Heroldt v Wills
[2014] JOL 31479 (GSJ)

Reported in:	Judgments Online, a LexisNexis Electronic Law Report Series
Case No:	12 / 10142
Judgment Date(s):	30 / 01 / 2013
Hearing Date(s):	19 / 10 / 2012
Marked as:	Reportable
Country:	South Africa
Jurisdiction:	High Court
Division:	South Gauteng, Johannesburg
Judge:	Willis J
Bench:	NP Willis J
Parties:	Warren Stephen Heroldt (At); Nicole Wills (R)
Appearance:	Adv T Engelbrecht, Wilkins Attorneys (At); Adv S van Aswegen, JNS Attorneys (R)
Categories:	Action – Civil – Substantive – Private
Function:	Confirms Legal Principle
Relevant Legislation:	Uniform Rules of Court

Key Words

Civil procedure – Interdict – Social media postings – Defamatory content

Mini Summary

The applicant sought an interdict to restrain the respondent from posting any information pertaining to the applicant on Facebook or any other social media, and to remove such postings which already had been put up on any social media websites. The respondent had posted an open letter to the respondent on Facebook, expressing her views on his life and the influence of alcohol thereon. The applicant complained that the posting in question published information which portrayed him as a father who did not provide financially for his family; who would rather go out drinking than caring for his family; and who had a problem with drugs and alcohol.

Held that the common law rights to privacy and to freedom of expression have been enshrined in our Constitution. The courts have a duty to develop the law in accordance with the principles of our Constitution. The nature of social media and of Facebook in particular was examined by the Court. Facebook has created a worldwide forum enabling friends to share information such as thoughts, links and photographs (known as "posts") with one another. Posts can either be posted to a friend on that friend's page known as a wall or on the subscribers own wall.

In our law, it is not good enough, as a defence to or a ground of justification for a defamation claim, that the published words may be true. It must also be to the public benefit or in the public interest that they be published. The Court was satisfied that it was neither to the public benefit or in the public interest that the words in respect of which the applicant complained be published. The background to the posting, together with the words themselves, indicated that the respondent acted out of malice when she posted the offending comments. The posting was unlawful.

Insofar as an interdict was concerned, the applicant had a clear right to his privacy and the protection of his reputation. The applicant had indeed been defamed. The next question was whether there was the absence of similar protection by any other ordinary remedy. The Court answered that question in favour of the applicant.

Concluding that the applicant had satisfied the requirements therefor, the Court granted him the following relief. The respondent was to remove all postings which she had posted on Facebook or any other site in the social media which referred to the applicant.

WILLIS J:

[1] The applicant seeks an order against the respondent in the following terms:

1.1. Interdicting and restraining the respondent from posting any information pertaining to the applicant on Facebook or any other social media;

1.2. In the event that the respondent fails to comply to the above-mentioned order that the respondent then be placed under arrest for non-compliance for a period of 30 days or a period as determined by the Court;

1.3. Removing the postings so posted by the respondent from Facebook or any other social site it might have been placed;

1.4. If and in the event that the respondent fails, *alternatively* neglects, *alternatively* refuses to remove such postings from Facebook or any other social media site upon which

it might have been posted that the Sheriff of Randburg be ordered and authorised to remove the postings so listed by the respondent;

1.5. Costs of the application.

[2] The respondent is the author of the posting on Facebook[1] which has given rise to this litigation. It was posted on 27 February, 2012. Its rubric reads: "Letter to Warren Heroldt – for public consumption". Warren Heroldt is the applicant in this matter. Included in the posting is the following:

> "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?"

[3] It is common cause that the applicant enjoys a good party and that he likes his social intercourse to be lubricated with alcoholic beverages. The applicant is an active social networker in that he has both a Facebook and Twitter[2] account on which he often communicates and therefore shares information. The respondent has relied on these facts as grounds of justification for publishing the posting in question. The respondent has refused to remove the posting, despite having been requested so to do by the applicant, acting through his attorney.

[4] The applicant is an insurance broker who is separated from his wife. The respondent had been a close friend of the applicant. This friendship extends back from the time before the applicant married his wife. In terms of a Deed of Trust, the applicant and his wife had jointly appointed the respondent to be the guardian of their three minor children in the event that both the applicant and his wife died or became incapacitated before their children attained their majority. The applicant had provided the respondent with guidance in starting her current business venture. The respondent had lent the applicant money to tide him over certain financial difficulties.

[5] The applicant and his estranged wife are engaged in a divorce action. The applicant's estranged wife is presently residing with the respondent. The applicant's wife left him to stay with the respondent on 14 January, 2012. The applicant pays for the children's medical aid,

extra mural classes, stationery and a full-time tutor to assist them. The three minor children born of the marriage between the applicant and his estranged wife are Zoë, born in 1997, Maxine, born in 1999 and Chad, born in 2001. These minor children have been residing with the applicant for the last few months. The two minor daughters are both "friends" on Facebook with the respondent. A "friend on Facebook" is a "term of art" to which I shall later refer. The applicant and the respondent were friends on Facebook but, consequent upon the applicant's wife leaving him and moving into the home of the respondent, the applicant has "defriended" the respondent.

[6] The applicant complains that the posting in question publishes information which portrays him as:

(i) a father who does not provide financially for his family;

(ii) a father who would rather go out drinking than caring for his family;

(iii) a person who has a problem with drugs and alcohol.

The applicant's attorney, in her letter dated 28 February 2012 addressed to the respondent, referred to the possibility of a claim for damages. The respondent claims that she posted the posting not to defame the applicant but in order for the applicant to reflect on his life and on the road he had chosen.

[7] We have ancient, common-law rights both to privacy[3] and to freedom of expression.[4] These rights have been enshrined in our

Constitution of the Republic of South Africa, 1996 ("the Constitution").[5] The social media, of which Facebook is a component, have created tensions for these rights in ways that could not have

been foreseen by the Roman Emperor Justinian's legal team, the learned Dutch legal writers of the seventeenth century (the "old authorities") or the founders of our Constitution.

[8] It is the duty of the courts harmoniously to develop the common law in accordance with the principles enshrined in our Constitution.[6] The pace of the march of technological progress has quickened to the extent that the social changes that result therefrom require high levels of skill not only from the courts, which must respond appropriately, but also from the lawyers who prepare cases such as this for adjudication.

[9] Counsel for the parties were *ad idem* that there is a dearth of South African case law on the question of the social media. Counsel are commended for responding so positively to my invitation that they should further research certain questions posed by me during the course of their argument. Not only did they undertake their research diligently and competently but also innovatively. For example, I received, via the electronic media, "footnotes to footnotes" which contained entire copies of judgments and extracts from the learned texts to which reference was made in the usual sequence of footnotes. It will not be possible to do justice to the research of counsel without penning an unduly lengthy judgment which would detract from its accessibility to those persons, other than the litigants themselves, who

use the social media. Both counsel referred me to helpful articles on the issue of Facebook. Especial mention deserves to be made of those articles written by Anneliese Roos, Professor of Private Law in the University of South Africa, "Privacy in the Facebook Era: A South African Legal Perspective"[7] and James Grimmelmann, Associate Professor of Law in the New York Law School, "Saving Facebook".[8]

[10] In the case of *Dutch Reformed Church Vergesig Johannesburg Congregation and another v Rayan Soknunan t/a Glory Divine World Ministries*[9] my sister Satchwell referred to the following extract from the case of *Largent v Reed and Pena*:[10]

> "Facebook is a free social networking site. To join a user must set up a profile, which is accessible only through the user's ID (email) and a password. Facebook allows users to interact with, instant message, email and friend or unfriend other users; to play online games; and to upload notes, photos and videos. Facebook users can post status updates about what they are doing or thinking. Users can post their current location to other friends, suggest restaurant, businesses, or politicians or political causes to 'like', and comment or 'like' other friends' posts.
>
> Social networking websites like Facebook, Google and MySpace are ubiquitous. Facebook which is only seven years old, has more than 800 million active users, 505 of whom are active on the site at any given day (Facebook statistics as at 25 October 2011). Facebook has spawned a field of academic research,

> books and a movie. Social networking websites also have a dark side – they have caused criminal investigations and prosecutions and civil tort actions . . .
>
> Facebook has a detailed, ever-changing privacy policy. Only people with user account can access Facebook. For all practical purposes, anyone with an email account can set up a Facebook account. Users can set their privacy settings to various levels, although a person's name, profile picture and user ID are always publicly available. At the least restrictive setting, named 'public', all 800 million users can view whatever is on a certain user's profile. At an intermediate level, only a user's Facebook friends can view such information, and at the least restrictive, only the user can view his or her profile. Facebook also currently allows users to customize their privacy settings.
>
> Facebook alerts users that Facebook friends may 'tag' them in any posting . . . 'You can either approve each post individually or approve all posts by your friends. If you approve a post and later change your mind, you can always remove it from your profile. If you do not want someone to tag you in their posts, we encourage you to reach out to them and give them that feedback. If that does not work, you can block them. This will prevent them from tagging you going forward.' (Facebook Data Policy)
>
> Therefore, users of Facebook know that their information may be shared by default, and a user must take affirmative steps to prevent the sharing of such information."

[11] The respondent contends that Facebook is an international social networking site and service ("SNS") launched in 2003 and owned and

operated by Facebook Inc.[11] Facebook is among the most popular SNS worldwide.[12] A social network service, an SNS, is:

> "a web-based service that allows individuals to:
>
> (a) construct a public or semi-public profile within a bounded system;
>
> (b) articulates a list of other users with whom they share a connection, and
>
> (c) view and traverse their list of connections and those made by others within the system."

The nature and nomenclature of these connections may vary from site to site.[13]

[12] The respondent goes on to contend that it is characteristic of an SNS that a user creates what is known as a "profile".[14] This is made up from personal information.[15] A user's personal information encompasses basic information such as where a person lives, his or her birthday and may include political and religious affiliations

views. The profile usually extends to pictures, the user's relationship status and family members as well as tastes in music, books, films.16 Customarily,

Page 11 of [2014] JOL 31479 (GSJ)

it refers to the user's educational background and contains contact information such as e-mail addresses and telephone numbers.17

[13] The user adds what are known as "contacts" in order to build relationships or a social network.18 A user can "traverse" to other users' sites and leave a private or public message on the site.19 On Facebook a message may be posted on what is termed a user's "wall".20 Everyone added as a "contact" can view and respond to such a message left on a "wall".21

[14] A perusal of readily accessible information on the internet as well as Facebook's own promotional literature and the article by Grimmelmann "Saving Facebook"22 indicates that Facebook seeks to put existing friends in touch with each other whilst also creating new friendships or networks between people. The founder of Facebook, Mark Zuckerberg, has said that Facebook is all about being "social".23 This "social" quality of the social media has legal implications for publication therein (or should one, more correctly, say "thereon") to which I shall refer later.

Page 12 of [2014] JOL 31479 (GSJ)

[15] Facebook is a voluntary social network to which members subscribe and submit information.24 Facebook is distinguished from other online sites such as Twitter or search engines such as Google in that in order to become a member a subscriber must accede and agree to Facebook's Data Privacy Policies and Terms.25 Once subscribed as a user the user creates an "identity".26 In order to view a subscriber's information one must be connected to that subscriber as a "friend" or a "contact".27 The "contact" function allows the user to form or maintain one-to-one relationships with other users.28 By adding a "contact" the user gives the contact access to his or her "profile".29 This has the consequence that the user shares personal information with the contact.30 Sharing personal information with a "contact" or friend creates a sense of intimacy and strengthens personal ties.31

[16] Facebook has created a worldwide forum enabling friends to share information such as thoughts, links and photographs with one

Page 13 of [2014] JOL 31479 (GSJ)

another.32 These personal thoughts, and photographs are generally known as "posts".33 These "posts" can either be "posted" to a friend on that friend's page known as a "wall" or on the subscribers own "wall".34 On the user's wall Facebook invites the user to comment.35 A user's wall is a personal space allowing for expression on any subject of choice.36 One's "profile" can be set so that one's "contacts" are notified of any new "posts" on one's "wall" and *vice versa*.37

[17] A Facebook application called "photos" also allows a user to share photographs.38 This may entail a process known as "tagging".39 "Tagging" a person means that the application allows one to click on the photograph and then enter the person's name.40 Tagging also enables one to post information which may be seen by one's Facebook friends.41 These friends can forward such information to others.42

Page 14 of [2014] JOL 31479 (GSJ)

[18] Facebook subscribers can also gain access to posts by other Facebook subscribers depending on the privacy settings between the parties.43 A party who shares the original post is thus not necessarily the author thereof.44 A subscriber can choose between various "privacy settings" choosing to make information available.45 Facebook states in its policies that, although it makes every effort to protect a user's information, these privacy settings are however not fool-proof.46

[19] The act of disclosure of information is referred to as a user's "visibility".47 Users control their "visibility" by their "privacy settings".48 There are three "privacy settings":

(i) "Everyone" which is a "public" setting which enables information and posts which are created to be available to all Facebook users, whether friends with that particular subscriber or not;

Page 15 of [2014] JOL 31479 (GSJ)

(ii) "Friends of friends" which enables those who are in the subscriber's immediate network also to view the posts, including photographs.

(iii) "Friends only" which allows only those people whom the Facebook user has selected or whose friend requests the user has accepted, to see the posts.49

[20] These privacy settings on Facebook enable a user to do the following:

(i) To control the list of friends;

(ii) To determine when to "check in";

(iii) Remove oneself from Facebook search results where one does not want people to be able to search Facebook for information about one;

(iv) Remove oneself from Google;

(v) Avoid the photographic/video tag mistakes;

(vi) Enable HTTPS (internet security settings) where one can set up security alerts and login alerts;

(vii) Make information about "contacts" private;

(viii) Avoid embarrassing wall posts about oneself;

Page 16 of [2014] JOL 31479 (GSJ)

(ix) Gain access to information available to applications such as "Farmville" and others;

(x) Instant "Personalization" through which one can stop other websites from viewing one's personal profile.50

[21] Accordingly, although one can control one's own Facebook profile but there is no method, within the Facebook system itself, by which one can control what other people place on their profiles about oneself and who can look at that.

[22] "Twitter" is also commonly known as being part of the social media.51 It is an information sharing and micro-blogging site available on the internet.52 It was founded in 2006 by Jack Dorsey and Christopher "Biz" Stone.53 Registered subscribers "tweet" (which means send messages or share information), limited to 140 characters or less, to their followers.54 Twitter has 517 million users worldwide, sending some 175 million "tweets" per day.55 "Tweets" are publicly visible by default.56 Another example of the social media is LinkedIn.57

Page 17 of [2014] JOL 31479 (GSJ)

[23] "Google", on the other hand, is an international public search engine, owned by Google Incorporated, which collects publicly accessible content and information on topics and either hosts or provides links to that information.58 Searches made by Google leave traces, called "cookies".59 When using a search engine through a browser program on a computer, search terms and other information will usually be stored on a computer by default, unless erased.60 The Internet Service Provider stores records with related search items to an IP address and a time.61 Google may keep logs of the same

Page 18 of [2014] JOL 31479 (GSJ)

information.62 Google searches webpages, images, news websites, videos and maps.63

[24] In the case of *Bernstein and others v Bester and others NNO*,64 the Constitutional Court held that, "In South African law the right to privacy is recognized as an independent personality right which the Courts have included within the concept of *dignitas*."65 The Constitutional Court has also entrenched in our law the close link between human dignity and privacy.66

[25] In *Janse van Vuuren and another NNO v Kruger*67 Harms AJA (as he then was) said:

> ". . . to determine whether a *prima facie* invasion of the right to privacy is justified, it appears that in general the principles formulated in the defences of justification in the law of defamation ought to apply."

Page 19 of [2014] JOL 31479 (GSJ)

In view of the *imprimatur* given by the Constitutional Court to the linkages between dignity and privacy, it may confidently be accepted that this approach of Harms AJA is correct.

[26] In the recent case of *Mthembi-Mahanyele v Mail & Guardian*,68 the Supreme Court of Appeal ("the SCA") affirmed the principle that the test for determining whether the words in respect of which there is a complaint have a defamatory meaning is whether a reasonable person of ordinary intelligence might reasonably understand the words concerned to convey a meaning defamatory of the litigant concerned.69 The words of the posting on Facebook which are in issue in this case indeed contain the defamatory meaning of which the applicant complains.

[27] In our law, it is not good enough, as a defence to or a ground of justification for a defamation, that the published words may be true: it must also be to the public benefit or in the public interest that they be published.70 A distinction must always be kept between what "is interesting to the public" as opposed to "what it is in the public interest to make known".71 The courts do not pander to prurience. I am

Page 20 of [2014] JOL 31479 (GSJ)

satisfied that it is neither to the public benefit or in the public interest that the words in respect of which the applicant complains be published, even if it is accepted that they are true.

[28] The next defence which needs to be considered is that of "fair comment". In *Crawford v Albu*72 it was held that in order to qualify as "fair comment", the comment "must be based on facts expressly stated or clearly indicated and admitted or proved to be true".73 When a defence to or a ground of justification for a defamation is raised in motion court proceedings, the assessment of facts differs from that set out in *Plascon-Evans Paints Limited v Van Riebeeck Paints* (*Pty*) *Limited*.74 The respondent, having raised a defence of fair comment, bears a burden of rebuttal.75 This burden presents the respondent with an insuperable difficulty in the present case. She has been unable to justify her posting. Furthermore, malice or improper motive by the perpetrator of the comment also acts to defeat the defence of fair comment.76 The background to the posting, together with the words themselves, indicates that the respondent acted out of malice when she posted the offending comments.

[29] The posting by the respondent was unlawful. In coming to this conclusion I have been mindful of the following which was said by Corbett CJ in *Financial Mail* (*Pty*) *Ltd and others v Sage Holdings Limited and another*:77

> "In demarcating the boundary between the lawfulness and unlawfulness in this field (infringement of personal privacy) the Court must have regard to the particular facts of the case and judge them in the light of contemporary *boni mores* and the general sense of justice of the community as perceived by the Court. Often a decision on the issue of unlawfulness will involve a consideration and weighing of competing interests."78

[30] What is to be done? The first two requirements for an interdict set out in *Setlogelo v Setlogelo*79 have comfortably been satisfied. In so far as an interdict is concerned, the applicant has a clear right to his privacy and the protection of his reputation. The applicant has indeed been defamed. What of the question of whether there is "the absence of similar protection by any other ordinary remedy"? The respondent has drawn attention to the fact that, previously, the applicant *via* his attorney, threatened to institute an action to claim damages. The respondent suggests that, if she has found to have defamed the applicant, his proper remedy is damages.

[31] It is in respect of the remedy where infringements of privacy take place in the social media that the common law needs to develop. The social media form a subset of the electronic media but are not coextensive with it: the social media are all part of the electronic media but not all the electronic media are social media. The electronic media were, almost certainly, beyond the imagination of the Court when *Setlogelo v Setlogelo* was decided in 1914. Not only can items be posted and travel on the electronic media at a click on a computer in a moment, in an instant, at the twinkling of an eye, but also they can, with similar facility, be removed therefrom. This can also be done at minimal cost. The situation is qualitatively different from the scenario where newspapers have been or are about printed in hardcopy and distributed. The law has to take into account changing realities not only technologically but also socially or else it will lose credibility in the eyes of the people. Without credibility, law loses legitimacy. If law loses legitimacy, it loses acceptance. If it loses acceptance, it loses obedience. It is imperative that the courts respond appropriately to changing times, acting cautiously and with wisdom.

[32] Louis Brandeis, a former justice of the Supreme Court of the United States of America, together with his professional partner in a Boston law firm, Samuel Warren, wrote an article in 1890 in the *Harvard Law Review* in which they argued that: "Political, social and economic changes entail the recognition of new rights, and the

common law, in its eternal youth, grows to meet the demands of society . . ."80

[33] In the case of *Financial Mail* (*Pty*) *Limited v Sage Holdings Limited*81 Corbett CJ said:

> "In a case of publication in the press of private facts about a person, the person's interest in preventing the public disclosure of such facts must be weighed against the interest of the public, if any, to be informed about such facts."82

[34] The historical reluctance of the courts to interdict publication in the media has its roots only in the issues relating to technology and economics that arise from "stopping the press" but also a concern about the social consequences of stopping the free flow of news and information. This concern about the "chilling effect" of court orders on freedom of expression has been manifested in the case of *National Media Limited v Bogoshi*83 recently decided in the SCA.

[35] Although major news items such as tsunamis, the outbreaks of war and the election of presidents may travel through the social media, the social media are not primarily news media. As the founder of Facebook said, it is all about being "social". The electronic media is

laden with news media. The social media are qualitatively different from the electronic news media. Such important news as may travel through the social media will also, in most instances, be widely and readily available in the

news media as well. Attitudes by the courts to the removal of items from the social media may be justifiably different in the case of the news media, even where the news media appear in electronic rather than print form. As Lior Jacob Strahilivetz has pointed out in his publication, *A Social-Network Theory of Privacy*,84 mathematical and sociological analysis shows that the effect of publication is much dependent on its context within the actual media.

[36] As an instrument for spreading love, friendship, fun and laughter around the world, Facebook is incontestably a force for good. As the learned authors Grimmelmann and Roos have pointed out, however, Facebook is fraught with dangers especially in the field of privacy.85 Grimmelmann, although sceptical about the efficacy of many other instruments (including legislation) to address the dangers of Facebook, believes that appropriate interventions by the courts can have a positive effect on the use of Facebook.86

[37] As was said by both the Constitutional Court in *S v Mamabolo* (*eTV and others intervening*)87 and the SCA in *National Media v Bogoshi*88

Page 25 of [2014] JOL 31479 (GSJ)

and *Van der Berg v Coopers and Lybrand Trust* (*Pty*) *Limited and others*,89 resolving the tensions between every human being's constitutionally enshrined rights both to freedom of expression and to *dignitas* is all about balance. In the case of *Le Roux v Dey* (*Freedom of Expression Institute and another as amici curiae*)90 the Constitutional Court emphasised the need to take into account the context in which a publication occurs.91

[38] The respondent has contended that the applicant could have approached Facebook, reported the abuse and asked for the posting to be blocked. Her counsel, Ms *Van Aswegen*, submitted that, as a subscriber, the applicant must know of Facebook's Data Policies and of the fact that he can report abuse to Facebook. There is nothing before me to assure me that Facebook would comply with such a request. Grimmelmann argues that it is better for the courts to focus on users rather than Facebook itself if intrusions on privacy are effectively to be curbed.92 I agree: if one wants to stop wrongdoing, it is best to act against the wrongdoers themselves.

[39] As is to be expected of a case that was decided in 1914 on so vital a legal issue as the obtaining of an interdict and which has been affirmed consistently since then, the question of what is meant by "the

Page 26 of [2014] JOL 31479 (GSJ)

absence of similar protection by any other ordinary remedy" in *Setlogelo v Setlogelo* has been much considered.93? As Colin Prest notes, Van der Linden used the words:

> ". . . geen ander gewoon middel . . . waar door men met het zelfde gevolg kan geholpen worden",

and

> ". . . geen ander ordinair middel . . . waar door men met het zelfde effect kan geholpen worden"94 (*Koopmans Handboek* (*Institutes*) 3.1.4.7 and *Judicieele Practijcq* 2.19.1).

In the circumstances of this case, I am satisfied that by issuing an interdict that the respondent is to remove the posting, the Court will be providing a remedy for which there is no other by which the applicant, with the same effect, "*kan geholpen worden*". Besides, the interdict which I propose to make will resolve the issue without the needless expense, drama, trauma and delay that are likely to accompany an action for damages in a case such as this.

[40] Although judges learn to be adept at reading tealeaves, they are seldom good at gazing meaningfully into crystal balls. For this reason I shall not go so far as "interdicting and restraining the respondent from posting any information pertaining to the applicant on Facebook or any other social media". I have no way of knowing for certain that there will be no circumstances in the future that may justify publication about the applicant.

Page 27 of [2014] JOL 31479 (GSJ)

[41] It seems that the relief which has been sought which relates to placing the respondent under arrest, if she fails to comply with the Court's order, is ancillary to the making of a continuing order of prohibition on postings in the social media. In any event, I shall also not go so far as making an order, at this stage, that in the event that the respondent fails to comply with the Court's order that the respondent then be placed under arrest for non-compliance for a period of 30 days or any other period. At the moment I have no way of knowing whether or not the respondent may become incapable of complying with the Court's order. Besides, it is unseemly for the courts to wield their authority with a sledgehammer. Everyone knows that life can be made uncomfortable for those who do not comply with court orders.

[42] I am not sure that it falls within the competence of the Sheriff of Randburg to remove the postings should the respondent fail to do so. At this stage I shall make no order in this regard but the applicant is welcome to approach me again on this issue should it become necessary.

[43] Those who make postings about others on the social media would be well advised to remove such postings immediately upon the request of an offended party. It will seldom be worth contesting one's obligation to do so. After all, the social media is about building friendships around the world, rather than offending fellow human beings. Affirming bonds of affinity is what being "social" is all about.

[44] It is to be anticipated that, in response to this exhortation to remove offending comments from Facebook when called upon to do

Page 28 of [2014] JOL 31479 (GSJ)

so, there will be the following question: "but what about public figures?" A few observations in this regard may be appropriate in order to avoid misunderstandings. Corbett CJ said in *Financial Mail* (*Pty*) *Ltd and others v Sage Holdings Limited and another*,95 that every case should be decided in the light of the *boni mores* of society.96 "*Boni mores*" means, literally, "good customs/conventions" but in this context it may more accurately be translated as "society's sense of justice and fair play". Ms *Engelbrecht*, counsel for the applicant, strongly relied the chapter on privacy in Johann Neethling's *The Law of Personality*.97 In that work he refers to a short article of his, written many years ago, in which he supports the standard that, in matters relating to privacy, parties persons must act reasonably ("op 'n redelike wyse").98

[45] The "truth plus public benefit/interest" test will generally protect both public figures and those who write about them provided it is remembered that it is not in the public interest that every titbit of information and not every morsel of salacious gossip about a public figure be made publicly known. There is legitimate public interest in the affairs of public figures. Legitimate interest in what they do does not overshadow the fact that public figures have the same human rights as everyone else. They too enjoy a constitutional right to privacy.

Page 29 of [2014] JOL 31479 (GSJ)

Not only does our law protect every person's right to *dignitas* (inner tranquillity)99 but also to *fama* (reputation).100 The "fair comment" test will generally come to the aid of those who wish to express themselves lavishly and perhaps even extravagantly. Trenchant commentaries on the performances of politicians as politicians, entertainers as entertainers, musicians as musicians, artists as artists, writers as writers, poets as poets, sports stars as sports stars will generally pass legal muster, even if posted in the social media. When it comes to freedom of expression in South Africa, there are oceans in which to swim and upon which to sail as freely as the wind blows.

[46] Above all, it is well to remember what Harms JA said in *National Media Limited v Jooste*,101 after referring to American jurisprudence, that the question of whether private facts are worthy of protection is determined by reference to "ordinary or reasonable sensibilities and not to hypersensitivities".102 Grimmelmann sagely invokes the ancient maxim *de minimis non curat lex* (the law is not concerned with

Page 30 of [2014] JOL 31479 (GSJ)

trivia).103 Delicate lilies are unlikely to bloom under the awnings of the courts when it comes to claims of damaged reputations.

[47] The applicant has been substantially successful inasmuch as he came to court seeking an interdict and has obtained it. He is entitled to his costs. The following is the order of the Court:

(a) The respondent is to remove all postings which she has posted on Facebook or any other site in the social media which refer to the applicant.

(b) The respondent is to pay the applicant's costs in this application.

Footnotes

1 Facebook is a popular, free, social networking website on the internet which enables registered users to send messages to one another, upload photographs and videos, keep in touch with one another and send information about oneself (and others) to other registered users. This definition has been adapted (in an attempt to conform to the requirements of legal precision) from that given by Margaret Rouse on whatis.techtarget.com (Accessed 17 January 2013). It has 900 million users worldwide, 23% of whom visit their "Facebook" page more than fives times a day. See www.internetworldsats.com/facebook.htm (Accessed 17 January 2013). 250 million photographs are loaded on to Facebook daily. See, again www.internetworldsats.com/facebook.htm (Accessed 17 January 2013). In South Africa there are almost six million Facebook users. See http://www.socialbakers.com/facebook-statistic (Accessed 17 January 2013). The largest single age group of users is between 25 and 34 years old, consisting of some 1,8 million persons. See, again http://www.socialbakers.com/facebook-statistic.

2 "Twitter" is dealt with in more detail in para [22] below.

3 It may interest those who take pride in our Roman-Dutch common law heritage that it was not until 1890 that a right to privacy was recognised by the Courts in the United States of America. The reason for this was that a right to privacy was not recognised in English common law, which was the law which was inherited in the USA. See Anneliese Roos *Privacy in the Facebook Era*: *A South African Legal Perspective* (2012) 129 *SALJ* 375. Our rights to privacy derive from the *actio iniuriarum*, an instrument that has descended to us from Roman law. That the *actio iniuriarum* protects privacy was first recognised in the South African courts in the case of *O'Keeffe v Argus Printing and Publishing Company Limited* 1954 (3) SA 244 (C) at 247H–249E, especially at 249C. See, once again Anneliese Roos *Privacy in the Facebook Era*: *A South African Legal Perspective* (*supra*) at 377.

4 See, for example, *National Media Limited and others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1210F [also reported at [1998] JOL 3766 (A) – Ed].

5 S 14 of our Constitution provides that:
"Everyone has the right of privacy, which includes the right not to have –
a) their person or home searched;

b) their property searched;
c) their possessions seized; or
d) the privacy of their communications infringed."

S 16 of our Constitution asserts that: "Everyone has the right to freedom of expression which includes – (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas . . ." The importance of this right has been affirmed on several occasions by the Constitutional Court. See *South African National Defence Union v Minister of Defence and another* 1999 (4) SA 469 (CC) [also reported at [1999] JOL 4919 (CC) – Ed] at para [7]; *S v Mambolo* (*eTV and others intervening*) 2001 (3) SA 409 (CC) [also reported at [2001] JOL 8222 (CC) – Ed] at para [37] *Islamic Unity Convention v Independent Broadcasting Authority and others* 2002 SA 294 (CC) [also reported at [2002] JOL 9576 (CC) – Ed] at paras [15]–[19] and *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC) [also reported at [2002] JOL 9862 (CC) – Ed] at para [21]; *De Reuck v Director of Public Prosecutions*, *Witwatersrand Local Division and others* 2004 (1) SA 406 (CC) [also reported at 2003 (12) BCLR 1333 (CC) – Ed] at paras [46]–[50]; *Laugh it Off Promotions CC v SAB International* (*Finance*) *BV t/a SABMARK International* (*Freedom of Expression Institute as amicus curiae*) 2006 (1) SA 144 (CC) [also reported at [2005] JOL 14579 (CC) – Ed]; *Johncom Media Investments Limited v M and others* 2009 (4) SA 7 (CC) [also reported at [2009] JOL 23343 (CC) – Ed] at para [1]; *Biowatch Trust v Registrar*, *Genetic Resources* 2009 (6) SA 232 (CC) [also reported at [2009] JOL 23693 (CC) – Ed] at para [27]; *Brümmer v Minster for Social Development and others* 2009 (6) SA 323 (CC) [also reported at [2009] JOL 24044 (CC) – Ed] at para [63]; *Bothma v Els and others* 2010 (2) SA 622 (CC) [also reported at 2010 (1) BCLR 1 (CC) – Ed] at para [92]. In the *Khumalo and others v Holomisa* case, at para [28], O'Regan J, delivering the unanimous judgment of the Constitutional Court said:

"The right to privacy, entrenched in section 14 of the Constitution, recognises that human beings have the right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity. No sharp lines can be drawn between reputation, *dignitas* and privacy in giving effect to the value of human dignity in our Constitution."

See also *Bernstein and others v Bester and others* 1996 (2) SA 751 (CC) [also reported at 1996 (4) BCLR 449 (CC) – Ed]; and *Mistry v Interim Medical and Dental Council of South Africa and others* 1998 (4) SA 1127 (CC) [also reported at 1998 (7) BCLR 880 (CC) – Ed].

6 Ss 39(2) and 173 of the Constitution of the Republic of South Africa, 1996.
7 (2012) 129 SALJ at 375.
8 James Grimmelmann *Saving Facebook*, 2009 (94) *Iowa Law Review* 1137 at 1137–1205.
9 2012 (6) SA 201 (GSJ) at para [42].
10 39th Judicial District of Pennsylvania, Franklin County 2009-1823 at 3–5.
11 See Anneliese Roos' article, *op.cit*.
12 See Anneliese Roos' article, *op.cit*.
13 Boyd DM & Ellison N "Social network sites: Definition, history and scholarship" 2007 (Vol 13 No. 1) Journal of Computer-Mediated Communication article 11. See also Anneliese Roos' article, *op.cit*.
14 See Anneliese Roos' article, *op.cit*.
15 See Grimmelmann's article, *op. cit*.
16 See Grimmelmann's article, *op. cit*.
17 See Grimmelmann's article, *op. cit*.
18 See Grimmelmann's article, *op. cit*.
19 See Grimmelmann's article, *op. cit*.
20 See Grimmelmann's article, *op. cit*.
21 See Grimmelmann's article, *op. cit*.
22 See Grimmelmann's article, *op. cit*.
23 See www.techcrunch.com/2012/09/11/zuckerberg-the-leader (Accessed 24 January 2013).
24 See Grimmelmann 's article, *op. cit*. especially at 1152–60.
25 Facebook's Privacy Policies and Terms.
26 See Anneliese Roos' article, *op.cit*. See Grimmelmann's article, *op. cit*.
27 *Ibid*.
28 *Ibid*.
29 *Ibid*.
30 *Ibid*.
31 *Ibid*.
32 *Ibid*.
33 *Ibid*.
34 *Ibid*.
35 *Ibid*.
36 *Ibid*.
37 *Ibid*.
38 See Anneliese Roos' article, *op.cit*. at 383–85.
39 *Ibid*.
40 *Ibid*.
41 *Ibid*.
42 *Ibid*.
43 See Grimmelmann's article, *op.cit*.
44 *Ibid*
45 *Ibid*.
46 See Anneliese Roos' article, *op.cit*., fn 48.
47 See Anneliese Roos' article, *op.cit*. at 386–90.
48 See Anneliese Roos' article, *op.cit*. at 386–90.
49 Allfacebook.com/facebook-privacy-settings_b31836.
50 *Ibid*.
51 See Anneliese Roos' article, *op.cit*.
52 See www.Mashable.com/category/twitter/ (Accessed 24 January 2013).
53 *Ibid*.
54 *Ibid*.
55 See www.internetworldsats.com/facebook.htm (Accessed 17 January 2013).
56 See www.Mashable.com/category/twitter/ (Accessed 24 January 2013) *Ibid*.
57 See Anneliese Roos' article, *op.cit*. It is appropriate that I disclose that I have not "joined" Facebook but have

subscribed to LinkedIn. All three of my children are "on Facebook". There are two reasons why I am not a subscriber to Facebook. The first is that there is a considerable body of opinion among judges both in South Africa and abroad that Facebook necessitates too public a disclosure of private facts than is appropriate in the case of judges. Unless a matter of high moral principle is involved I think it better that when it comes to issues that may affect the reputation of judges collectively, it is better that they judges should try to operate "in phase" with one another, rather than venture upon frolics of their own. The second is that I have been much affected by listening to a radio interview with a celebrity in which he expressed his horror at the thought of his father inviting him to be a "Facebook friend". I have the impression that my own children would be embarrassed if I were to "join" Facebook. Through my being a subscriber to LinkedIn, I have been able to experience, first hand, the benefits of the social media. I have re-established contact with long lost friends all around the world, with some of whom I last had exchanges more than 30 years ago. I also have the comfort and security of belonging to a worldwide network of highly influential people.

58 See www.Simonwillison.net/2004/apr/5/whatisgoogle/ and www.stateofsearch.com/what-is-google-really-all-about/ (BOTH accessed on 17 January 2013).

59 See www.google.com/goodtoknow/data-on-the-web/cookies/ and www.google.co.za/policies/privacy/ads/ (BOTH accessed on 17 January 2013).

60 See www.Simonwillison.net/2004/apr/5/whatisgoogle/ and www.stateofsearch.com/what-is-google-really-all-about/ (BOTH accessed on 17 January 2013).

61 *Ibid*.

62 *Ibid*.

63 *Ibid*.

64 1996 (2) SA 751 (CC) [also reported at 1996 (4) BCLR 449 (CC) – Ed] at para [68].

65 At para [68].

66 See *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others* 1999 (1) SA 6 (CC) [also reported at [1998] JOL 3801 (CC) – Ed] where it was said at para [30]:
"This case illustrates how, in particular circumstances, the rights of equality and dignity are closely related, as are the rights of dignity and privacy";
and *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC) [also reported at [2002] JOL 9862 (CC) – Ed] at para [21]; and *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and others* 2004 (1) SA 406 (CC) [also reported at 2003 (12) BCLR 1333 (CC) – Ed] at paras [46]–[50].

67 1993 (4) SA 842 (A) at 850.

68 2004 (6) SA 329 (SCA) [also reported at [2004] JOL 12852 (SCA) – Ed].

69 *Ibid*. at para [25].

70 See *Financial Mail (Pty) Limited v SAGE Holdings Limited* 1993 (2) SA 451 (A) at 464C; *Argus Printing & Publishing Company Limited and others v Esselen's Estate* 1994 (2) SA 1 (A) at 25B–E; *National Media Limited and others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1208G–J [also reported at [1998] JOL 3766 (A) – Ed].

71 *Ibid*.

72 1917 AD 102.

73 At 114.

74 1984 (3) SA 623 (A) at 634E–635C.

75 See *Borgin v De Villiers and another* 1980 (3) SA 556 (A); *Marais v Richard en 'n ander* 1981 (1) SA 1157 (A); *National Media Limited and others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1218E–F [also reported at [1998] JOL 3766 (A) – Ed]; *Khumalo v Holomisa* 2002 (5) SA 401 (CC) [also reported at [2002] JOL 9862 (CC) – Ed] at para [18].

76 See *Marais v Richard en 'n ander* 1981 (1) SA 1157 (A) at 1170A–C and *Jansen Van Vuuren and another NNO v Kruger* 1993 (4) SA 842 (A) at 850H–I.

77 1993 (2) SA 451 (A).

78 At 462F–463A.

79 1914 AD 221 at 227.

80 Samuel Warren and Louis D Brandeis "The right to privacy" (1890) 4 *Harvard LR* 193 at 195. See also Anneliese Roos' article, *op.cit*. at 376.

81 1993 (2) SA 451 (A).

82 At 462I–J.

83 1998 (4) SA 1196 (SCA) at 1210G–I [also reported at [1998] JOL 3766 (A) – Ed].

84 72. V.CHI. L. REV. 919, at 923–4.

85 *Op. cit*. (*supra*).

86 *Op. cit*. (*supra*).

87 2001 (3) SA 409 (CC) at 429I–431B [also reported at [2001] JOL 8222 (CC) – Ed].

88 1998 (4) SA 1196 (SCA) at 1207D [also reported at [1998] JOL 3766 (A) – Ed].

89 2001 (2) SA 242 (SCA) [also reported at [2001] JOL 7741 (A) – Ed] at para [23].

90 2011 (3) SA 274 (CC) [also reported at [2011] JOL 27031 (CC) – Ed].

91 See paras [39]–[51].

92 *Op. cit*. at 1195.

93 References to these cases can conveniently be found in *Herbstein and Van Winsen's The Civil Practice of the Supreme Court of South Africa* (4 ed) (1997); Juta's: Cape Town, at 1063–77 and CB Prest *The Law and Practice of Interdicts* (1996); Juta's: Cape Town, at 45–8. An already lengthy judgment will needlessly be extended by referring to all these cases individually.

94 *Ibid*.

95 1993 (2) SA 451 (A).

96 *Financial Mail v Sage Holdings* (*supra*) at 462F–463B; Neethling (*supra*) at 246.

97 Neethling, J. (2005) *The Law of Personality* (2 ed) LexisNexis Butterworths: Durban, Chapter 8, *Right to Privacy*.

98 1977 *THRHR* 101 at 104. He wrote a commentary on *S v I* 1976 (1) SA 781 (RA). Neethling, in his *The Law of Personality* (at 246) also endorses what Corbett CJ said in *Financial Mail (Pty) Ltd and others v Sage Holdings Limited and another* (*supra*, at 462F–463B) about the *boni mores* test.

99 In Melius de Villiers' (1899) *The Roman and Roman-Dutch Law of Injuries*: *A Translation of Book 47, Title 10, of Voet's Commentary on the Pandects*; Juta's: Cape Town at 24, he describes dignity as "that valued and serene condition" and goes on to say that: "Every person has an inborn right to the tranquil enjoyment of his peace of mind, . . ." This passage at 24 (or relevant portions thereof) has been referred to with frequent approval by the courts. See, for example, *Minister of Police v Mbilini* 1983 (3) SA 705 (A) at 715G–716A; *Jacobs en 'n ander v Waks en andere* 1992 (1) SA 521 (A) at 542C–E; *Argus Printing and Publishing Company Limited v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 585E–G; *Argus Printing and Publishing Company Limited v Esselen's Estate* 1994 (2) SA 1 (A) at 23D–H.

100 See, for example, *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC) [also reported at [2002] JOL 9862 (CC) – Ed] at paras [17]–[19].
101 1996 (3) SA 262 (SCA) [also reported at [1997] JOL 263 (A) – Ed].
102 At 270I–J.
103 *Op*. *cit*. at 1197.