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# EMPLOYMENT ALERT

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### No rest for the wicked Social Media Policy

Our courts have often dealt with employees operating under the misconception that their social network sites are personal, private and detached from their employment. Employees may often feel secure under the guise offered by the divide between work and personal life, particularly during the festive "leave" season where employees spend less time in their work environment. However, dismissals on account of social media misconduct are on the rise.

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## No rest for the wicked Social Media Policy

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**Our courts have often dealt with employees operating under the misconception that their social network sites are personal, private and detached from their employment. Employees may often feel secure under the guise offered by the divide between work and personal life, particularly during the festive "leave" season where employees spend less time in their work environment. However, dismissals on account of social media misconduct are on the rise.**

In recent judgment *EDCON Limited v Cantamessa and Others*, the Labour Court found that a racist comment made by an employee while on leave constituted a dismissible offence. The Labour Court crystallised the principle that it is within an employer's right to discipline its employee for misconduct which occurred outside the workplace, provided a connection can be established between the employees' misconduct and the employer's business.

In this case, the employee had identified herself as a specialist buyer for EDCON on her personal social media account wherein she posted comments, referring to former president Jacob Zuma, to the effect of:

*"...and listening to these stupid f@k1ng monkeys running our country and how everyone makes excuses for that stupid man we have to call a president..."*

The employee posted this comment following a cabinet reshuffle during December 2015. The comments made by the employee gained traction on social media, which resulted in a formal complaint being laid against the employee by a customer of the employer.

The Labour Court considered the established principle that employers are precluded from taking disciplinary action against employees for misconduct perpetrated outside of the workplace furthermore outside of their ordinary hours of work. The court however drew a distinction, in this particular context, as the conduct of the employee had ultimately caught the attention of the greater public which cast a negative light on the reputation of the employer against its customer base which was predominantly black people.

The Labour Court ultimately found that while the comment was made on the employee's private account, the comment did gain attention in the public domain *albeit* to a limited extent. However, within that limited range, the employer was associated with the employees' conduct which opened up the employer to reputational damage.

It is important to note that an employee need not identify themselves as an employee of a certain company in order for them to fall foul of the employers disciplinary policies and code of conduct. In *Dewoonarain v Prestige Car Sales (Pty) Ltd t/a Hyundai Ladysmith* (2014) [MIBC] the employee made racist remarks against its employer and colleagues, without mentioning the employers name. The employee argued that the employer ought to prove how the employee's comments could bring the company's name into disrepute, where its name was not mentioned. The arbitrator found that the issue was whether a reasonable inference could be drawn from the remarks that they were directed at the employer, thus creating a connection

## No rest for the wicked Social Media Policy...continued

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between the employees misconduct and the business of the employer. The arbitrator found this to be the case in that instant.

In the EDCON judgment, the employee fell within a group of employees whose identity largely remained anonymous, the court however provided:

*"...once their identities are exposed to the general public, it must only be in a positive and not negative environment or circumstance, otherwise such disclosure imposes a risk that the name of Edcon may be brought into disrepute."*

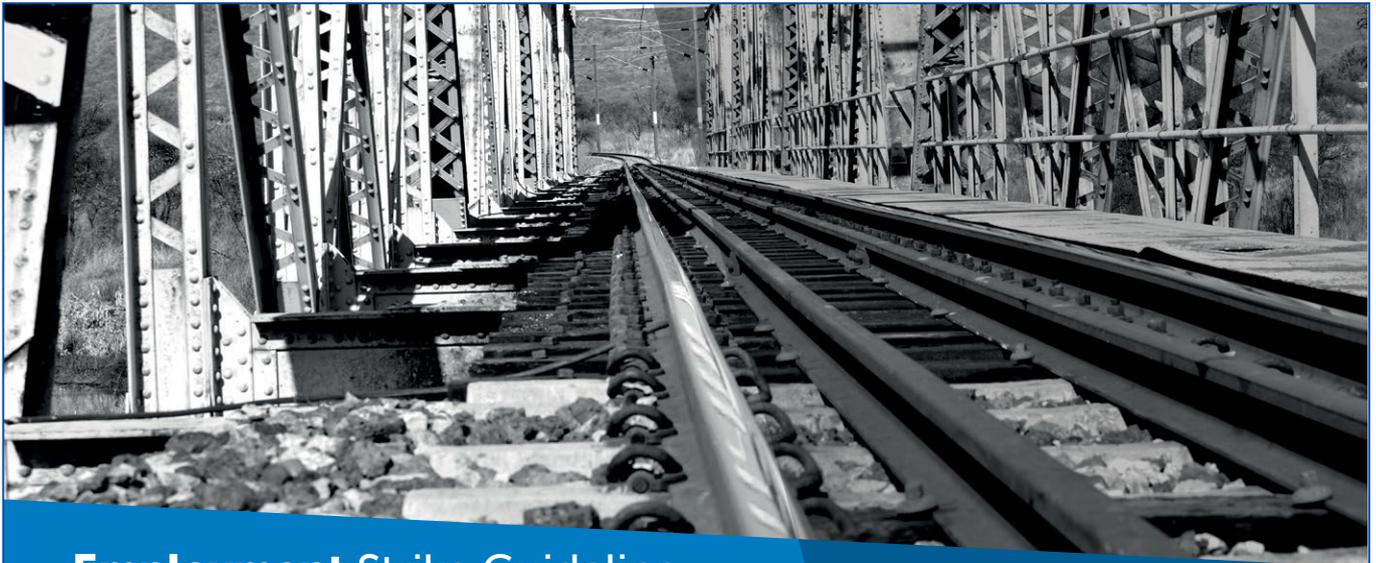
Social media misconduct not only opens up the employee to dismissal, it further leaves employers exposed to vicarious liability for discrimination, harassment and

defamation claims. In the case *Pehlani v Minister of Police* (9105/2011) [2014] ZAWCHC, the High Court held that it is not necessary for an employee to be acting within the course and scope of their employment to fall foul, provided a connection can be drawn between the misconduct of the employee and the employer's business.

With the festive season approaching, employers must encourage employees to be mindful of the company's social media policies and procedures, and most importantly their social media conduct as the failure to do so is likely to have devastating consequences for both the employer and its employees.

*Nicholas Preston and Lerato Malope*

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