

Hate speech symbols: Court imposed restrictions on flying the apartheid-era flag

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South African Equality Court, *Nelson Mandela Foundation Trust v Afriforum NPC*, 21 August 2019

Any public or private display of the South African apartheid flag for any reason besides a bona fide academic, scientific, artistic or journalistic one in the public interest (gratuitous displays) amounts to hate speech against black people under Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act (the Equality Act). The racially divisive history and meaning of the old flag is relevant. Both domestically and internationally the old flag symbolises the apartheid era and its oppression of black people. The “essence of speech” is communication which includes more than words. Section 10 requires that hate speech be propagated or advocated. One cannot propagate or advocate words. Words are a mere medium to communicate meaning. Leaving victims of non-verbal hate speech unprotected by the Act would be a violation of these victims’ right to dignity. Section 10 of the Equality Act includes both verbal and non-verbal expression. This broad interpretation aligns with the Equality Act’s objectives, the Constitution and constitutional obligations, international law and America’s free speech jurisprudence. Gratuitous displays of the old flag reveal a “clear intention to be harmful, hurtful or to incite and propagate hateful feelings” towards those victimised under apartheid or who still suffer because of it. There is clear intent to attack South Africa’s democracy. Gratuitously displaying the old flag was found to constitute hate speech, harassment and unfair discrimination under the Act.

Summary

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Keywords

freedom of expression - free speech - hate speech - racial discrimination - symbolic speech

1. Introduction

South Africa has long been hailed for its supposed miracle transition from a repressive racist state to a constitutional democracy founded on principles of human dignity, equality and freedom. The apartheid regime sought to divide black and white South Africans through a system designed to entrench white supremacy and oppress the black population. The 1994 democratic elections in which South Africans of all races could for the first time collectively participate ushered in a new era, forged in unity. The new South African flag, introduced under the 1994 Interim Constitution, is emblematic of this unity. The previous national flag (commonly known as the old apartheid flag/the old flag) was established in 1928 and remained the national flag throughout apartheid. The old flag honoured the post-war unity achieved between English and Afrikaans white speaking South Africans. Black South Africans remained overlooked by this flag. The old flag is widely viewed both within South Africa and internationally as licensing racial segregation and endorsing white supremacy. Parallels have been drawn between the flying of the old apartheid flag and the display of the swastika symbol of Nazi Germany. This note serves as a summary of the decision in *Nelson Mandela Foundation Trust v Afriforum NPC*. This case concerned whether the “gratuitous display” (display other than for bona fide academic, scientific, artistic or journalistic purpose) of the old apartheid flag amounts to hate speech, unfair discrimination and harassment against black South Africans under certain legislation.

2. The facts and the parties’ submissions

In October 2017 public protests took place across South Africa to bring attention to the violent assaults on, and murders of farmers. These events were dubbed the “Black Monday demonstrations”. The old apartheid flag was seen displayed at these events by certain protestors. Media coverage of the presence of the old flag at some of these demonstrations sparked public debate within South Africa on the potential banning of the old flag. Afriforum, a non-governmental organisation which claims to represent Afrikaner (Afrikaans speaking white South Africans) interests, played a central part in the Black Monday demonstrations and came out against the banning of the old flag. Afriforum’s stance on the old flag led to a conflict with the Nelson Mandela Foundation Trust (a foundation established by South Africa’s former President Nelson Mandela for purposes of contributing towards the achievement of social justice). This conflict culminated in the Foundation filing a complaint with the Equality Court seeking an order that the gratuitous display of the old apartheid flag constituted hate speech under Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act,¹ (the Equality Act). The Foundation also argued that such display amounted to unfair discrimination and harassment under this same legislation. Afriforum opposed the Foundation’s case and argued that exhibiting the old flag amounted to protected expression under Section 16(1) of South Africa’s Constitution. This

¹ Act 4 of 2000.

section provides that everyone has the right to freedom of expression inclusive of «freedom of the press and other media», «freedom to receive or impart information or ideas», «artistic creativity», «academic freedom» and «freedom of scientific research». Afriforum also argued that the prohibition against hate speech in Section 10(1) of the Equality Act did not extend to symbolic expression such as displaying the old flag. This is because Section 10 clearly states that the prohibition applies to the use of “words” and no other forms of expression is explicitly prohibited.

The South African Human Rights Commission (the SAHRC), as second applicant, subsequently filed papers in support of the Mandela Foundation’s case. The SAHRC is an independent body established under South Africa’s Constitution to uphold and strengthen the country’s constitutional democracy. The SAHRC argued in the alternative, that Section 10(1) of the Equality Act be declared unconstitutional in so far as it limits the forms of speech amounting to hate speech to “words” only. The Minister and Department of Justice and Correctional Services (collectively, referred to herein as the Department) were later joined to the matter. The Department too supported the Foundation’s case. It also endorsed the SAHRC’s argument that Section 10(1) be declared unconstitutional. It offered evidence on the history underpinning the apartheid flag. Pride, a South African civil rights organisation advocating for the rights of the LGBT+ community, was admitted as amicus and led evidence on the harm inflicted on the LGBT+ community when encountering gratuitous displays of the old flag. The Federasie Van Afrikaanse Kultuurvereniginge (FAK), an almost century old organisation dedicated to the progression of the Afrikaans culture, language and history was also admitted as amicus. FAK submitted historical evidence concerning the old flag and supported Afriforum’s position.

In establishing the facts, the court relied strongly on the affidavit of the Chief Executive Officer (CEO) of the Mandela Foundation in which he describes his experience as a black South African upon learning that the old flag had been displayed at the Black Monday demonstrations. He explained how this news invoked hurtful childhood memories of being called a derogatory name aimed at dehumanising black South Africans. He also recalled the humiliation his grandmother, a domestic worker, was subjected to by white children on her way to work. These unwanted memories came to mind because, he explains, the old flag represents the cruel and institutionalised system of racial division and black oppression that previously governed South Africa. Such display served for him as a reminder that some South Africans still view him in a dehumanising way and lack compassion for the suffering of black South Africans both under Apartheid and as a consequence thereof. None of the parties denied the CEO’s description of the anguish and harm invoked by the old flag. The court thus accepted this evidence as fact and reasoned that the CEO’s experience equated to how other black South Africans raised under apartheid would have felt upon hearing this news. In fact, the court states, it could have been the experience of any black person suffering because of apartheid.

3. The decision

3.1 The historical approach

The court adopted a historical approach for purposes of evaluating the objective meaning or meanings to be ascribed to the flag. This was in line with previous assertions by the South African Constitutional Court on the relevance of historical context, particularly South Africa's history of institutionalised racial inequality, when interpreting fundamental rights. The court considered the historical context surrounding the old flag to assess what impact encountering the old flag would have on an observer's right to human dignity and equality. Gaining insight into this oppressive history, the court explained, allowed for an understanding as to what the Constitution aimed to break away from and to guard against repeating. The court proceeded to set out the relevant history. The old flag was recognised as South Africa's national flag for 66 years and was abolished after the country's first democratic election. The British flag preceded the old flag as the official flag but was considered exclusionary as it was seen as representing white English speaking South Africans only. The old flag symbolised the breaking of ties with imperialist Britain and the reconciliation between white English and Afrikaans speaking South Africans. Black South Africans had no say in the discussion on and eventual adoption of the old flag and remained unrepresented by it. The court considered significant that the legislation establishing the old flag was passed together with other racist and repressive apartheid laws barring intercourse between white and black South Africans and aimed at controlling almost every aspect of black people's lives. This showed that the legislation which hailed in the old flag was part of a broader legislative framework aimed at cementing racial segregation and white superiority. The court described the old flag as a «vivid symbol of white supremacy and black disenfranchisement and suppression». The court noted that the topic of the old flag is a controversial and divisive one within South Africa. It symbolises for some the pride of Afrikaans and English unity and traditions. These views are held by people who did not suffer and who benefitted during South Africa's pre-democratic era. Those who were victimised under apartheid or who sincerely opposed the apartheid regime associate the old flag with the oppression of black South Africans. The current national flag which displaced the old flag was, the court observes, agreed upon by all South Africans through their elected representatives. The new flag, the court explains, forged a new identity for the country and symbolises the unity of all South Africans. It helps move the country towards the constitutional vision of a South Africa "united in its diversity". The old flag does the reverse.

3.2 The dominant meaning

3.2.1 Trademark and defamation laws

To determine whether the gratuitous display of the old apartheid flag amounts to

hate speech, the court looked at the contemporary meaning of the flag. The court leaned on trademark law to the effect that the dominant meaning of a trademark can be established through comparisons 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».² The court reasoned that determining the objective meaning(s) to be assigned to expression would similarly require an investigation into the existence of a dominant meaning, if any. Such investigation involved an assessment of the “main idea or impression left on the mind” of the observer when viewing the expression. The court also relied on defamation law. In particular, the decision in *AfriForum v Malema*, which explains the test for defamation as «whether the reasonable person of ordinary intelligence is taken to understand the words alleged to be defamatory in their natural and ordinary meaning». In establishing whether this is so the court must consider both the express and implied meaning of the words.³ Determining the meaning to be ascribed to an image thus, according to the court, acknowledges that more than one meaning can be attached and that the dominant meaning(s) should be established. What the image implies and the context in which it is used remain relevant.

3.2.2 The meaning the parties ascribed to the old flag

The court looked at the meaning which the parties themselves ascribed to the old flag. The Mandela Foundation described it as representative of the «inhumane system of racial segregation and subjugation» that characterised South Africa prior to the first democratic elections. The Foundation explains that «apartheid was a crime against humanity» and gratuitously displaying the old flag endorses that criminality. It is a rejection of the reconciliatory ideals of South Africa’s constitutional democracy. Pride submitted that the old flag symbolises «autocracy, oppression and denial of human rights, injustice, inequality and hate». The SAHRC described the old flag as representative of the apartheid regime. White supremacists from around the world, the SAHRC points out, have embraced the old flag as representative of their racial superiority. The Department defined the old flag as the «international symbol of apartheid» which is «akin and comparable to other international symbols of political oppression that comprise crimes against humanity as defined in the Rome Statute, for example the [Nazi] swastika as a symbol of ethnic genocide». The Department states that by design the old flag encompasses South Africa’s colonialist history and embodies the “memory of apartheid”. *AfriForum* did not dispute these meanings and admitted «[m]ost South Africans recoil from the old flag and openly denounce Apartheid as a crime against humanity».

FAK contends that the negative associations with the old flag are a stereotyped view

² *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 § 16.

³ *AfriForum and Another v Malema and Others* 2011 (6) SA 240 (EqC) § 41.

and that it can also be viewed as a symbol of the post war reconciliation achieved between white English and Afrikaans speaking South Africans. It therefore has “cultural historic value”. The court rejected this argument, pointing out that this was a racist reconciliation achieved through the oppression of black people. The court relied on a Constitutional Court decision which stated that any claim to the enjoyment of culture cannot extend to racist traditions.⁴ Even FAK, the court points out, seemingly concedes that the flag is representative of apartheid. Only the contemporary dominant meaning, the court explains, is relevant to the question of whether displaying the old flag constitutes hate speech. Even if cultural historic value could attach to the old flag this can never be its modern-day dominant meaning in a democratic South Africa. This is because the majority of black South Africans and South Africans collectively view its gratuitous display as supporting white supremacy and black oppression. This widely held meaning is the dominant meaning of the old flag.

3.2.3 The dominant international meaning

The court saw as significant that the old apartheid flag served to represent South Africa internationally and thus enquired into its dominant international meaning. Starting 1952 and for almost 40 years thereafter the United Nations (UN) had annually condemned apartheid as detrimental to certain articles of the United Nations Charter which required universal observance and respect for human rights regardless of race. The UN eventually declared apartheid a crime against humanity.⁵ This recognition persists under international law despite the disbandment of apartheid in South Africa. The UN had enacted a convention solely dedicated towards the suppression and punishment of the crime of apartheid inclusive of the apartheid policies and practices of Southern Africa.⁶ Under the Rome Statute (which South Africa has ratified and domesticated) the crime of apartheid is regarded as particularly vile transgression against humanity. Both these international instruments were adopted with near uniform support from member states. The court accepted that the old flag is internationally recognised as symbolic of apartheid and white supremacy and that white supremacists around the world have used it to symbolise racial hatred. The court points to an instance where a white American male had worn the flag when he killed nine black people in United States. The court concluded that the dominant meaning both domestically and internationally is that the old flag immortalises the apartheid era, apartheid as a crime against humanity and South Africa as an outcast state whose racist policies diverged with that of the international community. The flag invokes a shameful past most South Africans regardless of race do not want to be associated with.

⁴ City of Tshwane Metropolitan Municipality v AFRiform and Another [2016] ZACC 19; 2016 (6) SA 279 (CC) §§ 122; 169 and 175.

⁵ Convention on the Suppression and Punishment of the Crime of Apartheid General Assembly Resolution 3068, 1976.

⁶ International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973 (entry into force 1976).

3.3 South Africa's legal position on hate speech

The court then turned to consider South Africa's legal position on hate speech. The court first looked to the ordinary grammatical meaning of "hate speech" and how certain reputable dictionaries defined it. These definitions reveal that the term is used to connote speech that transmits hatred towards an individual or category of individuals based on race, ethnicity or other similar attributes. Hate speech need not necessarily encourage violence towards that individual or group. Section 10(1) of the Equality Act addresses hate speech. It forbids any person from publishing, propagating, advocating or communicating "words" founded on a prohibited ground(s) against any person «that could reasonably be construed to demonstrate a clear intention to be "hurtful", "harmful or to incite harm", or to "promote or propagate hatred"». This section is made subject to Section 12 of that Act which exempts from the definition of hate speech genuine participation 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». Section 3 of the Equality Act requires that the Act be interpreted in harmony with the Constitution, in line with international law, and through possible comparisons with foreign law taking into account the «context of the dispute and the purpose of this Act». This was therefore the legal interpretative framework the court followed to interpret Section 10(1) of the Equality Act. The court relied particularly on Section 39(2) of the Constitution which requires a court when interpreting legislation to «promote the spirit, purport and objects of the Bill of Rights». The Constitutional Court has made clear that this means a court must read legislation in a manner that gives effect to constitutional values. This approach is in keeping with the approach of other open and democratic societies founded on freedom, dignity and equality. Courts cannot, however, prefer a constitutional interpretation over an unconstitutional where the former interpretation cannot reasonably be ascribed.

3.4 "Words" as inclusive of symbols

Section 10(1) states that, subject to the Section 12, no person may publish, propagate, advocate or communicate certain words. Afriforum contends that the word "words" in the provision must be read literally. Since the old flag is not words but a symbol, it is therefore not covered by the prohibition. The court found that Afriforum's contention goes against the principles of legal interpretation. The court assigned a "generous" meaning to the term "words" so as to include more than verbal communications. The court justified its decision on the basis of 'four textual markers'. Firstly, Section 10(1) is titled "Prohibition of hate speech". The title therefore contemplates "speech". The court explained that the "essence of speech" is communication and speech is broader than words. The second marker lays in the use of the verbs "propagate" or "advocate". One does not advocate or propagate for words. To read the provision this way is awkward. Rather words are simply a medium to communicate meaning: «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». Section 10(1) should therefore be read as 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 certain hateful and harmful effects. Thirdly, the Equality Act lists as one of its objectives to give effect to «the letter and spirit of the Constitution», especially the prohibition against advocacy of hatred based on, amongst others, race that constitutes incitement to cause harm. The concept of “advocacy of hatred” is broad. Interpreting it narrowly would go against «the letter and spirit of the Constitution». A constitutionally aligned interpretation would include “advocacy of hatred” in all its forms. Lastly, Section 10 is subject to Section 12 of the Act which excludes expression by artistic means from the ambit of Section 10. This exclusion only makes sense if the prohibition in Section 10 was intended to apply to more than hateful words.

Section 16(2)(c) of the Constitution states that the right to freedom of expression does not extend to «advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm». Section 2(b)(iv) of the Equality Act has as one of the Act’s stated objectives, the prohibition of “advocacy of hatred”. The term “advocacy of hatred”, the court explains, must be understood to have the same meaning in both provisions. The Constitutional Court in *Islamic Unity Convention v Independent Broadcasting and Others* interpreted Section 16(2)(c) as including «expression or speech». Advocacy of hatred under Section 16(2)(c) is therefore broader than words. Section 10 of the Equality Act, the court reasons, must be interpreted the same way. To do otherwise, the court concludes, would be irrational as the Act’s main purpose is the prohibition of all hate speech. Limiting the hate speech prohibition to “words” would mean victims of hate speech who were unfairly discriminated against or whose dignity had been violated as a result of non-verbal hateful expression would not receive legal protection under the Equality Act. This, the court states, would be a violation of these victims’ right to dignity. Freedom of expression, the court explains, cannot be achieved in a way that infringes the dignity of others. The realisation of the right to equality affirms an individual’s dignity. Here the court appears to incorrectly reason that the right to dignity automatically trumps that of freedom of expression. South African jurisprudence, however, makes clear that there is no hierarchy of rights in the Bill of Rights.

The court latched onto an example provided during the hearing to highlight the absurdity of restricting the application of the provision to words only. Such an interpretation would prohibit a white racist from calling his black colleague a baboon yet permit that racist to circulate an image of that same colleague’s face placed over that of a baboon’s. This narrow interpretation, the court explains, runs contrary to the objectives of the Act and the constitutional demand for «equal enjoyment of all rights and freedoms». It contravenes Section 9(1) of the Constitution which provides that «everyone is equal before the law and has the right to equal protection and benefit of the law». Section 9(4) of the Constitution requires parliament to enact legislation «to give effect to the letter and spirit of the Constitution’ especially the ‘equal enjoyment

of all rights and freedoms by every person», «the promotion of equality», the constitutional values of non-racism and non-sexism, «the prevention of unfair discrimination and protection of human dignity» and «the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm». The Equality Act makes clear that it is to serve as such a law. Section 10(1) of the Act must therefore be interpreted taking into account these Section 9(4) objectives. An interpretation which limits the hate speech prohibition in the Act to words would mean that the parliament had failed to achieve its Section 9(4) obligation to prohibit unfair discrimination in all its forms.

3.5 International law

The court relied on previous case law to the effect that the Constitution shows a “clear determination” to ensure South African law and the Constitution itself is interpreted to align with international human-rights law. South African courts when interpreting rights in the Bill of Rights are constitutionally required to consider international law.⁷ The court observed an intimate connection between the Bill of Rights and Section 10 of the Equality Act. This is because the latter is aimed at giving effect to the constitutional rights to dignity and equality, as well as the constitutional provision prohibiting hate speech. Other provisions of the Act, such as the provision prohibiting unfair discrimination bears similar connection. Section 233 of the Constitution provides that a court reading legislation «must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent». The court notes that it is therefore constitutionally obliged to consider relevant international law and to interpret Section 10(1) to align therewith if reasonably possible.

The court proceeded to consider relevant international instruments. South Africa has ratified the International Covenant on Civil and Political Rights (ICCPR). Article 20 of the ICCPR states that «[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law». Article 20 is therefore not limited to words. South Africa has also ratified the International Convention on the Elimination of All forms of Racial Discrimination (ICERD). The ICERD requires that state parties take positive steps aimed at eliminating «all incitement to, or acts of discrimination» based on ideas of the racial or ethnic superiority of one group of people or which seeks to rationalise or encourage any form of racial hatred and discrimination. The convention does not differentiate on the forms of racial and ethnic incitement and discrimination which states must address. The ICERD also requires state parties to declare as a sanctionable crime «all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination». The convention does not restrict the manner in which these ideas are to be disseminated to words. South Africa is therefore under international law obliged to establish laws criminalising hate speech in its broadest sense so as to cover all forms

⁷ Section 39(1)(b) of the Constitution.

of expression. The Equality Act itself lists as one of its objectives to enable more conformity with South Africa's international law obligations. Section 10(1) can therefore, consistent with international law, be reasonably understood as prohibiting both verbal and non-verbal hate speech.

3.6 Foreign comparative law

South African courts although not bound by are free to draw on foreign law when interpreting statutes. The Constitution provides that a court when interpreting the Bill of Rights «may consider foreign law».

The court noted that although there is value in foreign law caution had to be practiced when relying on it. The court proceeded to consider the US position on hate speech. The US First Amendment prohibits the abridgment only of speech. However, US courts have long established that speech can include conduct and gestures. The court relied on the US Supreme court decisions of *Spence v Washington*,⁸ *West Virginia State Board of Education v Barnette*,⁹ and *Texas v Johnson*.¹⁰ These cases held that the protection of the first amendment extended to the display, salute and burning of the national flag respectively. In *Spence* the test was explained as requiring a court to determine 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». In *Johnson* the majority observed that the national flag's "very purpose" is to symbolise the country and in *Barnette* the US Supreme court described symbolism as «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 of State often convey political ideals just as religious symbols come to convey theological ones». Interpreting Section 10(1) of the Equality Act to include non-verbal expressions would therefore be akin to the American approach to the interpretation of constitutionally protected speech.

3.7 Clear intent and the display of the old flag

The court went on to consider what "clear intent" could reasonably be associated with displaying the old flag. According to Afriforum the intention may vary depending on who is doing the displaying. The court explained that the test is not based on subjective intent but on whether the speech in the given context «objectively demonstrates a hurtful, harmful or hateful meaning». The court considered the evidence before it on the adverse impact of displaying the old flag. The SAHRC had submitted that the only reasonable construction that can be assigned to displaying the old flag is an «endorsement of and mourning for the apartheid regime». Its display is "extremely hurtful",

⁸ *Spence v Washington* 418 U.S. 405, 409 – 411 (1974).

⁹ *West Virginia State Board of Education v Barnette* 319 US 624 (1943).

¹⁰ *Texas v Johnson* 491 US 397 (1989).

as it diminishes the suffering of those affected by apartheid. Pride's evidence spoke to the hostile and humiliating environment that such display creates for members of the LGBTI community who too were victimised under apartheid. Afriforum had not addressed any of this evidence and conceded that the old flag could potentially «cause offence and emotional stress». The court used this concession as corroborating the other parties' evidence. Even FAK, the court remarked, acknowledged that displays of the old flag are «frowned upon and actively discouraged, also in the broader Afrikaner community». The court found that the gratuitous display of the old flag «de-means and dehumanises people», on the basis of race and thus impairs their human dignity. Those who display it do so fully aware of, and clearly intent on this impact. They consciously opt for the old flag over the new “all-uniting” flag. There is a deliberate rejection of constitutional values of reconciliation and tolerance. Such display is done with a «clear intention to be harmful, hurtful or to incite and propagate hateful feelings» both to those who suffered under apartheid and those who suffer because of its legacy. There is also a clear intent to attack South Africa's budding democracy. Neither Afriforum nor FAK could provide a legally worthy purpose for displaying the old flag beyond those purposes already protected under the Equality Act. It is, according to the court, inconceivable to say that someone could gratuitously wave the old flag with noble intent knowing its association with apartheid. To say so is condescending towards black people. The submission that black people use catching sight of the old flag 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. It is completely inappropriate to tell the victim how to experience their own pain. South Africa's Constitution demands that every citizen receives equal protection under the law. It is therefore constitutionally impermissible to tolerate harmful or hurtful messages aimed at a segment of the country's population. The hurt inflicted on black people by such gratuitous display is on par with the types of expression already classified as hate speech under the Constitution.

3.8 Displaying the old flag in private areas

The court then considered the question of displaying the old flag in private areas. The court's view was that even though apartheid sought to separate South Africans physically there were barely any private spaces accessible to only one race. This meant gratuitous displays of the old flag in private areas like schools and homes also constitutes hate speech under the Equality Act. These are spaces where black people invariably work or are otherwise exposed to. Displaying the old flag in this manner signal to young people that racism and the public manifestation thereof is acceptable. Any gratuitous display of the old flag whatsoever showed a clear intention to be hurtful and harmful and to incite harm and promote and propagate hatred towards black people contrary to the Act. Displaying the old flag in this way is destructive of South Africa's non-racial democracy, the constitutional values of human dignity and equality and the spirit of ubuntu (oneness) that has come to mark civilised engagement in a

democratic South Africa.

3.9 Constitutionally protected speech

Afriforum argued that the gratuitous display of the old flag is constitutionally protected speech. The court reasoned that Section 16(2)(c) of the Constitution explicitly excluded hate speech from the right to freedom of expression and Section 10 merely duplicates this exclusion. Since the court had found that the gratuitous display of the old flag equates to hate speech Afriforum's attempt to rely on the Constitution was «illogical and misplaced». The court ordered that any gratuitous display of the old flag constitutes hate speech. The court also found that such display amounts to unfair discrimination and harassment against black people under the Equality Act. The court can be faulted for merely equating the hate speech prohibition as it relates to race in Section 10 of the Equality Act with constitutionally unprotected speech in Section 16(2)(c) of the Constitution. As has been recently found by the South African Supreme Court of Appeal (the country's second highest court), Section 10 of the Equality Act is far broader than Section 16(2)(c) of the Constitution.¹¹ This means that gratuitous displays of the old flag may well be constitutionally protected.

4. Recent Supreme Court of Appeal decision on hate speech and its impact

About three months after the decision in *Nelson Mandela Foundation Trust v Afriforum* that gratuitously displaying the old flag amounts to hate speech under Section 10 of the Equality Act, the Supreme Court of Appeal handed down judgment in *Qwelane v SAHRC & others*. The court in *Qwelane* found Section 10 of the Equality Act to be unconstitutional on the basis that the Section is overly broad and extends far beyond the hate speech limitation in Section 16(2) of the Constitution. Section 10, the court explains, sets a different legal standard for what constitutes hate speech. The constitutional test is objective and asks whether advocacy of hatred has occurred on a prohibited ground and, secondly, whether the speech amounts to “incitement to cause *harm*”. This is in line with the international approach to control speech for purposes of ensuring public order and overall societal well-being. Under Section 10 actual or potential harm is not even required for the section to apply. It is sufficient if a reasonable person could potentially view speech to bring about, amongst others, hurt. Section 10 hinges on a reasonable person's subjective opinion. The section is also excessively vague. What is “hurtful” the court explains is difficult to establish given the term's subjective nature. The court noted that daily human interactions are replete with words and jokes which are hurtful to those targeted and provided the example of atheists accusing religious people of believing in fairy tales. The Supreme Court of Appeal accepted unequivocally that the “harm” required under the hate speech

¹¹ *Qwelane v SAHRC & others* (686/2018) [2019] ZASCA 167 (29 November 2019).

provision in Section 16 of the Constitution need not be limited to physical harm and can include how the recipient is psychologically impacted. However what is harmful goes beyond what is hurtful. Hate speech beyond Section 16(2)(c) of the Constitution can be constitutionally permissible provided it is justifiable under Section 36 of the Constitution. This section allows for constitutional rights to be justifiably limited essentially through a proportionality analysis.

In *Qwelane* the Supreme Appeal Court, incidentally, read Section 10(1) of the Equality Act to be narrower than the constitutional prohibition on hate speech to the extent that the Act limits prohibited conduct to words only. This interpretation is in stark contradiction to the lower court's decision in *Nelson Mandela Foundation Trust v Afriforum* that advocacy of hatred based on "words" ought to be interpreted as also encompassing symbols. The *Qwelane* decision has been referred to the Constitutional Court for confirmation as this is constitutionally required. South Africa's legislature has in the meantime been afforded 18 months to pass legislation to remedy the constitutional defect in Section 10.

5. Conclusion

It remains unclear whether gratuitously displaying the old flag is indeed prohibited under the hate speech provision of South Africa's Constitution. It seems more likely that such display is constitutionally protected speech. A legal ban against the gratuitous display of the old flag may, however, be constitutionally justified under the limitation's clause of the Constitution. This is particularly so given the importance behind such a ban both in relation to protecting and upholding the rights of those who are adversely impacted by such displays and in preserving South Africa's budding democracy. A partial legal ban on the display of the old flag can be said to serve the constitutional vision of a diverse yet unified South Africa. Allowing for free and open displays, on the other hand, may be said to undermine this vision. The Prevention and Combating of Hate Crimes and Hate Speech Bill is currently before South Africa's parliament. It remains to be seen how South Africa's parliament intends to protect and combat hate speech in a constitutionally compliant manner. Any future hate speech provisions must be carefully legislated to ensure that is not unnecessarily broad and thus unconstitutional.