



An Analytical Look Into the Concept of Online Defamation in South Africa

Desan Iyer*

Associate Professor, Department of Private Law and Deputy Dean, Teaching and Learning, Faculty of Commerce, Administration and Law, University of Zululand

Abstract

In a way, the internet has revolutionised communication and it is now widely regarded as the main source of information-sharing and knowledge production. While emailing, instant messaging and social networking have "taken the world by storm", they also carry risks and threats, including online defamation. The ability and opportunity to express oneself freely at the click of a button has resulted in an increase in online defamation cases worldwide as well as in South Africa. Posting comments about oneself and others comes with a degree of responsibility but many users fail to exercise some restraint when making comments about others. Balancing the right of freedom of expression with what the broader society deems acceptable or unacceptable lies at the root of the problem. In recent times, there have been a plethora of online defamation cases in the headline news; and it appears that a lack of public awareness and general knowledge surrounding such cases has created an upsurge in online defamation cases. In addition, South Africa appears to lack a clear legislative framework that provides clear guidelines in dealing with online defamation cases. This article seeks to clarify the legal position regarding online defamation by looking into the complexities of such claims as well as analysing recent legislation and court decisions. It argues, inter alia, that adopting best practices from other countries may be crucial to reducing the number of online defamation cases.

* BProc (UND), LLM (UNISA), LL.D (UZ)

1 INTRODUCTION

In a technologically advanced world, the ease and speed of information sharing is incredible. Facebook, Twitter, LinkedIn, My Space and many other social networks continue to be popular sites where people use their accounts to share information about themselves and others on a regular basis. The ability to communicate at the click of a button, has seen social media grow at an astonishing rate as people from all walks of life identify with a medium that allows for instant expression against the backdrop of privacy and ill judgment.¹ The opportunity to say whatever is on one's mind instantly is an enticement that many can do without. The relatively low cost of connecting to the internet coupled with emergent knowledge and reliance on this virtual medium has created the opportunity for online defamation to increase exponentially.² Worldwide, people appear to be ignorant of the dangers in posting harmful or degrading comments about others on social media and it has become clear that the internet has made it challenging to regulate defamation.³ South Africa is no different and the popularity of these online public platforms has seen an increase in the number of online defamation cases that have ended up in court and litigation.⁴ The opportunity to post comments about oneself and others comes with a degree of responsibility but many users fail to exercise some restraint when making comments about others.

Professor De Vos, a well-known South African constitutional-law expert had this to say about online users:

There is something about internet websites and social media platforms that seem to bring out the worst in people. Reasonably decent people who might well carefully weigh their words can become raving hatemongers and irresponsible tattletales on these platforms.⁵

The internet tends to break down differences between people, societies and countries, and the unremitting problem of the publication of defamatory statements lies juxtaposed against the backdrop of freedom of expression.⁶ The South African Constitution⁷ tries to preserve freedom of expression but balancing the right of freedom of expression with what the broader society deems acceptable or unacceptable lies at the root of an online defamation case. Recent media reports and an upsurge in online defamation cases epitomised by the well-documented *Penny Sparrow* case⁸ has highlighted the need to address this scourge that appears to be spiralling out of control. The fact that South Africa seems to be lagging behind other countries in formulating a clear legislative framework to deal with online defamation cases warrants general concern. In an effort to address the problem, this article will seek to analyse the current legal framework regulating online defamation in South Africa. A cursory look into the complexity of a claim for online defamation will take place, with reference to recent local and foreign legislation and court decisions. Finally, by analysing our current legal framework and best-practice methods from other countries, it is anticipated that South Africa can make strides in building a model that seeks to curb the number of online defamation cases as well as create awareness amongst the people of South Africa.

2 DEFAMATION LAW IN SOUTH AFRICA

One can safely say that the internet has become the trend for both young and old, as in a technologically advanced world, it has, despite its risks created a platform for expressing one's ideas, views and thoughts instantaneously, connecting with people worldwide as well as learning and making discoveries about the world and its populaces.⁹ The internet is now regarded widely as the main source of information-sharing and knowledge production and it constitutes

1 Kashyap "Defamation in the Internet Age: Law and Issues in India" 2016 *International Journal for Innovation in Engineering Management and Technology* 18.

2 *Ibid* 19.

3 Joyce "Data Associations and the Protection of Reputation Online in Australia" 2017 *Original Research* 7.

4 Maharaj "Keep your Tweets Twibel Free" 2015 *De Rebus* 88.

5 De Vos "Defamation and Social Media: We Have Moved on From Jane Austin" <http://constitutionallyspeaking.co.za/defamation-and-social-media-we-have-moved-on-from-jane-austen> (accessed 23-10-2017).

6 Kashyap 2016 *Intl J for Innovation in Engineering Management and Technology* 19.

7 Section 16 of the Constitution of 1996.

8 *ANC v Sparrow* 2016 ZAEQC, Case No. 01/16.

9 Cassim "Formulating Adequate Legislation to Address Cyber-bullying: Has the Law Kept Pace with Advancing Technology?" 2013 *SACJ* 1.

a global computer network system that links with other networks via different communication technologies to transfer data.¹⁰ The internet has revolutionised communication to the extent that emailing, instant messaging and social networking has “taken the world by storm.”¹¹ However, sometimes with the good comes the bad, and in recent times, there has been a plethora of defamatory online conduct. The *Penny Sparrow*¹² case that raised widespread ire with Sparrow’s controversial Facebook post in which she likened black beach-goers to monkeys illustrates the power of this stimulus.¹³ Online or cyber defamation is considered to be “the act of defaming, insulting, offending or otherwise causing harm through false statements pertaining to an individual in cyberspace.”¹⁴ However, in South Africa, online defamation falls within the broad umbrella of defamation law. Thus, at the outset, it is important to consider what constitutes a defamatory statement and what needs to be proved in order for a claim of defamation to succeed.

Defamation is widely regarded as the “intentional infringement of another’s right to his good name, or, more comprehensively, the wrongful, intentional publication of words or behaviour concerning another which has the tendency to undermine his status, good name or reputation”.¹⁵ The law of defamation in South Africa is based on the *actio iniuriarum*, which originated from Roman law, and serves to protect a person whose personality rights have been infringed.¹⁶ In other words, defamation occurs where a person’s good name or standing in society has been tarnished in the “eyes of the community”.¹⁷ At common law, the elements that need to be proved in order for a claim of defamation to succeed are: (a) the wrongful and; (b) intentional; (c) publication of; (d) a defamatory statement; (e) concerning another.¹⁸ In South Africa, the onus of proof rests on the person claiming defamation to prove the above elements. In respect of wrongfulness, the element is satisfied if a person’s reputation has been injured and an objective test is used to determine whether in fact a person’s good name has been tarnished.¹⁹ The courts infer the intention to injure once the publication of the defamatory material has been proven.²⁰ Publication would be established once the defamatory statement is made known to at least another person and it can occur in various forms such as speech, print and online forums like websites, newsgroups and bulletin boards.²¹ It must be noted that publication will be presumed in instances where there is a strong likelihood that the defamatory statement would be read or heard, unless the contrary is proved.²² In order to prove that the material is of a defamatory nature, the ordinary or primary meaning of the words must be impugned.²³ At times, words may have a hidden or secondary meaning, and this innuendo has to be identified before it is established that they carried a defamatory assertion.²⁴

A defamatory statement is justified by three main defences.²⁵ The first is that the statement must be true and in the public interest. Secondly, the statement amounts to fair comment or freedom of expression; and thirdly, the statement is made under privileged circumstances.²⁶ In more recent times, a fourth defence was adopted by the Supreme Court of Appeal in *National Media Limited and Others v Bogoshi*²⁷ where it was held that the reasonableness of the publication which should consider the nature, extent and tone of the allegations can be used as a ground to justify the statement.

The Constitution is the highest law of the land in South Africa, and entrenches key rights

10 Papadopoulos “An Introduction to Cyberlaw” in Papadopoulos and Snail (eds) *Cyberlaw @ SA 111 The Law of the Internet in South Africa* 3 ed (2012) 3.

11 *Ibid* 4.

12 *ANC v Sparrow* 2016 ZAEQC, Case No. 01/16.

13 The Umzinto Equality Court ruled that Sparrow had to pay R150 000 damages to the Oliver and Adelaide for her racist comments on Facebook as well as interdicting her from further hate speech.

14 Kashyap 2016 *Intl J for Innovation in Engineering Management and Technology* 19.

15 Neethling, Potgieter and Visser *Deliktereg* 5 ed (2006) 325.

16 Burchell *The Law of Defamation in South Africa* (1985) 34.

17 Loubser and Midgley *The Law of Delict in South Africa* (2012) 339.

18 Burchell *The Law of Defamation* 35.

19 Loubser and Midgley *The Law of Delict* 355.

20 Loubser and Midgley *The Law of Delict* 343.

21 Nel “Online Defamation: The Problem of Unmasking Anonymous Online Critics” 2007 *CILSA* 193.

22 Nel 2007 *CILSA* 195.

23 Loubser and Midgley *The Law of Delict* 345.

24 Loubser and Midgley *The Law of Delict* 345.

25 *Borgin v De Villiers* 1980 3 SA 556 (A).

26 *Borgin v De Villiers* 1980 3 SA 556 (A).

27 1998 4 SA 1196 (SCA).

such as the right to dignity²⁸ and the right to freedom of expression,²⁹ which rights tend to clash within the context of defamation law.³⁰ The law of defamation serves to protect genuine interests that people have in their reputation and the South African Constitution reinforces this protection in the form of the right to dignity. The internet has become an important forum for the right to freedom of expression and such a basic right, be it in the form of a written, audio or video expression or opinion does enjoy protection under the auspices of the Constitution.³¹ Despite the importance of the right to dignity and the right to freedom of expression, it is noteworthy that these rights are not absolute and can be limited in certain instances.³² Section 36 of the Constitution allows for a limitation of rights, more so in instances where it is reasonable and justifiable to do so. It also takes into account factors such as the nature and extent of the right, the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and the purpose, and whether there are less restrictive means of achieving the purpose.³³ At the very heart of defamation law, lies the right to dignity and the right to freedom and in instances of an online defamatory statement, one would have to weigh up both of these rights to ensure that a just decision is made.³⁴

3 CHALLENGES IN DEALING WITH ONLINE DEFAMATION IN SOUTH AFRICA

Communication and access to information has been revolutionised by the internet and the advancement of computer technology but these platforms have also created the opportunity for widespread illegal activity.³⁵ In recent years, most of the attention and interventions have focused on internet pornography with online defamation taking a "backseat". However, there is growing awareness that the unique characteristics of online defamation make it a challenging global contagion that must be curbed. The challenge of dealing with online defamation is that the internet is not an easily identifiable body that is administered or regulated within the confines of strict internationally recognised parameters or boundaries.³⁶

In addition, many victims of online defamation find it difficult to identify or even trace the perpetrator.³⁷ Investigations may point to a particular computer being responsible for the sending of the message when in fact the person responsible for the online defamation is being sought. Adding to the dilemma is that the original posting of the message may be from an anonymous sender.³⁸ To pursue an action against the wrongdoer, it becomes necessary to establish the identity of the wrongdoer.³⁹ Many senders of defamatory material try to hide or disguise their identity.⁴⁰ Nel⁴¹ has indicated that unmasking the identity of internet users is not commonplace worldwide, but only one South African case in the form of *Rath v Rees*⁴² has suggested that making use of common-law discovery proceedings against the internet service provider may be an option to revealing the identity of the anonymous sender.

Other challenges facing the victim, is whether to proceed against the perpetrator or the system operator as in some cases, the perpetrator may have insufficient funds to settle the claim whilst the system operator may be in a better financial position.⁴³ In terms of South African law, anyone who participates in the publication of defamatory material can in theory found to be jointly and severally liable.⁴⁴ Nel suggests that based on the principles derived from the case of *Dunning v Thomson*⁴⁵, a service provider could avoid liability if the service provider had no

28 Section 10.

29 Section 16.

30 Loubser and Midgley *The Law of Delict* 355.

31 Loubser and Midgley *The Law of Delict* 355.

32 Section 36.

33 The limitation clause involves the balancing of conflicting interests.

34 Loubser and Midgley *The Law of Delict* 355.

35 Brenner "Cybercrime Investigation and Prosecution: The Role of Penal and Procedural Law" 2001 *MUR UELJ* 8.

36 Landau and Goddard "Defamation and the Internet" 1995 *International Media Law* 75.

37 Nel 2007 *CILSA* 208.

38 Nel 2007 *CILSA* 208.

39 *Ibid.*

40 Calow "Defamation on the Internet" 1995 *The Computer Law and Security Report* 199.

41 Nel 2007 *CILSA* 209.

42 (2006 CLR 429 C).

43 Calow *The Computer Law and Security Report* 199.

44 Nel 2007 *CILSA* 209.

45 1905 TH 313.

knowledge of the defamatory allegation or had no reason to believe that it was defamatory.⁴⁶ It becomes clear that a service provider would have a duty to act if the defamatory material is brought to the attention of the service provider. However, courts have to be mindful of the fact that some internet service providers may have privacy policies in place which could impact on the duration of storage of the information as well as reliability of the information.⁴⁷ The need to balance the various rights of the parties against disclosure cannot be ignored.

The most common challenge facing the victim is deciding on the jurisdiction of the court that would hear the defamation case as messages could be posted from all parts of the globe with the mere click of a button.⁴⁸ The matter of selecting the appropriate court may be simple where parties are from the same real-world jurisdiction but the challenge arises where the parties to the legal-suit come from different geographic locations.⁴⁹ It becomes crucial for the victim to determine exactly when and where the publication occurred and who is responsible for the defamatory statement.⁵⁰ The position in South Africa is that the victim has a choice to proceed against the perpetrator either in the jurisdiction where the cause of action arose or in the victim's area of jurisdiction.⁵¹ Unfortunately, where the perpetrator is in a country other than South Africa, the victim has the option of pursuing the matter in that country, subject to the laws of that country, or to wait until the perpetrator arrives in South Africa, have them arrested in order to confirm jurisdiction, which in all probability is unlikely.⁵² It is difficult to see how such victims could have the time, expertise and resources to pursue such inter-jurisdictional online defamation cases.

4 INTERNATIONAL TRENDS IN CURBING ONLINE DEFAMATION

In the United States of America (USA), like in many other countries, defamation is perceived as an impairment of a person's reputation where their self-esteem is lowered in the eyes of others.⁵³ The law of tort categorises defamation into "libel" and "slander" where slander is viewed as spoken defamation whilst libel is seen to be the publication of defamatory material in printed, published or broadcasted form.⁵⁴ In order for an online defamatory statement to be considered libellous, the victim must prove the elements of publication, identification, defamation, fault and injury.⁵⁵ Libel cases in the USA were previously governed by the common law but since the decision of *New York Times v Sullivan*⁵⁶, statutory and constitutional elements are considered crucial by the courts in striking a balance between the right to free speech and safeguarding another's reputation.⁵⁷ The perpetrator is entitled to respond to an allegation of defamation by raising a defence based on common-law grounds or the First Amendment.⁵⁸

Like in the USA, defamation and in turn online defamation in the United Kingdom (UK) falls within the area of tort law and the victim is expected to show that the defamatory statement has lowered their reputation amongst members of society.⁵⁹ In order for a defamatory case to be proven in the UK under the common law, it must have been shown that the statement was defamatory, the statement was directed at the victim and publication of the statement must have taken place.⁶⁰ Courts in the UK have used an objective test to determine the liability for libel and the opinion of right-thinking members of society has been used as a yardstick to guide the decision-making process.⁶¹ English law provides that all those who participated in the publication of the defamatory statement are liable for defamation and this includes the

46 Nel 2007 *CILSA* 209.

47 *Ibid* 214.

48 Calow 1995 *The Computer Law and Security Report* 199.

49 Bosky "Defamation in the Internet Age: Missouri's Jurisdictional Fight Begins with Baldwin v. Fischer Smith" 2012 *Saint Louis University Law Journal* 56 587.

50 Nel 2007 *CILSA* 195.

51 *Ibid* 214.

52 *Ibid*.

53 Pember and Calvert *Mass Media Law* 18 ed (2013) 154.

54 *Ibid*.

55 Stewart *Social Media and the Law* (2013) 148.

56 1964 376 US 254 (USSC).

57 Pember and Calvert *Mass Media Law* 154.

58 Stewart *Social Media and the Law* 148.

59 Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law* 7 ed (2012) 690.

60 *Ibid*.

61 *Ibid*.

service providers who are responsible for user access on the internet.⁶² Unlike in the USA, where service providers are protected from lawsuits by specific legislation like the Communications Decency Act 1996, the UK adopted a harsher approach against the service provider where many have been parties to lawsuits with some raising the defence of innocent disseminators.⁶³ However, for many years the common law was vague and underdeveloped in relation to online defamation and Parliament responded by enacting the Defamation Act of 2013, which amongst other aspects sought to regulate defamatory statements on social media platforms.⁶⁴ The Defamation Act⁶⁵ sought to jettison trivial claims, address and balance competing interests of freedom of expression and reputational harm as well as address challenges of online jurisdiction and anonymity amongst others.⁶⁶ Section 1 of the Defamation Act now requires serious harm to the reputation of the victim and factors such as serious financial loss, the nature and status of the parties, the magnitude of the publication, the parties financial position, whether they trade for profit, as well as whether there were similar previous allegations are all considered crucial.⁶⁷ It appears that the defamatory statement must cause serious harm to the victim in order for the victim to succeed in a damages claim. Section 10 of the Defamation Act requires the victim of defamation to focus attention on the principal author, editor or publisher of the defamatory statement and only when it is not reasonably practical to proceed against them, would a claim against a secondary publisher be considered.⁶⁸ However, the Defamation Act has not gone on to define “reasonably practical” and it would be left to the courts to decipher the issue.

It appears that the Defamation Act has further made it difficult for victims to institute multiple claims against social media platforms.⁶⁹ In other words, where a media platform has published a defamatory statement and later publishes the same statement, prescription will run from the date of the original publication thereby protecting the original publisher but failing to protect the platform that has republished the material. The Defamation Act in the form of section 8 has sought to eliminate separate cause of actions or everlasting liability for the same defamatory statement.⁷⁰ The implication is that the single publication rule tends to protect the original author against liability for subsequent re-publication of the same material but does not afford protection to third parties who publish defamatory material written by another. In respect of jurisdiction, the Defamation Act now limits the defamation claims brought before courts in the UK to parties within the European Union and foreigners from outside countries are prevented from doing so unless it is the most appropriate place to bring the action.⁷¹ The codification of defamation laws in the UK is an attempt towards the attainment of some form of legal clarity surrounding online defamation cases. The Defamation Act in the form of sections 5, 8, 9 and 10, has provided a clearer framework for addressing online defamation in the UK.⁷² However, the introduction of the Defamation Act has not completely eradicated the uncertainty surrounding online defamation cases as despite the eradication of the common law defences to online defamation, other areas of the common law remain intact.⁷³ The effect is that litigants may still be uncertain as to when to rely on the common law and when to rely on statutory provisions.

In recent times, countries such as Malta have codified their laws to establish a new legal framework for media law, libel, defamation and slander.⁷⁴ The Media and Defamation Act, 2018 like the UK Defamation Act has sought to limit the number of online defamation cases by stating that the plaintiff must provide proof of serious harm or a likelihood of serious harm.⁷⁵ Interestingly, the new Act provides a list of statements which are regarded as privileged and

62 Nel 2007 *CILSA* 214.

63 *Ibid.*

64 Collins *Collins on Defamation* (2014) 12.

65 Act of 2013.

66 Price and McMahon *Blackstone's Guide to the Defamation Act* (2013) 57.

67 Mullis and Scott “Tilting at Windmills: The Defamation Act 2013” 2014 *The Modern Law Review* 92.

68 *Ibid.*

69 Collins *Collins on Defamation* 12.

70 Mullis and Scott 2014 *The Modern LR* 92.

71 *Ibid.*

72 Price and McMahon *Blackstone's Guide* 57.

73 Mullis and Scott 2014 *The Modern LR* 93.

74 Fenech and Sammut “The Media and Defamation Act, 2018” <http://iurismalta.com/media-defamation-act-2018> (accessed 10-10-18).

75 *Ibid.*

exempt from legal action. Amongst others, peer-reviewed statements in academic journals as well as publications of public interest fall within this category.⁷⁶ Another important aspect covered in the Media and Defamation Act is the defence of truth.⁷⁷ In terms of the said Act, the defence of truth is inapplicable in matters pertaining to the private life of the plaintiff. What this means is that the court will allow the defence of truth to be raised in matters of general public interest or in the interests of proper administration of justice. It becomes evident that the intention of the legislature was to focus attention on the protection of private life, whilst ensuring proper administration of justice in public matters.⁷⁸ The Media and Defamation Act in the form of Article 9 allows the court to award moral damages, in addition to the normal actual damages; and this amount is capped.⁷⁹ Interestingly, the Act allows for the possibility of the matter being referred to mediation by the relevant court in actions of defamation. It appears that the intention of the legislature was to expedite the finalisation of defamation cases. However, a cause for concern is that the said Act fails to provide any guidelines on the basis upon which a court may refer a matter for mediation.

5 THE LEGAL POSITION IN SOUTH AFRICA

South Africa does not have a clear legislative framework regulating online defamation. South African courts have dealt with the area of online defamation on a case-by-case basis with the common law and the Constitution providing the basis for such cases to be heard. In addition, South African courts tend to look at other key statutes such as: the Electronic Communications and Transactions Act;⁸⁰ the Regulation of Interception of Communications and Provision of Communication-related Information Act;⁸¹ the Trade Marks Act;⁸² the Labour Relations Act;⁸³ the Code of Good Practice in the Labour Relations Act;⁸⁴ the Promotion of Equality and Prevention of Unfair Discrimination Act;⁸⁵ the Employment Equity Act;⁸⁶ the Protection from Harassment Act;⁸⁷ and the Protection of Personal Information Act,⁸⁸ amongst others, when dealing with cases pertaining to the social media. Although the Cybercrimes and Cybersecurity Bill, which is still to become law in South Africa does not specifically deal with online defamation, it does make it a criminal offence to distribute or broadcast a data message that is harmful to another. However, none of the aforementioned Acts provides clear guidelines to deal specifically with the issue of online defamation.

South African courts have in the past few years been inundated with online defamation cases, as many individuals have no option but to resort to litigation in such cases. The *Penny Sparrow* case, illustrates that any defamatory post that is classified as hate speech and violates a person's constitutional rights could end up in the Equality Court or even the Criminal Court where one could face a charge of *crimen injuria*.⁸⁹ Another recent case that illustrates the danger of defamatory posts is the *crimen injuria* case opened in 2018 by celebrity couple Basetsana and Romeo Kumalo. The case revolved around the use of obscene and racially offensive language by individuals who spread rumours on social media regarding a sex tape allegedly featuring the couple.⁹⁰

76 *Ibid.*

77 *Ibid.*

78 *Ibid.*

79 *Ibid.*

80 No 25 of 2002.

81 No 70 of 2002.

82 No 194 of 1993.

83 No 66 of 1995.

84 No 68 of 2008.

85 No 4 of 2000.

86 No 55 of 1998.

87 No 17 of 2011.

88 No 4 of 2013.

89 *ANC v Sparrow* 2016 ZAEQC, Case No. 01/16.

90 Nhlapo "Before You Click Post Know This About Social Media and Defamation in SA" <https://www.huffingtonpost.co.za> (accessed 10-10-18).

The list of similar cases goes on and this drastic rise in online defamation cases illustrates the power of social media and possibly the ignorance of users who are involved in such posts, uploads and comments without considering the serious legal consequences. The upsurge in online defamation cases may also indicate the need to review the current legal framework, in an effort to provide comfort and closure to the many victims who have been subjected to online abuse.

Many people in South Africa lack the insight and expertise to pursue legally online defamation cases and the lack of a clear legislative framework regulating online defamation in South Africa could in the future exacerbate the situation. For the time being, it is imperative that the knowledge base around such an inherent area of the law increases. As a starting point, it becomes important for any online user to understand that the common-law elements of defamation need to be established. The South African law of delict is available to the victim who wishes to proceed and the two actions that may be considered are the *actio legis Aquilae* (patrimonial damage) and the *actio iniurarium* (injury to personality) which are forms of damage.⁹¹ The onus rests with the victim to prove the wrongful and intentional publication of defamatory material.⁹² In cases of litigation, it becomes important to show a causal link between the defamatory statement and the publication, with the victim needing to show that the publication concerned the victim or referred to the victim.⁹³ The courts generally use an objective test to determine whether, in the eyes of a reasonable person, the defamatory statement can be seen to be linked to the victim.⁹⁴ Once it is established that a defamatory statement has been published, it is presumed that the publication is wrongful and intentional.⁹⁵ In respect of online defamation, it would proceed like any other defamation case and publication will take place when the defamatory statement is communicated to a third party who becomes aware of the defamatory content.⁹⁶ This aspect is important, as the third party must understand the content of the defamatory statement in order for a defamation claim to succeed.

South African courts have highlighted, in recent times the importance of recognising newly developed and modernised communication systems which have exponentially increased the number of defamatory statements made online. The power of Facebook as a modern online communication system was highlighted in the case of *CMC Woodworking Machinery (Pty) Ltd v Odendaal Kitchens*,⁹⁷ where the court recognised the need to move beyond established procedures of service and recognise Facebook as a modern modus of giving notice to another party. In *Dutch Reformed Church v Rayan Sooknunan*,⁹⁸ the defendant who published defamatory comments on the plaintiff's Facebook page was interdicted from making any defamatory remarks against the plaintiff and was directed to remove the plaintiff's email address from the Facebook page. A year later, in the landmark case of *Heroldt v Willis*,⁹⁹ an interdict was granted against the defendant for posting derogatory messages against the plaintiff suggesting that he was an unfit father to his girls because of "the alcohol, the drugs, the church". The defendant had initially declined to remove the postings arguing that she had the right to freedom of expression, which the court had to balance against the plaintiff's right to privacy and dignity.¹⁰⁰ The court ordered the defendant to remove the defamatory posts and pay the plaintiff's legal costs.¹⁰¹ The postings were deemed to be defamatory and unlawful and the court found that the right to privacy outweighed the right to freedom of expression.¹⁰² In addition, the court held that the statements did not qualify as "fair comment" as they were not based on facts and could not be proven to be true.¹⁰³ The interesting aspect about this case is that Willis J, saw the need of the courts to develop the common law in accordance with the Constitution and the evolving world of technology and social media.¹⁰⁴ Willis J, in arriving at

91 Loubser and Midgley *The Law of Delict* 355.

92 Burchell *The Law of Defamation* 35.

93 Loubser and Midgley *The Law of Delict* 343.

94 Neethling, Potgieter and Visser *Deliktereg* 326.

95 Burchell *The Law of Defamation* 36.

96 Nel "Defamation on the Internet and Other Computer Networks" 1997 *CILSA* 156.

97 2012 5 SA 604 KZD para 2.

98 2012 6 SA 201 GSJ para 114.

99 *Heroldt v Willis* 2013 2 SA 530 GSJ para 6.

100 *Heroldt v Willis* para 7.

101 *Heroldt v Willis* para 40.

102 *Heroldt v Willis* para 6.

103 *Heroldt v Willis* para 6.

104 Singh "Social Media and the Actio Injuriarum in South Africa – An Exploration of New Challenges in the

his decision explored the link between the law of privacy and defamation as well as looking at the requirements for an interdict.¹⁰⁵ Willis J, can be commended for highlighting the gap that existed around issues pertaining to defamation on social media and online platforms in his judgment. As correctly pointed out by Roos and Slabbert, the court was wary of the law losing credibility if it failed to take into account the changing realities.¹⁰⁶ However, a criticism of the judgment, which in my view is justified, was that Willis J missed an opportunity to extend the current legal principles to social media law. Instead, he chose the simplified option of focusing on reader convenience and user friendliness rather than the norm of a more detailed legal analysis.¹⁰⁷ In addition, the court chose to deal with the pertinent issues of whether the post was defamatory and whether any justification for the post existed, in an ephemeral manner and as such missed an opportunity to deal with ground-breaking issues through a more detailed and critical lens.¹⁰⁸ However, as a whole, the judgment did create awareness around the impact of electronic and social media on people's lives and the possible consequences that exist for individuals who abuse such mediums when posting derogatory comments about another.

In the subsequent case of *Isparta v Richter*,¹⁰⁹ the court went one step further and awarded damages to the plaintiff against both the first and second defendant. The first defendant posted inappropriate comments on Facebook about the plaintiff, calling her a bad mother and allowing an inappropriate relationship between her step-son and daughter to develop.¹¹⁰ Interestingly, the second defendant who was the husband of the first defendant and the ex-husband of the plaintiff was tagged but did not add to the posts, and the court found him jointly and severally liable for the defamatory posts.¹¹¹ Many may argue that the court's finding against the second defendant was harsh as he did not palpably respond to the post, but I agree with Singh who called the ruling "just and apt" as there was no effort by the second defendant to "untag" himself or show that he strongly rejected such comments.¹¹² The fact that he was aware of the posts, had a previous relationship with the plaintiff, remained silent after being tagged, and chose not to distance himself from the remarks all added to the legitimacy of the postings in the eyes of other readers. The court noted that there was no attempt to apologise on the part of both defendants and as a result awarded an amount of forty-thousand rand to be paid by both defendants.¹¹³ The decision is of great importance because it indicates that it is not just the initiator of a defamatory post that can be held liable but anyone who is tagged and does not take steps to dissociate themselves from the defamatory posts can also be held liable. The court also highlighted the fact that anyone who shares a defamatory post may also be liable for defamation.¹¹⁴ The court went on to add that a series of posts may convey a defamatory meaning when read together yet may appear harmless when read individually.¹¹⁵ It is clear from the case that one has to guard against becoming a party to defamatory posts by failing to act.

The subsequent case of *RM v RB*,¹¹⁶ reiterated the duty of the court to weigh the right to freedom against the right to dignity. The applicant and the respondent had been in a previous relationship and were the biological parents of a five-year-old daughter. The child stayed with the respondent and had contact with the applicant every alternate weekend. During one such weekend, the respondent posted certain negative comments about the applicant's care of their daughter alleging the use of alcohol and drugs by him. Many of the respondent's Facebook friends then commented with many being critical of his behaviour. The applicant approached the High Court for an interdict alleging that the posts had defamed him as a parent as well as a businessman. In terms of the interdict, he asked for an order requesting the respondent to:

Online Era" 2014 *Obiter* 617.

105 Willis J, followed the ratio of the court in *Jansen van Vuuren v Kruger* 1993 4 SA 842 A and *Setlogelo v Setlogelo* 1914 AD 221 when exploring the link between privacy and defamation as well as the requirements of an interdict.

106 Roos and Slabbert "Defamation on Facebook: *Isparta v Richter* 2013 6 SA 529 (GP) 3" *PER/PELJ* 2014 (17) 2850.

107 Singh 2014 *Obiter* 618.

108 *Ibid.*

109 *Isparta v Richter* 2013 12 SA 243 GNP para 36.

110 *Isparta v Richter* para 41.

111 *Isparta v Richter* para 41.

112 Singh 2014 *Obiter* 622

113 *Isparta v Richter* para 41.

114 *Isparta v Richter* para 42.

115 *Isparta v Richter* para 42.

116 (2015 1 SA 270 KZP).

(1) remove the messages from her Facebook page; (2) refrain from posting further derogatory statements about him on Facebook; and (3) refrain from publishing defamatory statements about him in any other form or way.¹¹⁷ The court granted prayer (1) but dismissed prayer (2) and (3).¹¹⁸ The court held that courts should guard against granting a blanket interdict to prevent future defamatory posts as some of them may not be actionable in court.¹¹⁹ Each defamatory post should be dealt with on its merits and after balancing the constitutionally entrenched rights, a decision can be made calling for the removal of the defamatory post.¹²⁰

Despite millions of people using Facebook and other social media forums on a daily basis, many worldwide remain ignorant about the risks of posting or tweeting on social media. This is illustrated by the recent 2017 ruling in a Swiss Court where a man who “liked” a Facebook post accusing another of anti-Semitism and racism was convicted of defamation.¹²¹ The judge, Catherine Gerwig indicted that a “like” is associated with a positive value judgment indicating support for the content.¹²² The judgment clearly indicates the need for awareness and consciousness surrounding risks attached to online statements. People continuously fail to recognise the difficulty in retracting tweets or posts once published online as they fall within the public domain.

South African courts continue to send out strong messages against online defamers who post serious and scandalous remarks on social media sites, as reflected in the recent 2018 judgment of *Mwanele Manyi v Mcebo Freedom Dhlamini*.¹²³ Mavundla J, had little doubt in finding that the plaintiff’s right to dignity and having such dignity respected, was clearly infringed, as the plaintiff was likened to a, “lame horny old donkey” who had paid a student the sum of R40 000 to have sexual intercourse with her and later told: “you deserve to be necklaced period”.¹²⁴ The court held that the defamatory words were intended to violate the plaintiff’s right to reputation, self-worth, dignity and privacy and such publication on Whatsapp, which is a social media platform had the potential to reach a wide spectrum of readership.¹²⁵ The court referred to the case of *Tsichlas v Touch Line Media (Pty) Ltd*, which held that national or geographic boundaries are irrelevant when dealing with the internet and electronic communications.¹²⁶ It was further held that in such matters, publication can take place anywhere in the world where the user has accessed the website and has read and understood the words.¹²⁷ Interestingly, in this particular case, the court in considering the quantum for damages, held that the “seriousness of the defamation, the nature and extent of the publication, the reputation, character and conduct of the plaintiff, the motives and conduct of the defendant” must be taken into account.¹²⁸ In respect of the first claim, an amount of R50 000 was awarded, whilst R5 000 was awarded for damages in respect of the threat.¹²⁹ The case clearly illustrates the point that the court will not tolerate defamatory comments that tend to harm the reputation, character and conduct of the online victim, and even in cases where damages are difficult to estimate or assess with certainty, the wrongdoer will not escape paying damages for their breach.

Our courts have shown creativity in recent times by extending the long established principles of the *actio iniuriarum* to cope with the modern day challenges of online social media.¹³⁰ It is clear from recent judgments that our courts will not tolerate online defamatory posts. It is also refreshing to note that our courts will not shy away from awarding damages or granting interdicts when the circumstances justify such action to be taken. However, seeing that online defamation is still an area that is evolving, our courts will no doubt have to tackle

117 *RM v RB* para 276.

118 *RM v RB* para 276.

119 *RM v RB* para 277.

120 *RM v RB* para 278.

121 Hall “Swiss Court Convicts Man for ‘Liking’ Defamatory Facebook Post in Landmark Ruling” <http://www.telegraph.co.uk/news/2017/05/30/swiss-court-convicts-man-liking-defamatory-facebook-post-landmark/> (accessed 30-10-2017).

122 *Ibid.*

123 Case number 36077/18 (unreported) heard in the High Court of RSA Gauteng Division, Pretoria.

124 *Mwanele Manyi v Mcebo Freedom Dhlamini* para 5.

125 *Mwanele Manyi v Mcebo Freedom Dhlamini* para 13.

126 2004 2 SA 112 W.

127 *Mwanele Manyi v Mcebo Freedom Dhlamini* para 5.

128 *Mwanele Manyi v Mcebo Freedom Dhlamini* para 22.

129 *Mwanele Manyi v Mcebo Freedom Dhlamini* para 28.

130 Singh 2014 *Obiter* 628.

novel issues that are more complex and demanding such as cross border defamation involving jurisdictional issues, amongst others where guidance may have to be sought from international law.

6 CONCLUSION AND WAY FORWARD

Online defamation will continue to spiral out of control until people figure out how to protect themselves from the perils of using this ever-growing forum of communication. As indicated earlier in this article, South Africa, unlike other countries does not have specific legislation to regulate online defamation. Different forms of legislation in South Africa¹³¹ do touch on minor components of online defamation but it may be argued that this is insufficient to address the ever-growing scourge that is spiralling out of control. Some academics such as Neethling¹³² believe that the current framework and in particular, the law of delict is adequately equipped to deal with online defamation. Others believe that our courts have done an excellent job in dealing with online defamation to date and they can continue to adapt established principles.¹³³ There is no doubt that the creativity adopted by our judges in general by adapting our existing laws to deal with 21st century issues can only be commended. However, the possibility exists that new forms of online defamation will emerge with evolving technology and our courts may not be prepared to respond to this effectively. The proficiency and capability of existing laws to keep abreast of changes within the global internet network may eventually be exposed, as many of the existing laws have not been designed to deal with modern technology. Challenges of jurisdiction, anonymity and dissemination of information, amongst others may continue to escalate. The responsibility of our courts to decode the technical characteristics of the internet and formulate well-settled precedents cannot be underestimated.¹³⁴ For the future, the need to enter into discussions to consider codifying online defamation in a specific Act may be crucial to jettison trivial claims, prevent huge court backlogs, address and balance competing interests of freedom of expression and reputational harm as well as address challenges of online jurisdiction and anonymity amongst others.¹³⁵ In addition, in an effort to address transborder jurisdictional issues and future global internet issues, international cooperation may need to be sought to uphold the integrity of a global networking system.¹³⁶

For the present, there may be a need for special ongoing training for prosecutors, magistrates and judges to deal adequately with evolving technology and emerging threats. The possibility of introducing specialist courts to deal with such matters could provide the solution that alleviates possible future backlogs. As more and more youngsters become technologically savvy, education at schools and tertiary institutions should also focus on online ethics, evolving technology and legal risks surrounding the online world. Education, awareness and training on the subject matter should extend to both the private and public world, with businesses, service providers and the public at large all being educated about the perils and risks of social media usage. South Africa needs to be progressive rather than reactive in dealing with online defamation as an ever-changing technological world demands an advanced legal framework that can deal with evolving barriers, inequities and injustices that will continue to grow and evolve in a virtual society.

131 Legislation such as the Electronic Communications Act 36 of 2005, the Electronic Communications and Transactions Act 25 of 2002, the Regulation of Interception of Communications and Provisions of Communication-related Information Act 70 of 2002, the Protection of Harassment Act 17 of 2011, the Employment Equity Act 55 of 1998, the Protection of Personal Information Bill and the Cybercrimes and Cyber Security Bill amongst others.

132 Neethling "Vonnisbespreking : Facebook en Persoonlikheidsbeskerming" 2014 *LitNet Akademies* 49.

133 Singh 2014 *Obiter* 628.

134 Cassim 2013 *SACJ* 69.

135 See Price and McMahon *Blackstone's Guide*, for a discussion on the new UK Defamation Act and adapting the online environment to deal with the challenges of jurisdiction, anonymity and wide dissemination of content.

136 Cassim 2013 *SACJ* 42.