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A double-edged sword: revenge porn and the Cybercrimes Act

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Recently, South Africa has been experiencing a barrage of cyber-attacks and/or cyber-related/enabled crimes, with many individuals and organisations being caught flat-footed.

In 2021, South Africa was ranked third in the world for having the highest number of cybercrime victims. Accordingly, cyber security is a growing concern, especially in the context of the increasing ubiquity (omnipresence) of social networks. Digital abuse is and cybercrime is becoming more prevalent in South Africa; and the footage stolen from Malusi Gigaba's phone during a hack in 2016, to the more recent leak of sexually explicit digital content of what appears to be Zanele Sifuba constitute but-a-few of many examples of increased incidence of cybercrime.

Non-consensual pornography (colloquially referred to as "revenge porn") is a form of digital abuse in which sexually explicit photos or videos are disseminated without the consent of the subjects in such content. Why revenge? Because generally speaking the person who is in possession of and/or shares such content does so as a means of retaliating against a subject who, amongst others, has failed/refused to offer some kind of benefit in return for the non-release of compromising or damaging information.

Given the possible 'secondary-victimisation' that a victim be exposed to, taking legal action in revenge-porn cases is one of the more effective avenues that can help to mitigate the harm caused.

LEGAL POSITION

The distribution of sexually explicit images or videos without someone's consent is a criminal offence. More specifically, section 16 of the Cybercrimes Act 19 of 2020 (Cybercrimes Act/ the Act) criminalises the unlawful and intentional disclosure of a data message of an intimate image of which the subject displayed retains a reasonable expectation of privacy, without the person's consent. The Act defines the term 'intimate image' as a depiction of a person, real or simulated, in which such person is, *inter alia*, nude or their genital organs are displayed.

Revenge porn contains intimate image(s) of the subject displayed there in. Thus, it constitutes a criminal offence in terms of the Act, and punishable by either a fine, or imprisonment for a period not exceeding 3 years (or both). What should also be borne in mind is that those who re-share revenge-porn may also be liable for criminal or civil sanction on the basis of section 17 of the Act, which prohibits the unlawful and intentional "...aiding, abetting, inducing, inciting, instigating, instructing, commanding or procuring to commit an offence" in terms of the Act.

(a) *The issue of enforcement*

The Cybercrimes Act regulates the powers of the South African Police Service (SAPS) to investigate cybercrimes or other offences that are committed or facilitated by cyber means. Furthermore, the Act provides for the establishment of a designated Point of Contact (i.e. a cybercrimes unit) to enforce the law by, *inter alia*, providing immediate assistance for the purpose of proceedings or investigations regarding the commission or intended commission of cybercrime.

Although the Act makes provision for enforcement mechanisms (i.e. Chapter 6), the Standard Operating Procedures (SOPs) and/or designated Point(s) of Contact (dPOCs) geared towards facilitating such enforcement have not yet been established as the Department of Justice has not announcement a commencement date for Chapter 6 of the Cybercrimes Act.

Indeed, portals such as Cybercrime.org.za are a starting point insofar as providing resources, information and reporting mechanisms for cybercrime. However, questions remain as to the pragmatic elements of enforcing the Act. For example, what are the processes for lodging a cybercrime-specific complaint? And what of those cybercrimes occurring and/or reported pending the announcement of the commencement of Chapter 6?

(b) Civil action

While the Cybercrimes Act is a world-class piece of legislation, mechanisms are lacking from a criminal-sanction perspective. Fortunately, victims of cybercrimes such as revenge porn do not have to rely solely on criminal sanctions; and have the option of pursuing civil remedies insofar justice is concerned.

A victim of revenge-porn may institute civil action for damages on the basis that such distribution of sexually explicit content without the consent of the victim may constitute the wilful impairment or violation of a person's dignity and privacy (also known as *crimen injuria*). In other words, a victim or revenge porn can claim compensation for non-patrimonial losses sustained as a result of the wrongful, culpable act of another which caused injury to the victim's personality right(s) (i.e. dignity).

CONCLUSION

There can be no denying that the enactment of the Cybercrimes Act is a step in the right direction insofar as bringing South Africa up to speed with international standards for fighting cybercrime. In the context revenge porn, such an addition to South Africa's regulatory framework serves as a reminder of the serious consequences that attach to sextortion and other forms of cybercrime. Indeed, enforcement mechanisms provided for in the Act are lagging behind from an implementation point of view. However, victims (and potential victims) can rest assured that civil remedies can stand in the enforcement gap.

The message should be clear to all – from jilted (ex)lovers looking for payback after a breakup to sophisticated hackers seeking financial gain from sextortion – "revenge is a double-edged sword, the longer you hold it, the deeper you cut yourself." – Chris Colfer

Read more on cybercrimes – Not every crime is a cybercrime – The dichotomy of cyber-enabled crimes and cybercrimes.

Footnotes

[1] A Moyo "Top-notch Cyber Crimes Act ultimately fails to deliver" ITWeb Security Summit accessed on 16 November 2022.
[2] A Moyo "Top-notch Cyber Crimes Act ultimately fails to deliver" ITWeb Security Summit accessed on 16 November 2022.
[3] A Moyo "Top-notch Cyber Crimes Act ultimately fails to deliver" ITWeb Security Summit accessed on 16 November 2022.
[4] K Mokgonyana "Zanele Sifuba and the case of revenge porn. What to do?" Mail & Guardian accessed on 16 November 2022;
[5] eNCA "Sex Tape: Gigaba's home affairs leaked" accessed on 16 November 2022.
[6] K Masweneng "Free State speaker Zanele Sifuba opens civil case over online sex tape" accessed on 16 November 2022.
[7] K Mokgonyana "Zanele Sifuba and the case of revenge porn. What to do?" Mail & Guardian accessed on 16 November 2022;
[8] K Mokgonyana "Zanele Sifuba and the case of revenge porn. What to do?" Mail & Guardian accessed on 16 November 2022; Cambridge Dictionary "Blackmail" accessed on 5 December 2022.
[9] SOUTH AFRICAN SERVICE CHARTER FOR VICTIMS OF CRIME The term 'secondary victimisation' refers to the attitude, processes, actions or omissions that may intentionally or unintentionally contribute to the re-victimisation of a person who has experienced a traumatic event.
[10] K Mokgonyana "Zanele Sifuba and the case of revenge porn. What to do?" Mail & Guardian accessed on 16 November 2022;
[11] Cybercrimes Act 19 of 2020, section 16(b)(ii).
[12] Cybercrimes Act 19 of 2020, section 16; A Burger-Smidt "Cybercrimes Act: South Africa Finally Joins the Big Boy Table" accessed on 16 November 2022.
[13] Cybercrimes Act 19 of 2020, section 16(b)(i)(aa).
[14] Cybercrimes Act 19 of 2020, section 19(7).
[15] Cybercrimes Act 19 of 2020, section 17.
[16] Cybercrimes Act 19 of 2020, section 26(a).
[17] Cybercrimes Act 19 of 2020, section 52.
[18] Standard Operating Procedures. The draft SOPs for investigation, search, access or seizure of Articles were released for public comment in June 2022.
[19] Cybercrime.org.za
[20] A Moyo "Top-notch Cyber Crimes Act ultimately fails to deliver" ITWeb Security Summit accessed on 16 November 2022.
[21] E Lubaale "Making the case for mental health expertise in crimen injuria cases: An issue awakened by the Vicki Momberg sentence" De Jure Law Journal Vol 52 (2019), accessed on 5 December 2022; Snyman "Criminal law" (2014) at 469; S v Sharp 2002 1 SACR 360 at 372b.
[22] K Allen "South Africa lays down the law on cybercrime" Institute for Security Studies (ISS) accessed on 5 December 2022.



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