and opinions, they also present a minefield of potential pitfalls, such as misconduct and defamation. This case underscores the delicate equilibrium that must be maintained between the right to freedom of expression and the potential harm to an individual's reputation.

Major used social media to voice her allegations of sexual abuse against Booysen and to build a support network for other victims. While one might respect the exercise of Booysen's right to freedom of expression, this act also raised concerns about the potential misuse of such platforms for personal motives. Booysen's argument that Major's posts were defamatory and damaging to his reputation underscores the potential harm such expressions can cause. This case highlights the possible legal consequences of defamatory posts on social media, underlining the need for individuals to exercise their right to freedom of expression responsibly.

Major's posts about Booysen could have a detrimental effect on his professional reputation, not just in his personal capacity but also in relation to his current or future employers. In today's digital age, employers often consider the online presence and reputation of their employees, as it can reflect on a company's image. If an employee is associated with negative or controversial content, it could potentially harm the company's reputation. In this case, Major's allegations against Booysen could lead his employer or future employers to disassociate from him to avoid any negative impact on the company's image. This is not just about Booysen's personal reputation but also about the reputation of the place where he works. Employers may not want to be associated with an individual who has been publicly accused of such serious misconduct, even if the allegations are unproven. This could potentially limit Booysen's professional opportunities and growth. The post by itself can constitute social media misconduct on Booysen's part, as he might bring the company name into disrepute even if he was not the administrator or the author of the posts; merely associating with the post may be enough to commit misconduct. The case underscores the importance of clear and comprehensive social media policies in the workplace. Employers should explicitly stipulate in these policies that any association of their employees with posts that could negatively affect the workplace or its reputation will not be tolerated.

This aspect of the case underscores the far-reaching implications of social media misconduct and defamation. It serves as a reminder that the potential harm caused by defamatory posts extends beyond the individual's personal reputation and can have serious professional consequences. The case further emphasises the need for individuals to exercise their right to freedom of expression responsibly, considering not only their own reputation but also the potential impact on their professional life and the reputation of their employers.

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Adding another layer of complexity to this case is the timing of the allegations. Major accused Booysen of raping her in 2002 but only made these allegations public in 2016. This delay could potentially impact the credibility of the allegations and of the subsequent social media posts. It raises questions about the appropriate use of social media for making serious allegations and the potential for such platforms to be misused for disseminating unverified or false information.

The court's findings in *Booysen v Major* present a multifaceted exploration of social media misconduct, defamation and freedom of expression. The court's finding that Booysen had withheld crucial information when seeking urgent relief is a stark reminder of the importance of full disclosure in legal proceedings. Misleading the court is a serious offence, and in this case, it resulted in the dismissal of Booysen's application. This highlights the potential consequences of withholding information and the importance of honesty and transparency in legal proceedings.

The court's determination that the irreparable harm Booysen feared did not exist raises questions about the subjective nature of harm to reputation. His congregation had been discussing the issue for years without a noticeable impact on his reputation. This underscores the difficulty of quantifying such harm and the complexities involved in defamation cases.

Finally, the court's decision that granting Booysen's application would cause more harm to Major and the 8 000 individuals who had either shared their experiences or felt encouraged to speak out about their abuse highlights the potential broader societal impact of such cases. This raises the question of balancing individual rights with broader societal interests. Freedom of expression is a fundamental right, but it must be balanced against the potential harm to individuals and society.

The *Booysen v Major* case is a stark reminder of the complexities and challenges of navigating social media misconduct, defamation and freedom of expression. It highlights both the potential pitfalls and the power of social media, emphasising the need to navigate these platforms with care and responsibility. This serves as a cautionary tale regarding the responsible use of social media. It highlights the potential legal consequences of making defamatory posts. It stresses the importance of ensuring that the right to freedom of expression does not infringe upon the rights and reputations of others.

6 Conclusion

The case note has delved into the intricate interplay between social media misconduct, defamation and freedom of expression, using *Booysen v Major* as a poignant example. This case illuminates the complexities and challenges of navigating these interconnected elements in our increasingly digital world.

The emergence of social media has necessitated the formulation of employer regulations designed to protect corporate reputation and mitigate potential legal risks. However, these regulations often intersect with employees' constitutional rights, underlining the need to uphold a delicate

equilibrium. The *Booysen v Major* case highlights the potential pitfalls of social media, such as misconduct and defamation, underscoring the importance of careful and responsible navigation of these platforms.

The case note also emphasises social media's empowering potential, enabling individuals to share their experiences and express their opinions. It underscores the critical importance of employer social media policies and the potential legal consequences of non-compliance. The case serves as a cautionary tale, reminding us of the responsible use of social media and the potential legal implications of posting defamatory content.

The case note underscores the need to balance the right to freedom of expression with the potential harm to the reputation of others. It stresses the importance of ensuring that the exercise of the former does not infringe upon the latter. This case note highlights the evolving nature of labour laws in the context of technological advancements and the need for potential legal developments to manage effectively the complexities of social media misconduct, with a particular focus on defamation.

This case note reminds us of the ongoing evolution of the legal landscape in response to social media's rise and the challenges it presents. It underscores the importance of maintaining a balance between freedom of expression, potential harm to reputation, and the need to navigate social media platforms carefully to avoid legal pitfalls.

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https://doi.org/10.17159/76vbfx24