

SETHIBE V ATTORNEY GENERAL

Background

On 13 July 2022, Tshepo Junior Sethibe was arrested and charged under Section 59(1) of the Penal Code for publishing “alarming statements”, after he posted several comments on his Facebook page comments criticising the police in Lobatse. The post that gained the attention of the authorities stated:

“Because the police say that remains of the child that were found on 06 July 2022 are to be brought together with the remains found on 14 April 2022 after two weeks they are going to be burnt or cremated, [this means] there will be no Tlotlo’s funeral because there was deceitfulness.”

The Facebook comments came after a spate of ritual killings and the disappearance of persons. More in particular, after the disappearance of six-year-old Tlotlo Karema from the town of Lobatse on 18 March 2022.

False news provisions and freedom of expression

Section 59(1) of the Penal code makes it an offence to publish a “false statement, rumour or report likely to cause fear and alarm or disturb the public peace. False news provisions such as the one above tend to be vague and ambiguous and are often used to stifle freedom of expression and allow persons enforcing the provision to determine which is regarded as ‘alarming statements’.

The history of ‘false news’ provisions is initially from a colonial period and was used to fight dissent by those colonisers oppressed. Many African countries with these provisions in the law have since taken steps to remove them and allow for freedom of expression.

The right to freedom of expression is protected locally by Section 12(1) of the Botswana Constitution. It is also recognised regionally and internationally under Articles 9 of the African Charter and Article 19 of the International Covenant on Civil and Political Rights.

Application for Unconstitutionality

The accused has filed an application in the High Court of Botswana for an order declaring that Section 59(1) is Unconstitutional. The Applicants argue that the law

- Is too vague and under-specified to allow the Applicant to conduct his defence properly
- It is vague and nebulous as it imposes criminal liability on almost any expression “likely to cause fear and alarm which allows for arbitrary application”.
- It is used to silence members of the public who are critical of the government
- It offends against the right to freedom of expression locally, regionally and internationally
- Other African countries have started calling these provisions unconstitutional.

The hearing at the Botswana High Court in Maun is in May 2023. Sethibe is represented by Dr Jonas Obonye of Obonye Attorneys and is supported by the Southern Africa Litigation Centre.