

Employee privacy vs employer protection

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There have been several cases on the fairness of disciplinary action taken against employees for engaging in misconduct on social media platforms, with the popular defence being raised of the right to privacy, provided by the Constitution of the Republic of South Africa.



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This is a relevant factor as generally, allegations of misconduct on social media arise from information obtained from an individual's personal social media accounts such as Facebook or Twitter.

The Constitutional Court, in the case of *Gaertner & Others v Minister of Finance & Others 2014*, found this to be a clear and simple issue, when it stated, "Privacy, like other rights, is not absolute. As a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks."

Evidence of lack of fiduciary duty

The High Court in the case *Harvey v Niland and Others* (unreported) followed this principle. The High Court was required to deal with the issue of whether Facebook communication, obtained by hacking the former employee's Facebook account without his knowledge, was admissible as evidence against him. The former employee remained a member of the Close Corporation of the employer and therefore continued to owe a fiduciary duty to the Close Corporation, despite his resignation from employment.

Niland had tendered his resignation as an employee of Huntershill but remained in his capacity as a member of the Close Corporation, when he took up employment with Thaba Thala, a competing safari tour company. Niland then shared posts on his Facebook account to the effect of advising several clients of Huntershill that he had moved onto 'bigger thinking' and would be operating close by.

The remaining member of Huntershill, Harvey, obtained the password for Niland's Facebook account and accessed the posts that Niland made, in reference to his new employment. These posts were printed and submitted as part of the application to the High Court to interdict Niland from continuing his activities, which caused financial harm and reputational damage to Huntershill.

Furthermore, the High Court was requested to order that Niland was still obliged to act in the best interests of Huntershill and to comply with his fiduciary duties, as he remained a member of the Close Corporation.

Niland objected to the use of his Facebook posts and argued that such evidence was inadmissible as it was unlawfully obtained and violated his fundamental right to privacy as enshrined in s14 of the Constitution.

Court's decision

Plasket J found that s86(1) of the Electronic Communications Act was silent on admissibility of evidence obtained in contravention of the provision, and that in the circumstances, the High Court would have the discretion to decide whether to allow the evidence. In exercising its discretion, the High Court considered various factors, such as the reasons why the evidence was unlawfully obtained, the nature of the evidence and availability of lawful means, as well as the extent to which the right to privacy has been violated.

The High Court noted that while the information was obtained unlawfully in violation of the right to privacy, the right to privacy is not absolute. This does not mean that people lose their right to privacy but the right is weakened depending on the manner in which an individual has carried themselves out in the circumstances.

The High Court held that there were no other practical and lawful means available for obtaining access to the Facebook communication and, without such information, Huntershill would have no platform to enforce its rights against Niland. In addition, Niland had denied his conduct on several occasions and therefore he could not be allowed to hide behind the expectation of a right to privacy.

These cases are important as it illustrates that the right to privacy is not absolute and employers may be entitled to use information, which cannot be obtained in any other manner, in order to protect its interests and reputation. Employers must however be careful in the manner of obtaining information as the admissibility of unlawfully obtained information is subject to the discretion of the court and in certain circumstances can amount to a violation of the right to privacy.

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