


REPUBLIC OF SOUTH AFRICA



IN THE EQUALITY COURT OF SOUTH AFRICA
SITTING ALSO AS THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: EQ 02/2018

(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: Yes
(3)	REVISED:
21 August 2019	
DATE	SIGNATURE

In the matter between:

NELSON MANDELA FOUNDATION TRUST 1st Applicant

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION 2nd Applicant

and

AFRIFORUM NPC 1st Respondent

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES** 2nd Respondent

**DEPARTMENT OF JUSTICE AND
CORRECTIONAL SERVICES** 3rd Respondent

with

JOHANNESBURG PRIDE NPC 1st Amicus Curiae

**FEDERASIE VAN AFRIKAANSE
KULTURVERENIGING NPC** 2nd Amicus Curiae

Coram: Mojapelo DJP

Heard: 29 and 30 April 2019

Decided: 21/22 August 2019

Constitutional law and Equality legislation –

Equality: – the display of the old national flag of South Africa introduced from 31 May 1928 - Hate speech – Discrimination – Harassment – What constitutes - Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 – legal interpretive framework – “words” given wide interpretation.

Constitution: – freedom of expression under section 16 (1) of the Constitution – categories of constitutionally unprotected expression in section 16 (2) of the Constitution – include hate speech (“advocacy for hatred”).

The Nelson Mandela Foundation Trust (“the Mandela Foundation”), first applicant, sought an order declaring that any gratuitous display of the Old Flag constitutes, as against black people:

- a) hate speech, under section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act);*
- b) unfair discrimination, under section 7 of the Equality Act; and*
- c) harassment, under section 11 of the Equality Act.*

The second applicant, the South African Human Rights Commission (“SAHRC”), supports the relief sought by the Mandela Foundation and, in the alternative, seeks an order declaring that section 10 of the Equality Act is “unconstitutional and invalid to the extent that it restricts the type of expression which may constitute hate speech to ‘words’ only”. Once the SAHRC raised the constitutionality of section 10 of the Equality Act, albeit in the alternative, the case required the Court to sit both as an Equality Court and as a High Court. The second and third respondents, respectively the Minister of Justice and Correctional Services and the Department of Justice and Constitutional Services (together “the Department”), support(s) the relief sought by the SAHRC and, in relation to the alternative relief also sets out how it intends to correct the defect. The first amicus curiae, Johannesburg Pride, also supports Mandela Foundation.

The first respondent, Afriforum, opposes this relief in its entirety, and contends, among others, that section 10(1) of the Equality Act expressly regulates ‘words’ and as such does not apply to other forms of expression like symbols, and that it accordingly does not regulate displays of the Old Flag. It asserts also that displaying the Old Flag is constitutionally protected expression under section 16(1) of the Constitution. The second amicus curiae, Federasie Van Afrikaanse Kultuurverenigings (“FAK”) supports Afriforum.

Having considered the history of the flag, the Court concluded that the Old Flag or Apartheid Flag (as it is sometimes called) was a vivid symbol of white supremacy and black disenfranchisement and

suppression. Further, the dominant meaning attributable to the Old Flag, both domestically and internationally, is that it is for the majority of the South African population a symbol that immortalises the period of a system of racial segregation, racial oppression through apartheid, and of South Africa as an international pariah state that dehumanised the black population.

The Court found that any gratuitous display of the Old Flag, besides being racist and discriminatory, demonstrates a clear intention to be hurtful; to be harmful and incites harm; and to promote and propagate hatred against black people in contravention of section 10(1) of the Equality Act. Furthermore, displaying the Old Flag in the face of most South Africans knowing that they recoil from it as a crime against humanity also constitute harassment.

Court accordingly held that the gratuitous display of the Old Flag constitutes prohibited hate speech, unfair discrimination and harassment.

ORDER

- (1) In terms of section 21(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“the Equality Act”), it is determined that the display of the old national flag of South Africa, introduced from 31 May 1928, and used throughout apartheid until it was abolished on 27 April 1994 (“the Old Flag”), at the ‘Black Monday’ demonstrations on 30 October 2017 constituted:
 - a. hate speech, in terms of section 10(1) of the Equality Act;
 - b. unfair discrimination on the basis of race, in terms of section 7 of the Equality Act;
 - c. harassment in terms of section 11 of the Equality Act.

- (2) In terms of section 21 (2) of the Equality Act, it is declared that subject to the proviso in section 12 of the Equality Act, any display of the Old Flag constitutes:
 - a. hate speech in terms of section 10(1) of the Equality Act;
 - b. unfair discrimination on the basis of race, in terms of section 7 of the Equality Act;
 - c. harassment in terms of section 11 of the Equality Act.

JUDGMENT

MOJAPELO DJP

Introduction

[1] ‘We, the people of South Africa’, proclaimed the preamble to the Constitution of the Republic of South Africa, 1993¹, the interim constitution. This was the first time that the people of South Africa expressed their oneness as a nation. It is a oneness that we reiterated in the Constitution of the Republic of South Africa, 1996², that came into operation on 08 May 1996, replacing the 1993 interim constitution, following the historic, emotional and near magical first democratic elections of 27 April 1994. The Constitution and the first democratic elections brought all of us together across racial, ethnic, language, cultural, gender and sexual orientation divides. The significance of that day has etched itself in the collective memory of the nation as Freedom Day, which we celebrate each year.

[2] Prior thereto South Africans were divided amongst each other on mainly racial basis from cradle to grave and were denied by the apartheid rule an opportunity of a common nationhood and oneness. The so-called unity achieved under the Union of South Africa in 1910 or through the Republic of South Africa Constitution Act of 1961, was one based on racism, as it united the white English and Afrikaans speaking parts of the population whilst excluding all the blacks,³ including indigenous African population. The 1994 elections and the subsequent 1996

¹ Act 200 of 1993.

² Constitution of the Republic of South Africa, 1996.

³ The term black is used in the contextual sense to include everybody who was not classified white and who was denied the right to vote. Not even the 1983 “Tricameral Parliament” was inclusive as it still sought to define indigenous Africans as non-South African. Many argue that it in fact sought to further entrench racial divisions and was thus destined to fail, as it did.

Constitution remain unparalleled in unifying all South Africans and thus etching, for the first time, the emotional and constitutional unity that we can be proud of. The new Constitution defines us as one nation, united in our diversity.

[3] This case drags, from our recent ugly past into our current non-racial democratic dispensation, the old national flag of South Africa introduced from 31 May 1928 and used throughout apartheid until it was abolished on 27 April 1994 (“the Old Flag”), and raises the question whether its gratuitous display constitutes hate speech, unfair discrimination or harassment against those that it never represented. The official status of the Old Flag as a symbol of the country came to the end in April 1994, when South Africa was liberated.

[4] The first applicant, the Nelson Mandela Foundation Trust (“the Mandela Foundation”), seeks an order declaring that any display of the Old Flag that does not serve any genuine journalistic, academic or artistic purpose in the public interest (i.e. “gratuitous display”) constitutes, as against black people:

4.1 hate speech, under section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act);

4.2 unfair discrimination, under section 7 of the Equality Act; and

4.3 harassment, under section 11 of the Equality Act.⁴

[5] The first respondent, Afriforum NPC (“Afriforum”), opposes this relief in its entirety, and contends that “displaying the Old Flag is constitutionally protected expression” under section 16(1) of the Constitution.⁵ It contends also that section 10(1) of the Equality Act expressly regulates ‘words’ and as such does not apply to other forms of expression like symbols, and that it accordingly does not regulate displays of the Old Flag.⁶

⁴ Mandela Foundation’s affidavit, p 16-17 paras 23 – 25 (vol 1) (Rec 16 – 17:23-25).

⁵ Afriforum’s Answering affidavit to the Mandela Foundation, p 97 para 54 (vol 1) (Rec 97:54).

⁶ Afriforum’s Answering Affidavit p 87 para 29 (Rec 87:29).

- [6] The dispute and the proceedings were initially between the Mandela Foundation and Afriforum. All other parties joined later, having been granted leave to intervene or having been admitted as the *amici curiae*.
- [7] The second applicant, the South African Human Rights Commission (“SAHRC”), supports the relief sought by the Mandela Foundation and, in the alternative, seeks an order declaring that section 10 of the Equality Act is “unconstitutional and invalid to the extent that it restricts the type of expression which may constitute hate speech to ‘words’ only”.⁷ Its main contention, which is similar to that of the Mandela Foundation is that, correctly interpreted, the section encompasses all forms of expression including flags.
- [8] The second and third respondents, respectively the Minister of Justice and Correctional Services and the Department of Justice and Constitutional Services (together “the Department”), “support(s) the relief sought by the SAHRC”,⁸ and, in relation to the alternative relief, also sets out how it intends to correct the defect.⁹
- [9] The first *amicus curiae*, Johannesburg Pride NPC (“Pride”), argues that “the gratuitous display of the Old Flag amounts to hate speech, discrimination and harassment not only against black people but also against members of the LGBT+ community”.¹⁰
- [10] The second *amicus curiae*, Federasie Van Afrikaanse Kultuurvereniginge (“FAK”), submits that displays of the 1928 Flag should not be “banned”.¹¹ It, in effect, supports Afriforum.

⁷ SAHRC’s notice of motion p 218 -219 (Rec 218 – 219).

⁸ Department’s affidavit, p 264 para 4 (vol 3) (Rec 264:4).

⁹ Department’s affidavit, p271 paras 23 – 25 (vol 3) (Rec 271:23-25).

¹⁰ Pride’s founding affidavit, p 111 para 11(a) (vol 2) (Rec 111:11 (a)).

¹¹ FAK’s affidavit, p 211 paras 23 – 25 (vol 3) (Rec 211:23-25).

Joint High Court and Equality Court Hearing and Motion Court

[11] Once the SAHRC raised the constitutionality of section 10 of the Equality Act, albeit in the alternative, the case required the Court to sit both as an Equality Court and as a High Court. This is despite the mistake that the SAHRC made inadvertently by maintaining the heading in its Notice of Motion and Founding Affidavit as “Equality Court,” whilst their papers were in all material respects for the High Court.¹² It is a mistake for which the SAHRC formally apologised at the hearing, which apology I accepted. The consolidated hearing, which I allowed, was both convenient and ideal in the circumstances.¹³

[12] The parties agreed in the preliminary case management meetings that this matter be determined by way of application proceedings without any oral evidence being led. This became a convenient way having regard to the limited issues and the total absence of any dispute of fact. The agreements in the case management meeting were recorded in minutes which, in material respects, form part of these proceedings.¹⁴ Parties which came into the matter after the relevant agreement confirmed that they associate themselves with agreement for the matter to proceed as agreed. Affidavits were accordingly filed as if proceedings were conducted in terms of the High Court Rules. All parties in this matter are legally represented by attorneys and counsel.

South Africans united in their diversity and constitutional values

[13] At the outset it is important to remind ourselves of the constitutional values of democratic South Africa and how under the Constitution, all South Africans stand united in their diversity. In this regard it bears recalling parts of the preamble and section 1 to the Constitution – the supreme law of the land and the founding

¹² The mistake was understandably retained by all other parties who responded to its application.

¹³ See *De Lange v Methodist Church* 2016 (2) SA 1 (CC) at para 53] to [59].

¹⁴ Record 127.

document of our nation. This is what binds us together and makes us South Africans and should guide us all the time:

“Preamble

*We the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our
diversity.*

*We therefore, through our freely elected representatives, adopt this
Constitution as the supreme law of the Republic so as to –*

*Heal the divisions of the past and establish a society based on
democratic values, social justice and fundamental human rights;*

*Lay the foundations for a democratic and open society in which
government is based on the will of the people and every citizen is
equally protected by the law;*

*Improve the quality of life of all the citizens and free the potential
of each person; and*

*Build a united and democratic South Africa able to stand its
rightful place as a sovereign state in the family of nations.”*

Section 1(a) – (c)

*“South Africa is one sovereign, democratic state founded on the following
values:*

- a. Human dignity, the achievement of equality and the
advancement of human rights and freedoms.*
- b. Non-racialism and non-sexism.*
- c. Supremacy of the constitution and the rule of law.”*

Factual Matrix and More about Parties

[14] The factual circumstances from which the issues in this case arise are brief, undisputed and broadly common cause.

[15] Having regard to the fact that the case revolves around the historic and now contentious Old Flag, I set out briefly, together with the facts, more information about the parties and their respective roles in society. This might be helpful to elucidate their role in the factual matrix and in these proceedings. I base this on the information placed before the Court by each of the parties and by other parties and not denied by the party concerned.

[16] The Mandela Foundation was established in 1999 as a registered trust by former President Nelson Rolihlahla Mandela, shortly after his retirement from public office. Its vision is "a society that remembers its past, listens to all its voices, and pursues social justice". Its mission is "to contribute to the making of a just society by promoting the legacy of Nelson Mandela, providing an integrated public information resource on his life and times, and convening dialogue around critical social issues".¹⁵

[17] Afriforum is a non-profit company, which was registered in 2005. According to its website,¹⁶ it is a non-governmental organisation whose vision is "that Afrikaners - who have no other home - are able to lead a meaningful and sustainable existence, in peace with other communities, here on the southernmost tip of Africa". Its stated mission is as follows: "Afriforum works to ensure that the basic prerequisites for the existence of Afrikaners are met, by acting as a credible Afrikaner interest organisation and civil rights watchdog - as part of the Solidarity Movement - outside the workplace on national and local level to handle the impact

¹⁵ Mandela Foundation (Founding Affidavit – Rec 9:4)

¹⁶ afriforum.co.za (as quoted by the Mandela Foundation (Founding Affidavit – Rec 10:6; and not denied by Afriforum).

of the current political realities facing Afrikaners, and to influence those realities, while working simultaneously to establish sustainable structures through which Afrikaners are able to ensure their own future.”¹⁷ According to this, Afroforum is essentially about Afrikaner interests. In its answering affidavit, it states that “as a civil organisation it is committed to upholding freedom of expression, while taking active steps to combat genuine hate speech.”¹⁸

[18] The SAHRC is a constitutional state institution established in terms of Chapter 9 of the Constitution to support constitutional democracy in South Africa. Its mandate is contained in the Constitution itself as follows:¹⁹

“The Human Rights Commission must

- (a) promote respect for human rights and a culture of human rights;*
- (b) promote the protection, development and attainment of human rights; and*
- (c) monitor and assess the observance of human rights in the Republic.”*

[19] The Department (by which term we include the Minister) is responsible for the administration and implementation of the Equality Act. Its role became implicated in the proceedings following the intervention of SAHRC and the constitutional challenge to the under-inclusivity of section 10 of the Equality Act. As already stated, the Department “support(s) the relief sought by the SAHRC” and set(s) out their responses to the applications of both the SAHRC and the Mandela Foundation.²⁰ It provided evidence on the history of the Old Flag and also supports the relief sought by the Mandela Foundation.

[20] Pride is a registered non-profit company, a civil rights organisation which aims to increase the visibility and awareness of the LGBT+ community, and since 1990

¹⁷ afriforum.co.za, as per Founding Affidavit of the Mandela Foundation 10:5 and 6

¹⁸ Answering Affidavit of Afriforum Rec 79:4).

¹⁹ Section 184 (1) (a) – (c).

²⁰ Rec 264:1-4.

organises and executes the Johannesburg Pride Parade and contributes towards greater awareness and tolerance of sexual diversity in South African society. It was implicated and admitted as the *amicus curiae* once the Gay Pride Rainbow Flag was mentioned by Afriforum as an example of symbols for which a precedent might be set for their suppression, if the application of the Mandela Foundation were to be granted.²¹ It also supports the Mandela Foundation and adds by articulating concerns for the LGTB+ community and how that community experiences gratuitous displays of the Old Flag.

[21] FAK is also a non-profit company. It was founded in 1929, co-incidentally a year after the introduction of the Old Flag. It is thus the oldest of all the parties before this Court. It describes itself as “a cultural organisation” established “with the purpose of promoting and advancing the Afrikaans language and culture as well as Afrikaner history” by coordinating the efforts of other cultural organisations through a federal network. In brief “it is the oldest Afrikaans cultural organisation in South Africa” - a federal structure for the advancement of Afrikaans and the Afrikaner culture and history.²² It too provided evidence on the history of the Old Flag and supports the relief sought by Afriforum.

[22] The common cause facts have their genesis in nationwide public demonstrations that took place in South Africa on 30 October 2017 against farm murders and violent attacks against farmers. The demonstrations were dubbed as “Black Monday”. The details set out hereunder appear from the Founding Affidavit of the Mandela Foundation and are uncontested. During the protest march and demonstrations, at which Afriforum played a central role, certain protestors displayed the Old Flag. The display of the Old Flag gave rise to a dispute between the Foundation and Afriforum concerning contemporary displays of the previous official flag of South Africa. The demonstrations and the debate that ensued received nationwide media coverage, generating further debates that were carried forward by members of the public, including via social media. They gave rise to

²¹ Rec 109:4 – 110:9.

²² Rec 202:1 – 203:6.

the complaint being lodged with the Equality Court and the subsequent conditional 'counter-application' for constitutional invalidity in the High Court, and the joint and simultaneous hearing.

[23] The Founding Affidavit of Mr Sello Hatang, the Chief Executive Officer of the Mandela Foundation, describes in paragraphs 11 to 15 the events and how they affected him as follows:

"Black Monday

11. *On 30 October 2017, nationwide demonstrations were held to protest violent attacks on farmers, using the title "Black Monday" (as the protesters were to wear black), as well as "Genoeg is Genoeg" and "Stop die Moorde". AfriForum played a leading role in these demonstrations and announced as follows in a statement issued the same day, a copy of which is attached, marked "SH2":*

Today's gatherings are only the beginning of a campaign that will ripple outward even further and will become a bigger campaign. AfriForum already at today's gathering announced campaigns and safety plans in the fight against farm attacks and murders.

12. *It was widely reported that the Old Flag was displayed at some of the "Black Monday" demonstrations. Attached, marked "SH3", are examples of such reportage. Many social media users also published eyewitness accounts and photographs of displays of the Old Flag by "Black Monday" demonstrators. One example is attached, marked "SH4": a statement published by Bongani Baloyi, the Executive Mayor of Midvaal Municipality, on his official Twitter account at 10:02 am on 30 October 2017, that he "witnessed the open and proud embrace of symbols (Old SA Flag) and Die Stem by the Farmers on the R59 in Redan".*

How it affected me

13. *On that day, I was giving a guided tour of Robben Island (as part of a visit jointly hosted by the Foundation and the Ahmed Kathrada Foundation). While reckoning with the pain that Nelson Mandela and his fellow political prisoners endured on the Island, reports of the displays of*

the Old Flag by "Black Monday" demonstrators were brought to my attention. Two painful personal memories immediately invaded my mind:

a. First, I remembered that, when I was about ten years old, I was walking with my brother in Stilfontein and two white boys said to us "Wat soek julle hier, kaffirs?" My brother signalled that we should ignore them and keep walking, which we did, but he later explained to me that the word denoted hatred for black people, and was used to humiliate black people. It is my first vivid memory of being told that I was not only "other", but less than human, because of the colour of my skin.

b. Second, I remembered occasions, later in my childhood, during school holidays, when I heard white children singing "Daar kom a bobbejaan" as my grandmother walked past them on her way to work. While school holidays should be a joyful time in any family and community, it pained me to know that my grandmother hated school holidays, because she would have to navigate her way to work, as a domestic worker, through groups of idle white children subjecting her to this kind of abuse, and she was powerless to do anything about her trauma and anguish.

14. The reason these memories came involuntarily to mind, upon hearing reports of the Old Flag being displayed, is that the Old Flag represents nothing other than the inhumane system of racial segregation and subjugation that governed South Africa before 27 April 1994 (which manifested in various forms since the 1600s and became formally known as apartheid from 1948). It was that system, under that Old Flag, which licensed those white children who still haunt my memories to dehumanise me, my brother and my grandmother in the way that they did.

15. To hear that the Old Flag had been displayed gratuitously in 2017, more than a generation after apartheid had been abolished, reminded me that some South Africans still see me and other black people as "other", and would deny us the opportunity just to be human. They have no concern or compassion for the suffering that the majority of South Africans endured during apartheid and continue to bear as a result of apartheid."

[24] It is common cause that the description of how the events were experienced by, and affected, Mr Hatang reflects the reality of the feelings and experience of the black child raised in apartheid South Africa. This is how black people would have experienced the display. It is common cause also that the feelings are real. The feelings and evidence could have been that of any other black person to whom apartheid rule and oppression represented a painful reality. No exaggeration. It was their common hope that 1994 would have put this behind for ever – and never to be brought back again. The “never-again and never again” hope.

[25] The painful current harm that emerges from the statement is not denied and must be accepted as a fact. The response of the first respondent is that the Old Flag “has a capacity to cause offence and emotional distress”.²³ It would have been helpful to have a direct response of the first respondent to those experiences, either by a denial or an acceptance – that is, other than by a terse acknowledgement. There has been no engagement with the emotional and historic facts articulated here, especially under paragraphs 13 to 15 of the Founding Affidavit. The facts were simply dealt with as an academic issue by the first respondent. Save to criticise one journalist for posting a non-Black Monday related tweet of persons wearing the Old Flag and burning the New Flag, Afriforum does not deny that the Old Flag was displayed during the protest march.²⁴ Furthermore, Afriforum, whilst acknowledging the truth of the experience of Mr Hatang, simply states that South Africa has moved on and expresses a hope that when he next sees the Old Flag being waved, Mr Hatang will feel differently – “he could use the opportunity to reflect on how far we have moved as a nation”.²⁵ I will return to this later when I deal with contextualised meaning of the Old Flag. For now, suffice it to state that it still does not engage with the feelings and memories Mr Hatang testifies about, which are all rooted in decades of being discriminated against on the basis of his colour.

²³ Rec 79:6.

²⁴ Afriforum answering affidavit vol 1 pp 99 – 100 para 62 – 64.

²⁵ Rec. 99:61.

[26] The case essentially turns mainly on two things, namely, the Old Flag and hate speech. These are therefore the two main topics that this judgment will discuss in order to answer the question whether the display of the flag constitutes hate speech. If it does, then the final question will be whether such display is an expression that is protected by the provision of the Constitution which guarantees freedom of expression. The main topics for discussion are therefore the Old Flag, hate speech and finally freedom of expression (having regard to the targeted display of the flag and hate speech). Unfair discrimination and harassment will also be considered as these are also alleged to be the impact of gratuitous display of the Old Flag

The Old Flag

Importance of history when assessing the right to dignity

[27] The Constitutional Court has time and again emphasised the importance of historical context when considering human dignity,²⁶ especially the history of racialized inequality in South Africa – the unique attribute of which was the denial of human dignity to black South Africans. One of the specific goals of the current Constitution is to redress the legacy of race-based inequalities which was characterised by the denial of dignity to black South Africans.

[28] In 2000, the Constitutional Court in *Dawood* noted the express purpose of the value of right to dignity as being “to contradict” the past:²⁷

“The value of dignity in our Constitutional framework cannot...be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels.”

²⁶ See, for example, *Daniels v Scribante and Another* [2017] ZACC 13, 2017 (4) SA 341 (CC).

²⁷ *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) par [35].

[29] The value of history as an interpretive tool was emphasized again, recently (2018), in *Rahube*, where the Constitutional Court stated:²⁸

“The historical context within which a particular provision operated, or in response to which it was enacted, has been used as an interpretative tool by this Court on a number of occasions. In Brink, this Court recognised that the interpretation of section 8 of the Interim Constitution – now the section 9 right to equality – involved a historical enquiry. This Court held:

‘As in other national constitutions, section 8 is the product of our own particular history. Perhaps more than any of the other provisions in [the Bill of Rights], its interpretation must be based on the specific language of section [9], as well as our own constitutional context. Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life...The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.’”²⁹

[30] Finally, a lesson from our history, as underscored by the Constitutional Court in *Garvas*³⁰ is that “ours is a ‘never again’ Constitution: never again will we allow the right of ordinary people to freedom in all its forms to be taken away.”

History of the Old Flag

[31] The Old Flag must be interpreted against its history and meaning in order to ascertain its objective meaning(s) and thus to assess the effect of its display on the rights to dignity and equality. It is necessary, first, to understand its origins and history.

²⁸ *Rahube v Rahube and Others* [2018] ZACC 42; 2019 (1) BCLR 125 (CC) para [22].

²⁹ *Brink v Kitshoff NO* [1996] ZACC 9; 1996 (4) SA 197 (CC) para [40].

³⁰ *South African Transport and Allied Workers Union and Another v Garvas and Others* [2012] ZACC 13; 2013 (1)SA 83 (CC) para 63.

[32] In brief, the Old Flag was adopted in June 1927 by a parliament consisting only of white people and was brought into operation in 1928. It is therefore sometimes referred to as the 1928 Flag or the Old Flag. It was abolished in 1994 by South Africa's first democratic and non-racial parliament representing all the people of the country. It had 66 years during which it was a symbol of South Africa which was run by, and represented the rights of, the minority white South Africans to the exclusion of black South Africans. It is thus, not surprisingly, viewed differently even today by mostly white people on the one hand and black people on the other. It was replaced in 1994 by the new national Flag which represents a united democratic non-racial South Africa.

[33] FAK, SAHRC and the Department placed evidence before court on the history of the Old Flag.³¹ Other parties also referred to a different degree to the history. The history of the Old Flag itself is uncontested. Each party, however, ultimately sought to place their own interpretation on the gratuitous display of the Old Flag in modern South African context.

[34] Some detail on the history of the Old Flag is necessary for an understanding of how it was conceived and where that flag is today and what it represents, on the one hand, to a section of the white minority, represented in this case by the first respondent and the second amicus; and, on the other hand, to the majority comprising mostly black people and others, represented in this case by all other parties.

[35] The British flag, which is also known as the Union Jack, was the official flag of the country prior to the adoption of the Old Flag, because the Union of South Africa was considered to be part of the British Empire. The first call for the recognition of a "national flag" was made by the Cape conference of the Nationalist Party in 1919. The demand was repeated in 1921 when the Free State branch of the Nationalist Party held its Congress. The justification for the new flag

³¹ FAK Rec 205:9 – 208; SAHRC Rec 229:23-24 and the Department Rec 272:26.

was that the Union Jack represented only one section of the population, the English. This was during the leadership of General Jan Smuts.

[36] For General Jan Smuts, leader of the South African Party and prime minister of South Africa, the flag issue was a sensitive one, which he did not touch because for him, the unity between the English and Dutch speaking white people was paramount. In 1924 the South African Party of Smuts lost the general election to a coalition of the Labour Party and the National Party. A new government, referred to as the “Pact Government” was formed. JBM Hertzog, the head of the National Party, became prime minister. The debate about a new flag would now be resurrected.

[37] In 1925, the Minister of Interior, DF Malan, was responsible for the introduction of Afrikaans as the second national language, replacing Dutch. He was also instrumental in proposing a new flag through the Union Nationality and Flag Bill. The Bill, however, was withdrawn before its second reading. Malan however pointed to the need for a new flag that would be “accepted as the united choice of all sections of the nation through their recognised political leaders.”³² This was with reference to only white people.

[38] The flag Bill was re-introduced in 1926. Malan motivated for it on the grounds that the history of division between the Afrikaners and the English had to be forgotten and that “both sections” had to forge unity for the future of South Africa. His speech delivered on 20 May 1926, quoted from Hansard during the hearing, is significant for its clarity as to the intentions behind the Bill. He explained why a flag was important. It was not a mere cloth, but a symbol of national existence: “a flag is a living thing; it is the repository of national sentiment”.³³ As to why it was being introduced, Malan was again explicit:³⁴

³² Quoted in Harry Saker, *The South African Flag Controversy, 1925 – 1928* (PhD dissertation, University of Cape Town, 1977), pp 64 – 65.

³³ Hansard, *Debates of the House of Assembly*, 20 May 1926.

³⁴ *Id.*

“What we therefore want in South Africa is a flag which breaks with the past, and which looks only to the future. This is what the new design will be. It is not connected with the past, so that the two sections of the people are united in a common nationhood, a common national feeling...”

[39] In his view the resolution of the flag question carried the potential for the resolution of the racial reconciliation between the Afrikaners and the English. The proposed flag was not adopted, however, on 26 May 1926. Instead, it was postponed, owing to the resistance from “both sections” of the population.

[40] When the Union Nationality and Flag Bill was re-introduced on 16 May 1927, it still bore its distinctive features – fusion of the Afrikaner and English invented traditions – which, as Malan explained, comprised two parts. The first was “a legal recognition by ourselves and for the legal information of other nations, that we exist as a South African nation.”³⁵ Moreover:

“The second part, which is based on the first, has to do with the establishment of an outward and visible symbol of our independent nationhood, and our national status. It has to do with the binding together of all sections of the people in one common sentiment. It provides, in other words, for a South African national flag.”

[41] By 1927 the English and Afrikaans speaking representatives in the whites-only Parliament were able to “reconcile” their differences and agree on a new flag. The flag was adopted in June 1927 (and would enter into force in 1928). Its purpose was twofold: to serve as a distinctive marker for severing the ties with the imperial power, Britain; it was also a nationalist symbol of unity between English and Afrikaans speakers.

[42] Significantly, the Africans and other people of colour were excluded from the discussion and adoption of the flag. Their rights to vote had been curtailed since the Treaty of Vereeniging, and the exclusion was entrenched in 1910 when the remaining elements of native franchise were subjected wholly to the whims of the

³⁵ Hansard, Debates of the House of Assembly, 26 May 1927.

whites-only Parliament. As the debate was raging concerning the Flag Bill, Hertzog's government was introducing other legislative steps designed to consign blacks into the status of subservience. Smuts' warning was not heeded:³⁶

"We are to hold a joint sitting of both houses over the Colour Bar Bill, the Senate having once more rejected the bill. After that the Asiatic Segregation Bill will come on, as dangerous and unpleasant a measure as has ever been before our parliament. Then Hertzog will bring forward his Native segregation bills. This will become a most unhappy country with policies such as these."

[43] The Union Nationality and Flag Act of 1927 ("the Flag Act") was passed alongside the Immorality Act of 1927, which outlawed "illicit intercourse between Europeans and natives"; and the Native Administration Act of 1927, which made the Governor-General "the supreme chief of all natives" and gave him vast powers to appoint and depose chiefs, and generally to control how black people occupied and used land, moved, married, inherited, and settled disputes. It was control from cradle to grave. He controlled even where they could and could not bury their dead. These laws paved the way for the subsequent notorious "Hertzog Bills" of 1936: the Native Representation Bill - to further limit native franchise; the Native Trust and Land Bill - to intensify the land ownership restrictions set by the Native Land Act of 1913; and the Urban Areas Amendment Bill - to limit native people to residing in urban areas only as labourers for white people. These Bills in due course became law. Under these laws urban areas were reserved for white people. Black people could only lawfully enter and remain in the urban areas as labourers for white masters. Black people were labourers and white people were masters. Almost every white person had their own black person(s) as labourer(s). A situation not very much different from slavery. Only a bit different because a stipend was payable by the white employer to the black worker – but regulated mostly by the will of the master.

³⁶ Quoted in Harry Saker, *The South African Flag Controversy, 1925 – 1928* (PhD dissertation, University of Cape Town, 1977) p 152.

Conclusion about history

[44] Viewed in this context, the Flag Act was part of a scheme of statutes that were intended to entrench, and in fact did entrench, racialized segregation and white supremacy.

[45] The Old Flag or Apartheid Flag (as it is sometimes also called) was a vivid symbol of white supremacy and black disenfranchisement and suppression. It combined four flags: the British Union Jack and the flags of the Transvaal and Oranje Vrystaat republics founded by Boer settlers, on the background of the “Oranje Blanje Blou” Dutch Prinsevlag. It gave expression to European heritage and heraldry, excluding black people entirely from the project of “binding together of all sections of the people in one common sentiment”. Mr Ngcukaitobi, for the Mandela Foundation, argues that it also excluded black people from any sense of national belonging in the land of their birth.

[46] In 1948, after their election victory, the National Party tried unsuccessfully to amend the flag design to remove what they called the “Blood Stain” (the flag of the United Kingdom). In 1968 Prime Minister John Vorster proposed the adoption of a new flag in 1971 - the tenth anniversary of the declaration of South Africa as an independent ‘republic’. However, his idea did not gain parliamentary support and the flag change never happened. As such this flag was used during the entirety of the apartheid era as well. This is what led to it being labelled the “Apartheid flag”.

[47] The Flag Act was superseded and repealed by the 1961 “Republic” Constitution, which retained the Old Flag,³⁷ entrenched electoral exclusion of everybody other than “white persons”,³⁸ and vested the State President with absolute authority over “Bantu affairs”, including “Bantu locations”.³⁹

³⁷ Republic of South Africa Constitution Act 1961 para 5.

³⁸ Id, para 34 and para 46.

³⁹ Id, para 111.

[48] The Old Flag was retained in the 1983 “Tricameral” Constitution,⁴⁰ which gave limited electoral rights to “Coloured” and “Indian” persons,⁴¹ but excluded African people from the definition of South Africa’s “population groups” that were entitled to “self-determination”.⁴² The 1983 Constitution elevated the Old Flag making it a criminal offence, punishable by five years’ imprisonment, to “hold the National Flag of the Republic in contempt”.⁴³ It was only replaced by the current flag in 1994 with the commencement of the republic’s transitional constitution and the end of apartheid.

[49] Following the end of its official status in 1994, the Old Flag has been controversial within South Africa, with some people viewing it as historic and a proud symbol of Afrikaner-English unity and heritage, while others view it as a symbol of oppressive apartheid and white supremacy.

[50] It certainly still means one thing to some (those who did not suffer and benefitted under the pre-democracy or apartheid rule) and another thing to others (the victims and those who, though not victimised, were genuinely opposed to the apartheid rule). It is unfortunately still divisive.

[51] When a new democratic dispensation was forged in 1994, what South Africa needed was a new identity which broke away from her racial past in which unity had been identified and defined as unity between the Afrikaans and the English speaking populations only (that is, to the exclusion of black people). South Africa needed a new all-embracing unity that unites all her people, broke with the past and looked only to the future. The new Constitution and the new national flag defined the new South Africanness explained in the first paragraph of this judgment. One that would never look back to her past. The current flag was accepted as the united choice of all sections of the nation, without exclusion, through their recognised political leaders.

⁴⁰ Republic of South Africa Constitution Act, 1983 para 4.

⁴¹ *Id.*, para 52.

⁴² *Id.*, para 100(1)(ix), read with the preamble.

⁴³ *Id.*, para 92.

[52] As Mahomed J, who later became the first black Chief Justice of South Africa, explained the stark contrast between the pre and the post 1994 era:

“The past was riddled with statutes which assaulted the human dignity of persons on the grounds of race and colour alone; section 10 constitutionally protects that dignity. The past accepted, permitted, perpetuated and institutionalized pervasive and manifestly unfair discrimination against women and persons of colour; the preamble, section 8 and the postamble seek to articulate an ethos which not only rejects its rationale but unmistakably recognizes the clear justification for the reversal of the accumulated legacy of such discrimination. The past permitted detention without trial; section 11(1) prohibits it. The past permitted degrading treatment of persons; section 11(2) renders it unconstitutional. The past arbitrarily repressed the freedoms of expression, assembly, association and movement; sections 15, 16, 17 and 18 accord to these freedoms the status of “fundamental rights”. The past limited the right to vote to a minority; section 21 extends it to every citizen. The past arbitrarily denied to citizens on the grounds of race and colour, the right to hold and acquire property; section 26 expressly secures it.”⁴⁴

There could not have been a better graphic representation of the legal difference between the apartheid and democracy respectively.

[53] South Africa needed (and apparently may still need) to get to a place proclaimed by the current Constitution, where we are not divided but “united in our diversity.” It is a unity worth striving for at all costs, especially for those parts of the nation (to the left and to the right), who may not yet be there. That the current South African flag does, while the Old Flag seems to be doing the very opposite. The contrast between the old and the new flags and the continued division in the interpretation of the Old Flag is at the base of this application. FAK, which argues for a different outcome, does recognise and acknowledge the truth of the inclusivity of the current flag in contrast to the old: “The meaning and symbolism

⁴⁴ In *S v Makwanyane* 1995 (3) SA 391 (CC) at p 488 A-D para [262].

contained in the new flag is truly remarkable, ... this time the flag was fully representative of all the people of South Africa.”⁴⁵

[54] It is against the backdrop of this history and the current divergent interpretations of the Old Flag, that its meaning(s) must be assessed.

Meaning of the Old Flag

[55] It is necessary to consider fully what meaning is attributable to the Old Flag (when it is displayed gratuitously).

[56] In affording a meaning to ‘gratuitous’, the Mandela Foundation describes this as “any display that does not serve any genuine journalistic, academic or artistic purpose in the public interest”.⁴⁶ This is an interpretation that accords with section 12 of the Equality Act, discussed below, and which sets out circumstances that justify the display of an image or expression which would otherwise be prohibited. However, for purposes of this judgment, the focus is only on the meaning of the Old Flag in South Africa today.

[57] In trademarks law, it is accepted that the dominant feature of a mark is determined through “*the comparison [is] to be made between the main idea or impression left on the mind by each of the marks, having regard to any essential or salient or leading or striking feature or features in each.*”⁴⁷ Similarly, the ascertainment of an objective meaning or meanings to expression will entail an inquiry into whether a dominant meaning exists or through an evaluation of “the main idea or impression left on the mind” as a recipient viewer of the expression.

⁴⁵ Rec 207:18.

⁴⁶ Foundation founding affidavit vol 1 p 10 para 8. This description echoes the proviso to section 10 (1), which is found in section 12 of the Equality Act.

⁴⁷ *Searles Industrials (Pty) Ltd v International Power Marketing (Pty) Ltd* 1982 (4) SA 123 (T) 127D; *Orange Brand Services Ltd v Account Works Software (Pty) Ltd* [2013] ZASCA 158 para [16].

[58] In *AfriForum v Malema*, the Equality Court had regard to the defamation law to ascertain the meaning of words and applied the following test:

“the test [is] whether the reasonable person of ordinary intelligence is taken to understand the words alleged to be defamatory in their natural and ordinary meaning. In determining whether this is the position the Court must take account not only of what the words expressly say, but also what they imply. The context within which the words have been used cannot be ignored. See: Argus Printing and Publishing Co Ltd v Esselen’s Estate [1993] ZASCA 205; 1994 (2) SA 1 (A) at 20E – 21B.” Per: Kgomo J in *Selemela and Others v Independent Newspaper Group Ltd and Others* 2001 (4) SA 1001.⁴⁸

[59] Taken together, and applied in the context of an image and not words, the approach acknowledges the possibility of:

- 1 Two or more meanings to a particular expression; and
- 2 Seeks to arrive at a dominant or series of dominant meanings.

[60] The approach also gives due regard to what the words or image implies, and the context in which the words or image are used.

[61] What then does such a display (gratuitous) of the Old Flag mean?

[62] The applicable test to ascertaining the meaning of an expression (including an image) is objective and accepts that a particular expression may have more than one objective meaning.⁴⁹

Meaning to the Parties

⁴⁸ *AfriForum and Another v Malema and Others* 2011 (6) SA 240 (EqC) para [41].

⁴⁹ *Id* para [99] – [100].

[63] Each of the parties set out what meaning they each attach to the Old Flag. That, I suggest, is a helpful starting point for the current purpose.

[64] The Mandela Foundation testified that:⁵⁰

“...the Old Flag represents nothing other than the inhumane system of racial segregation and subjugation that governed South Africa before 27 April 1994 (which manifested in various forms since the 1600s and became formally known as apartheid from 1948).”

[65] Further, the Foundation states: “apartheid was a crime against humanity. Displaying the flag of apartheid South Africa represents support for that crime”,⁵¹ and “a total rejection of tolerance, reconciliation and all the values underlying the Constitution”.⁵²

[66] Pride similarly, “associate(s) the Old Flag with autocracy, oppression and denial of human rights, injustice, inequality and hate.”⁵³

[67] The SAHRC testified that the Old Flag:

1 “constitutes a symbol of the racist and oppressive regime that governed South Africa prior to democracy and the dehumanising ideologies espoused during that regime, specifically that of the racial superiority of white South Africans and, inter alia, the corresponding inferiority of black South Africans”,⁵⁴ and

⁵⁰ Mandela Foundation’s founding affidavit para 14 (vol 1 p 12).

⁵¹ Mandela Foundation’s affidavit, para 18 (vol 1 p 14).

⁵² Mandela Foundation’s affidavit para 22 (vol 1 p 16).

⁵³ Pride’s expert affidavit para 29 (vol 2 p 146).

⁵⁴ SAHRC’s affidavit, para 24 (vol 3 pp 229 – 230).

- 2 “has also been adopted and used by white supremacists around the world as a symbol of hatred, oppression and racial superiority.”⁵⁵

[68] The Department (the State respondents), meanwhile, described the Old Flag as:

- 1 “a particularly invidious image used during apartheid as the national symbol of a country that created, promoted and brutally enforced a political system that, at its core, was aimed at discrimination and oppression”;⁵⁶
- 2 “the international symbol of apartheid”;⁵⁷
- 3 “an image [that] is widely, if not universally recognised, as one that promotes white racial supremacy”;⁵⁸ and
- 4 “akin and comparable to other international symbols of political oppression that comprise crimes against humanity as defined in the Rome Statute [of the International Criminal Court], for example the [Nazi] swastika as a symbol of ethnic genocide.”⁵⁹
- 5 The Department states further, about the Old Flag that:
 - a. “Its design encapsulates South Africa's history of colonialism, with references to the official flags of the Netherlands and United Kingdom, both of which colonised South Africa.”⁶⁰

⁵⁵ SAHRC's affidavit para 27 (vol 3 p 230).

⁵⁶ Department's affidavit para 31 (vol 3 pp 273 – 274).

⁵⁷ Department's affidavit para 31 (vol 3 p 274).

⁵⁸ Department's affidavit para 31 (vol 3 p 274).

⁵⁹ Department's affidavit para 32 (vol 3 p 274).

⁶⁰ 229:23.

- b. “(it) constitutes a symbol of the racist and oppressive regime that governed South Africa prior to democracy and the dehumanising ideologies espoused during that regime, specifically that of the racial superiority of white South Africans and, inter alia, the corresponding inferiority of black South Africans.”⁶¹
- c. “Moreover, the memory of apartheid is represented by the Old Flag. The use of such a symbol, otherwise than in accordance with the proviso in terms of section 12 of [the Equality Act] ..., recalls the inhuman sufferings, the oppressive ideologies and the lack of dignity, freedom and equality afforded to the majority of the country’s people under the apartheid regime.”⁶²

[69] Afriforum does not dispute any of these meanings, and itself testified that: “During Apartheid the Old Flag was held aloft as a symbol of the past regime’s power. At the time it was seen as a constant reminder of an oppressive and racist system.”⁶³ As to how it is currently received Afriforum concedes further and states: “Most South Africans recoil from the old flag and openly denounce Apartheid as a crime against humanity.”⁶⁴

[70] Only FAK begs to differ. It states:⁶⁵

“This is, with respect, a stereotyped view of the flag which has a far more complex history than this, and is capable of being viewed in ways other than being a flag that celebrates or promotes apartheid or ideas premised on racial superiority and inferiority, and that could only be displayed in a manner that is intended to be hateful or offensive.”

⁶¹ Rec 229:24.

⁶² Rec 229:25.

⁶³ Afriforum’s answering affidavit to the Mandela Foundation, para 60 (vol 1 p 98).

⁶⁴ Rec 98:58.

⁶⁵ FAK’s affidavit, para 8 (vol 3 pp 204 – 205).

Even in this very statement, FAK seems to concede a meaning attributed by others and asserts only that the Old Flag has other meanings as well. It “is capable of being viewed in ways other than being a flag that celebrates or promotes apartheid.”

[71] FAK testified that the Old Flag can also be seen as “a symbol of reconciliation and unity between the English- and Afrikaans-speaking population”,⁶⁶ and an “example of how two warring nations (the Boers and the British) found a way to reconcile”.⁶⁷ FAK thus claims that the Old Flag could be displayed “for reasons that are based on an appreciation of its culturally historic value.”⁶⁸

[72] FAK acknowledges that the Old Flag was not “fully representative of all the people of South Africa,”⁶⁹ but does not concede and thus fails to appreciate that this lack of full representation or non-inclusivity of black people is rooted in racism. FAK does not acknowledge that “the Boers and the British found a way to reconcile” only through the disenfranchisement, dispossession and denigration of black people, to the exclusive benefit of themselves as white people. It is difficult to see why FAK cannot see or acknowledge the obvious: a reconciliation between white Boers and white British and which excludes black people is simply racist. More so when there is no other justification. Froneman J and Cameron J describe these failures in *Tshwane v Afriforum* as follows:⁷⁰

“To deny these realities or avert one’s eyes to them lays one open to a charge that what one seeks to protect is not culture, but a heritage rooted in racism. The Constitution protects culture, yes, but not racism.”

⁶⁶ FAK’s affidavit, para 11 (vol 3 p 206).

⁶⁷ FAK’s affidavit, para 13 (vol 3 p 206).

⁶⁸ FAK’s affidavit para 21.3 (vol 3 p 209). The writer is not sure that its historic value as in 1927/28 can be countered. The dispute revolves around its exclusion of black people from that unity at the time and how it is objectively perceived today.

⁶⁹ FAK’s affidavit para 18 (vol 3 p 207).

⁷⁰ *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19; 2016 (6) SA 279 (CC) para [122].

[73] Even if the Boer-British reconciliation (symbolised by the Old Flag) was capable of “appreciation” for its “culturally historic value”, this appreciation would not qualify for recognition under the current Constitution. As Jafta J held, also in *Tshwane v Afriforum*:⁷¹

“There can be no justification for recognition of cultural traditions or interests ‘based on a sense of belonging to the place where one lives if those interests are rooted in the shameful racist past...”

Any claim to the enjoyment of culture may not include an entitlement to racist and oppressive cultural traditions of the colonial and apartheid era. Recognition of racist traditions is inconsistent with our constitutional order which seeks to establish ‘a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.’”

Dominant meaning

[74] Even if it were possible to construe a gratuitous display of the Old Flag as benign “appreciation” of its “culturally historic value” (which is not necessarily the case), that meaning cannot be its current dominant meaning. As Mogoeng CJ held in *Tshwane v Afriforum*:⁷²

“White South Africans must enjoy a sense of belonging. But unlike before, that cannot and should never again be allowed to override all other people’s interests. South Africa no longer ‘belongs’ to white people only. It belongs to all of us who live in it, united in our diversity. Any indirect or even inadvertent display of an attitude of racial intolerance, racial marginalisation and insensitivity, by white or black people, must be

⁷¹ Id para 169 and para 175.

⁷² Id para 11.

resoundingly rejected by all South Africans in line with the Preamble and our values, if our constitutional aspirations are to be realised.”

[75] To the majority of South Africans, and undoubtedly, to the majority of black South Africans, a gratuitous display of the Old Flag has, as its dominant meaning, an endorsement of the system of apartheid. Afriforum in fact concedes that “most South Africans recoil from the Old Flag and openly denounce apartheid as a crime against humanity.”⁷³

[76] Describing the strong constitutional rejection of the ugly pre 1994, Mahomed J (as he was then) held that the Constitution:

*“retains from the past only what is defensible and decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.”*⁷⁴

[77] The Old Flag is a symbol of “*that part of the past which is disgracefully racist, authoritarian, insular, and repressive*”. The dominant meaning of displaying the Old Flag (outside the context of genuine journalistic, artistic or academic endeavour) is an endorsement of precisely “that part of the past”.

[78] The meaning or meanings of the Old Flag falls to be determined in favour of one overriding, dominant meaning and in context it is this: that the gratuitous display of the Old Flag visually communicates a message of the belief in or support of racism, white supremacy and the subjugation of the black population. In short, the

⁷³ Afriforum’s answering affidavit to the Mandela Foundation para 58 (vol 1 p 98).

⁷⁴ *S v Makwanayane supra* (footnote 44 above) para [262].

Old Flag is, according to the dominant meaning, representative of apartheid, which has been declared a crime against humanity.

Non-Dominant Meaning

[79] The FAK holds a singularly different view to that of the other parties to the application.⁷⁵ It advances the contention that the image is capable of an alternative meaning and that meaning is that it is “a symbol of reconciliation and unity between the English- and Afrikaans-speaking population”.⁷⁶ FAK does not suggest that the image is capable of being viewed with any perception of reconciliation or unity with the majority black. Even on their version, the Old Flag is therefore discriminatory; and based on a minority perception, it is therefore inherently exclusionary of the black majority population who are not recognised or acknowledged in the image.

[80] The FAK’s alternative meaning is fundamentally flawed. It is also not advanced as the dominant interpretation of the image. As such, on an application of the applicable legal principles, the proposed interpretation does not meet the legal threshold. It falls short even of the Afriforum admission that the Old Flag is offensive in the context of a post 1994 democratic society. In short, the image represented the unity and reconciliation of the two groups that proceeded to brutally oppress the African majority through apartheid. The non-dominant meaning is stark in history at 1928 and has no place in the current democratic inclusive society.

International perspective

⁷⁵ FAK affidavit vol 3 pp 204 – 205 para 8 – 11.

⁷⁶ FAK affidavit vol 3 p 206 para 11.

[81] The Old Flag operated as the national flag of apartheid South Africa, and therefore an image that represented the country internationally. This requires consideration of the international dominant meaning of the Old Flag.

[82] In the Minister's affidavit,⁷⁷ it is recognised that apartheid was declared a crime against humanity by the United Nations in the Convention on the Suppression and Punishment of the Crime of Apartheid (General Assembly Resolution 3068, 1976 and the 2002 Rome Statute). This action was a culmination of prior steps of condemnation against the policy of apartheid adopted by the international community: Apartheid was annually condemned by the United Nations from 1952 to 1990 as inimical to Articles 55 and 56 of the United Nations Charter, 1945:

"Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nation shall promote:

- a. Higher standards of living, full employment, and conditions of economic and social progress and development;*
- b. Solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and*
- c. Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.*

Article 56

⁷⁷ Minister answering affidavit vol 3 p 272 par 27.

All members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55.”

[83] In 1966, the General Assembly labelled apartheid as a crime against humanity⁷⁸ and, in 1984, the Security Council endorsed this determination.⁷⁹

[84] The International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973 (entry into force 1976) declares in Article I (1):

“The States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.”

[85] Article II continues, that:

“the term ‘the crime of apartheid’, which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of person and systematically oppressing them...”

[86] Article III states that international criminal responsibility applies to individuals, members of organisations and representatives of the State who commit, incite or conspire to commit the crime of apartheid.

⁷⁸ GA Resolution 2202 A (XXI) of 16 December 1966.

⁷⁹ SC Resolution 556 (1984) of 23 October 1984.

[87] The Rome Statute, 2002 recognises the crime of apartheid as a particularly pernicious crime against humanity in Article 7(1)(j) and describes the crime in Article 7(2)(h) as:

“inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime”

[88] The dominant and international law perspective on the point is underscored by:

- 1 The near uniform adoption of the two conventions. The 1976 Convention was adopted with 91 votes, four against (Portugal, South Africa, the United Kingdom and the United States) and 26 abstentions.⁸⁰ As at August 2008, the Convention had been ratified by 107 States. The Rome Statute was adopted by 139 States with 118 ratifications.
- 2 The fact that despite the end of apartheid as a political system in South Africa, it lives on as a specie of the crime against humanity. Both under customary international law⁸¹ and the Rome Statute of the International Criminal Court.
- 3 The Rome Statute was adopted and signed on 17 July 1998 by a majority of states attending the Rome Conference, including the new democratic South Africa. South Africa ratified the

⁸⁰ United Nations Audio-Visual Library of International Law, available at <http://legal.un.org/avl/ha/cspca/cspca.html> (accessed 21 February 2019).

⁸¹ Customary international law consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way and includes:

- a) The widespread repetition by States of similar international acts over time (State practice);
- b) The requirement that the acts must occur out of a sense of obligation (*opinio juris*); and
- c) That the acts are taken by a significant number of States and not rejected by a significant number of States.

Rome Statute on 27 November 2000 and, in accordance the obligation of states parties, South Africa passed the Implementation of the Rome Statute of the International Criminal Court, 2002⁸² on 16 August 2002 which is now the domestic law giving effect to the Rome Statute in South Africa. Therefore, apartheid which is represented by the Old Flag must, in South Africa, as in the international arena, be acknowledged and classified as a crime against humanity.

- 4 As evidenced in the affidavit of the SAHRC, the Old Flag is an internationally understood symbol of white supremacy⁸³ and as stated in the Minister's affidavit is "an image that was the international symbol of apartheid".⁸⁴

[89] For these reasons, the dominant meaning attributable to the Old Flag, both domestically and internationally, is that it is for the majority of the South African population a symbol that immortalises the period of a system of racial segregation, racial oppression through apartheid, of a crime against humanity and of South Africa as an international pariah state that dehumanised the black population.

[90] A practical meaning of the Old Flag was demonstrated, as the Department points out, by the fact that it is adopted and used internationally by white supremacists around the world as a symbol of hatred, oppression and racial superiority. In the United States of America, for example, the Old Flag was worn by convicted murderer, Dylann Roof, on the day he shot and killed nine black people at a church in Charleston, South Carolina in 2015.⁸⁵ Most peace loving South Africans who may otherwise have been inclined to support the Old Flag, must feel ashamed when such incidences occur.

⁸² Act 27 of 2002.

⁸³ SAHRC joinder application para 23.7.

⁸⁴ Department answering affidavit vol 3 p 273 para 31.

⁸⁵ Rec 230:27.

[91] The Old Flag is associated with the shameful apartheid policy with which most peace-loving South Africans, of all races, do not wish to be associated.

[92] It is now necessary, to consider hate speech in South Africa, and against the history and meaning of the Old Flag, to determine whether a gratuitous display of that flag constitutes hate speech.

Hate Speech

Dictionary Meaning

[93] The ordinary grammatical meaning of the expression “hate speech” as used in everyday language is the dictionary meaning⁸⁶.

[94] The *Oxford Dictionary* meaning of “hate speech” is: “speech expressing hatred / intolerance of other groups, especially on the basis of race, gender etc.”⁸⁷ The *Miriam Webster Dictionary* defines “hate speech” as: “speech expressing hatred of a particular group of people”.⁸⁸ *Cambridge Dictionary* explains it as: “public speech that expresses hate or encourages violence towards a person or group based on something such as race, religion, sex, or sexual orientation.”⁸⁹ *Harper Collins English Dictionary* describes it as “speech disparaging a racial, sexual, or ethnic group or a member of such group”⁹⁰ In short it is speech and expresses hatred towards a person or his or her group based on race or other attributes such as religion, sex, ethnicity, sexual orientation and the like. It may even, but does not necessarily, encourage violence towards the group or a member of such group.

⁸⁶ A dictionary meaning of hate speech is hard to come by in old printed versions of dictionaries. However, the internet / website versions of some dictionaries do shed some light, as I shall set out.

⁸⁷ <https://en.oxforddictionaries.com> (accessed on 16 October 2018)

⁸⁸ <https://www.merriam-webster.com/dictionary/hate%20speech>. (accessed on 27 June 2019)

⁸⁹ <https://dictionary.cambridge.org/dictionary/english/hate-speech>. (accessed on 16 October 2018 and 27 June 2019)

⁹⁰ <https://www.collinsdictionary.com/dictionary/english/hate-speech>(accessed on 27 June 2019)

Legislation

[95] Section 10(1) prohibits hate speech and provides:

“Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to –

- (a) be hurtful;*
- (b) be harmful or to incite harm;*
- (c) promote or propagate hatred.”*

[96] ‘*Prohibited grounds*’ as defined by the Equality Act is fairly broad, and includes race, sexual orientation “*or any other ground where discrimination based on that other ground causes or perpetuates systemic disadvantage or undermines human dignity.*”⁹¹

[97] The proviso in section 12, states that any:

“...bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by the section.”

[98] The section needs to be interpreted together with its proviso, in order to answer the question, having regard to the explanation of the Old Flag and its meaning,

⁹¹ Section 1(1) of the Equality Act defines prohibited grounds as follows:

“ ‘prohibited grounds’ are:

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or*
- (b) any other ground where discrimination based on that other ground –*
 - i. causes or perpetuates systemic disadvantage;*
 - ii. undermines human dignity; or*
 - iii. adversely affects the enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).”*

whether a gratuitous display of the Old Flag constitutes hate speech under section 10(1) of the Equality Act.

[99] It is proposed to approach the interpretation within a framework, which is mandated by the Constitution, international law, the Equality Act itself and with the benefit of comparative law. It is an approach which we shall refer to as the legal interpretive framework. It is then proposed to have regard to the purpose and objects of the Equality Act and the language of section 10 itself.

Legal interpretive framework

The Constitution as an interpretive aid

[100] The first duty is for the Court to interpret the hate speech provisions having regard to and in accordance with the approach mandated by the Constitution. What then is the duty that the Constitution places on the courts when interpreting legislation?

[101] Section 39(2) of the Constitution provides that:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.” (Emphasis added)

[102] This duty upon a court to interpret legislation in a manner consistent with the Bill of Rights was set out by the Constitutional Court in the case of *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors and Others v Smit NO and Others*⁹² (*Hyundai*) as follows:⁹³

“The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently

⁹² 2001 (1) SA 545 (CC).

⁹³ *Hyundai* at para [22].

with this, when the constitutionality of legislation is in issue, they are under duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as possible, in conformity with the Constitution” (Emphasis added)

[103] Human dignity, equality and freedom are imperatives underpinning this constitutional injunction. The Constitutional Court in *Hyundai* quoted with approval an extract from the judgment of Ackerman J in the case of *De Lange v Smuts NO and Others*⁹⁴ (“*De Lange*”) where he stated that the principle of reading legislation in conformity with the Constitution does –

*“no more than give expression to a sound principle of constitutional interpretation recognised by other open and democratic societies based on human dignity, equality and freedom such as, for example, the United States of America, Canada and Germany, whose constitutions, like our 1996 Constitution, contain no express provision to such effect. In my view, the same interpretative approach should be adopted under the 1996 Constitution.”*⁹⁵

[104] The approach in *Hyundai* that legislation must be interpreted through the lens of section 39(2) of the Constitution, is only possible where a constitutional interpretation can be reasonably ascribed to the wording of the section of the legislation under review.⁹⁶ In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (“*National Coalition*”) the Constitutional Court held that –

“There is, it is true, a principle of constitutional interpretation that where it is reasonably possible to construe a statute in such a way that it does not give rise to a constitutional inconsistency, such a construction should be preferred to another construction which, although also reasonable, would give rise to such inconsistency. Such a construction is not a

⁹⁴ 1998 (3) SA 785 (CC).

⁹⁵ *Hyundai* at para [23]; *De Lange* at para [85].

⁹⁶ *Hyundai* at para [23].

reasonable one, however, when it can be reached only by distorting the meaning of the expression being considered."⁹⁷

[105]In the same case the Constitutional Court stated that interpreting legislation in a manner consistent with section 39(2) of the Constitution is an interpretive process which "*is limited to what the text is reasonably capable of meaning.*"⁹⁸

[106]The above requirements, which shall be referred to as the *Hyundai* test, require that the court:

- 1 Consider the objects and purport of the legislation under scrutiny; and
- 2 Read the provisions of the legislation as far as possible in a manner which is consistent with the Constitution, to the extent that the text is reasonably capable of bearing such a meaning.

[107]The above principles of constitutional interpretation accord with the approach reiterated and confirmed in a number of Constitutional Court decisions over a long time.⁹⁹ The principles are thus by now trite.

International law as an interpretive aid

⁹⁷ 2002 (2) SA 1 (CC) at para 23.

⁹⁸ *National Coalition* at para 24.

⁹⁹ The principle was stated succinctly by Ackerman J in *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003 (4) SA 1 (CC) at para 35 where it was held as follows: "A settled principle of constitutional construction recognises that a statutory provision may be capable of more than one reasonable construction. If the one construction leads to a constitutional invalidity but the other not, the latter construction, being in conformity with the Constitution, must be preferred to the former, provided always that such construction is reasonable and not strained." See also *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another* 2003 (3) SA 513 (CC) at para 37; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 290 (CC); *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) (in considering the interim Constitution). In his dissenting judgment in the case of *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC) at par 108, confirming the principle, Yacoob J stated that: "There is a long line of judgments of this court in which we have repeatedly emphasised the rule, by now axiomatic, that where a statutory provision is reasonably capable of a construction that would bring it in line with the Constitution, it is that construction which must be preferred provided that it is not strained."

[108] An equally important provision of the Constitution is section 39(1)(b) which requires that international law must be used as an interpretive aid when the court interprets the rights set out in the Bill of Rights.¹⁰⁰ International law is thus key when interpreting rights in the Bill of Rights.

[109] The provisions of section 10 of the Equality Act are inextricably linked to the Bill of Rights. As set out below, section 10(1) gives effect to the following sections of the Constitution: section 9 (the right to equality), section 10 (the right to dignity), and section 16(2)(c) (the exclusion of hate speech from the ambit of the right to expression). Similarly, section 7 of the Equality Act that forbids unfair racial discrimination is linked to sections 9 and 10 of the Constitution. Section 11 of the Equality Act is also linked to both constitutional rights, and possibly other rights in the Bill of Rights. Therefore, a court interpreting these sections must have regard to international law. However, for now we focus on section 10(1) read together with the proviso which deals with hate speech and shall revert later to the other impugned provisions of the Equality Act to the extent necessary.

[110] In addition to the two constitutional injunctions, more directly section 233 of the Constitution requires that:

“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.” (Emphasis added)

[111] The Constitutional Court in *Glenister v President of the Republic of South Africa* (“*Glenister*”) emphasised the role of international law as an interpretive aid when it stated as follows:¹⁰¹

¹⁰⁰ Section 39(1)(b) provides that “[w]hen interpreting the Bill of Rights, a court, tribunal or forum - ...must consider international law.”

¹⁰¹ 2011 (3) SA 247 (CC) at para 97.

“Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law. Firstly, s 233 requires legislation to be interpreted in compliance with international law; secondly, s 39(1)(b) requires courts, when interpreting the Bill of Rights, to consider international law...These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.” (Emphasis added)

[112]The Supreme Court of Appeal (“SCA”) also emphasised this principle in *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others*.¹⁰² The SCA noted that our Constitution—

“decrees that, when interpreting any legislation, the courts must prefer a reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

[113]To sum up, the requirements of the Constitution as considered by our highest courts may be stated as follows: Both the Constitution and South African law in general must be interpreted in a manner which complies with international law, if such an interpretation is a reasonable one. It follows then that when section 10(1) of the Equality Act is interpreted, its meaning should be interpreted in a manner which is consistent with international law. If the interpretation of the section that is consistent with international law is reasonable, then that interpretation is to be preferred to an interpretation which is inconsistent with international law.

Comparative foreign law as a possible interpretive aid

[114]South African jurisprudence does not develop in isolation to other comparable legal systems, though our courts are not bound by their jurisprudence. This includes but is not limited to our human rights jurisprudence.

¹⁰² 2016 (3) SA 317 (SCA) at para 62.

[115]Our courts have thus regularly referred to foreign jurisprudence to assist them in the interpretation of legislation and the development of the common law. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,¹⁰³ the SCA considered and made extensive reference to foreign jurisprudence in the context of reformulating the common-law approach to the interpretation of statutes. In *S v Makwanyane* the Constitutional Court emphasised that “our courts can derive assistance from...foreign case law, but we are in no way bound to follow it.”¹⁰⁴ In *Masstores (Pty) Ltd v Pick ‘n Pay Retailers (Pty) Ltd*¹⁰⁵ the Constitutional Court determined Aquilian liability in the context of unfair competition and, with reference to its earlier decision in *Makwanyane*, made a similar pronouncement in relation to foreign comparative law.

[116]Furthermore, section 39(1)(c) of the Constitution provides expressly that courts “may consider foreign law” when interpreting the Bill of Rights. A similar principle will apply when courts interpret legislation that impacts on or gives effect to the Bill of Rights. In *President of the RSA v M & G Media Ltd*¹⁰⁶ the Constitutional Court sought to interpret how the state discharges the burden under section 81(3) of the Promotion of Access to Information Act 2 of 2000 (PAIA) of establishing that its refusal to grant access to a record is justified. In doing so the Court had regard to foreign comparative legislation, and held as follows:

“Before formulating the standard to assess whether the State has properly discharged its burden under s81(3), it is desirable to consider foreign jurisprudence dealing with comparable legislation, as we are encouraged to do by s39(1)(c) of the Constitution. Foreign jurisprudence is of value because it shows how courts in other jurisdictions have dealt with the issues that confront us in this matter. At the same time, it is important to appreciate that foreign case law will not always provide a safe guide for the interpretation of our Constitution. When developing our jurisprudence in matters that involve constitutional rights, as the present

¹⁰³ 2012 (4) SA 593 (SCA).

¹⁰⁴ 1995 (3) SA 391 (CC) at para 39.

¹⁰⁵ 2017 (1) SA 613 (CC) at para 46.

¹⁰⁶ 2012 (2) SA 50 (CC).

case does, we must exercise particular caution in referring to foreign jurisprudence.”

[117]In the present instance, it is accordingly appropriate for this Court to make reference to foreign law in considering the proper scope and application of the Equality Act, particularly section 10. This is more so the case because of the direct effect the applicants’ interpretation of the Equality Act has on the right to equality in section 9, the right to dignity in section 10, and on the limitation of the right to freedom of expression in section 16(2)(c).

The interpretive injunction in section 3 of the Equality Act

[118]In addition to the injunctions and guidelines provided by the Constitution as the supreme law of the land, the Equality Act itself provides important pointers to those who have to interpret and apply its provisions. Section 3 of the Equality Act expressly echoes the above duties to interpret that Act in a manner that accords with its purpose, in consonance with the Constitution, in accordance with international law, and possibly having regard to foreign comparative law. It goes further, however, by introducing context as an interpretive marker.

[119]Section 3(1) of the Equality Act provides that –

“Any person applying this Act must interpret its provisions to give effect to –

- (a) *the Constitution, the provisions of which include the promotion of equality through legislative and other measures designed to protect or advance persons disadvantaged by past and present unfair discrimination;*
- (b) *the Preamble, the objects and guiding principles of this Act, thereby fulfilling the spirit, purport and objects of this Act.”* (Emphasis added)

[120]Section 3(2) of the Equality Act provides that –

“Any person interpreting this Act may be mindful of –

- (a) any relevant law or code of practice in terms of a law;*
- (b) international law, particularly the international agreements referred to in section 2 and customary international law;*
- (c) comparable foreign law.” (emphasis added)*

[121]Section 3(3) of the Equality Act requires that any person applying or interpreting the Act “*must take into account the context of the dispute and the purpose of this Act*.” (Emphasis added)

[122] To sum up, the applicable principles with regard to the legal interpretive framework: A court must interpret the relevant sections of the Equality Act in a manner which best accords with the legal interpretive framework set out above. The framework requires the following. Sections of the Equality Act, including section 10(1), must be given a meaning which its wording is reasonably capable of bearing. That interpretation must accord with the objects of the Equality Act. Where there are multiple interpretations, the interpretation that is adopted must be consistent with international law. That interpretation can be assessed against comparative foreign law. It must further take into account the context of the dispute. And, most importantly, it must give effect to the spirit, purport and objects of the Bill of Rights and ensure that sections of the Equality Act are generally consonant with the Constitution.

[123]It is apposite therefore that this Court must have regard to the purpose of hate speech under section 10(1) of the Equality Act.

[124] Section 2 of the Equality Act sets out its objects in relevant part as follows:

“The objects of this Act are –

- (a) to enact legislation required by section 9 of the Constitution;*

- (b) to give effect to the letter and spirit of the Constitution, in particular
-
- (i) the equal enjoyment of all rights and freedoms by every person;
 - (ii) the promotion of equality;
 - (iii) the values of non-racialism and non-sexism contained in section 1 of the Constitution;
 - (iv) the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution;
 - (v) the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution and section 12 of this Act;
- (c) ...
 - (d) ...
 - (e) ...
 - (f) ...
 - (g) ...
 - (h) to facilitate further compliance with international law obligations including treaty obligations in terms of, amongst others, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women". (Emphasis added)

[125] Section 10 of the Equality Act must thus further be interpreted and ascribed a meaning which it can reasonably bear having regard to these objects when viewed in light of the Constitution.

Language of section 10

[126] Against the backdrop of the above interpretive framework, one should drill down to the language of section 10 to determine its meaning in relation to the issue at hand. It bears recalling its language:

"10 Prohibition of hate speech

(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to –

- (a) be hurtful;*
- (b) be harmful or to incite harm;*
- (c) promote or propagate hatred.*¹⁰⁷

And the proviso in section 12 reads:

“...bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded ...”
 ” (Emphasis added)

[127] The first respondent, Afriforum, relies on a literal reading and interpretation of section 10(1) and contends that because the hate speech prohibition therein refers to “words”, it does not apply to the display of the Old Flag which is a symbol and not words.¹⁰⁸ The literal interpretation it seeks to rely on fails to have regard to the relevant principles of interpretation articulated above as the legal interpretive framework.

[128] The reference to “words” in section 10(1) must be given a generous and wide meaning going beyond mere verbal representations. There are at least four textual markers which indicate this, two of which are directly located in section 10 itself.

¹⁰⁷ ‘Prohibited grounds’, as pointed out in para [97] and footnote 90 above, fairly wide. It is defined in section 1(1) of the Equality Act to mean “any other ground where discrimination based on that other ground causes or perpetuates systemic disadvantage [or] undermines human dignity”.

¹⁰⁸ Rec 87:29; See also para [5] in the introduction above.

[129] Firstly, the heading of section 10 contemplates the “Prohibition of hate speech” (emphasis added). When regard is had to the purpose for which the Equality Act was enacted, the provisions of the Constitution, international law and comparative foreign law, “speech” must be widely interpreted to mean all forms of expression of ideas. It is not limited to verbal representations. This is dealt with further below. The essence of speech is communication. This in turn suggests that “words” in section 10(1) should not be taken literally, but should be given a wider meaning, in order to achieve its purpose and the broad purpose of the Equality Act. It must include in this regard all hate speech however expressed. “Speech” is certainly already wider than “words” and sits comfortably with the section read as a whole and in the context of the entire Equality Act.

[130] Secondly, section 10(1) provides that nobody may “propagate” or “advocate” hateful “words”. These verbs are ill-fitting if “words” is taken literally. How does one “propagate” or “advocate” words? But ideas can be “advocated” or “propagated”. In order for these two verbs to make sense and be given their full meaning, the prohibition must apply to “ideas”, irrespective of how those ideas are expressed. Not only will these two verbs make sense, but the rest of the verbs also sit comfortably and retain a sensible meaning. Thus, the effect will be that: no person may publish, propagate or communicate *words / ideas* based on prohibited grounds with a clear intention to be hurtful, harmful, incite harm, promote or propagate hatred.

[131] Similarly, one does not “communicate” words. What is being communicated is the meaning conveyed, words being a medium (and not the only one). All the verbs employed in the section are consistent with a wider meaning being attributed to “words”. Hence it makes sense and it is consistent with the purpose of the Equality Act, the Bill of Rights and international law for the section to provide that no person may publish, propagate, advocate or communicate *speech, ideas, ideologies, beliefs, meaning, instructions* (etc) based on one or more of the prohibited grounds with the intention to achieve the stated effects. This wider

meaning gives the subsection, read as a whole, a sensible and reasonable interpretation and which fits in with the interpretive framework set out above.

[132] “Words” in section 10(1) of the Equality Act may be interpreted to mean ideas, ideologies, beliefs, instructions, etc conveyed by the words. Words thus mean what the words convey or mean and not just a conglomeration of letters, which though constituting a word or words may be meaningless in a particular context. What the section targets is thus the meaning behind words and not simply words, although the subject of the verbs is stated as “words”. What is behind words, that is, their meaning, may be represented by verbal and non-verbal expressions. A wider meaning is thus clearly the most sensible, reasonable and consistent with the principle-based interpretive framework. It is the correct meaning.

[133] Thirdly, one of the objects of the Equality Act, set out in section 2(b)(v), is to give effect to “the letter and spirit of the Constitution”, in particular the exclusion from constitutional protection of “advocacy of hatred, based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm: as contemplated in section 16(2)(c) of the Constitution”. The notion of “advocacy of hatred” set out in section 2(b)(v) of the Equality Act is broad. It cannot be interpreted narrowly to mean only words. That would run completely contrary to “the letter and spirit of the Constitution”. This is a further reason why “words” in section 10(1) cannot be taken literally. Instead, section 10 must be read as prohibiting any “advocacy of hatred” which may manifest itself in any expression of ideas.

[134] Fourth, the prohibition in section 10 is expressly made subject to the proviso in section 12 which reads as follows:

“Provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.”

[135]The proviso clearly excludes the expression of ideas, not only by words, but also by artistic means. It makes sense only if the prohibition in section 10 is also understood to apply to all expression of hateful ideas, whether by word or conduct.

“Advocacy of hatred” - same meaning

[136]The relevant section in the Bill of Rights itself does shed light on a proper interpretation of section 10 of the Equality Act. Section 16(1) of the Bill of Rights protects freedom of expression. Section 16(2), however, excludes certain categories of speech from the protection of section 16(1). Section 16(2)(c) removes hate speech from the protection of section 16(1) by excluding any *“advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”* (Emphasis added) One sees immediately the expression “advocacy of hatred” which is echoed and repeated in section 2(b)(iv) of the Equality Act.¹⁰⁹ That expression where it appears in section 2(b)(iv) of the Equality Act must bear the same meaning as it bears in section 16(2)(c) of the Bill of Rights.

[137]The prohibition in section 10 of the Equality Act is intended *inter alia* to prohibit the kind of speech excluded from protection by section 16(2)(c) of the Bill of Rights. The Bill of Rights does not confine the exclusion to hate speech expressed in words. It thus applies to the advocacy of hatred by any means, whether by word or conduct.

[138]The Constitutional Court made this clear in *Islamic Unity Convention v Independent Broadcasting and Others (Islamic Unity Convention)* when explaining what genuine hate speech is:

“Section 16(2) (c) is directed at what is commonly referred to as hate speech. What is not protected by the Constitution is expression or speech

¹⁰⁹ See also para 133 above.

*that amounts to 'advocacy of hatred' that is based on one or other of the listed grounds, namely race, ethnicity, gender or religion and which amounts to 'incitement to cause harm.'*¹¹⁰ (Emphasis added)

The Constitutional Court here makes it clear that unprotected hate speech is “expression or speech”. It is not limited to words – the narrow interpretation that is rejected. Although this was stated in the interpretation of the Constitution, it is an interpretation with which section 10 of the Equality Act must be aligned.

[139] Section 10 must accordingly be interpreted to do likewise. It would be irrational to limit its prohibition to the advocacy of hatred by words but not by other means because the main purpose of section 10 of the Equality Act is to prohibit all hate speech. This is evident from the broad prohibition against the “advocacy of hatred” set out in section 2(b)(iv), describing an object of the Act.

Interpretation advocated by Afriforum – untenable

[140] The interpretation that Afriforum advocates violates the Constitution in several respects and is therefore untenable and unsustainable in several respects as I shall demonstrate, particularly because Afriforum does not seek constitutional invalidity.

Equality

[141] Afriforum submits that section 10(1) of the Equality Act applies only to hate speech communicated by “words”. If it were so, then the State would not be adequately protecting the rights to dignity and protection against unfair discrimination of people who are subjected to hateful communication expressed in a form other than words. In other words, people who experience hate speech communicated by other forms of expression than words would not have any

¹¹⁰ 2002 (4) 294 (CC) at para 33.

protection or remedies under section 10 of the Equality Act. This interpretation does not make sense and runs counter to the objects of the Act and all the principles in the interpretive framework.

[142] The legislature could not have intended for this to be the case. Such an interpretation is untenable. It does not accord with the wording of section 10(1) of the Equality Act as described above.

[143] This interpretation would also irrationally differentiate between hate speech by language (which is prohibited) and hate speech by other means (which is not prohibited). It would run contrary to one of the objects of the Equality Act set out in section 2(b)(i), namely to give effect to the letter and spirit of the Constitution, in particular the equal enjoyment of all rights and freedoms by every person. And it would directly fall foul of the fundamental right to equality in section 9 of the Constitution which provides in section 9(1) that “everyone is equal before the law and has the right to equal protection and benefit of the law.”

[144] Section 9(4) of the Constitution requires parliament to enact legislation “to prevent or prohibit unfair discrimination”. The Equality Act was enacted to fulfil this duty.¹¹¹ If the prohibition of hate speech (which is a form of unfair discrimination) is limited to hate speech expressed in words, and does not extend to hate speech expressed in other forms of expression, the prohibition of hate speech in section 10 and the Equality Act itself would fall short of the obligation imposed on parliament by section 9(4) of the Constitution to prohibit all forms of unfair discrimination (and not just discrimination expressed in the form of words).

[145] In order to pass constitutional muster, the exercise of public power must be rationally related to the purpose sought to be achieved by the exercise of that power.¹¹² The restriction of the prohibition of hate speech to words only would not achieve the purpose of the Equality Act which is to prohibit all forms of hate

¹¹¹ Section 2(b)(iv) of the Equality Act.

¹¹² *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at para 49 – 50.

speech and unfair discrimination. The restriction is accordingly irrational, clearly unlawful and must be rejected.

Dignity

[146] This narrow interpretation would also be contrary to the object of the Equality Act set out in section 2(b)(iv) as it would undermine the right to dignity. Human dignity informs the interpretation of all other rights, including the right to freedom of expression and the right to equality.¹¹³ The right to freedom of expression must be realised in a manner that does not violate the dignity of others. And, as described above, the right to equality must be realised in a manner that ensures everyone is equal before the law and has the right to equal protection and benefit of the law, so as to ensure their dignity.

[147] If section 10(1) of the Equality Act was read as prohibiting literally only “words” it would directly contravene the right to dignity (in section 10 of the Constitution) of victims of non-verbal hate speech. This is because it would result in such victims being forced to endure hatred and suffer affronts to their dignity without the protection of section 10 of the Equality Act simply because the aggressor chose to express their hatred in a non-verbal manner. The absurdity of the interpretation by Afriforum is demonstrated by an example put forward by counsel: where section 10 of the Act would prohibit a white racist from describing a black colleague as “baboon” in front of other colleagues, but not prohibit him from circulating an image of the same colleague’s face superimposed on the body of a baboon. The restriction of hate speech under section 10(1) literally to “words”, in this context, would not only undermine the right to dignity, but would also “*lead to an absurdity so glaring that it could not have been contemplated by the legislature*”.¹¹⁴ It is unjustifiably narrow and unconstitutional.

¹¹³ *Dawood and another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para 35.

¹¹⁴ *Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Another as Amici Curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC) at para [232] where the CC adopted the interpretive rule laid down century ago in *Venter v R* 1907 TS 910 at 915.

International Law

[148] Article 20, paragraph 2 of the International Covenant on Civil and Political Rights (ICCPR), ratified by South Africa on 10 December 1998, provides that:

“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” (Emphasis added)

[149] Furthermore, Article 4 of the 1965 International Convention on the Elimination of All forms of Racial Discrimination (ICERD), ratified by South Africa on 09 January 1999, states that:

“State Parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

- (a) *Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racists activities, including the financing thereof.* (Emphasis added)

[150] The ICCPR prohibits “any advocacy” of racial hatred. The ICERD provides that all state parties (including South Africa) shall eradicate “all incitement to, or acts of, such discrimination”. It furthermore requires them to declare “all dissemination of ideas” based on racial superiority, hatred, discrimination, acts of violence and incitement to such acts, offences punishable by law. Both instruments are broad in their ambit. They embrace the prohibition of hate speech in the widest sense to

include any expression of ideas. Neither instrument draws a distinction between verbal and non-verbal advocacy or communication of racial hatred.

[151] As a state party to both the ICCPR and ICERD, South Africa is obliged to comply with these provisions. Accordingly, at least under international law, South Africa is obliged by both instruments to promulgate laws which prohibit hate speech in the widest sense so as to include any expression of ideas.

[152] This Court is enjoined to give effect to the objects of the Equality Act. One of the objects of the Equality Act, set out in section 2(h), is “*to facilitate further compliance with international law obligations*”. Furthermore, in accordance with section 233 of the Constitution, the Court must prefer the applicants’ reasonable interpretation which is consistent with international law over respondents’ alternative interpretation that is inconsistent with international law. In other words, section 10(1) of the Equality Act must be interpreted in a manner that prohibits any manner of expression which constitutes hate speech, and not just words or verbal expressions. Such an interpretation complies with the constitutional imperative of ensuring consistency with international law. It also accords with one of the objects of the Equality Act, namely to facilitate compliance with international law.

[153] When interpreting and applying section 10 of the Equality Act, a court having regard to this context should not limit the scope of the prohibition of hate speech in section 10(1) to literally only “words”, thereby allowing expressions of hatred in non-verbal forms to escape prohibition.

Comparative Law

[154] The United States First Amendment prohibits the abridgment only of “speech”¹¹⁵ - not “conduct” or “expression”. But the US courts have long recognised that

¹¹⁵ The First Amendment to the Constitution of the United States provides as follows:

“speech” under the First Amendment is not limited to words, but extends to the communication of ideas in the form of conduct and gestures.

[155] Thus in *Spence v Washington* the US Supreme Court held that the First Amendment extends to non-verbal conduct, including the display of the national flag, if such conduct is “sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.”¹¹⁶ The test to determine whether the particular conduct possesses sufficient communicative elements is whether “[a]n intent to convey a particularised message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.”¹¹⁷

[156] In *Texas v Johnson* (“*Johnson*”) the majority of the US Supreme Court held that the public burning of the national flag, in the context – at a demonstration held in protest of the Reagan administration and certain Dallas-based corporations – constituted “expressive conduct” which was protected under the US First Amendment.¹¹⁸ The court in *Johnson* also made the following instructive remarks regarding why conduct involving a national flag would fall under the notion of “speech” in the First Amendment:

“That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, the one visible manifestation of...nationhood.”

...

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” (Emphasis added).

¹¹⁶ *Spence v Washington* 418 U.S. 405, 409 – 411 (1974) at 409. Spence had attached a peace sign to the national flag and displayed it out of his apartment window as a form of protest against the invasion of Cambodia and the killings at Kent State University, events which occurred a few days prior to Spence’s arrest. This conduct was held to fall within the scope of the First Amendment.

¹¹⁷ *Spence* 410 – 411.

¹¹⁸ *Texas v Johnson* 491 US 397 (1989) at 406.

Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in 'America'.” (Emphasis added)¹¹⁹

[157] The Supreme Court in *Johnson* also relied on *West Virginia State Board of Education v Barnette*¹²⁰ (“*Barnette*”), a case about certain laws and regulations that required public school learners to salute the national flag, failing which a learner could be expelled on the basis of insubordination. The Court in *Barnette*¹²¹ made the following instructive obiter statement regarding a gesture (the flag salute) that was required to be performed as a sign of respect and of loyalty to the US, which the Court found to constitute “speech” under the US First Amendment:

“[T]he flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolise some system, idea, institution, or personality, is a shortcut from mind to mind.

Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a colour or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideals just as religious symbols come to convey theological ones.”
(Emphasis added)

[158] The following words of the US Supreme Court in the above obiter are instructive:

“[T]he flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolise some system, idea, institution, or personality, is a shortcut from mind to mind...Symbols

¹¹⁹ *Johnson* at 405.

¹²⁰ 319 US 624 (1943).

¹²¹ At 632.

of State often convey political ideas just as religious symbols come to convey theological ones.”

[159]It is thus reasonable to interpret “words” in section 10(1) of the Equality Act to include non-verbal expressions of ideas. This would be analogous to the broad manner in which the US courts have interpreted the term “speech” under the US First Amendment. The use of symbols is indeed “a short cut from mind to mind”. They communicate just as with words do.

Context

[160]Section 3(3) of the Equality Act requires that any person applying or interpreting the Act “must take into account the context of the dispute and the purpose of this Act”.

[161]The present case vividly illustrates this point. The display of the Old Flag is extremely hurtful and dehumanising to those who suffered under apartheid. The message generally communicated by displays of the Old Flag indicates a symbol of support for and promotion of the racist ideologies espoused under the apartheid regime. This communication, in turn, promotes hatred and harm towards those who suffered, and continue to suffer, as a result of this regime and has the potential to diminish their suffering or indicate a support for such suffering – a clear affront to the dignity of those who suffered as a result of the racist and dehumanising policies of apartheid.

[162]In interpreting and applying section 10 of the Equality Act, a court having regard to this context should not limit the scope of the prohibition of hate speech in section 10(1) to literally only “words”, thereby allowing expressions of hatred in non-verbal forms to escape prohibition.

Conclusion on “words” in section 10

[163] To sum up and conclude: Section 10 of the Equality Act should be interpreted in a manner that prohibits all expressions of ideas, verbal and otherwise (including the displaying of a flag), that amount to hate speech. Accordingly, “words” in section 10(1) must not be read literally. It must be interpreted to be wide enough to include expression of ideas such as the waving of a flag. Such an interpretation is not unreasonable. Instead, it ascribes a meaning to section 10(1) and “words” which is reasonably capable of being borne. It accords with the objects of the Equality Act. It is consistent with international law. It is not out of kilter with comparative foreign law. It takes into account the context of the dispute. And, most importantly, it gives effect to the spirit, purport and objects of the Bill of Rights and ensures that section 10(1) is generally consonant with the Constitution. Accordingly, the prohibition against hate speech in section 10 (1) applies to and regulates the waving of the Old Flag. This is so having regard to the correct legal interpretation of the section that requires “words” in that section to be given a wide interpretation to include symbols such as the flag.

[164] In contrast, Afriforum and FAK sought to urge this Court to interpret section 10(1) of the Equality Act to mean only that ideas expressed by “words”, that is, ideas expressed by verbal language alone, can amount to hate speech. Although at a superficial level this may appear to accord with the ordinary literal meaning of “words”, it is an interpretation which is absurd,¹²² unreasonable and out of sync with the purpose of the Act. It could not have been intended by the legislature because it is contrary to the objects of the Equality Act itself, it is inconsistent with international law, it is out of kilter with comparative foreign law, it fails to take

¹²² In *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) at par 28 the Constitutional Court held as follows:

“The avoidance of absurdity, which is considered a ‘fundamental tenet of statutory interpretation’ must be guided by the ‘rider’ –

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised; and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).”

into account the context of the dispute, and runs contrary to the spirit and letter of the Constitution (particularly rights in the Bill of Rights).

[165] Apartheid discriminated against black people purely on the basis of their race or colour of their skin. This is a prohibited ground for discrimination under the Equality Act. The conclusion reached regarding the dominant meaning of displaying the Old Flag and the wide interpretation that is given to “words” in section 10 (1) lead to the inevitable conclusion that the gratuitous display of the Old Flag constitutes, as against black people, the publishing, propagating, advocating or communication (expression) of hatred based on prohibited grounds (i.e., race and possibly sexual orientation).

Clear intention attributable

[166] The next question on the topic of hate speech is what is the clear intention, if any, that is reasonably construed from such display. In other words, is there evidence or a base to hold that the gratuitous display of the Old Flag can reasonably be construed to demonstrate the clear intent required in section 10 (1) of the Equality Act.

[167] Afriforum contends that the order sought by the applicants ‘is inappropriate on the basis that ‘different people may have *different intentions* when they display the old flag’ and accordingly, that even if the Act were to regulate display of the Old Flag, it would need to do so ‘on a case by case basis’.¹²³ (Emphasis added)

[168] However, clear intention here refers to objective intent and not to the subjective intent of the speaker. The available authorities on section 10 are unanimous in holding that the subjective intention is irrelevant, and the test is whether the speech objectively demonstrates a hurtful, harmful or hateful meaning.¹²⁴ It would for

¹²³ Rec 87:30.

¹²⁴ See *Afriforum v Malema* [2011] ZAEQC 2; 2011 (6) SA 240 (EqC), para 109; *Sonke Gender Justice Network v Malema* [2010] ZAEQC 2; 2010 (7) BCLR 729 (EqC), para 14; *South African Human Rights Commission v Qwelane* [2017] ZAGPJHC 218; 2018 (2) SA 149 (GJ), para 50; *Smith v Mgoqi and Another* [2007] ZAEQC 2.

instance not depend on the subjective intent of the speaker to establish that calling or referring to a black person by the “k” word is prohibited hate speech. It is the objective intention determined on the basis of context that leads to such a conclusion.

[169] This Court is accordingly in a position to determine the issue and answer the question with the full benefit of the meaning of such display determined contextually with the benefit of evidence and full argument from the parties who are well placed to make the submissions they made. With the benefit of the historical and current meaning of the display of the Old Flag, this Court also has regard to what the evidence suggests to be the effect of such display in order to answer the question.

[170] Testifying for the Mandela Foundation, Mr Hatang imputes the following intention to those who gratuitously display the Old Flag:

“[They] still see me and other black people as ‘other’, and would deny us the opportunity just to be human. They have no concern or compassion for the suffering that the majority of South Africans endured during apartheid and continue to bear as a result of apartheid.”¹²⁵

[171] The SAHRC testified, through one of its Commissioners, that gratuitous display of the Old Flag:

(a) *“can, ... only plausibly and reasonably be construed as a means of asserting one's affinity with, endorsement of and mourning for the apartheid regime which resulted in the undignified, degrading and detestable treatment of black people”;*¹²⁶

¹²⁵ Rec 13:15.

¹²⁶ Rec 230:28.

- (b) *“promotes the apartheid regime and laments its downfall, and, in turn, promotes hatred and harm towards those who suffered, and continue to suffer, as a result of this regime”*;¹²⁷
- (c) *“is also extremely hurtful and dehumanising to those who suffered under apartheid as it has the potential to diminish their suffering or indicate a support for such suffering.”*¹²⁸

[172] The Department testified that a gratuitous display of the Old Flag: “imputes to those hoisting [it] that they reminisce and long for the days when the Old Flag was the national flag of the country between 1928 and 1994.”¹²⁹

[173] In its Founding Affidavit, Pride testify that: “The gratuitous display of the Old Flag demeans, humiliates, and creates a hostile and intimidating environment towards members of the LGBT+ community who were also victims of apartheid and its legacy. It also demonstrates a clear intention to be harmful, hurtful and hateful to members of that community.”¹³⁰ Further that “The Old Flag is a symbol and reminder of the inhumane policies adopted by the apartheid regime, ... It is hurtful and harmful to members of the LGBTI community, and promotes hatred against them when the Old Flag is flown.”¹³¹ And finally, that: “the Old Flag ... (is) a symbol of an oppressive regime, its gratuitous display is hurtful and harmful, and promotes or propagates hatred against people of colour as well as members of the LGTBTI community.” Afriforum and FAK do not oppose the effect of the gratuitous display on the LGBT+ community. They oppose only the statement that such display constitutes hate speech.

[174] Afriforum does not engage with this evidence, but concedes that displaying the Old Flag “has the capacity to cause offence and emotional stress”. Whilst this is

¹²⁷ Rec 230:28.

¹²⁸ Rec 230:28.

¹²⁹ Rec 272:27.

¹³⁰ Rec 111: 10 (c).

¹³¹ Rec 146:28.

not a direct admission of the testimony stated above, it is undoubtedly corroborative. It acknowledges also that: “Most South Africans recoil from the Old Flag and openly denounce apartheid as a crime against humanity.”¹³²

[175] Although still opposing the order sought by the applicant, FAK does acknowledge that in some instances ‘the display of the Old Flag ... is frowned upon and actively discouraged, also in the broader Afrikaner community.’ (Emphasis added)¹³³

[176] If, as Afriforum acknowledges, ‘most South Africans’ recoil from the Old Flag and denounce apartheid as a crime against humanity, having regard to the context and the direct evidence before Court, what then can be a reasonable clear intent attributable to a gratuitous display other than a clear intention to hurt, harm and incite hatred and the most negative feelings against ‘most South Africans’? And indeed, can there be any noble intention when to the knowledge of those who display it gratuitously, most South Africans in whose face it is so displayed not only recoil but also frown at such display? Could it be anything else other than to provoke and hurt, harm and promote and propagate hatred by stimulating those very negative feelings and at the same time damaging (harming) our feeling of oneness as South Africans?

Conclusion on hate speech

[177] On a conspectus of the case as a whole I am satisfied that displaying the Old Flag gratuitously does much more than merely cause offence and emotional stress to black people. Indeed, it bears repeating that the declarator sought is based expressly on how the display affects black people.¹³⁴ It therefore makes no difference to my finding that some isolated person(s) somewhere, who has no idea of or is indifferent to the profound suffering endured by black people under apartheid, may experience it differently. It demeans and dehumanises people on

¹³² Rec 98:58.

¹³³ Rec 209:21.3.

¹³⁴ Rec 16-17:23.

the basis of their race. It impairs their human dignity.¹³⁵ The Old Flag is displayed gratuitously with the full knowledge of its current and historical effects and therefore with clear intent to bring its effects upon fellow men and women.

[178] Those who display the Old Flag choose deliberately not only to display the apartheid discriminatory, divisive and oppressive flag; they also consciously and deliberately choose not to display the new democratic all-uniting non-racial flag. They choose an oppression symbol over a liberation symbol. What then is their objective intention? They intend to incite and awaken feelings of white supremacy against black people. They know or ought to know that other oppression prone white people will be incited to recall and long for days when white people exercised oppressive power over black people - with the sanction of an oppressive and unjust legal system. They wish to remind black people of the oppression, humiliation, indignity and dehumanisation that they moved away from and do not wish to relive or return to. They are therefore correctly described as demonstrating 'total rejection of tolerance, reconciliation and all values underlying the Constitution'. They deliberately chose to reject reconciliation and embrace hatred and oppression because they incite polarised feelings. As Mr Trengove for SAHRC puts it: "the message publicly conveyed by those who wave the apartheid flag is a hurtful message. It is also a harmful message. It incites harm on the racist grounds. And it propagates hatred, because it propagates the superiority of the white race over the black race."

[179] Their action demonstrates a clear intention to be harmful, hurtful, and to incite and propagate hateful feelings not only to victims of apartheid and its legacy, but also to our nascent non-racial democracy.¹³⁶ There has been no suggestion to the contrary. Not a single black person has suggested feeling embraced by the display of the flag and not a single white person has suggested that the display is a

¹³⁵ Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with the psychological integrity and empowerment. Human dignity is harmed when individuals and groups are marginalised or devalued. The Canadian Supreme Court in *Law v Canada* [1999] 170 DLR 4th 1 (SCC).

¹³⁶ Rec 17:23.

demonstration of love and tolerance towards black people. On the very contrary the evidence of those who oppose the complaint / application confirms that the display of the flag has the potential to cause harm and distress. The very negative feeling that the Mandela Foundation, SAHRC, Pride and the Department testify is caused by the display. Such evidence is an admission and not a denial. It is true that the evidence of the supposed opposition goes only as far as admitting potential to be harmful or incite harm. However, such evidence collaborates the direct evidence (of the NMF, SAHRC, Pride and the Department) that it is in fact hurtful, harmful and promotes and propagates hatred towards black people.

[180]Afriforum is aware of the negative effect of the display of the Old Flag. It states as a fact that most people recoil from the display of the flag, but it (Afriforum) does not wish to support declaring its gratuitous display as hate speech and thus limiting it to instances reserved by the proviso in section 12. Why would they not support the curbing of its hateful, hurtful, harmful and inciteful effect towards black people (their fellow men and women)? Instead it chooses to pose as a champion of freedom of expression and chose not to engage with the hurt or reason behind the feelings of those who recoil from it. Those who display the flag gratuitously clearly intend to cause that feeling.

[181]The effect on Mr Hatang of news of the display of the Old Flag on that ‘Black Monday’ in October 2017 was to bring back two distinct memories which came flashing back in his mind.

[182] Firstly, he recalls being confronted with the hurtful outburst: “*Wat soek julle hier kaffirs?*” He says this made him feel that he was treated, and is still regarded by the displayers and those who are likeminded, as “less than human because of the colour of my skin”. His is clear evidence of being dehumanised, that is, denied all human dignity just because of the colour of his skin. It is common uncontested knowledge that in the old South Africa and under the Old Flag black people were officially and unofficially called “kaffirs” and subjected to other despicable

treatment all because of the colour of their skin. No one should ever be made to relive that feeling without the law coming to their rescue.

[183] There could be no other decent intentions behind waving the Old Flag gratuitously other than to cause a recall of painful memories of being called the “k” word and being subjected to related treatments under the apartheid rule. Despite being asked by this Court, neither Afriforum nor FAK could give me a purpose for such display, worthy of legal protection, other than the instances mentioned in the section 12 proviso. No one gratuitously waves the apartheid flag in front of black people without intending to cause harm, hurt or causing hatefulness. It is like calling a black person the “k” word outside the purpose protected by the proviso and then alleging that there may have been a good intention worthy of protection. Fact of the matter is when that is done the hurt is immediate, deep and long lasting. That is the impact of memories the inhuman apartheid rule brought back flashing into one’s mind.

[184] The second memory that came to Mr Hatang is that of white children singing “*Daar kom die bobebaan*” on the advance of his grandmother. Only in apartheid South Africa! One’s grandmother being called a baboon! Mr Hatang immediately recalled that his grandmother’s feeling was that of trauma and anguish on the unavoidable advance to pass the singing white children together with helplessness against her tormentors. To use the expression of Afriforum, Mrs Hatang ‘recoiled’ helplessly at the experience. Because the Old Flag represented apartheid South Africa, it is not far-fetched for black people to relive the experience each time the Old Flag is waved gratuitously. It is unthinkable to imagine, never mind accept, that those who wave the flag gratuitously do so with any noble intentions knowing the association with apartheid in the memory of black people. Nothing but apartheid memories incited the hurt in the dignity of Mrs Hatang. It is ludicrous and absurd to think that she and her children will not recall the horror of apartheid at the sight of the gratuitous display of the Old Flag. It is almost suggesting to black people that apartheid was good for them as if they cannot decide or depict for themselves what is hurtful to them. That would be nothing short of an insult to

black people. I have no doubt that most South Africans, across racial lines, who have truly moved away from the indignity of apartheid, do not wish to be taken back to it. Not even emotionally. This is their collective “never again” resolve of 1994. South Africa cannot countenance a legal situation which is hurtful or harmful to a section of its population because the Constitution obliges her to ensure that “every citizen is equally protected by the law”.¹³⁷

[185] One of the hurtful effects of racist hate speech is that “*memories of humiliation, suffering and indignity endured by black people for so long ... come flooding back*”.¹³⁸ For black people to see the Old Flag gratuitously displayed is thus ‘hurtful’ in a sense which is qualitatively not different to expressions that are, as a matter of law, already accepted as constituting hate speech.¹³⁹ To suggest in the face of such hurt, as the first respondent does, that black people should either tolerate or use incidences of such displays ‘as an opportunity to reflect on how far we have come as a nation’ is insensitive in the extreme, destructive of human dignity and equality and constitutionally untenable. One should be slow to tell victims how they should feel about being hurt and how they should experience their pain. Especially for those who do not share their experience of the pain. It is wholly inappropriate and impermissible for anyone to seek to tell the victim how he / she should feel or not feel about their pain. It has a ring of talking down upon victims, minimising their hurt and being downright paternalistic. This is more so as, in this case, the raw feelings of victims of apartheid are rooted in decades of being discriminated against on the basis of colour. As Mr Hatang, his grandmother, Mrs Hatang, and their predecessors and many black people have collectively lived under colonial and apartheid rule for over 350 years, they and

¹³⁷ Preamble to the Constitution; And again, more directly in terms of sec 9 of the Bill of Rights “Everyone is equal before the law and has the right to equal protection of the law.”

¹³⁸ *African National Congress v Sparrow* [2016] ZAEQC 1.

¹³⁹ *Thembanani v Swanepoel* [2016] ZAECMHC 37; 2017 (3) SA 70 (ECM); *Kente v Van Deventer*, unreported Case No EC 9/13, Cape Town Magistrates’ Court (24 October 2014); *Mdladla v Smith* [2006] ZAEQC 3; *Khoza v Saeed and Another* (2006) ZAEQC 2; *Herselman v Geleba* (231/2009) [2011] ZAEQC 1; *Strydom v Chiloane* [2007] ZAGPHC 234; 2008 (2) SA 247 (T).

the black people they represent have endured and suffered under that rule all their lives. In the words of Mogoeng CJ in *Tshwane v Afriforum*.¹⁴⁰

“It is impermissible to ever adopt an attitude that seems to suggest that some of our people can afford to endure the pain and torture induced and symbolised by instruments of the colonial and apartheid legacy, probably because they have endured them long enough to find them tolerable, if not somewhat acceptable ...”

[186] The question of display of the Old Flag in private spaces was argued briefly. Despite years of apartheid rule, the lives of various races in South Africa have never been compartmentalised. That was the impracticality that apartheid rule sought to and never achieved. There is therefore hardly any space which is private to the one race to the exclusion of the other. Especially in modern day South Africa. Thus, displaying the Old Flag in private spaces like homes and schools is equally unacceptably offensive and ‘hurtful’, as black people are invariably employed and exposed in other ways to such spaces. The display in such spaces thus also constitutes hate speech under the Equality Act, as it ostensibly demonstrates an intention to be ‘harmful or to incite harm’ and ‘promote and propagates hatred’ (section 10 (1) (a) – (c)), by propagating to others, including children, that apartheid and how it treated black people was acceptable. Furthermore, such displays, as the Mandela Foundation explained, “make young people believe that it is acceptable to harbour racist views and then to manifest them publicly.”¹⁴¹

[187] Accordingly, any gratuitous display of the Old Flag (that is, a display beyond the protection of the proviso in section 12 of the Equality Act), besides being racist and discriminatory, demonstrates a clear intention:

- (a) to be hurtful;
- (b) to be harmful and incites harm; and
- (c) it promotes and propagates hatred

¹⁴⁰ *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19; 2016 (6) SA 279 (CC) para 15 – 16.

¹⁴¹ Rec 15:19.d.

against black people in contravention of section 10 (1) of the Equality Act. It constitutes hate speech. Such display is furthermore divisive, retrogressive and destructive of our nascent non-racial democracy, the constitutional values of human dignity and equality and the building of a society united in its diversity. It is an affront to the spirit and values of *ubuntu / botho*, which has become a mark of civilised interaction in post-apartheid South Africa.

Unconstitutionality (SAHRC)

[188]The SAHRC would have sought a declaration that section 10 (1) of the Equality Act is unconstitutional if it were to be construed restrictively as excluding non-verbal expressions. I would have agreed. However, in view of my conclusion regarding the correct interpretation of the hate speech provisions of section 10(1), it is not necessary for me to entertain that relief.

Harassment

[189]The Mandela Foundation also seeks an order that the gratuitous display of the Old Flag constitutes harassment in terms of section 11 of the Equality Act against black people.

[190] Section 11 provides that: *No person may subject any person to harassment.* ‘Harassment’ is defined in sec 1 (1) to include: ‘... *unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment ... related to ... a person’s membership or presumed membership of a group identified by one or more of the prohibited grounds ...*’

[191]The Mandela Foundation testified that any gratuitous display of the Old Flag “seriously demeans, humiliates and creates a hostile and intimidating environment for victims of apartheid and its legacy, particularly black people.”¹⁴² Pride also

¹⁴² Rec 17:23.

testified that the gratuitous display of the Old Flag has the same effect “towards members of the LGBT+ community, who were also victims of apartheid and its legacy.”¹⁴³

[192] Afriforum does not deny these allegations but contends that for conduct to constitute harassment “it must amount to torment that is persistent and repetitive.”¹⁴⁴ There is no such requirement in the Equality Act and this Court was not referred to any other authority for the contention. Accordingly, there is no basis for denying the order sought by the applicants. Furthermore, displaying the Old Flag in the face of most South Africans knowing that they recoil from it can only constitute harassment. It goes beyond hate speech.

Unfair Discrimination

[193] The Mandela Foundation finally also seeks an order that the gratuitous display of the Old Flag constitutes unfair discrimination against black people, as victims of apartheid.

[194] Section 7 of the Equality Act provides amongst others that:

“... no person may unfairly discriminate against any person on the ground of race, including –

(a) the dissemination of any ... idea, which propounds the racial superiority or inferiority of any person ...

(b) the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity based on race ...”

[195] The Mandela Foundation testified that any gratuitous display of the Old Flag “propounds racial superiority and promotes racial exclusivity”. Whilst not disputing this, Afriforum contends that “the intention of a person displaying the Old Flag would need to be assessed on a case by case to determine whether it

¹⁴³ Rec 111:10 (c) and 146-147:31.

¹⁴⁴ Rec 89:56.

constitute unfair discrimination.”¹⁴⁵ Again, there is no such requirement in the Equality Act and none was referred to me. I refer once more to my earlier discussion with regard to hate speech to the extent applicable. There is no basis for denying the order sought.

Expression of Freedom under section 16 of the Constitution as a defence

[196] As the first respondent contends in its opposition of the relief in its entirety, amongst others, that displaying the Old Flag is constitutionally protected expression under section 16(1) of the Constitution of the Republic of South Africa, 1996,¹⁴⁶ it is necessary to deal briefly with that defence.

[197] Section 16 provides in its entirety as follows:

“16. Freedom of Expression

(1) Everyone has the right to freedom of expression, which includes -

- (a) freedom of the press and other media;*
- (b) freedom to receive or impart information or ideas;*
- (c) freedom of artistic creativity;*
- (d) academic freedom and freedom of scientific research.*

(2) The right in subsection (1) does not extend to –

- (a) propaganda for war;*
- (b) incitement of imminent violence; or*

¹⁴⁵ Rec 97:53.

¹⁴⁶ Afriforum’s answering affidavit to the Mandela Foundation, para 54 (vol 1 p 97).

- (c) *advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.*”

[198] There are clearly two parts to section 16. Section 16(1) protects freedom of expression and specifies categories of the freedoms that are included under its protection, like freedom of the press and media etc. Section 16(2), however, excludes certain specified categories of speech from the protection of section 16(1). The excluded expressions can therefore simply not claim the protection of section 16 (1). Hate speech is an expression which is specifically excluded from protection by section 16(2)(c). Section 16(2)(c) does so by excluding any “advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.” As the Constitutional Court explained in *Islamic Unity Convention*¹⁴⁷, “*What is not protected by the Constitution is expression or speech that amounts to 'advocacy of hatred' that is based on one or other of the listed grounds, namely race, ethnicity, gender or religion and which amounts to 'incitement to cause harm.'*” Because this judgment finds that the gratuitous display of the Old Flag amounts to hate speech, that is, advocacy for hatred within the meaning of section 16(2), it means such display enjoys no protection as free speech under the Constitution.

[199] The prohibition in section 10 of the Equality Act is clearly intended inter alia to prohibit speech of the kind excluded from protection by section 16(2)(c). Hate speech is excluded except to the extent that it may fall under the section 12 proviso. Gratuitous display of the Old Flag is display that does not fall under the proviso. The Mandela Foundation was careful to target only the displays of the Old Flag which are not protected by section 12. Their complaint and application can therefore not be met by a claim that the display they target is protected under freedom of expression in the Constitution (in terms of section 16). The contention of Afriforum that seeks to rely on freedom of expression is therefore illogical and misplaced and stands to be dismissed.

¹⁴⁷ See para [137], footnote 103 above

[200] Accordingly, the gratuitous display of the Old Flag constitutes prohibited hate speech, unfair discrimination and harassment.

Relief sought is not a ban

[201] Contrary to the protestations of Afriforum, the relief sought by the applicants in this matter is not a banning order against the Old Flag. The Mandela Foundation seeks only an order that will declare to all South Africans (including potential offenders and complainants) that the display of the impugned flag must be confined to genuine artistic, academic or journalistic expression in the public interest (i.e., it must qualify for the proviso in section 12 of the Equality Act). Any display beyond that may be brought before the Equality Court for the displayer to prove that the display was defensible (under the proviso) or to prevail on the Court to make an appropriate remedy.

[202] That amount of legal certainty is required first to provide certainty in circumstances where the display of the Old Flag during the October 2017 so-called Black Monday demonstrations caused serious violations of fundamental human rights; the ensuing debate was fairly widely covered in the country and remained inconclusive in certain respects leaving the door wide open for future repeat of the violation of fundamental human rights with potential polarisation of society along racial lines. Furthermore, there are prospects that in the light of certainty even parties that are currently opposing the application shall be strengthened in promoting the avoidance of hurtful displays of the Old Flag. Afriforum, which no doubt believed in the correctness of its submissions, has informed the Court that it is a reluctant opponent in these proceedings; that it has no love for the Old Flag and what it represents; that it is aware that most South Africans recoil from the Old Flag; it also says that it is committed to taking active steps to combat genuine hate speech. Now that the judgment has set out in some detail the extremely dehumanising and hurtful violations that flow from the gratuitous display even in current society, one expects Afriforum to live up to its own words, and thus help

to build an inclusive South Africanness of all citizens united in their diversity based on mutual respect and genuine acknowledgment of equal dignity, despite the superficial differences in the skin colour.

[203] Even FAK did acknowledge that “The display of the Old Flag is frowned upon”.

What was missing from its response and submissions was an attempt to view gratuitous (almost purposeless) displays from the perspective of the victims of apartheid oppression, whose hurt is sought to be protected. What FAK too may appreciate is that the order sought and granted is not a total “ban”, if one sees as a ban – which it is not. It is rather a prohibition which is carefully guided – falling within the ambit of the proviso in section 12 of the Equality Act. FAK made an uninvited commitment in paragraph 26 of its affidavit that: “Whatever the outcome, the FAK is willing and able to work together with any organisation or individual genuinely seeking to foster a social relationship of mutual respect for the cultural-historic identity of all cultural groups in South Africa.” That seems to be the statement of an organisation that is prepared to turn a new leaf and to engage about other cultures as well in the spirit of inclusivity of diversity. This then is its time. South Africa will move faster towards its vision of one nation united in its diversity.

[204] The parties were agreed in their submissions that, whatever the outcome of this case, none of them seeks costs against the others.

Order

[205] In the result, I make following order:

- (1) In terms of section 21(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“the Equality Act”), it is determined that the display of the old national flag of South Africa, introduced from 31 May 1928, and used throughout apartheid until it

was abolished on 27 April 1994 (“the Old Flag”), at the ‘Black Monday’ demonstrations on 30 October 2017 constituted:

- a. hate speech, in terms of section 10 (1) of the Equality Act;
- b. unfair discrimination on the basis of race in terms of section 7 of the Equality Act;
- c. harassment in terms of section 11 of the Equality Act.

(2) In terms of section 21 (2) of the Equality Act, it is declared that subject to the proviso in section 12 of the Equality Act, any display of the Old Flag constitutes:

- a. hate speech in terms of section 10 (1) of the Equality Act;
- b. unfair discrimination on the basis of race in terms of section 7 of the Equality Act;
- c. harassment in terms of section 11 of the Equality Act.

(3) There is no order as to costs



**P M MOJAPELO
DEPUTY JUDGE PRESIDENT
HIGH COURT OF SOUTH AFRICA
GAUTENG, JOHANNESBURG**

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Date heard: 29 and 30 April 2019

Judgment: 21 August 2019