



## Legal update

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### The use of social networking sites

In this legal update, we look at how the use of social networking sites (SNSs) for example Facebook and Twitter impacts on a person's right to privacy.

#### Why do people use social networking sites?

Many people use SNSs because it is a quick and easy way to keep in contact with their family and friends and to get updates about what's happening in a person's life.

SNSs allow a person to create an identity and to portray themselves however they choose, maintain relationships with other users by sharing personal information with contacts and may also be able to access the profiles of other users. Basically, social networking allows a user to be part of a community of social networkers.

#### Impact on a person's right to privacy

By using SNSs, a person's right to privacy may be threatened. This may be due to the following:

##### The user divulges personal information

Even though most SNSs have privacy settings where a person can choose what information is posted on their profile and can also choose which users can access this information, these privacy settings are not foolproof and most SNSs warn users that their privacy cannot be guaranteed. Furthermore, a user does not have control over the information that other users may post about him/her.

##### Processing of personal information by the SNS

The SNS receives and stores a user's personal information and this qualifies as data processing. When signing up with an SNS, it is important to find out if they comply with data protection laws or whether they share information with third parties. The terms and conditions for use or any disclaimers should alert a user to this fact.

##### Third party access to personal information

Sometimes third parties can access personal information without the user or the SNS sharing that information with the third party. For example there could be a security breach, an interception of a password which is not encrypted, or when other users upload personal information about you.

##### Tracking the location of a user

With some SNS applications, a user can let other users know their exact locations.

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## **“Publishing” information about another person on a social networking site**

As an SNS user, a person can choose what information they want to publish about themselves and share with other users. But what happens when someone publishes personal information about you without your consent or makes defamatory (offensive) remarks that can damage your good reputation? How is a person’s right to privacy balanced against someone else’s right to freedom of expression?

### Constitutional right to privacy

The South African Constitution protects a person’s right to privacy. For example, a person cannot obtain, publish, disclose or use information about another person without their consent.

### Defamation and the right to privacy

The law defines defamation as a statement that *“has the effect of injuring a plaintiff’s reputation”*. The test for defamation is whether a reasonable person of average intelligence might understand the statement as having a defamatory or offensive meaning.

Like all rights, there are certain limitations on one’s right to privacy and in certain cases defamation can be justified. For example, if statements are true and if it is in the public interest to publish them; also if it was fair comment and made without any malice or spite.

### Case law- defamatory comments made on Facebook

In the recent 2013 SA case of *H v W*, H and W were close friends until H separated from his wife. H’s wife and daughters then went to live with W. W thereafter posted the following message on Facebook:

*“I wonder too what happened to the person who I counted as a best friend for 15 years, and how this behaviour is justified. Remember I see the broken hearted faces of your girls every day. Should we blame the alcohol, the drugs, the church, or are they more reasons to not have to take responsibility for the consequences of your own behaviour? But mostly I wonder whether, when you look in the mirror in your drunken testosterone haze, do you still see a man?”*

H repeatedly asked W to remove the posting from her page as he saw this as a defamatory statement which portrayed him as a person who could not provide for his family and as someone who had a problem with alcohol and drugs. He was also concerned because his two daughters were “friends” on W’s Facebook page and had access to this statement. W refused to remove the message and said that her intention was not to defame H but for him to reflect on his life.

H then approached the court and applied for an interdict restraining W from posting any information about him on any social media as well as an order that W remove the message from her Facebook page.

The court found that the posting was unlawful and infringed upon H’s right to privacy and W was ordered to remove the defamatory posting from Facebook and also to pay all H’s costs for the court application.

### Settlement – defamatory comments made on Twitter

In 2009, Rock star Courtney Love was sued by fashion designer Dawn Simorangkir after she degraded the fashion designer in one of her tweets. Her lawyers had argued that *“Twitter was so appealing and addictive for Love that she had no appreciation for how the comments she posted would be received by others.”* The designer eventually settled for a payment of \$340 000.

## **Summary**

Using social media to make malicious and offensive comments about another person may infringe on a person’s constitutional right to privacy. If you are requested by the person to remove such postings, you should do so immediately in order to avoid drawn out legal battles and unnecessary costs.