EMPLOYMENT LAW
ALERT

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CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

‘I tweet what I like’ – Social media and the risk of defamation

Social media has transformed our modes of communication, access to information and speed of transfer of information. Different social media platforms will forever be part of our lives and ways of interacting with other people in both professional and personal settings.

As the Supreme Court of Appeal (SCA) noted in *Economic Freedom Fighters and Others v Manuel [2021] 1 All SA 623 (SCA) (Manuel)*), social media platforms like Twitter, Facebook and others, have provided ordinary members of society with publishing reach beyond print and broadcast media’s capabilities. There is no doubt a direct correlation between the increase in defamation cases both internationally and locally, and the ability to express one’s views to a large audience at the mere click of a button.

With the ever-growing use of social media, the spread of misinformation and damage to individuals and institutions, it is useful to revisit the principles of defamation in light of the recent judgment in *Daily Maverick (Pty) Ltd and Another v Modibe Julius Modiba case no: 33428/2020*. In this case the High Court (Gauteng Division) was confronted with a defamation case stemming from the posting of a series of defamatory tweets. The *Daily Maverick*, an online news and information service and others (applicants), instituted proceedings against a certain Modibe Modadiba (respondent). From 17 January 2019, and over a period of 10 months, the respondent submitted unsolicited columns to the *Daily Maverick*, four of which it published. No reward was offered to the respondent, whether in cash or kind, as was customary with all guest columnists. In June 2019, an article by the respondent entitled *“Why Zindzi Mandela should be protected”* was editorially considered unfit for publication because it was poorly written and incoherent. The respondent submitted more columns which were also considered unfit for publication. One of them, an article about the establishment of a national women’s football league, was rejected because it lacked depth, and another on Pan-Africanism because it was too short for a *Daily Maverick* column, was incoherent and lacked a real conclusion. The respondent ceased to submit articles to the Daily Maverick. Instead, on 3 January 2020 he posted a message on the social media platform Twitter, alleging that *“I took a decision to stop writing /sending articles to the Daily Maverick. They only publish articles where you criticise black leaders /ANC, or EFF. Once you start writing about anything which is seen as ‘anti-white’, they have a problem (Let’s create our platforms)*”. The respondent continued to post a series of similar tweets, and further alleged that the applicants were engaged in a concerted campaign to mobilise students and social media influencers to spread fake news regarding certain individuals and organisations for payment.

'I tweet what I like' – Social media and the risk of defamation

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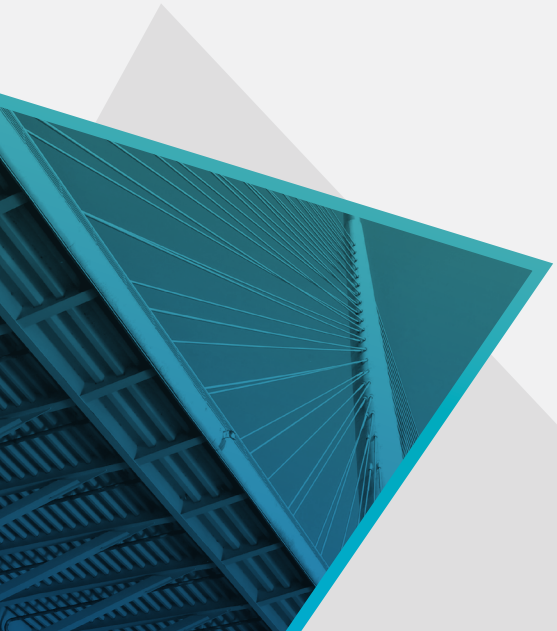

DEFINING DEFAMATION

In considering the matter, the court defined defamation as any damaging statements made publicly with the intention to harm or damage someone's good name and reputation. With reference to the important Constitutional Court decision in *Le Roux and Others v Dey 2011 (6) BCLR 577 (CC)*, the court explained that defamation is established by applying a two-pronged test – first, to determine the meaning of the publication as a matter of interpretation; and second, whether that meaning is defamatory. The court went on to state that defamatory statements are presumed to be false and to have caused damage to their target. The requirement of wrongfulness and intention is deemed to be present once a person has proven publication of a defamatory statement concerning the plaintiff. A defendant wishing to avoid liability for defamation must then raise a defence which disputes unlawfulness or intention.

Given that the respondent did not participate in the court proceedings and thus did not dispute the applicant's version, the court accepted that the tweets in question were false and defamatory. The court reasoned that the words used were obviously defamatory, as a reasonable reader would understand the words to mean that the *Daily Maverick* and its journalists lack integrity, are unethical, and drive a secret agenda to tarnish the reputation of specific individuals and organisations by deliberately engineering fake news about them. The court further reasoned that the allegations contained in the tweets were believed and taken seriously by the Economic Freedom Fighters, IOL and the Information Communication & Technology Union. As the applicants proved the elements of defamation, the respondent's statements were deemed untrue. The respondent was ordered to issue an unconditional retraction and to pay R100,000 in damages. That's a sting to any individual.

RECOGNISED DEFENCES

It is important to note that there are several recognised defences available to someone who has published defamatory statements, such as the defence of truth, public interest, fair comment, or reasonable publication.

Although social media has had a similar effect in South Africa to other jurisdictions globally, there is, however, no uniform approach to defamation. In the *Manual* case, with reference to the UK judgment of *Reynolds TD v Times Newspapers Ltd*, which provided a comprehensive survey of the approach taken in the US, Canada, India, Australia, South Africa and New Zealand to issues of the media's liability for defamation with regards to public figures, political expression and the requirement of reasonable care in publishing defamatory statements, the SCA noted that each society has found it necessary to address this issue in its own way and in accordance with

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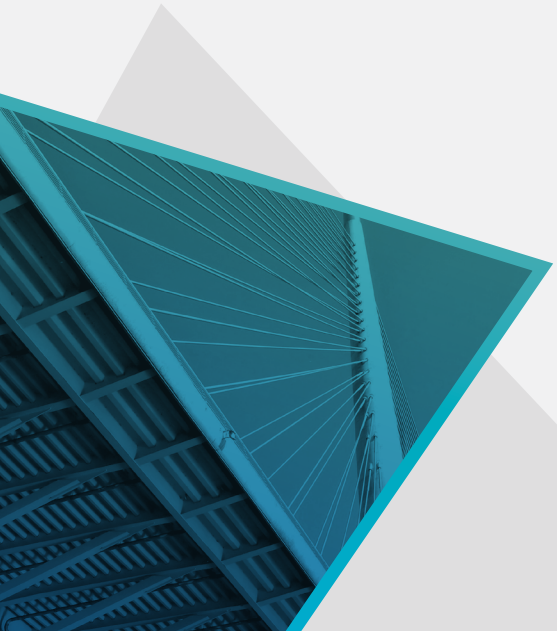
its own legal principles. Some have addressed the problem by developing common law principles, some have resorted to statute, and others have found answers through a blend of constitutional principle and common law development.

CONCLUSION

Social media comments attract defamation complaints and there has been a distinct rise in these in recent years, with a number of cases coming before our courts. This trend will continue. The general legal principles applicable to defamation cases have stood the test of time and have been applied by the courts to deal with social media posts.

So, think before posting on social media. Before circulating a message the author, and anyone who forwards the message, must be certain that it is not defamatory or they could face the risk of a complaint. It is worthwhile remembering that the constitutional right of freedom of expression does not extend to the right to defame another. Our law is now clear.

IMRAAN MAHOMED AND
MBULELO MANGO



Age is nothing but a number: Can an employer fairly dismiss an employee who has reached the agreed retirement age?

In *Motor Industries Staff Association and Another v Great South Autobody CC T/A Great South Panel Beaters* (JA68/2021), the Labour Appeal Court (LAC) considered whether an employer can fairly dismiss an employee based on age, at any time after the employee has reached the agreed upon age of retirement.

The facts briefly are that the employee entered into an employment contract with the employer on 30 January 2008. It is common cause that the employment contract expressly stated that the employer's retirement age was 60 years. On 15 March 2018, the employee turned 60 years old and continued to render his services to the employer as per the employment contract. On 14 January 2019 (and some nine months after the employee reached the agreed retirement age of 60), the employer informed the employee in writing that his employment contract would be terminated with effect from 12 February 2019 as the employee had reached the normal retirement age. The employee was subsequently dismissed and referred a dispute to the Labour Court contending that his dismissal constituted unfair discrimination in terms of section 187(1)(f) of the Labour Relations Act 66 of 1995, as amended (LRA).

THE LABOUR COURT

The Labour Court considered section 187(2)(b) and the relevant jurisprudence. In essence, this section reads that the dismissal of an employee based on age is not automatically unfair in circumstances where the employee has reached the agreed or normal retirement age. The Labour Court found that since the employee had already reached the retirement age of 60 (as per his employment contract) at the time of his dismissal, section 187(2)(b) applied and therefore the employee's dismissal was fair. Consequently, the Labour Court dismissed the employee's claim and further held that the argument that the parties "*tacitly*" entered into a new employment contract when the employee continued to render his services beyond the age of retirement would "*have no traction*".

THE LABOUR APPEAL COURT

Dissatisfied with the findings of the Labour Court, the employee was successful in his application to apply for leave to the LAC. The LAC commenced by analysing the cause of action and the defence advanced by the employer. The employee argued that in terms of section 187(1)(f) his dismissal was automatically unfair because the reason for his dismissal was based on an arbitrary ground, in this case, his age. Secondly, the employee alleged that his dismissal was based purely on age and by dismissing him, the employer had unfairly discriminated against him. The employee persisted with the argument that the employer had waived his right to rely on the retirement age in the employment contract by allowing him to continue working after 60 and, alternatively, that a new (second) contract of employment had come into existence between the parties.

Age is nothing but a number: Can an employer fairly dismiss an employee who has reached the agreed retirement age?

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The employer invoked the defence contained in section 187(2)(b) of the LRA and denied, firstly, that the parties had waived the effect of the retirement provisions in the employment contract and secondly, that the parties had tacitly entered into a second employment contract when the employee continued to render his services beyond the agreed retirement age of 60.

The LAC considered the provisions of section 187(2)(b) of the LRA and found that where regard is given to its ordinary meaning, as the dismissed employee had already reached the agreed or normal retirement age, it follows that the dismissal is deemed to be fair. More importantly, the LAC found that section 187(2)(b) does not prescribe a timeframe within which the dismissal should take place and therefore, this section affords the right to an employer to dismiss an employee on the basis of age at any time after the employee has reached the retirement age. The LAC further found that this right also affords employees the opportunity to terminate their services at any time after reaching the agreed retirement age. The LAC accordingly dismissed the employee's appeal.

CONCLUSION

This judgment provides some certainty on an otherwise grey area regarding employees who have reached their agreed-to retirement age but continue to work beyond that date. In essence, the LAC has held that section 187(2)(b) enables employers to fairly terminate the services of an employee at any stage after the retirement age has been reached. The LAC had little sympathy for the employee's argument that he stood to lose his retirement benefits because he was dismissed before 65, which was the retirement age provided for in terms of the applicable provident fund and found that the employee understood his retirement age to be 60 and therefore he was reasonably expected to have taken steps to prepare for his retirement. Interestingly, the LAC held that section 187(2)(b) provided a framework for employers to provide employment opportunities to younger employees, especially in a country that is plagued by record levels of unemployment, particularly amongst the youth. It remains to be seen whether the employee will seek to appeal the LAC's decision to the Constitutional Court.

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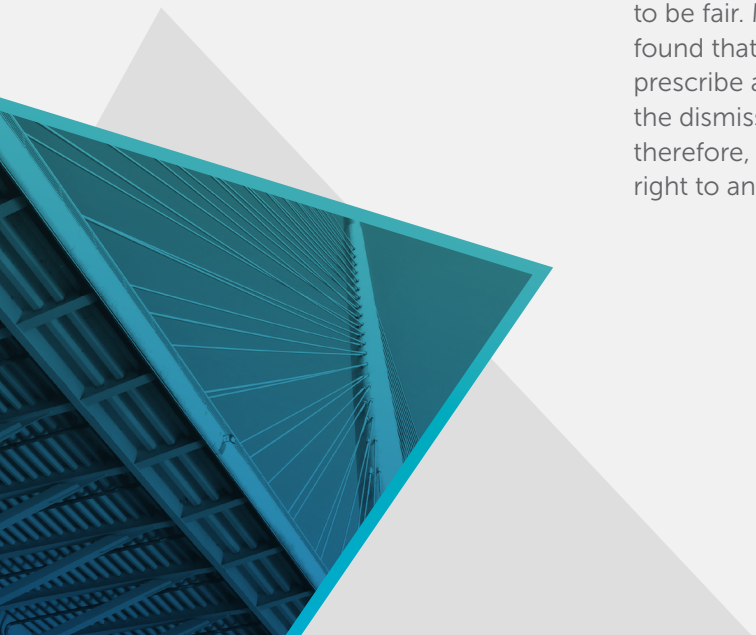

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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