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NEWSLETTER
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FACING UP TO THE INTERNET

"Electronic communications and Internet access are usually regulated in business by electronic communication policies (ECPs). These traditionally focus on rules concerning obscene, profane and defamatory and/or racist language and material; use of the Internet and email facilities for work and private purposes; the retention and storage of records and information; and the employer reserving the right to monitor employees' electronic activities," explains Roy Monk of LLI's labour law department.

The advent of social networking sites such as Facebook, Twitter and others presents an additional challenge to employers. This is further complicated by section 14 of the Constitution and the Regulation of Interception of Communications and Provision of Communication-Related Information Act (RICA,) which protect the privacy of individuals and private communications. Blocking access to social networking sites and/or the Internet through technical means is an obvious way to ensure that employees do not spend their time trawling the Internet. However, a thornier problem arises when employees use such sites to comment freely on their employers, managers and fellow-workers, not necessarily using the employer's equipment and facilities, but very often in unflattering terms. Employers are also entitled to formulate policies (usually incorporated into the contract of employment) pertaining to the use of employer-provided email facilities and the monitoring of such facilities, and making provision for such electronic activities to be monitored. In recent years the use of individual Internet-based email accounts has become extremely popular, which creates its own problems. Two recently reported cases, one dealing with Facebook and the other with Internet-based email accounts, demonstrate the difficulties which may arise in this context.

Access to Facebook is open and free. Users create 'profiles' and establish connections with 'friends' who have access to one another's profiles. Facebook has a number of privacy settings by means of which users can limit the information which a casual visitor to their profiles can access but, if no restrictions are set, anyone who accesses their profiles has access to comments posted on their 'walls', which is where users posts their messages and where 'friends' either respond or post their own messages. In Sedick & Another v Krisray (Pty) Ltd, a senior operations manager and a bookkeeper were avid Facebook users. Each had posted on her respective wall derogatory comments about their employer (a family-owned and managed business) and other employees, especially family members both in senior positions and those recently employed by them to learn the ropes. Some of the posts were downright nasty and derogatory nicknames were used for those they complained about. Unfortunately for these employees, the marketing manager also became a Facebook user and invited the operations manager to be a 'friend'.

She then accessed the operation

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FICA UPDATE

As part of the fight against crime, attorneys are required to register with the Financial Intelligence Centre as accountable institutions and, in addition to the requirement that they know their client, they are obliged to:

- file a cash threshold report in respect of any cash received in excess of R25 000.00; and
- report suspicious or unusual transactions to the Centre.

Facing up to the Internet

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manager's profile and, in the absence of privacy settings, was able to view all the posts made by the operations manager, including the derogatory and nasty ones. The same occurred in respect of the bookkeeper's profile. This was reported to the employer, who understandably viewed the situation in a serious light. The operations manager and, to a lesser extent, the bookkeeper were seen as part of the public face of the employer, dealing with both customers and suppliers.

The situation was compounded by the fact that previous employees had responded to the posts in a negative manner. All of this, contended the employer, damaged the company's reputation and the employees in question were charged with misconduct and dismissed after an enquiry. In the CCMA arbitration which followed, the bookkeeper contended that she was merely venting emotions and that many of the posts were nothing more than jokes.

A more serious issue was raised by the operations manager, namely that her privacy had been invaded by her employer who had accessed her profile without her consent. Both these arguments were given short shrift by the arbitrator. He found that the comments were not jokes and, because access to the profiles was unrestricted, they were wholly in the public domain. Consequently, any person using the Internet, by extension, qualified as a party to the communications posted on the relevant pages. The dismissals were upheld.

However, the employer in Smith v Partners in Sexual Health was not as fortunate. This matter related to the employer obtaining access to an employee's private web-based email account. The Google website offers free email account hosting to users who register for the service. Email messages are accessible only to registered users who have a username and password, used to log into the account. Users may choose, at the end of a session, not to use the logout feature, which provides the convenience, when again accessing the account, of being returned directly to the Gmail pages last used, without the need for further log-in. The employer had opened a Gmail account, pending finalisation of its own website. The employee had also set up a private Gmail account for her personal use. After the finalisation of the website, it was necessary to access the employer's account as there was an overlap between the communications received on that account and those received via its new website. While the employee was away on leave, it was necessary for the employer's CEO to access a document on the employee's computer.

She also wanted to access the employer's 'old' Gmail account and when doing so was taken directly to the employee's Gmail account as the employee had not logged out after the last session. Here she found exchanges between the employee and former employees, as well as persons outside the organisation, which discussed internal matters in somewhat robust terms, including a reference to the CEO as a 'cow'. The employee was charged with, amongst others, bringing the name of the employer into disrepute. The employer argued that the tenor of the comments was such that there could never again be a relationship of trust between the CEO and the employee. The employee was found guilty and dismissed.

In the CCMA arbitration which followed it was argued that the emails had been obtained in violation of the employee's rights to privacy under the Constitution and in contravention of RICA. The argument that the employee's use of the automatic login feature implied that she had abandoned her right to privacy was dismissed by the arbitrator. He held that the contents of an email account stored in an account allocated to the employee on the employer's server could not be compared with comments posted on Facebook where access is not restricted in any way.

A further distinguishing feature was that the information which had been accessed was not stored on the employer's server or computers but in an Internet domain owned and operated by Google. The arbitrator concluded that although the CEO had initially accessed the employee's email account accidentally, the further access was deliberate and in contravention of RICA. Most of the evidence used to discipline the employee had been obtained by illegal means and having regard to the constitutional right to privacy enshrined in the Constitution, it was held that the evidence was tainted and could not be used. The dismissal was held to be unfair.

"The moral of this story," concludes Roy wryly, "is that employers should have effective and comprehensive ECPs in place!"

ESTATE AGENT'S COMMISSION – DOUBLE JEOPARDY

"A recent Supreme Court of Appeal (SCA) judgment highlights the level of care that needs to be taken when appointing estate agents and signing sale agreements to avoid the dangers of multiple commission claims," cautions Barry Lewis of LLI's property department.

In the case of Wakefields vs Attree and Howard, Mr and Mrs Attree sold their Durban North property to Mrs Howard. Although Mrs Howard was originally introduced to the property by a Wakefields agent, and viewed the property twice with the Wakefields agent, no offer was submitted through Wakefields as the price asked was significantly more than the purchaser was able to pay. Shortly thereafter, a sale was concluded through Pam Golding after the seller had agreed to reduce the asking price when giving a sole mandate to Remax. The Attrees, on transfer, paid commission on the sale to Pam Golding, who shared the commission with Remax, who held the sole mandate.

Wakefields took the matter to the High Court, claiming that they were the effective cause of the sale and therefore entitled to payment of commission. After being unsuccessful in the High Court, Wakefields appealed to the SCA where they succeeded in establishing that they were the effective cause and the Attrees were ordered to pay them commission on the sale.

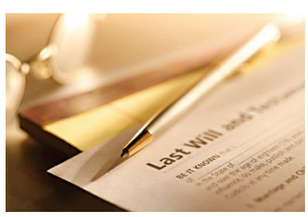
In considering the matter, the Court stated that it is "notoriously difficult, when there are competing estate agents, to determine who is the effective cause of the sale that eventuates. It may be that more than one agent is entitled to commission."

"In order to protect against the risk of either paying the wrong agent or being liable for multiple commission claims, care should be taken in the drafting of any mandate and a warranty should be sought from the purchaser that he was not introduced to the property or the seller by any other agent. This should be coupled with an indemnity from the purchaser should such a claim for commission arise from another estate agent," concludes Barry.

DRAFTING A WILL? CONSIDER THE MINORS

When drafting a will, special attention should be given to the interests of minor children. In terms of Section 17 of the Children's Act, which came into operation on 1 July 2007, the age of majority is 18 years and a child is defined as any person under that age.

As the law, with some justification, places restrictions on the ability of a minor to manage his or her own affairs and contract on his or her own behalf, the question of guardianship and the bequest of assets should be carefully considered.



Parents are, during their lifetime, the natural guardians of their minor children and should either parent die, the other parent will automatically be their sole guardian. However, consideration should be given to appointing a suitable guardian to take care of the person and property of minor children in the event of both parents dying at the same time. This issue is frequently dealt with in a Will.

The mere appointment of a guardian in a Will does not mean that any bequest made to a minor child will fall under the administration of the guardian. Unless a Will Trust is created, any property (other than immovable property) will be paid into the Guardian's Fund for administration by the State on behalf of the minor until he or she reaches the age of majority. To avoid this situation arising, it is common practice to provide in a Will that bequests made to a minor (or to any person who the testator considers to be of an age that he or she should not be given control of the assets) be paid into a trust to be administered on behalf of the minor until he or she reaches the age of majority or such other age as the testator may decide. Immovable property may be left and transferred directly into the name of the minor, however the minor (duly assisted by his/her guardian) may not dispose of the immovable property without the consent of the Master of the High Court or the High Court.

As circumstances often change, care needs to be taken before immovable property is bequeathed to a minor (other than in trust) as, should it be necessary to sell or bond the property, the guardian will be faced with an expensive court application seeking the necessary consent.

In drafting a Will, consideration should also be given to any existing Court orders dealing with the maintenance of children; to the question of the duty of support of minor children; and to the provision of maintenance of minor children.

Should you need to discuss any issues relating to the drafting of your Will, contact Russell Argue of our estates department.

New associate for LLI

The Directors of LLI are pleased to welcome Jadyne Devnarain as an Associate in the litigation department.

Jadyne graduated with an LLB, LLM (Business Law) and completed her Articles of Clerkship with LLI. Out of the office she has a keen interest in golf, fashion design, cosmetology, and stand-up comedy.

A (PRE)CAUTIONARY TALE

"The case of Hawekwa Youth Camp and others vs Burne sends a clear warning to schools," observes Gordon Pentecost of LLI's litigation department.

In this matter the plaintiff was Mr Burne, the father of Michael, a nine-year-old Grade 3 learner. Michael accompanied a school group under the supervision of his teachers on a two-day excursion to a camp in Wellington, in the Western Cape. When the group arrived there they were accommodated in bungalows with bunk-beds; Michael chose to sleep on the upper level of one of the bunk-beds. During the early hours of the morning, Michael was found lying on the cement floor of his bungalow. No-one witnessed how he had ended up there but he was unconscious and appeared to be having convulsions.

He was taken to hospital where it was discovered that he had sustained a fractured skull with underlying brain injuries, resulting in some degree of permanent brain damage. It appeared that the bunk-bed he had slept in did not have adequate protection to prevent him from falling out of his bed.

The case turned on whether Michael's injuries could have been prevented by his teachers. The matter went on appeal to the Supreme Court of Appeals in Bloemfontein where the Court held that Michael's teachers should reasonably have foreseen that, in the absence of adequate barriers affixed to the upper bunk where Michael had slept, there was a real risk that he might roll over in his sleep and fall out, injuring himself.

The question was raised as to what steps, if any, the teachers should have taken to guard against this possible danger. The Court held that the reasonable teacher should have examined the beds and considered whether they offered enough protection to prevent children from rolling off them in their sleep. This precautionary measure would have required very little effort when weighed up against the seriousness of the possible harm which could have, and in fact, resulted from the teachers' failure to do so. The Court maintained that the reasonable teacher would have instructed the children allocated to the upper level bunks to sleep on their mattresses on the floor.

"Schools that arrange excursions for their learners need to be aware of possible dangers to the children and take appropriate steps to guard against such dangers," cautions Gordon. "In this particular case the school concerned was a state school so the Department of Education was held responsible. However, if it had been a private school, the school would have been held liable for the injuries that young Michael suffered," he concludes.

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