

## **Cyberlaw: Can You Be Held Liable For Your Social Media Posts?**

### ***Introduction***

For many people social media has provided a safe space to voice their opinions without the fear of being judged or ridiculed. It has allowed people to exercise their right to freedom of expression on a public platform amongst like-minded people. Although, many people may attest to the positive impact that social media has had on their lives; there are also others who might have fallen victim to some of the negative effects of social media such as cyber bullying, cyber harassment, hate speech etc.

It is for this reason why legislation such as the Protection of Personal Information Act 4 of 2013, the Cybercrimes Act 19 of 2020, the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 and the Protection from Harassment Act 17 of 2011 have become important in regulating those parts of social media which might be harmful to society.

### ***Freedom Of Expression Versus Hate Speech.***

In our constitutional democracy, the right to freedom of expression is provided for in terms of s16 of the Constitution of the Republic South Africa Act of 108 1996 (“the Constitution”) and is celebrated as it provides our citizens the liberty to express themselves without the fear of censorship or sanction. However, while freedom of expression is a recognized right in our constitution, there are certain limitations to what can be perceived as genuine expressions of one’s opinions and those communications which constitute hate speech (s36 of the Constitution).

The limitations to the exercise of freedom of expression can be determined through the lens of s10 of the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 (hereafter the “Equality Act”). Section 10(1) of the Equality Act provides for the prohibition against hate speech where one advocates, propagates or communicates words against any person that can reasonably be construed to show a clear intention to be hurtful, harmful or to incite harm.

In the *Qwelane v South African Human Rights Commission and Another* 2020 (2) SA 124 (SCA) (the “Qwelane case”), the court determined that the right to freedom of

expression is not paramount. Thus, when exercising one's right to freedom of expression you must be mindful of our country's history where vulnerable groups of people were subjected to systematic and structural discrimination. This means that hate speech is an offence when it targets groups of people who have been historically subjected *To Unfair Discrimination*.

### ***Hurtful vs Harmful?***

In the *Qwelane* case the court drew a distinction between speech that can be perceived as being hurtful from speech that is harmful. Where speech is harmful it tends to infringe on the rights to dignity and equality of the targeted group thus causing physical, psychological and emotional harm. Furthermore, the test to determine hate speech is an objective one requiring the reasonable perception of the targeted group. The court also stated that the speech need not have actually caused harm to the targeted group since the aims of the Equality Act are to both stop the use of hate speech and to prevent it from happening at all.

Moreover, the language used in the Equality Act, ie "published, advocates or propagates", refers to communications conducted in public which in contrast can cause or incite harm. Therefore hate speech communications conducted on social media platforms fall firmly within this framework.

### ***Available Remedies***

Section 10(2) of the Equality Act allows targeted groups that have been subjected to hate speech to institute civil litigation against the perpetrator. This would be based on defamation (a delictual remedy) and can include an interdict or order directing the perpetrator to not to proceed with the conduct. In addition, the Cybercrimes Act 19 of 2020 (hereafter "the Act") expressly includes those harassments deriving from electronic communication such as social media. Chapter 4 of the Act gives both police officials and investigators the authority to search, seize or access any resource suspected to have been used for the commission of a cyber-crime.

## ***Conclusion***

While social media allows our society to freely voice their beliefs and opinions on a public platform, the exercise of one's freedom of expression cannot be conducted without responsibility. The fact that social media is open to the public means that everyone is liable for the communications that they post and where hate speech is used against certain groups an actionable offense is committed.

Contact an Attorney at SchoemanLaw for your legal needs!