

Legal Responsibilities of WhatsApp Community Administrators in South Africa

1. Executive Summary

In South Africa, WhatsApp community administrators can indeed be held legally responsible for content shared within their groups under specific circumstances. Key areas of potential liability include defamation, hate speech, and the dissemination of other illegal content as defined by South African law. Recent updates to the WhatsApp platform, granting administrators greater control over group content through message deletion capabilities, have significantly amplified these responsibilities. Consequently, the failure to promptly address and remove illegal or harmful content could lead to legal repercussions for administrators. To mitigate these risks, administrators should proactively implement clear group rules, actively monitor content, and take swift action against problematic posts.

2. Introduction

WhatsApp communities have become a ubiquitous tool for communication and information sharing across various sectors in South Africa. These groups serve diverse purposes, from neighborhood watch initiatives and school parent groups to social clubs and professional networks. The ease and immediacy of WhatsApp facilitate rapid dissemination of information, but this also presents potential legal challenges arising from user-generated content. This report aims to clarify the legal responsibilities of WhatsApp community administrators in South Africa, examining the relevant legislative framework, common law principles, and the implications of recent platform updates to provide a comprehensive understanding of this evolving legal landscape.

3. The Legal Landscape of Online Content in South Africa

3.1. Foundational Legal Principles:

The right to privacy is recognised as a fundamental human right in the Bill of Rights of the Constitution of the Republic of South Africa and is protected by the Constitution and common law.¹ However, this right is not absolute and may be limited where it is reasonable and justifiable to do so.² Similarly, the South African Constitution guarantees freedom of expression, which includes the right to communicate freely using social media.³ This freedom, however, is also not unlimited and must be balanced against other rights and interests, such as the right to privacy, human dignity,⁴ and freedom of association.⁵ Expressing opinions online in South Africa is thus subject to various laws and regulations.

3.2. Key Legislation Governing Online Content:

3.2.1. *The Cybercrimes Act 19 of 2020:*

This Act criminalises various activities, and creates offences for threats directed at individuals or groups, as well as threats to property, when communicated through data messages.⁶ The Act is highly relevant to content shared on WhatsApp, encompassing illegal activities such as incitement to violence or damage to property,⁷ and the making of unlawful threats.⁸ The broad scope of jurisdiction under this Act

¹ Section 14 of the Constitution of the Republic of South Africa (hereinafter cited as “the Constitution”).

² Section 36(1) of the Constitution.

³ Section 16 of the Constitution.

⁴ Section 10 of the Constitution.

⁵ Section 18 of the Constitution.

⁶ See the Preamble to the Cybercrimes Act.

⁷ Section 14 of the Cybercrimes Act.

⁸ Section 15 of the Cybercrimes Act.

means that South African courts have the power to try individuals, including non-South African citizens, who commit cybercrimes that affect persons or businesses within South Africa.⁹ This implies that an administrator located in South Africa could be held accountable for harmful content in their group, even if the original poster is located elsewhere. For instance, an individual was arrested in Durban under this Act for circulating voice notes inciting violence against foreign nationals via WhatsApp.

3.2.2. *The Films and Publications Act 65 of 1996 (as amended):*

This Act, along with its amendments and regulations, provides the legal framework for regulating the creation, production, possession, and distribution of films, games, publications, and online content in South Africa. The amended Act extends its scope to regulate content distributed online,¹⁰ including user-generated content on social media platforms like WhatsApp. It prohibits the distribution of specific categories of harmful content, such as child pornography,¹¹ content amounting to propaganda for war, messages inciting violence,¹² and intimate images shared without consent.¹³ The Film and Publications Board (FPB) has developed industry codes and guidelines to address harmful content online, placing an obligation on online distributors, including social media platforms and service providers, to have mechanisms in place to mitigate the impact of online harm. These entities are required to suspend access to and report prohibited content when they become aware of it. The FPB's definition of "harmful" content is broad, encompassing material that causes emotional, psychological, or moral distress, it also specifically includes causing such distress through the internet. This suggests that administrators should be aware of a wide range of potentially problematic posts within their WhatsApp communities.

3.2.3. *The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) 4 of 2000:*

PEPUDA aims to prevent unfair discrimination and prohibit hate speech based on various grounds, including race, gender, religion, and sexual orientation.¹⁴ Social media posts that contain hate speech or discriminatory content can be considered violations of PEPUDA and can lead to legal action. Section 10 of PEPUDA prohibits the publication, propagation, advocacy, or communication of words based on prohibited grounds against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm, and/or to promote or propagate hatred. The Act established Equality Courts tasked with hearing and resolving cases related to unfair discrimination and hate speech.¹⁵ Therefore, administrators who permit the dissemination of hate speech within their WhatsApp groups could be seen as enabling its propagation and may face legal consequences.

3.2.4. *The Electronic Communications and Transactions Act 25 of 2002 (ECTA):*

The Electronic Communications and Transactions Act 25 of 2002 (ECTA) previously played a role in discussions surrounding intermediary liability in South Africa, particularly concerning Internet Service Providers (ISPs) and, by analogy, social media platform administrators. However, it is important to note that key provisions of ECTA, including Section 86 which addressed unlawful access and interception of data messages, have since been repealed by the Cybercrimes Act 19 of 2020. While ECTA remains relevant for aspects of e-commerce and digital contracts, its direct application to intermediary liability for harmful user-generated content has largely been superseded by the Cybercrimes Act and evolving common law principles. Therefore, the primary statutory framework for addressing cybercrimes and the potential liability of those who facilitate their dissemination, such as WhatsApp group administrators, now predominantly falls under the ambit of the Cybercrimes Act, complemented by

⁹ Section 24(1)(e) of the Cybercrimes Act.

¹⁰ Section 18E of the Films and Publications Act.

¹¹ Section 18G of the Films and Publications Act.

¹² Section 18H of the Films and Publications Act.

¹³ Section 18F of the Films and Publications Act.

¹⁴ Section 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act.

¹⁵ Chapter 4 of the Promotion of Equality and Prevention of Unfair Discrimination Act.

established common law precedents. This shift underscores the dynamic nature of digital law, adapting to new technological realities and legislative developments.

3.3. Common Law Principles: Defamation:

Under South African common law, defamation is defined as the intentional and wrongful publication of a statement that injures another person's reputation. This law applies equally to statements made on digital platforms, including WhatsApp groups, as it does to traditional forms of communication. For a statement to be considered defamatory, it must be published (communicated to at least one other person), be defamatory in nature (tend to damage or impair a person's good name and reputation in the community), and refer to the person claiming defamation. Importantly, anyone who repeats, confirms, or draws attention to a defamatory statement can be held responsible for its publication. This includes individuals who "like," "share," or comment on defamatory content. The case of *Dutch Reformed Church v Sooknunan* (2012) established that the creator of a Facebook page could be held responsible for defamatory comments posted by others on their timeline.¹⁶ This precedent suggests that WhatsApp group administrators, who similarly create and manage a platform for communication, could also be held liable for defamatory content they are aware of and fail to address. Furthermore, an omission by a page administrator to remove defamatory remarks from their online platform after becoming aware of their defamatory nature constitutes publication by the administrator, and as such, the administrator can be held liable.

4. Are WhatsApp Community Administrators Legally Responsible?

4.1. The Impact of WhatsApp's Admin Controls:

In September 2022¹⁷, WhatsApp rolled out an update that significantly altered the landscape of group administration by granting administrators the ability to delete messages posted by any participant in the group. This feature, allowing admins to remove content for everyone in the chat, has been widely interpreted by legal experts as a "game-changer" concerning the legal responsibilities of administrators in South Africa. According to social media law experts like Emma Sadleir¹⁸ and Mercia Fynn¹⁹, this update effectively means that WhatsApp group administrators can now be held legally responsible for all content that appears in their groups. The reasoning is that if an administrator has the power to remove illegal content, such as hate speech, threats, incitement, racism, or defamatory statements, but chooses not to, their inaction could be construed as condoning or even endorsing the content. WhatsApp has also extended the timeframe for deleting messages for everyone to up to 48 hours, providing administrators with a reasonable window to identify and remove problematic content. This capability creates a strong argument for a "duty of care" on the part of administrators to actively manage the content within their groups.

4.2. The Principle of "Failure to Disassociate":

Even before the introduction of the admin deletion feature, South African law recognised the principle that individuals could be held liable for unlawful content shared on social media if they were aware of it and failed to take steps to disassociate themselves from it. The landmark case of *Isparta v Richter and Another* (2013)²⁰ established this precedent. In this case, the court held a person liable for defamatory comments made by their spouse on Facebook because the person was tagged in the post, was aware of it, and took no action to distance themselves from the defamatory statements. This principle is highly relevant to WhatsApp group administrators. Even if they did not have the technical ability to delete

¹⁶ *Dutch Reformed Church Vergesig Johannesburg Congregation and Another v Rayan Sooknunan t/a Glory Divine World Ministries* 2012 (6) SA 201 (GSJ).

¹⁷ <https://blog.whatsapp.com/new-features-for-more-privacy-more-protection-more-control>

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<https://businesstech.co.za/news/government/623759/new-hate-speech-laws-coming-for-south-africa-including-legal-trouble-for-whatsapp-messages/>

¹⁹ <https://businessreport.co.za/companies/2022-09-18-admins-will-now-be-held-liable-for-whatsapp-group-content/>

²⁰ *Isparta v Richter and Another* 2013 (6) SA 529 (GNP).

messages previously, an administrator who became aware of illegal content in their group and failed to express disapproval, warn the member who posted it, or remove the member from the group (if they had the power to do so) could be seen as failing to disassociate themselves from the content. This inaction could potentially lead to them being considered part of the "chain of publication" and thus held liable. Now, with the added ability to delete problematic content, the expectation for administrators to actively disassociate themselves from it has only increased.

5. Specific Areas of Liability

5.1. Defamation in WhatsApp Groups:

Defamation laws are fully applicable to content shared within WhatsApp groups. An administrator can be held liable for defamatory statements posted by group members if they are aware of the statement and fail to remove it using their admin deletion capabilities or take other steps to disassociate themselves from it. The determination of whether a statement is defamatory hinges on the context and how a reasonable person of ordinary intelligence would interpret it. The statement must have been published within the group, be inherently defamatory, and clearly refer to the individual claiming defamation. Given the instantaneous nature and wide reach of WhatsApp, administrators must be particularly vigilant in addressing potentially defamatory content to mitigate the risk of legal action against themselves or the group.

5.2. Hate Speech in WhatsApp Groups:

South African law, through Section 16(2)(c) of the Constitution, PEPUA, and the Prevention and Combating of Hate Crimes and Hate Speech Act²¹, strictly prohibits hate speech. This includes the advocacy of hatred based on characteristics²² such as race, ethnicity, gender, or religion, which constitutes incitement to cause harm. WhatsApp group administrators bear a significant responsibility to prevent the dissemination of hate speech within their communities and can face legal repercussions if they fail to take action against such content, especially with their current ability to delete messages. South Africa's history underscores the sensitivity of hate speech, and administrators must be proactive in identifying and removing any content that could be construed as such to avoid severe legal and social consequences. The newly enacted Prevention and Combating of Hate Crimes and Hate Speech Act further strengthens the legal framework against hate speech by creating the offences of both hate speech²³ and hate crime,²⁴ potentially increasing the liability for administrators who allow it to persist in their groups.

5.3. Incitement and Threats in WhatsApp Groups:

The Cybercrimes Act specifically criminalises the act of disclosing data messages with the intention to incite violence or damage to property,²⁵ as well as threatening individuals or groups with violence or property damage. Administrators who permit such content to remain in their WhatsApp groups, particularly given their enhanced ability to remove it, risk being seen as condoning or enabling these illegal activities. The case of a member of Operation Dudula being arrested for circulating voice notes inciting violence against foreign nationals via WhatsApp serves as a stark reminder of the legal consequences of such actions. Administrators should establish clear rules against any form of incitement or threats and act swiftly to remove any such content, potentially reporting it to the authorities in serious cases.

5.4. Other Illegal Content:

Beyond defamation, hate speech, incitement, and threats, WhatsApp groups may also be used to share other forms of illegal content. This includes the non-consensual dissemination

²¹ Prevention and Combating of Hate Crimes and Hate Speech Act 16 of 2023.

²² Definition of "characteristics" in section 1 of the Prevention and Combating of Hate Crimes and Hate Speech Act.

²³ Section 4 of the Prevention and Combating of Hate Crimes and Hate Speech Act.

²⁴ Section 3 of the Prevention and Combating of Hate Crimes and Hate Speech Act.

²⁵ Section 14 of the Cybercrimes Act.

of intimate images, which is now a criminal offense under the Cybercrimes Act,²⁶ the distribution of child pornography, which is strictly prohibited by law, and potentially the infringement of copyright, although the liability of group administrators in this context is less clearly defined but still a potential risk. Administrators have a responsibility to be aware of and address such content if it appears in their groups, especially considering their increased control over group communication.

6. The Role of Case Law and Legal Precedents

6.1. Isparta v Richter and Another (2013):

The case of *Isparta v Richter and Another*²⁷ is a significant legal precedent concerning online content liability in South Africa.² The court found the second defendant, who was tagged in a defamatory Facebook post by his spouse, to be jointly and severally liable for the defamation because he was aware of the post and chose not to disassociate himself from it. This ruling established that liability for harmful online content can extend beyond the original author to individuals who are aware of the content and fail to take steps to distance themselves from it. For WhatsApp group administrators, this precedent has crucial implications. With the current ability to delete messages, their failure to remove illegal or defamatory posts could be interpreted as a failure to disassociate themselves from the content, potentially leading to legal liability. The case underscores the judiciary's stance on extending responsibility in the digital sphere to those who, through their inaction despite awareness, allow harmful content to persist.

6.2. Dutch Reformed Church v Sooknunan (2012):

In *Dutch Reformed Church v Sooknunan*,²⁸ the court held the creator and administrator of a Facebook page liable for defamatory comments posted by third parties on the page's timeline. The court reasoned that the administrator provided the platform for the comments and had a degree of control over the content displayed. This case provides a more direct legal precedent for the liability of online platform administrators for user-generated content. It strongly suggests that WhatsApp group administrators, who similarly create and manage a communication platform and now possess significant control over the content shared, could also be held responsible for unlawful content they are aware of and fail to address.

7. WhatsApp's Community Guidelines and Terms of Service

7.1. Overview of WhatsApp's Rules:

WhatsApp provides community guidelines for administrators to help foster a safe and respectful environment.²⁹ These guidelines emphasise the importance of having clear and specific rules that reflect the community's values and clarify which behaviors are encouraged and which are not tolerated. They prohibit the sharing of illegal content, hate speech, content that could cause serious harm, and fraudulent activity. WhatsApp advises administrators to immediately delete harmful content, block or remove abusive members, and report serious violations to WhatsApp and, if there is a serious risk to safety, to contact local authorities. Administrators are also encouraged to communicate community rules clearly and often to members.

7.2. Legal Weight in South Africa:

While WhatsApp's community guidelines are not South African law, they represent the platform's standards of conduct for its users and administrators. Failure to adhere to these

²⁶ Section 16 of the Cybercrimes Act.

²⁷ See footnote 20 for full citation.

²⁸ See footnote 16 for full citation.

²⁹ <https://www.whatsapp.com/communities/learning/>

guidelines could result in WhatsApp taking action against the community or the administrator's account, such as suspending the channel or revoking verification. Furthermore, these guidelines can be seen as reflecting a general expectation of responsible behavior for managing online communities. While not directly legally binding in the same way as legislation or court precedent, they can be used as evidence of the expected standard of care for administrators in managing their WhatsApp communities. Adherence to these guidelines can demonstrate a proactive approach to content management and may serve as a mitigating factor in potential legal disputes.

8. Mitigating Legal Risks for WhatsApp Community Administrators

8.1. Implementing Clear Group Rules and Guidelines:

Administrators should establish and clearly communicate a comprehensive set of rules and guidelines for their WhatsApp communities. These rules should explicitly prohibit the posting of illegal content, including hate speech, defamatory statements, incitement to violence, threats, and the sharing of private information without consent. It is also advisable to include a disclaimer reminding members that they are responsible for the content they post. These rules should be easily accessible to all members, perhaps through a pinned message or a welcome message, and should be reinforced periodically.

8.2. Actively Monitoring and Moderating Content:

Administrators should actively monitor the content shared within their WhatsApp groups on a regular basis. This may involve regularly reviewing messages or assigning moderation responsibilities to trusted members. Proactive monitoring allows for the early detection of potentially problematic content, enabling administrators to intervene before harm is done or legal issues arise.

8.3. Promptly Removing Illegal or Harmful Content:

Upon identifying illegal or harmful content, administrators must act swiftly to remove it using the admin deletion features. Maintaining a record of removed content and any warnings issued to the responsible members is also recommended for demonstrating due diligence.

8.4. Issuing Disclaimers (and their Limitations):

While posting a disclaimer stating that administrators are not responsible for user-generated content is a common practice, administrators should understand that such disclaimers are not a foolproof legal shield. Particularly in light of the admin deletion capabilities, a disclaimer will not absolve an administrator of liability if they are aware of illegal content and fail to take action to remove it. Disclaimers should be viewed as a supplementary measure that reminds members of their own responsibility but does not replace the administrator's duty to manage the group responsibly.

8.5. Strategies for Disassociating from Problematic Content:

When illegal or harmful content is posted, administrators should immediately and publicly express their disapproval within the group. They should clearly state that the content violates the group rules and will not be tolerated. Administrators should also consider temporarily muting or removing members who post such content, especially if they are repeat offenders. In cases of serious or repeated violations, administrators should consider reporting the member or the content to WhatsApp directly. If the content involves potential criminal activity, reporting it to the South African Police Service may also be necessary. In extreme cases where a group becomes consistently problematic and difficult to manage, administrators may need to consider dissolving the community to avoid ongoing legal risks.

9. Conclusion and Recommendations

WhatsApp community administrators in South Africa face legal responsibilities for the content shared within their groups, particularly concerning defamation, hate speech, incitement, and other illegal material, especially since the introduction of admin deletion features. The legal landscape, shaped by legislation like the Cybercrimes Act, the Film and Publications Act, PEPUA, and common law principles of defamation, coupled with precedents set by certain court cases, underscores the need for administrators to actively manage their communities. To minimise legal risks, WhatsApp community administrators in South Africa are strongly advised to:

- Establish and clearly communicate comprehensive group rules and guidelines that explicitly prohibit illegal and harmful content.
- Actively monitor the content shared within the group on a regular basis.
- Promptly remove any illegal or harmful content using the available admin tools.
- Recognise that disclaimers alone are not sufficient protection against legal liability.
- Take explicit steps to disassociate themselves from any problematic content that appears in the group.
- Familiarise themselves with and adhere to WhatsApp's community guidelines and terms of service.
- Seek legal advice if they are unsure about specific situations or potential liabilities.

By adopting these proactive measures, WhatsApp community administrators can foster safer online environments and significantly mitigate their potential legal exposure in the dynamic digital landscape of South Africa.

Table 1: Summary of Key South African Legislation Relevant to Online Content Liability

Act Name	Key Provisions Relevant to Online Content	Potential Implications for WhatsApp Community Administrators
The Cybercrimes Act 19 of 2020	Criminalises disclosure of harmful communications, threats via data messages, incitement of violence or damage to property.	Administrators could be liable for not removing such content they are aware of and have the ability to delete.
The Film and Publications Act 1996 (as amended)	Regulates online content, prohibits distribution of harmful content like child pornography, war propaganda, incitement, intimate images without consent.	Administrators are expected to prevent the distribution of such content in their groups and may face repercussions for failing to do so.
The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) 4 of 2000	Prohibits unfair discrimination and hate speech based on various grounds.	Administrators could be held responsible for allowing hate speech to be disseminated in their groups.

Table 2: Examples of Content and Potential Legal Ramifications for Administrators

Type of Content	Scenario Example	Relevant Legislation/Legal Principle	Potential Liability for Administrator
Defamatory Statement	A member posts: "John Doe is a corrupt thief who stole money from the company."	Common Law Defamation	If the administrator is aware and does not remove the post (now having the ability), they could be held liable for contributing to the publication of defamatory content.
Hate Speech	A member posts: "All members of X community are criminals and should be..."	PEPUDA, Prevention and Combating of Hate Crimes and Hate Speech Act	Failure to remove such content could lead to legal action against the administrator for allowing the propagation of hate speech.
Incitement to Violence	A member posts: "Let's all go to Y street tomorrow and burn down the shops."	The Cybercrimes Act	An administrator who is aware of this and does not remove it could be seen as enabling or condoning incitement, leading to potential legal consequences.
Unauthorised Sharing of Private Image	A member shares an intimate photo of another person without their consent.	The Cybercrimes Act	Allowing this to remain in the group could make the administrator liable for facilitating the unlawful disclosure of an intimate image.

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