Recent high-profile cases of social media indiscretions have proved that there is a high price to pay for impulsively posting comments on platforms such as Twitter and Facebook. Although an indiscretion might affect your reputation or your career more than your bank balance, the cost could be devastating, says Liz Still.

It is the era of social media indiscretion. Penny Sparrow, Justine Sacco, McIntosh Polela, Matthew Theunissen ... just four of the best-known examples of people who have paid dearly this year for posting thoughtless remarks on social media.

Sparrow compared the black people who left litter on Durban’s beaches on New Year’s Day to “monkeys”; Sacco, a New Yorker, was on her way to South Africa when she implied that HIV and Aids afflict only black people; Polela made a crass remark that seemed to condone rape in prison; and Theunissen indulged in some racial ranting against Sports Minister Fikile Mbalula.

All of them have had good reason to regret their words and learnt the futility of apologising, but Polela and Sacco also lost their jobs. Theunissen was unemployed at the time, and Sparrow had recently given up her job. However, it illustrates how seriously employers take the risk of damage to their reputations that Sparrow’s former employer, Jawitz Estates in Scottburgh on the KwaZulu-Natal South Coast, made a frantic attempt to distance itself from its former employee by tweeting its disgust and promising to post her letter of resignation on social media to prove that she had left the company before the remark was made. Jawitz Estates also claimed to be “consulting an attorney to deal with this matter and the damage this woman has done to our company”.

So social media indiscretions risk much more than short-lived embarrassment or reputational damage. If they reflect on your employer, you risk losing your job and damaging your prospects of finding another. As Sacco put it in an interview: “I had a great career, and I loved my job, and it was taken away from me. Everybody else was very happy about that.”

Publish and be damned
There is no easy way of getting an accurate picture of the number of people who have been fired for misdemeanours on social media in the recent past, as only contested disputes are brought to the attention of the media via either the Commission for Conciliation, Mediation and Arbitration (CCMA) or the courts. However, social media lawyer Emma Sadleir says she would not be surprised if one person was being fired every day in South Africa for some sort of social media indiscretion.

According to the Oxford Dictionary, the definition of “publish” is to “make generally known; make known to a third party”. Note that the definition refers to “a third party”, not a large number of third parties, so one is publishing even if the audience is very limited. With the help of Facebook, Twitter, LinkedIn, WhatsApp, YouTube, the comment facilities on websites, and countless other routes to getting your two-cents’ worth out there, we have all become instant publishers. It follows that we
should all be aware of the elementary rules of publishing. We should be conscious of defamation, hate speech, racist speech, confidentiality, privacy, intellectual property and, of course, the basics of employment law.

Traditional media channels are well versed in the dos and don’ts of hate speech and defamation. They have well-established systems for handling complaints from the general public, through the South African Press Council and the Broadcasting Complaints Commission of South Africa, the final arbiters of disputes. Both these councils are independent judicial tribunals that regulate in the interests of freedom of expression and are mandated to reach binding decisions on complaints about transgressions of their codes of conduct.

On January 1 this year, the Interactive Advertising Bureau of South Africa (IAB SA, formerly the Digital Media and Marketing Association, or DMMA) which represents the digital media, joined the Press Council and adopted the Press Code, which has been repackaged as the Code of Ethics and Conduct for South African Print and Online Media. Individuals with a complaint against any of the nearly 200 members of IAB SA (including the likes of IOL, News24, MWeb, BizCommunity and MyBroadband) can approach the Press Ombudsman for redress.

**Where the danger lies**

AT THE LAST COUNT, FACEBOOK HAD MORE than 50 million users in Africa and 14 million registered users in South Africa. Twitter has at least seven million users in South Africa. According to Twitter, the international Twitter stars are Katy Perry with 91.8 million followers, Justin Bieber with 86.4 million and Taylor Swift with 80.4 million. The South African Twitterati include Trevor Noah with 4.2 million followers, AB de Villiers with 3.6 million and Gareth Cliff with 1.4 million.

It is quite sobering to compare these figures with the circulation figures of the traditional print media. According to the Audit Bureau of Circulations (ABC) figures for May 2016, daily newspapers in South Africa were selling 1.33 million copies a day – fewer than Cliff’s Twitter followers. Social media has magnified the reach and impact of casually
offensive, racist and derogatory remarks exponentially.

South Africa is one of a very few countries that have laws prohibiting hate speech, although hate speech is not defined specifically in the legislation. (The Oxford Dictionary defines it as “the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.)

The Promotion of Equality and Prevention of Unfair Discrimination Act (known as the Equality Act), which was passed in 2000, promotes equality and makes it “illegal” to engage in harassment or hate speech. The Act prohibits the publication or communication of words that could reasonably be construed as having the intention to be hurtful, to harm or incite harm, or to promote or propagate hatred.

However, if you are found guilty of hate speech, the censure does not carry a criminal record unless the court recommends escalation of the case to the Director of Public Prosecutions for the possible institution of criminal proceedings.

Sheniece Linderboom, who heads the Law Clinic at the Freedom of Expression Institute, says that, while hate speech is prohibited, it is not a crime “in the strict legal sense”. The notion of hate speech should be understood in the context of the transformation mandate of the South African constitution, she says.

Anyone accused of hate speech is obliged to appear before a designated Equality Court. In terms of the Act, the court has a range of possible punishments available to it, from an unconditional apology to the payment of a fine or compensation for financial loss, unless it sees fit to escalate the case.

In Sparrow’s case, the Umzinto Equality Court ruled that she should pay a fine of R150 000 to the Oliver and Adelaide Tambo Foundation. Theunissen was required to do community service for sports development in a disadvantaged part of Cape Town as part of a settlement agreement. He was also required to refrain from using social media for a year and to undergo anger management therapy.

**Defamation**

Defamation is quite different from hate speech. It is defined as the unlawful and intentional publication of statements about a person that has the effect of hurting that person’s reputation in the eyes of society. Whereas hate speech is motivated by prejudice against a group of people, defamation is motivated by an intention to harm the reputation of a specific individual or that of a company.

The law of defamation seeks to find a workable balance between the right to an unimpaired reputation (the right to dignity) and the sometimes-conflicting right to freedom of expression. Individuals who believe they have been defamed can claim damages for the unjustified publication of anything that damages the reputation.

According to the Freedom of Expression Media Handbook, published by the Freedom of Expression Institute, examples of defamatory statements might include the suggestion that a person is a criminal or has committed a criminal offence, has acted immorally, is insane or suffers from a stigmatising disease, is unfit for the profession he or she practises, or is trading despite being insolvent or of dubious financial standing.

There are very specific conditions that must be met for a defamation case to be successful. According to the handbook, the wronged party must be able to prove that:

- The statement was published.
- The statement was defamatory. The courts use the “reasonable man” test to decide whether or not a reasonable person of ordinary intelligence would think less of the wronged party after hearing or reading the defamatory statement.
- There was the intention to injure the reputation of the aggrieved party. An intention to defame is assumed unless the defendant can prove that the statement was a mistake, or was made in jest.
The publication of the statement was unlawful – in other words, it was an unjustified infringement of the aggrieved party’s right to dignity.

Speaking at the short-term insurance industry’s 2016 conference in Johannesburg earlier this year, Dario Milo, a partner in the Dispute Resolution Practice at the law firm Webber Wentzel, told the audience that publishing via social media had compounding defamation cases.

“Material is deemed to be published where it is viewed,” he says. In the past, the readership of print media was constrained by geographic boundaries. Now, a defamatory remark delivered by Twitter can be read in any country in the world. In this new environment, the offended party can look for the most benign or favourable jurisdiction in which to seek redress for defamation and apply to the courts in that country for the matter to be heard. In the United States, for example, defamation law is much less favourable towards the plaintiff, especially when the plaintiff is a public figure, than it is in Europe and Commonwealth countries such as South Africa.

The difference, according to a post on the website of the Chicago law firm Saper Law, which specialises in social media, is that the US courts are reluctant to discourage the reporting of news issues that are in the public interest. “Accordingly, when an allegedly defamatory statement is made about a member of public office or a public figure, such as a celebrity, it’s not enough to prove the falsity of the statement in dispute. US courts require such public plaintiffs to show both falsity and actual malice. This actual malice standard requires the plaintiff to show by clear and convincing evidence that the defendant knew the material was false, or published the material with reckless disregard for the truth,” the Saper Law article says.

Under British and South African law, however, there is no distinction between public figures and ordinary citizens. “The burden of proof rests with the defendant/publisher to prove the truth of the statements in dispute,” explains the article. “The plaintiff only has to show that the statement harms his reputation, without having to show that any damage has actually been suffered. Defamatory statements are thus presumed to be false, unless the defendant can prove their truth.”

In the past, a three-year prescription applied to defamatory remarks – in other words, the wronged party had to seek redress within three years of the remark being published. Journalists were told not to throw anything away for at least three years, as this was the standard limitation period for defamation actions. According to Milo, the prescription rule has become irrelevant in the era of Google, since a defamatory article or comment is effectively republished every time it is accessed. So, in South Africa, the prescription period begins anew every time an archived article is accessed.

Defence mechanisms

There are a number of acceptable defences to a charge of defamation. The main ones are that the wronged person gave his or her consent, that the reported comments are true, that it is in the public interest to publish the truth, or that the comments were made in the discharge of a duty or during judicial proceedings.

Typical court redress for defamation might be a prohibition on the publication of the defamatory statement, the withdrawal or recall of the defamatory statement, an award of financial compensation to the aggrieved party, a public apology, or a combination of these.

‘Like’ it or not?

The burning question is: Are you guilty of defamation if you “like” or share a post on Facebook, or retweet something you read on Twitter?

According to Milo, this depends on the context, but if the context suggests that you are endorsing the statement or republishing it, you could be liable for defamation.

In a recent debate on the online IT magazine MyBroadband, Verlie Oosthuizen, a social media law specialist and partner at Shepstone & Wylie Attorneys, said there was a risk in engaging in “the chain of publication”.

“When a person likes or shares a comment, they are publishing that comment once again, especially in a Facebook and social media context, as it will appear on that person’s newsfeed,” Oosthuizen says. Whether or not anyone would see in such a case remains to be seen, but who wants to risk it?

Linderboom argues that “liking” a Facebook post would probably not be considered an endorsement of the comment. “Liking a post is not a direct articulation of defamatory remarks; it lacks the clear intention required to declare it as defamation,” she says.

However, the case of the DA MP Dianne Kohler-Barnard, whose political career is in disarray after she shared a post on Facebook claiming that education, health and the police service were better under apartheid, demonstrates that the price can be high, even if your action is not legally defamatory. Kohler-Barnard claimed she had not read the whole post before she shared it, and had not seen the reference to apartheid state president PW Botha.

According to an article on the website of Cerebra, an advertising agency that develops social media campaigns for companies such as Absa, Vodacom and Bosch, “even if you didn’t mean to be spiteful or were ‘just joking’ and made a comment that can be seen to be derogatory, the courts can still punish you”. The writer, Cerebra managing director Craig Rodney, says you should think “more than twice” about posting anything negative or controversial on social media.

He says court cases have found the following:

You don’t have to be the original poster;
just sharing (or retweeting) defamatory content can make you liable;
- If someone tags you in a defamatory post, you are just as liable, unless you attempt to extricate yourself;
- A series of posts can be seen as defamatory in context with one another; and
- If posts are not kept private, they are held to be in the public domain, and this makes you liable.

Employment law
THE POTENTIAL FOR EMPLOYEES TO GET INTO trouble with their employers has grown dramatically as a consequence of social media. Two of the most simple and obvious - but serious - ways they might do this is by posting defamatory statements or hate speech about their employers, or publishing confidential information about the company's operations.

Social media ensures that comments that would once have remained private become widely read gaffes with potentially dire consequences. A number of prominent cases have shown that despite the culprit being off-duty and using a private cellphone or computer to publish remarks, there have been serious repercussions.

Can an employer act against an employee simply because it doesn’t like something he or she has said on social media? Or is the employer required to have a specific social media policy or code of conduct in place, to which all employees sign up as a condition of employment?

According to Linderboom, a code of conduct is not necessary, but it is the employer’s prerogative to introduce one should it wish to. However, she says that any policy or code of conduct would need to be in line with the constitution – in other words, it would need to avoid overstepping its purpose and restricting the constitutional right to freedom of expression enjoyed by every individual.

But how do you know where the boundary lies between free expression and something that can legitimately be construed as hate speech, or is legally defamatory? If you have a bad day at the office and then, after a few drinks, send out a late-night tweet saying you hate your boss, can you be fired?

According to Rosalind Davey, at law firm Bowman Gilfillan, in our law, dismissal should be reserved for cases of serious misconduct. “For a dismissal for conduct on social media to be fair, there must have been misconduct by the employee that renders continued employment intolerable and the employer must have followed a fair procedure. Dismissal should be reserved for cases of serious misconduct repeated offences.

“I do not think that to remark about having a bad day at the office, on its own, warrants dismissal. Before taking disciplinary action against employees for social media misconduct it is important to understand that, as with any disciplinary infraction, the same rules relating to fairness and equity apply,” she said.

Is the right to privacy a defence?
IN AN OPINION PIECE PUBLISHED ON THE WEBSITE of Bowman Gilfillan, headed Beware: Facebook could get you fired, Davey and Lenja Dahms-Jansen, an associate in the law department, refer to a case settled at the CCMA: Sedick & Another and Krisray (Pty) Ltd (2011).

In this case, the employer charged employees with “bringing the company name, director, management and staff into serious disrepute in the public domain” and posting disparaging comments on Facebook. After a disciplinary hearing, it dismissed them.

According to Davey and Dahms-Jansen, the marketing manager of the company had set up her own account on Facebook and found that she could access all the employees’ Facebook pages and read their comments. In challenging the fairness of their dismissals, the employees alleged that the employer had suffered no damage because their posts had not referred to anyone by name. The employees also alleged that, by accessing their profiles, the employer had infringed their right to privacy. The arbitrator therefore had to decide whether the employees’ right to privacy had been violated.

Davey and Dahms-Jansen say: “The commissioner considered the Regulation of Interception of Communications and Provision of Communication-Related Information Act (Rica), which regulates the interception of communications, and decided that the employer was entitled to access the discussions as the employees had ‘open’ Facebook profiles.

“Although the employees alleged otherwise, the commissioner found that they had failed to use their privacy options and had thus abandoned any claim to privacy and to the protections of Rica.

“Considering what was written, where the comments were posted, to whom they were directed, to whom they were available and by whom they were made, the commissioner confirmed that the comments brought the employer’s good name and reputation into disrepute with persons both inside and outside the organisation. The employees’ dismissals were accordingly confirmed.”

Davey and Dahms-Jansen conclude that commissioners are taking the issue of social media misconduct seriously and are not falling for arguments about special privilege, privacy and anonymity of employees online. They warn, however, that employers cannot use employees’ online conduct as an excuse for carrying out a pre-meditated house-cleaning: the normal rules of fairness and equity apply.

Davey believes a social media policy is a good idea, but it should be backed up by a social media strategy that contains an action plan for handling incidents when they happen. “I also think employers should train their employees about the risks and unforeseen
consequences of social media use and what the employer believes is acceptable social media use and what is not acceptable,” she says.

Asked if she thought South Africans were learning any lessons from the “Twitter villains they were reading and hearing about, Sadleir said she thought they were. “However there are more cases coming to the fore where the victims believe they are having a private conversation when, in fact, they are not,” she says. “A good example of this is the case of the allegedly racist comments made by Judge Mabel Jansen with a journalist via the message system on Facebook. In other examples I have dealt with, the offending communication was via a supposedly private WhatsApp group.”

Managing user-generated content

IF YOU OWN A BUSINESS WITH A WEBSITE THAT invites comments from the public, you should be aware that you have a special duty to monitor your website for hate speech and defamation.

The website techopedia.com says user-generated content (UGC) refers to “any digital content that is produced and shared by end users of an online service or website”. So this can be anything from a regular blog to a brief comment at the end of a news report, or a retweet.

The responsibility of ensuring that UGC does not contain hate speech is particularly important in South Africa, where racism and related issues are the subjects of daily debate. Many news websites have simply given up trying to manage UGC and withdrawn the invitation to readers to contribute to discussions.

If you have a blog site that attracts comments that clearly constitute hate speech, what should you do? Or what if you own a travel agency and a customer makes scathing comments about a tour operator?

Milo told the insurance conference that the best local example of such a case involved singer Sunette Bridges, who was taken to the Equality Court by the South African Human Rights Commission in 2015. She was accused of hosting commentary on her Facebook page that constituted hate speech in terms of the Equality Act.

The court ordered Bridges to monitor her Facebook pages regularly and remove any content that amounted to hate speech, harassment or the incitement of violence. Further, she was told to post messages on her Facebook pages, in both English and Afrikaans, distancing herself from any form of hate speech and harassment. She was also ordered to warn users that the court order existed; therefore, comments that promoted hate speech, constituted harassment, or incited violence would not be tolerated on her pages.

Last words

MILO URGED INSURERS ATTENDING THE INSURANCE conference to design liability insurance products that would provide cover for legal fees and defamation awards in the case of the misuse of social media. However, none of the insurers contacted for this article expressed any interest in such a product. Insurance is designed and priced according to the level of risk of a certain event taking place and they said it would be difficult to evaluate the risk where social media was concerned.

Sadleir acknowledges this, but says the first such product might be designed for an employer “in the event of large-scale reputational damage caused by an employee.”

“However, in order for such a policy to be sold, the insurers would be sure to insist on appropriately worded social media policies, appropriate training for staff and censure by way of employment contracts,” she says.

A final warning comes from Milo: “Imagine your tweeted remark or Facebook post printed in large letters on a billboard on a major highway,” he says. “If you would be uncomfortable seeing it published in such a way, don’t write it anywhere else.”