South Africa Cracks Down on Revenge Porn

Introduction

Unfortunately, far too many unkind and insensitive individuals in society today spread private and sexually explicit videos or images of their former partners or lovers to the public and other individuals with the aim of punishing or humiliating them. This is a form of cyberbullying and with the negative stigma attached, victims rarely speak out about it. This leaves them feeling helpless and exposed and, in many cases, causes them to leave their school or job. However, with recent changes to our law, this no longer needs to be the case. South Africa’s “revenge pornography” (or “revenge porn”) laws are here to give these victims their power back and put the leakers of nude images and sex tapes in jail.

In recent years, many countries have introduced laws combating the phenomenon commonly known as revenge porn. In October of 2019, President Cyril Ramaphosa signed the Films and Publications Amendment Act 11 of 2019 (“the Act”) in to law which cracks down on the distribution of child pornography, hate speech and revenge porn.

In addition, the final draft of the Cybercrimes and Cybersecurity Bill (“the Cyber Bill”) will expectantly be tabled in Parliament in the near future which too criminalises the releasing of intimate pornographic content in cyberspace.

But, what exactly is “revenge porn” and how can it land you in jail?

What is revenge pornography?

“Revenge porn” is widely understood to mean the non-consensual distribution of a sexually explicit or nude photograph or video. As stated previously, the term “revenge” implies that this is done out of spite, normally by a former partner after their relationship comes to an end, in order to humiliate the victim. The photograph or video can be distributed via email, pornographic websites, text message or any social media platform. With the advent of smartphone technology and the digital era we live in, this can occur rapidly with just a click of a
Revenge porn is pertinent in South Africa with females being the main victims. Victims are often left with mental health issues and suicidal tendencies after personal, sexual content of themselves are posted for the public to see. This can very easily destroy someone’s life and have permanent effects for those who fall victim to it. Moreover, this is a violation of one’s constitutional right to dignity and privacy and thus the new legislation, which prohibits and criminalises such actions, seems overdue in our law.

Although revenge porn is typically distributed by an ex-partner, this is not always the case. For example, revenge porn that went viral on social media last year was when Home Affairs Minister, Malusi Gigaba (“Gigaba”), was hacked on his personal cell phone and a video displaying him performing a solo sexual act was posted on various social media platforms. The video was initially shared on Pornhub, a pornography website, by a user with a false name and had more than sixty five thousand views. Gigaba expressed that the video was intended for his wife’s eyes only and the revenge porn was a product of blackmail and extortion attempts against him.

There are many instances, such as the above, where individuals are blackmailed and have to pay over large amounts of money as a result. There are also many instances where cell phones are hacked or stolen and the sexual content of those devices uploaded on to the internet.

This is extremely harmful and can have devastating effects; once the image or video is posted online it can very easily and very quickly be saved by an individual (in many ways, including through a “screenshot”) and then shared multiple times amongst others. In fact, it is almost impossible to permanently remove such content nowadays with the internet cloud servers available.

What are the legal penalties?

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As of 2019, distributing revenge porn of your former partner can land you in trouble with the law. Interestingly, the penalties differ based on whether or not the person in the image or video is identifiable and you can tell who they are.

Section 24E(1) of the Act provides that any person who knowingly distributes private sexual photographs and films, on any medium, without the prior consent of the individual, and with the intention to cause the individual harm, shall be guilty of an offence and liable to a fine not exceeding R150 000.00 and/or imprisonment for a period not exceeding two years. This means that a perpetrator can face both jail time as well as a fine.

Section 24E(2) provides that if the person is identified or identifiable in the said photograph or film the perpetrator shall be guilty of an offence and liable to a fine not exceeding R300 000.00 and/or imprisonment for a period not exceeding four years.

Essentially, the possible jail time and financial penalty double when the person in the revenge porn is recognisable.

Unknown distributor

Very often, such as in the case of Gigaba, one does not know who was responsible for publishing the sexual, private content of themselves. What then?

Luckily, this does not mean that the victim is stripped of legal recourse. Section 18E of the Act provides that the relevant internet service provider “shall be compelled to furnish the Board or a member of the South African Police Services with information of the identity of the person who published the prohibited content.”

The Act thus recognises that anonymity is problematic in situations such as these and puts measures in place to address such.

Criticism
Scholars have criticised the wording of the Act. The term “private” in “private, sexual photographs or images” is said to be problematic in the sense that a perpetrator can argue that the victim who initially shares the sexual image or video with another person (most often, their lover) no longer has the intention to keep it private. By sharing it with someone else, that victim arguably intends for others to see the image or video.

There is also concern around the requirement of “intention to do harm” as not all distribution of offensive material is done with the sole intent to do harm; sometimes perpetrators are driven by profit and entertainment. In this regard, an accused could very easily argue before a court of law that they had other intentions when distributing and posting the image or video and bypass the legislation.

Accordingly, one could argue that “negligence,” as opposed to intent, should be sufficient for conviction as even if a person negligently or “by mistake” distributes the content, they will still be liable.

With that being said, no one can be certain as to how the Act will operate in practice and its effectiveness thereof.

The Cybercrimes and Cybersecurity Bill

The Cyber Bill, which regulates cybercrimes, cyber forgery and cyber fraud, was passed by the National Council of Provinces (“NCOP”) on 1 July 2020 and now anticipates the assent of the President. The Cyber Bill criminalises “malicious communications” which includes the dissemination of revenge porn. In terms of the Cyber Bill, offenders can face a period of imprisonment not exceeding three years upon conviction.

Clause 18 of the Cyber Bill provides that any “any person who unlawfully and intentionally makes available, broadcasts or distributes, by means of a computer system, a data message of an intimate image of an identifiable person knowing that the person depicted in the image did not give his or her consent to the making available, broadcasting or distribution of the
data message, is guilty of an offence.” It defines an “intimate image” as a “visual depiction of a person” made by any means “that give rise to a reasonable expectation of privacy” and “in which the person is nude, is exposing his or her genital organs or anal region or, in the case of a female, her breasts.”

Due to the fact revenge porn has already been dealt with by the Act, critics find Clause 18 of the Cyber Bill redundant. However, others believe that the Act should not cover this crime at all and that once in effect, the Cyber Bill will be the primary source of legislation within which this crime will be dealt.

Just like the Act, critics also find the requirement of “intention” in the abovementioned clause problematic as one’s intention is extremely difficult to ascertain and a perpetrator may argue the distribution was done unintentionally.

Other remedies

Apart from the Act and the impending Cyber Bill, victims have legal recourse in other areas of the law.

One option comprises a victim of revenge porn suing a perpetrator for civil damages as it constitutes defamation of character. Another option would be to proffer a criminal charge for crimen injuria, which is defined as the act of “unlawfully and intentionally impairing the dignity or privacy of another person.”

The Protection from Harassment Act 17 of 2011 (“the Harassment Act”) also permits a victim to apply for a protection or harassment order against a perpetrator which, once granted, is coupled with a warrant of arrest and is suspended subject to the relevant person complying with the terms of protection order.

Conclusion

In conclusion, the amendments to our law and imminent passing of the Cyber Bill are positive
steps in bringing justice to revenge porn victims as perpetrators now stand to face jail time and hefty fines. The current and proposed legislation will hopefully enable the proper and effective investigation and prosecution of such crimes.

With that being said, concerns remain around the enforcement of these laws and how the Act, with the requirement of “intention to do harm” seems to only apply to cases involving vengeful ex-partners and not those who submit this kind of material to make money. However, one can only hope that the Act will be a deterrent for future perpetrators who attempt to abuse, humiliate and intimate their partners through revenge porn.

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