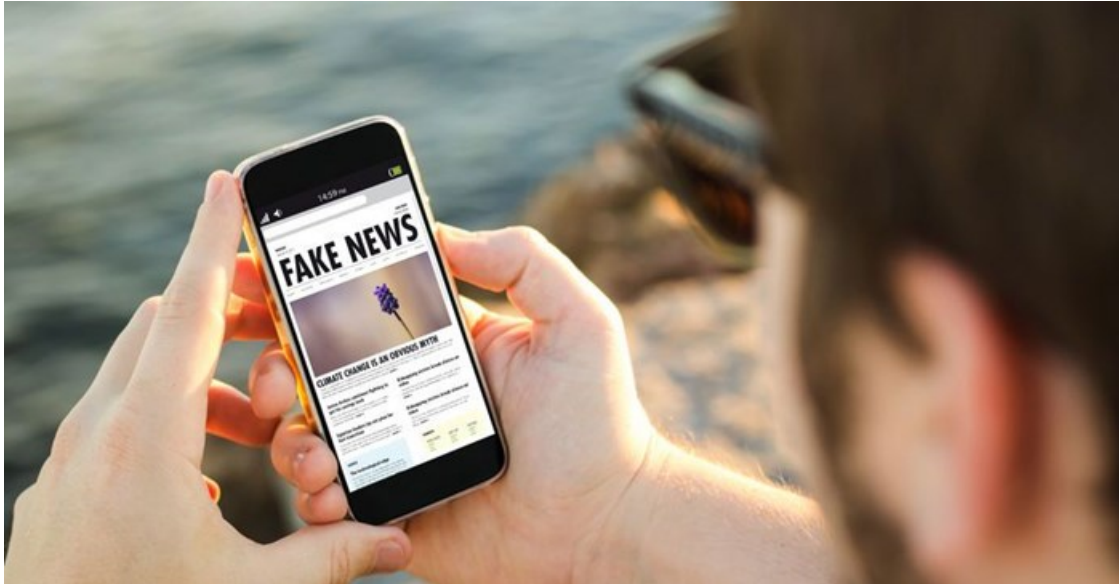


The consequences of spreading fake news about Covid-19

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Social media and particularly fake news are adding fuel to the sense of uncertainty during the Covid-19 lockdown. What does our law say taking into account the regulations published by the government amid the pandemic?



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Section 16 of the Constitution provides every South African the right to freedom of expression which includes the right to receive or impart information or ideas. However, it is clear that the right to freedom of expression may be limited under the general limitation clause in terms of section 36 of the Constitution provided that such limitation is just and reasonable in an open and democratic society based on human dignity, equality and freedom.

Our law in South Africa has recognised specific instances in which this right can be justifiably limited within the context of social media use, including WhatsApp groups.

National Disaster Regulations

In addition, the Regulations issued in section 27(2) National Disaster Act set out the consequences attached to false publication related to the coronavirus.

Regulation 11(5) of the National Disaster Act criminalises the publication of any statement, through any medium, including

social media, which is intended to deceive any other person about Covid-19, the infection status of any person, or any measure taken by the government to address the virus. The punishment upon conviction of acting in contravention of this provision is a fine or imprisonment for a period not exceeding six months or both. This provision includes WhatsApp message or status update.

It is important that Regulation 11(5) requires the intention to deceive, and as a result strict liability is not imposed in this case. Nor will negligence in publishing a false statement be sufficient for conviction in terms of the Regulation. The wrongdoer, in order to be held criminally liable under the Regulation within the context of the use of WhatsApp, will have to be found to have acted with knowledge of falsehood of the statement, and intended that those at the receiving end of the WhatsApp message or status update to be deceived by the statement. From the wording of the provision, it appears as though actual deception on the part of the recipient(s) is not required for a conviction, a mere intention to deceive on the part of the wrongdoer is sufficient.

Intention

The key is that intention may be present in more than a single form in our South African criminal law, one being, *dolus directus*, which is the highest form of intention and requires a direct intent to deceive. Another form of intention is *dolus eventualis* which entails subjective foreseeability of an unlawful outcome and the reconciliation of oneself to that possibility.

If *dolus eventualis* as a form of intention suffices for a conviction under the Regulation, this would mean that, for example, a person who sends a message to someone else containing a false statement relating to the virus itself, the infection status of a person, or any measure taken by the government in the fight against the virus and who does so subjectively foreseeing that the recipient(s) may be deceived by the message containing the false statement and reconciles him or herself with such possibility may be considered to have acted with the necessary intention.

However, in a scenario, where the person in question sends a wildly exaggerated message related to one of the listed topics regarding Covid-19 in the Regulation, with knowledge of falsehood and the publisher believes that the members of the group will also find it to be false owing to its overly exaggerated nature, in such a case, the publisher does not have the necessary intention to deceive.

Interestingly what would happen when someone publishes a slightly exaggerated statement relating to the listed topics and the publisher foresees the possibility of deception but doesn't actually believe the members of the group will be deceived?

In *Humphreys v The State the Supreme Court of Appeal* dealt with this question of failing to reconcile oneself with the possibility of an unlawful consequence despite foreseeing the outcome. In this case the court held that *dolus eventualis* is not present in the case where the wrongdoer subjectively foresees the unlawful consequence occurring but does not reconcile himself with its possibility. The question is not whether the wrongdoer should reasonably have reconciled himself with the possibility, but whether an inference can be drawn that the person in question did reconcile himself with the possibility.

WhatsApp administrator strict liability

There is yet to be a case in South African law where strict liability is imposed on the administrator of a WhatsApp group for content that is posted by a member of that group. However, there has been a case in India in which the administrator was found liable for defamatory content posted by one of the members' of that group after a photoshopped image, with defamatory elements, of the Indian prime minister was posted.

The case of *Isparta v Richter and Another* confirmed that those who are tagged in defamatory or hate speech posts on Facebook may be held liable in the same fashion as the author of the post should they fail to remove themselves from the post in question. The failure to do so is regarded as an indication of self-association with the defamatory or hate speech post.

In light of the case from India and the extension of liability by our courts to those tagged in defamatory posts or posts

constituting hate speech on Facebook, the question of the liability of WhatsApp administrators is relevant. It appears that it is possible for administrators to be held liable for unlawful content which has not been posted by themselves but by a member of the group. The reason for this is that administrators carry responsibility for the group and the content therein.

Importantly, what does this mean for WhatsApp group administrators in view of the Regulations enacted given the possible liability of WhatsApp administrators for unlawful content posted on groups. Despite the fact that it is not posted by themselves but by other members of the group, it may be advised that WhatsApp administrators are to be cautious over the content that is posted on groups relating to Covid-19.

Generally, it is advised that if WhatsApp administrators wish to escape possible liability for content on groups, they should clearly disassociate themselves from the unlawful or infringing content, or alternatively employ more drastic measures such as removing the individual member or members who have directly published unlawful or infringing content on the WhatsApp group.

The false statement prohibition in the Regulation is unique from defamatory statements or those of hate speech. We believe there should be particular restrictions placed on when liability of the WhatsApp group administrator should arise, such as knowledge of the falsehood of the statement. If the administrator is also deceived by the publication of a false statement by a member of the group, public policy may possibly dictate that in this case the group administrator should not be held liable. If the administrator later learns of the falsehood of the statement, it may possibly be required that the administrator take the general appropriate steps to escape strict liability or to bring to light the falsehood of the statement and - as a further possible alternative - counter the false statement with the truth.

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