

Incitement of public violence (on social media) and the repercussions for individuals and contracts

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Incitement of public violence

With the recent public unrest and public violence outbreaks in the country the President of the Republic of South Africa with the Minister of Police, have vowed to prosecute the perpetrators of the public violence including the inciters of the public violence.

Taking into account the above, we provide below a concise analysis of the law regarding –

- the incitement of public violence;
- the consequences for social media users who incite public violence or share content that they may be considered as inciting public violence on social media; and
- the consequences on companies that cannot perform contractual obligations due to the interruptions caused by the widespread looting, riots and destruction of property due to violence.

Public violence: The criminal offence

Inciting public violence is a common law criminal offence, however, the requirements for the public incitement have been codified in section 17 of the Riotous Assemblies Act No. 17 of 1956 ("the Act").

According to section 17 of the Act, a person is deemed to have committed the common-law offence of incitement to public violence if a person has conducted him/herself in a manner, which the reasonable consequence would be the commission of public violence by others.

Noteworthy is the fact that the intention of the accused's is irrelevant, what is relevant is whether or not a reasonable person would expect that the consequences of the accused's conduct to be the incitement of public violence.

Incitement of public violence and right to freedom of expression

Section 16 of the Constitution of the Republic of South Africa, 1996 provides everyone with the right to freedom of expression. However, in terms of section 16(2) that right to freedom of expression does not extend to the incitement of violence. Thus, an argument that one must balance the right to freedom of expression and incitement of violence will, in our opinion, not be successful.

Incitement of Public Violence on Social Media Platforms

In order for there to be incitement of public violence, the Act requires that there is offending –

- conduct by the accused;
- words spoken by the accused; or

- words *published* by the accused.

For purposes specifically of social media posts, we consider what is envisaged by “published words”. The Act does not define the term “publish”. The rules of statutory interpretation dictate that when no statutory definition is present in an Act, we may use the ordinary grammatical meaning of the word. In this regard, the *Oxford Dictionary* defines the term “publish” as, *inter alia*, “making something available to the public on the Internet”.

In applying the above to instances of social media posts, arguably when one makes a post available to the public and where the post contains words, speech or conduct that may have the effect of causing others to commit public violence, arguably, the aforementioned post may make one guilty of the offence of inciting public violence.

In support of the above, in the case of *Hotz and Others v University of Cape Town* (730/2016) [2016] ZASCA (“the *Hotz* case”) which dealt with protest action that was intensified by social media posts, the court held, at paragraphs 55 and 56, respectively –

“[t]he university’s complaint related more to an earlier incident on 10 February 2016 when some students were in a dining hall on the campus and it came to the university’s attention, as a result of postings on social media, that Mr Magida was there wearing a T-shirt with the slogan ‘KILL ALL WHITES’ written in large letters with a marker pen on the back.

A court should not be hasty to conclude that because language is angry in tone or conveys hostility it is therefore to be characterised as hate speech, even if it has overtones of race or ethnicity. The message on Mr Magida’s T-shirt said unequivocally to anyone who was more than a metre or two away that they should kill all white people. The reaction to that message by people who saw it, as communicated to Mr Ganger, was that this was an incitement to violence against white people. The vast majority of people who saw it would not have ventured closer to ascertain whether, imperceptibly to normal eyesight, the message was something other than it appeared to be. They would have taken it at face value as a message being conveyed by the wearer that all white people should be killed”.

In our view, it is on the precedent set by the *Hotz* case that the recent surge of social media posts inciting violence will be assessed and prosecuted, namely, on an objective basis without considering the intention of the “poster” but rather what the reasonable person reading or watching the post may be provoked to do by virtue of the post.

In so far as our view is that making content available on social media that may have the effect of inciting others to commit public violence, may fall within the ambit of the Act, this arguably, also include posts that you receive for other social media users and then share on your own social media platform. In so far as you would have also made the post “available on the internet”.

We note however, that in the event that you receive an offending posts and do not share the posts, as you would not have made the posts publicly available, you may, arguably, fall outside the ambit of the Act.

With a vast majority of people obtaining information from news media and social media platforms, due care must be taken when sharing thoughts and opinions not only for the impact they may have on your “followers” but also the legal consequences your conduct, speech or words may attach.

Contractual Obligations

The public unrest and rioting attacks that occurred in the past few days in South Africa also saw many businesses looted, set alight and destroyed, resulting in a double whammy as businesses are still reeling from the consequences of the lockdown rules due to the COVID-19 pandemic. The question is what happens to a company that cannot perform its obligations in terms of a contract due to the interruptions caused by the widespread looting, riots and destruction of property after such contract has been concluded?

The first point of reference would be the written contract concluded by the affected company. Certain bespoke contracts usually contain a “*force majeure*” provision (a French term meaning “superior force”), however, if such concept is not provided in the contract, then consideration must be given to the common law principle of “*supervening impossibility*”. Both legal principles have the objective of excusing performance by a party to a contract due to the impact of the event on such a party, causing performance (arising from a contract) to be partially or wholly impossible.

Typically, a *force majeure* provision will provide that a party will be excused from performing some or all of its obligations, for a specified time period, under the contract, should the specified event (*force majeure* event) occur. What exactly constitutes a *force majeure* event will be as defined by the parties in the contract (i.e. riots, wars, pandemics, natural disasters, government directives and etc.). Since it would be commercially unworkable for the period of suspension of performance to exist indefinitely, the clause may also provide for the termination

of the contract should the *force majeure* event persist for longer than an agreed period of time. On the other hand, supervening impossibility will require the performance to be objectively impossible due to unforeseeable and inevitable events before a party can be excused in terms of this common law principle, which events are due to no fault of any contracting party. Such events are also known as "*casus fortuitous*" (accidental occurrences).

The common law principle of supervening impossibility may prove onerous to establish then the typical commercial *force majeure* clause, in excusing the inability of a party to perform its expected obligations in terms of a contract. The concept of supervening impossibility will apply by default if a *force majeure* clause is not included in a contract. It may be prudent to have the latter in a commercial contract to salvage a contract that may otherwise terminate and result in a damages claims being pursued against the defaulting party.

Parties should obtain legal advice when negotiating contracts to ensure adequate protection and mitigate risk against interrupting circumstances beyond their control, which also may include procuring appropriate business insurance cover.

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