



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case No: 371/2020

In the matter between:

**AFRIFORUM
APPELLANT**

NPC

and

**NELSON MANDELA FOUNDATION TRUST
RESPONDENT**

FIRST

**MINISTER OF JUSTICE AND
RESPONDENT**

SECOND

**CORRECTIONAL SERVICES
DEPARTMENT OF JUSTICE
RESPONDENT**

THIRD

**AND CORRECTIONAL SERVICES
SOUTH AFRICAN HUMAN RIGHTS
RESPONDENT**

FOURTH

COMMISSION

**JOHANNESBURG PRIDE NPC
CURIAE**

FIRST AMICUS

**FEDERASIE VAN AFRIKAANSE
CURIAE**

SECOND AMICUS

KULTUURVERENIGINGE NPC

Neutral citation: *Afriforum NPC v Nelson Mandela Foundation Trust and Others* (Case no 371/2020) [2023] ZASCA 58 (21 April 2023).

Coram: MAYA P and SCHIPPERS, PLASKET and MABINDLA-BOQWANA JJA and SAVAGE AJA

Heard: 11 May 2022

Delivered: 21 April 2023

Summary: Constitutional Law – section 16(1) of the Constitution – freedom of expression – whether right infringed by prohibition of gratuitous public display of the old South African flag – symbol of apartheid and white supremacy – such display constitutes hate speech, unfair discrimination and harassment under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg, sitting as Equality Court (Mojapelo DJP sitting as court of first instance):

1 Paragraph (2) of the order of the court below is set aside and replaced with the following order:

‘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 gratuitous public 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.’

2 Save as aforesaid, the appeal is dismissed. There is no order as to costs of the appeal.

JUDGMENT

Schippers JA (Maya P and Plasket and Mabindla-Boqwana JJA and Savage AJA concurring)

[1] This case brings into sharp focus the potency of a symbol of the cruel ideology of apartheid, infamous for its assault on the dignity, freedom and equality of black people. The main issue is whether the gratuitous display of that symbol – the former South African flag (the old flag) – is harmful, incites harm, and promotes and propagates hatred within the meaning of s 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act).

[2] The appellant, Afriforum NPC (Afriforum), played a leading role in nationwide demonstrations to protest against the murder of farmers, held on Monday, 30 October 2017. They were called ‘the Black Monday protests’. It was widely reported in the mainstream and social media that at some of these protests, the old flag was displayed. These incidents led to a complaint against Afriforum lodged by the first respondent, Nelson Mandela Foundation Trust (NMF), with the Gauteng Division of the High Court, Johannesburg, sitting as an Equality Court (the high court), that the display of the old flag at the Black Monday protests was a contravention of the Equality Act.

[3] The second respondent, the Minister of Justice and Constitutional Development (the Minister), and the third respondent, the Department of Justice and Correctional Services, were joined as parties in the proceedings in the high court. They were joined by the fourth respondent, the South African Human Rights Commission (SAHRC), when it applied for an order declaring that s 10(1) of the Equality Act was unconstitutional and invalid, to the extent that it restricted the conduct proscribed by s 10(1) to ‘words’ only.

[4] The high court (Mojapelo DJP) did not issue the declaratory order sought by the SAHRC. The court interpreted s 10(1) broadly and purposively in the light of the objects of the Equality Act, namely that the prohibition of hate

speech includes any expression of ideas, whether by words or conduct. This interpretation was confirmed by the Constitutional Court in *Qwelane*.¹ The high court determined that the display of the old flag at the Black Monday protests constituted hate speech, unfair discrimination and harassment, within the meaning of ss 10(1), 7 and 11 of the Equality Act. All the parties participated in the appeal, save for two amici curiae that had been admitted by the high court. The appeal is with the leave of this Court.

The facts

[5] The basic facts were largely undisputed and can be briefly stated. Mr Sello Hatang, the NMF's Chief Executive Officer (CEO), said that on the day of the protests he was giving tourists a guided tour of Robben Island near Cape Town, where former President Nelson Mandela and his fellow political prisoners had been incarcerated. The displays of the old flag brought two painful memories of Mr Hatang's childhood to mind. The first was an incident during which two white boys addressed Mr Hatang (then ten years of age) and his brother in the following repulsive terms, 'What are you kaffirs doing here?'² His brother explained that the 'k-word' denoted hatred for, and was used to humiliate black people. This is how Mr Hatang described the effect of that incident on him:

'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.'

[6] The second memory was about Mr Hatang's grandmother. She was a domestic worker. She hated school holidays because she was subjected to racial abuse by groups of idle white children. Mr Hatang, who used to accompany his grandmother, would hear them singing, 'Here comes a baboon',³ referring to his

¹ *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC) paras 113-114.

² The statement was uttered in Afrikaans: 'Wat soek julle hier, Kaffirs?'

³ The abuse was hurled in Afrikaans: 'Daar kom 'n bobbejaan.'

grandmother, as they walked past the children on their way to her place of work. She was powerless to do anything about the trauma and anguish she endured as a result of this abuse.

[7] Mr Hatang recalled these memories because, as he put it, the old flag ‘represents nothing other than the inhumane system of racial segregation and subjugation that governed South Africa before 27 April 1994’. He went on to say that the gratuitous display of the old flag, more than a generation after the abolition of apartheid, reminded him that some South Africans still see him and black people as ‘other’ and would deny them the opportunity to be human. They have no concern or compassion for the majority of South Africans who suffered under apartheid.

[8] On the day of the Black Monday protests and subsequently, the NMF received numerous media enquiries about its position on the displays of the old flag. On 5 November 2017 the NMF issued a media statement in which it said that it deplored the murder of farmers and respected the constitutional right of South Africans to protest; that the display of the old flag and the burning of the national flag was deeply problematic; that apartheid was a crime against humanity; and that displaying the flag of apartheid South Africa represented support for that crime. The media statement ended with the following question: ‘Is it time to criminalize displays of the old flag?’

[9] That question led to a debate on national television and radio, between Mr Hatang and Mr Kallie Kriel, the CEO of Afriforum. Mr Kriel, surprisingly, denied that the old flag had been displayed at any of the protests, dismissed reports about such displays as ‘fake news’, and subsequently published statements on Twitter to that effect. Afriforum, he said, discouraged its members from bringing the old flag to public gatherings which detracted from

‘the main message, which on Black Monday, was the issue of farm murders’. Mr Kriel stated that although it was ‘unwise’ to display the old flag as it would ‘offend people’; ‘it should not be unlawful’ as ‘it is part of history and you cannot ban history’.

[10] Mr Hatang’s riposte was that both public and private displays of the old flag were offensive, since they made young people believe that it is acceptable to harbour racist views and then manifest them in public. Subsequently the NMF launched the application in the high court for a declaratory order that any gratuitous display of the old flag constitutes hate speech, unfair discrimination and harassment under the Equality Act. The founding affidavit states that such displays serve no genuine journalistic, academic or artistic purpose; and do nothing to advance social justice, national unity and human dignity – to the contrary.

[11] Afriforum’s response to the claim that gratuitous displays of the old flag constitute hate speech, was that the relief sought was a ‘wide-reaching ban’. Mr Ernst Roets, its Deputy CEO who made the answering affidavit, went on to say this:

‘At the outset we acknowledge that the old South African flag has the capacity to cause offense and emotional distress. As an organisation, we have no particular love for the flag or what it represents. In the exceptionally rare instance that anyone participating in one of our events brings an old flag with them, we ask them to put it away.’

[12] Afriforum opposed the application in the high court, essentially on the ground that a ‘wide- reaching ban’ on public displays of the old flag ‘would be an unconstitutional infringement of the right to freedom of expression’. It contended that s 10(1) of the Equality Act regulated only ‘words’, not other forms of expression such as symbols. Therefore, it did not regulate displays of the old flag, which was neither speech, a call to action, nor incitement to cause

harm. The display of the old flag was not harassment under s 11 of the Equality Act, because it did not amount to torment that was persistent and repetitive. Neither was it unfair discrimination under s 7, since it was not the dissemination of information and constituted protected speech in terms of the proviso in s 12 of the Equality Act.

The decision of the high court

[13] The high court considered the history of the old flag and what it represents, and came to the following conclusions. The Union Nationality and Flag Act 40 of 1927 (the Flag Act) was part of a statutory scheme designed to entrench racial segregation and white supremacy. The old flag is a vivid symbol of white supremacy and black disenfranchisement and oppression. The Flag Act was repealed by the Constitution of the Republic of South Africa Act 31 of 1961. The latter Act retained the old flag,⁴ entrenched electoral exclusion of everybody other than ‘white persons’,⁵ and vested the State President with absolute authority over ‘Bantu affairs’, including ‘Bantu locations’.⁶

[14] The old flag was retained in the Republic of South Africa Constitution Act 110 of 1983, which gave limited electoral rights to ‘Coloured’ and ‘Indian’ persons, but excluded black (African) people from the definition of South Africa’s ‘population groups’, entitled to ‘self-determination’. The 1983 Constitution gave special protection to the old flag: it provided that any person who ‘maliciously destroys or spoils the National Flag of the Republic’; or ‘commits any other act which is calculated to hold the National Flag of the

⁴ Section 5 of the South Africa Constitution Act 31 of 1961 (the 1961 Constitution).

⁵ Sections 34 and 46 of the 1961 Constitution restricted membership of the Senate and House of Assembly to ‘white persons’. Section 42 provided for the division of provinces into electoral divisions according to voters’ lists comprising ‘white voters’.

⁶ Section 111 of the 1961 Constitution, in relevant part, provided:

‘The control and administration of Bantu affairs and of matters specially or differentially affecting Asiatics throughout the Republic shall vest in the State President, who shall exercise all those special powers in regard to Bantu administration which immediately prior to the commencement of this Act were vested in the Governor-General-in-Council of the Union of South Africa, and any lands which immediately prior to such commencement vested in the said Governor-General-in-Council for the purpose of reserves of Bantu locations shall vest in the State President . . .’

Republic in contempt . . . shall be guilty of an offence and liable on conviction to a fine not exceeding R10 000 or imprisonment for a period not exceeding five years'.⁷ It was only in 1994 that the old flag was replaced by the current flag, with the end of apartheid and the coming into force of the Interim Constitution.

[15] The high court found that any gratuitous display of the old flag, aside from being racist and discriminatory, demonstrates a clear intention to be hurtful; to be harmful and to incite harm; and to promote and propagate hatred against black people, in contravention of s 10(1) of the Equality Act. Such a display constitutes hate speech and is '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'.

[16] The high court made a determination, in terms of s 21(1) of the Equality Act, that the display of the old flag (introduced on 31 May 1928 and used throughout apartheid until it was abolished on 27 April 1994) at the Black Monday protests, constituted hate speech, unfair discrimination and harassment. The high court then issued a declaratory order in terms of s 21(2), that subject to the proviso in s 12 of the Equality Act, any display of the old flag constitutes hate speech within the meaning of s 10(1); unfair discrimination on the basis of race in terms of s 7; and harassment in terms of s 11 of that Act.

[17] Afriforum challenged the high court's order, mainly on the following grounds. The court did not have the power to grant the relief sought. The matter was not ripe for hearing. Public displays of the old flag are protected under the rights to freedom of expression, dignity and freedom of assembly; and do not constitute hate speech, unfair discrimination or harassment as envisaged in the Equality Act. Private displays of the flag are protected by the right to privacy.

⁷ Section 92(1) of the Constitution of the Republic of South Africa Act 110 of 1983.

[18] At the outset it is convenient to deal with the argument that the high court's order infringes the rights to dignity⁸ and freedom of assembly⁹ of those who publicly display the old flag. Save for quoting various excerpts from decisions of the Constitutional Court and other courts, Afriforum failed to make out a case in its answering papers, or to demonstrate in its written or oral submissions why a prohibition of gratuitous displays of the old flag violates these rights.

[19] Afriforum did not explain how the display of the old flag implicates or infringes the right to dignity of the persons displaying it. This, especially when the founding affidavit made it clear that gratuitous displays of the old flag 'do nothing to advance social justice, national unity and human dignity'; and that such displays were egregious examples of conduct that undermined equality and human dignity. Neither did Afriforum assert that it is impossible for, or an impediment to, its followers and others to assemble, demonstrate, picket or petition, without displaying the old flag. This is simply because the rights to dignity and freedom of assembly of persons who gratuitously display the old flag, are not implicated at all.

The procedural defences

[20] Afriforum argued that an equality court is a creature of statute and has no power to grant relief in respect of 'prospective conduct that has not yet taken place'. The case brought by the NMF, so it was argued, was not directed at the displays of the old flag at the Black Monday protests and those who displayed it, but at future displays of the flag.

⁸ Section 10 of the Constitution 108 of 1996 provides:

'Everyone has inherent dignity and the right to have their dignity respected and protected.'

⁹ Section 17 of the Constitution states:

'Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.'

[21] Afriforum however disregards the role of the Equality Court in facilitating access to justice for the victims of hate speech, unfair discrimination and harassment. As Navsa JA said in *Manong*:¹⁰

‘It is abundantly clear that the Equality Court was established in order to provide easy access to justice and to enable even the most disadvantaged individuals or communities to walk off the street, as it were, into the portals of the Equality Court to seek speedy redress against unfair discrimination, through less formal procedures.’

[22] But fundamentally, Afriforum ignores the broad powers conferred on the court by the Equality Act. The powers and functions of the Equality Court are set out in s 21 of the Equality Act. Section 21(2) provides that after holding an inquiry, ‘the court may make an appropriate order in the circumstances’, including a declaratory order. This is hardly surprising. In *Rail Commuters Action Group*,¹¹ the Constitutional Court stated that ‘a declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner that promotes the protection and enforcement of the Constitution and its values’. In addition, s 21(5) of the Equality Act emphasises that the Court ‘has all ancillary powers necessary or reasonably incidental to the performance of its functions and the exercise of its powers, including the power to grant interlocutory orders or interdicts’.

[23] In *Minister of Environmental Affairs and Tourism v George*,¹² this Court considered the nature of an equality court relative to a high court. It held that the Equality Act ‘vests equality courts with extensive procedural and remedial powers in complaints of unfair discrimination’, and that ‘the equality court is not a wholly novel structure, but is a High Court or a designated magistrates’ court’. Apart from the specific powers which the Equality Act confers, the only

¹⁰ *Manong and Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape and Others* [2009] ZASCA 50; 2009 (6) SA 589 (SCA); [2009] 3 All SA 528 (SCA) para 53.

¹¹ *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) para 107 at 410D-E.

¹² *Minister of Environmental Affairs and Tourism v George and Others* 2007 (3) SA 62 (SCA) paras 3-4.

distinction between a high court and an equality court is that the presiding Judges or magistrates must have undergone ‘social context training’.

[24] The Equality Court is a specialised court with expedited rules and an informal procedure. It applies different evidential thresholds to that of a high court.¹³ The object of the Equality Act is to make the Equality Court as accessible as possible. The formal, adversarial court processes of other courts, which are often costly and potentially intimidating, have no place in the Equality Court.¹⁴ Proceedings may be instituted by any person acting in their own interest or any person acting on behalf of another who cannot act in their own name.¹⁵ The Regulations made under the Equality Act prescribe the procedures to be followed at an inquiry, and create an informal court system which places substance above form or technicality.¹⁶

[25] The Equality Act obliges an equality court in which proceedings are instituted to hold an inquiry in the manner prescribed in the regulations and to ‘determine whether unfair discrimination, hate speech or harassment . . . has taken place, as alleged’.¹⁷ That is precisely what happened in this case. The NMF’s complaint about the displays of the old flag at the Black Monday protests and their impact on the complainant and others, were set out in the affidavit filed in support of the complaint. That evidence was never challenged. Afriforum only disputed the contention that the display of the old flag was unlawful. The high court granted declaratory relief based on the evidence before it. But the court also declared that the displays of the old flag at the Black Monday protests, as a matter of fact, constituted hate speech, unfair

¹³ *AS v Neotel (Pty) Ltd* [2018] ZAEQC 1; 2019 (1) SA 622 (GJ) para 10.

¹⁴ *George and Others v Minister of Environmental Affairs and Tourism* 2005 (6) SA 297 (EqC) para 12.

¹⁵ Section 20 of the Equality Act.

¹⁶ J A Kok, *A Socio-Legal Analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2007, unpublished doctoral dissertation, University of Pretoria) 145.

¹⁷ Section 21(1) of the Equality Act; *George* fn 12 para 5.

discrimination and harassment. It was empowered to do so under s 21(2) of the Equality Act.

[26] It follows that there was nothing abstract, academic or hypothetical about the NMF's complaint. It was based on actual contraventions of the Equality Act, and grounded in concrete events at which the old flag was displayed. Afriforum's argument to the contrary, in reliance on *JT Publishing*,¹⁸ is misconceived.

[27] For the same reasons, Afriforum's argument based on the doctrine of ripeness, namely that a court deals with situations that have already ripened or crystallised, and not with prospective or hypothetical ones,¹⁹ is unsustainable. Apart from this, the old flag is displayed from time to time. It was again displayed at the Black Monday protests. There is a public controversy about the lawfulness of doing so. The purpose of the application by the NMF and the SAHRC was to resolve that very controversy for the benefit of all. Declaratory orders by their very nature, are often directed at conduct that has not yet occurred. But they are vital in the right context, specifically to address issues of public importance or involving a compelling public interest. The Constitutional Court has held that declaratory orders 'can bring clarity and finality to disputes that may, if unresolved, have far-reaching consequences for each party'.²⁰ So, even if there had not been an actual infringement of the Equality Act, this is precisely the kind of case in which a declaratory order of the sort issued by the high court is apposite.

[28] In any event, it is legitimate for the SAHRC to say: there has been a public display of the old flag but it does not wish to bring proceedings against

¹⁸ *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC) para 15.

¹⁹ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) para 199.

²⁰ *Competition Commission v Hosken Consolidated Investments Ltd and Another* [2019] ZACC 2; 2019 (4) BCLR 470 (CC); 2019 (3) SA 1 (CC) para 78.

the individuals who displayed the flag on that occasion, but seeks instead, in the public interest, that a principle be established that the gratuitous display of the old flag is unlawful. Such an approach is entirely consonant with a guiding principle of the Equality Act: to take measures to eliminate unfair systemic discrimination and inequalities.²¹ As the Constitutional Court stated in *Qwelane*:

‘Our Constitution requires that we not only be reactive to incidences or systems of unfair discrimination, but also pre-emptive. We need to act after the damage has occurred where so required but, importantly, we are also required to act to ensure that it does not occur.’²²

The values underpinning the prohibition of hate speech

[29] The starting point for an analysis of the meaning and effect of s 10(1) of the Equality Act, is the Bill of Rights in the Constitution. It contains the fundamental rights to freedom of expression, equality and dignity. Section 10(1), which effectively proscribes hate speech, is inextricably linked to these rights. As the Constitutional Court said in *Islamic Unity Convention*,²³ the State has a direct interest in regulating hate speech ‘because of the harm it may pose to the constitutionally mandated objective of building a non-racial and non-sexist society based on human dignity and the achievement of equality’.

[30] Section 16(1) of the Constitution guarantees the right of freedom of expression to all persons.²⁴ Freedom of expression is fundamental to most other

²¹ Section 4(2) of the Equality Act.

²² *Qwelane* fn 1 para 110.

²³ *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC) para 33.

²⁴ Section 16 of the Constitution provides:

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

rights and freedoms, and quintessential of democracy.²⁵ However, expression can, and often does, infringe upon the rights and interests of others. This is recognised in s 16(2) of the Constitution, which excludes hate speech from the right to freedom of expression. It does so, as the Constitutional Court emphasised in *Qwelane*, because ‘[h]ate speech is the antithesis of the values envisioned by the right to free speech – whereas the latter advances democracy, hate speech is destructive of democracy’;²⁶ and it ‘undermines the constitutional project of substantive equality and acceptance in our society’.²⁷

[31] The Equality Act is the legislation mandated by s 9 of the Constitution to prevent unfair discrimination and to promote the achievement of equality.²⁸ Equality among all people who live in South Africa is at the heart of the Constitution.²⁹ This is emphasised throughout the Constitution, particularly in the founding values in s 1.³⁰

[32] Human dignity informs the interpretation of all other rights, including the rights to freedom of expression and equality.³¹ In *Qwelane*,³² the Constitutional Court described the impact of hate speech on the right to dignity as follows:

‘Hate speech is one of the most devastating modes of subverting the dignity and self-worth of human beings. This is so because hate speech marginalises and delegitimises individuals based on their membership of a group. This may diminish their social standing in the broader

²⁵ *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* [2020] ZACC 25; 2021 SACR 387 (CC); 2021 (2) SA 1 (CC); 2021 (2) BCLR 118 (CC) paras 1 and 95; *Democratic Alliance v African National Congress and Another* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 paras 122-123; *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC) para 37.

²⁶ *Qwelane* fn 1 para 78.

²⁷ *Qwelane* fn 1 para 130.

²⁸ *Qwelane* fn 1 para 48. Section 9(1) read with s 9(4) of the Constitution requires Parliament to enact legislation to ‘prevent and prohibit unfair discrimination’.

²⁹ *Du Preez v Minister of Justice and Constitutional Development and Others* [2006] 3 All SA 271 (SE) para 12.

³⁰ Section 1 of the Constitution, in relevant part, reads:

‘Republic of South Africa

The Republic of 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.’

³¹ *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) para 35.

³² *Qwelane* fn 1 para 1.

society, outside of the group they identify with. It can ignite exclusion, hostility, discrimination and violence against them.’

Section 10(1) of the Equality Act: hate speech

[33] In terms of the Constitutional Court’s order in *Qwelane*,³³ the prohibition of hate speech in s 10(1) of the Equality Act now reads:

‘Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm; and to promote or propagate hatred.’³⁴

[34] As already stated, the high court interpreted s 10(1) broadly and purposively in the light of the objects of the Equality Act and the underlying constitutional imperatives. Its interpretation means that any expression of ideas, whether by word or conduct, is included in the prohibition in s 10(1). In approving this interpretation, the Constitutional Court stated that ‘[t]his wide meaning accords not only with our Constitution, but also with the provisions of the Equality Act. And it is consonant with international law and comparative foreign law’.³⁵

[35] The Equality Act itself states what factors should be considered in its application. Section 4(2) provides:

‘In the application of this Act the following should be recognised and taken into account:

- (a) The existence of systemic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy; and
- (b) the need to take measures at all levels to eliminate such discrimination and inequalities.’

³³ Paragraph 1(d) of the order in *Qwelane*, fn 1. Prior to this order, s 10(1) proscribed the publication, propagation or communication of words based on a prohibited ground, that could reasonably be construed to demonstrate a clear intention to ‘be hurtful’.

³⁴ *Qwelane* fn 1 at 3 of the judgment.

³⁵ *Qwelane* fn 1 para 113.

[36] When the amended prohibition of hate speech in s 10(1) is read with the proviso in s 12 of the Equality Act, it proscribes expression: (a) that constitutes publication, propagation or communication of words; (b) based on one or more of the prohibited grounds against any person; (c) that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm, and to promote or propagate hatred; and (d) provided that bona fide engagement in artistic creativity, academic and scientific enquiry, fair and accurate reporting in the public interest or publication of any information, is excluded. In what follows, each of these elements of s 10(1) are considered in turn.

(a) *The publication, propagation or communication of words*

[37] In *Qwelane* the Constitutional Court held that the use of the terms ‘advocate’ and ‘propagate’ in the section ‘is indicative of ideas rather than words, if they are to be accorded their full meaning’.³⁶ These two concepts suggest that the intention is to give effect to article 4 of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) and s 16(2)(c) of the Constitution, which are concerned with racist ‘propaganda’ and the ‘advocacy’ of hatred.³⁷

[38] The concept ‘communicate’ denotes ‘the conveyance of ideas’, and all the verbs used in the section require some form of public transmission or dissemination.³⁸ The prohibition extends to the expression of ideas by conduct. It targets the ‘meaning behind the words, and not simply the words’.³⁹ There is no question that the gratuitous public display of the old flag constitutes the publication, propagation, advocacy, or communication of a message, within the meaning of s 10(1) of the Equality Act.

³⁶ *Qwelane* fn 1 para 114.

³⁷ *Ibid.*

³⁸ *Qwelane* fn 1 para 115.

³⁹ *Ibid.*

(b) based on one or more of the prohibited grounds

[39] The message conveyed by gratuitous public displays of the old flag is plainly one based on race – apartheid and white supremacy. Indeed, this is common ground. Afriforum did not take issue with the impact of the gratuitous displays of the old flag on Mr Hatang or black people generally. And as stated, it acknowledged that the old flag causes offence and emotional distress. That is why it asks its followers to put away the old flag at Afriforum events, and not to display it.

[40] The old flag is an awful reminder of the anguish suffered by millions of people under apartheid South Africa before the advent of democracy in 1994. It symbolises, clearly and painfully, the policy and manifestation of apartheid. In fact, Afriforum’s answering affidavit states: ‘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’. As stated in the founding affidavit of the SAHRC, the old flag represents precisely that racist and repressive regime, and the dehumanising ideologies espoused during its rule – the racial superiority of white South Africans and the corresponding inferiority of black South Africans.

[41] As a revered icon of apartheid, the old flag represents hate, pain and trauma for most people, particularly black South Africans. The gratuitous public displays by people of the old flag – a provocative symbol of repression, authoritarianism and racial hatred – brings into unmistakable view their affinity and mourning for the apartheid regime, characterised by its degrading, oppressive and undignified treatment of black South Africans. The message

conveyed is a longing for the days of apartheid and the restoration of white minority rule.

(c) *reasonably be construed to demonstrate a clear intention to be harmful or to incite harm, and to promote or propagate hatred*

[42] The Constitutional Court has held that this is an objective test. The question is whether a reasonable person in the circumstances surrounding the expression, would reasonably construe the words or conduct as demonstrating an intention to be harmful, incite harm or propagate hatred.⁴⁰

[43] The emphasis is on the ‘*effects* of the hate speech, not the intent’.⁴¹ In this regard, the Constitutional Court observed that ‘*systemic* discrimination tends to be more widespread than intentional discrimination’:

‘This Court has acknowledged that “systemic motifs of discrimination” are part of the fabric of our society. This analysis is apt when considering the philosophical underpinnings of hate speech prohibitions that attach civil liability, coupled with the role of hate speech and systemic discrimination in this country.’⁴²

[44] The objects of the intention – to be harmful or incite harm, or to promote or propagate hatred – must be read conjunctively.⁴³ However, the section distinguishes between the concepts, ‘harmful’ and ‘to incite harm’, which the Constitutional Court referred to as ‘clear disjunctive terms’.⁴⁴ Accordingly, s 10(1) prohibits expression that harms or ‘evokes a reasonable apprehension of

⁴⁰ *Qwelane* fn 1 paras 96-101.

⁴¹ *Qwelane* fn 1 para 100, emphasis in the original.

⁴² *Ibid*, emphasis in the original. The Constitutional Court endorsed the approach in *Saskatchewan (Human Rights Commission) v Whatcott* 2012 SCC 11; [2013] 1 SCR 467 (*Whatcott*) para 126, in which the Supreme Court of Canada stated:

‘The preoccupation with the effects, and not with intent, is readily explicable when one considers that systemic discrimination is much more widespread in our society than is intentional discrimination. To import a subjective intent requirement into human rights provisions, rather than allowing tribunals to focus solely upon effects, would thus defeat one of the primary goals of the anti-discrimination statute.’

⁴³ *Qwelane* fn 1 paras 102-110.

⁴⁴ *Qwelane* fn 1 para 112.

harm to the target group’.⁴⁵ The incitement of harm and the promotion or propagation of hatred are the key elements of hate speech,⁴⁶ since freedom of expression requires tolerance of speech that shocks and offends.⁴⁷

[45] The requirement that speech ‘be harmful or incite harm’ does not require a causal link to be established between the speech and subsequent actions taken against individuals or groups at whom the speech is targeted. Requiring such a causal link would be contrary to and undermine the provisions of the Equality Act, ‘in that not every instance of harmful . . . speech will result in imminent violence’. However, the fact that it does not result in imminent violence does not detract from the reality that such expression would constitute hate speech.⁴⁸

[46] The Constitutional Court has held that racist speech is particularly egregious. In *Rustenburg Platinum Mine*, it said:⁴⁹

‘Our Constitution rightly acknowledges that our past is one of deep societal divisions characterised by strife, conflict, untold suffering and injustice. Racism and racial prejudices have not disappeared overnight, and they stem, as demonstrated in our history, from a misconceived view that some are superior to others. These prejudices do not only manifest themselves with regard to race but it can be seen with reference to gender discrimination.’

[47] Racist conduct, the Constitutional Court said in *South African Revenue Service*,⁵⁰ must be dealt with firmly:

‘[R]acist conduct requires a very firm and unapologetic response from the courts, particularly the highest courts. Courts cannot therefore afford to shirk their constitutional obligation or spurn the opportunities they have to contribute meaningfully towards the eradication of racism and its tendencies’

⁴⁵ Ibid.

⁴⁶ In the light of the judgment in *Qwelane*, which removed the requirement that hate speech must also ‘be hurtful’.

⁴⁷ Following the judgment in *Qwelane*, which removed the requirement that it must also ‘be hurtful’.

⁴⁸ *Qwelane* fn 1 para 111.

⁴⁹ *Rustenburg Platinum Mine v SAEWA obo Bester* [2018] ZACC 13; 2018 (5) SA 78 (CC); 2018 (8) BCLR 951 (CC) para 52.

⁵⁰ *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* [2016] ZACC 38; 2017 (1) SA 549 (CC); 2017 (1) BCLR 241 (CC) para 14.

[48] These two cases, it was held in *Qwelane*,⁵¹ ‘demonstrate the presence of deeply rooted structural subordination in relation to race’. The Court went on to say:

‘In these cases, the Court underscored how facially innocuous words or notorious words have to be understood based on the different structural positions in post-apartheid South African society. This is an approach which takes cognisance of how words perpetuate and contribute towards systemic disadvantage and inequalities. In essence, this is the corollary of our substantive equality demands that flow from the Constitution. The purpose of hate speech regulation in South Africa is inextricably linked to our constitutional object of healing the injustices of the past and establishing a more egalitarian society. This is done by curtailing speech which is part and parcel of the system of subordination of vulnerable and marginalised groups in South Africa.’⁵²

[49] The message communicated by gratuitous public displays of the old flag is not innocuous, let alone facially innocuous. Rather, those who publicly hold up or wave the old flag, convey a brazen, destructive message that they celebrate and long for the racism of our past, in which only white people were treated as first-class citizens while black people were denigrated and demeaned. It is a glorification and veneration of the hate-filled system that contributed to most of the ills that beset our society today. The message is aimed at intimidating those who suffered, and continue to suffer, the ravages of apartheid; and poses a direct challenge to the new constitutional order. This, when, as stated in the Minister’s affidavit, it has been determined that apartheid is a crime against humanity.⁵³ And when Afriforum itself states: ‘Most South

⁵¹ *Qwelane* fn 1 para 86.

⁵² *Ibid.*

⁵³ The International Convention on the Suppression and Punishment of the Crime of Apartheid, 1976 (Gen Assembly Res 3068/1976 Article I(1) and the Rome Statute Article 7(2)(h) states:

‘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. The Rome Statute describes the crime of apartheid as, “inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with intention of maintaining that regime”.’ In 1984 the UN Security Council at

Africans recoil from the old flag and openly denounce Apartheid as a crime against humanity’.

[50] Such displays of the old flag are calculated to be harmful: it results in ‘deep emotional and psychological harm that severely undermines the dignity of the targeted group’⁵⁴ – black people. It also incites harm: it is able to ignite exclusion, hostility, discrimination and violence against them.⁵⁵ It can, ‘have a severely negative impact on the individual’s sense of self-worth and acceptance. This impact may cause the target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority’.⁵⁶ This, in turn, not only perpetuates systemic disadvantage and inequalities, but also obstructs the constitutionally mandated objective of building a non-racial society based on human dignity and the achievement of equality; and impairs the pursuit of national unity and reconciliation.⁵⁷ In short, hate speech tears at the very fabric of our society.⁵⁸

[51] That brings me to last element of s 10(1) of the Equality Act: the promotion or propagation of hatred. The word ‘promote’ in this context, means to ‘further or encourage the progress or existence of’ hatred.⁵⁹ To ‘propagate’ means to ‘extend the bounds of’, ‘spread (esp. an idea, practice, etc.) from place to place’,⁶⁰ or ‘promulgate; disseminate’⁶¹ hatred.

its 2560th meeting, endorsed this Resolution (SC Resolution 556 (1984) of 23 October 1984).

⁵⁴ *Qwelane* fn 1 para 154.

⁵⁵ *Qwelane* fn 1 para 1.

⁵⁶ *R v Keegstra* [1990] 3 SCR 697 at 746i-j, approved in *Qwelane* fn1 para 154.

⁵⁷ *Islamic Unity Convention* fn 23 paras 28 and 33; *Qwelane* fn 1 para 1.

⁵⁸ *Qwelane* fn 1 para 1.

⁵⁹ *Collins English Dictionary* online at www.collinsdictionary.com/dictionary/english/promote (accessed on 14 April 2023).

⁶⁰ L Brown *The New Shorter Oxford English Dictionary on Historical Principles* (3 ed 1993) Vol 2 at 2378.

⁶¹ *Collins English Dictionary* online at www.collinsdictionary.com/dictionary/english/promote (accessed on 14 April 2023).

[52] The Constitutional Court, with reference to three Canadian cases, held that hate speech is not merely offensive expression, but ‘extreme detestation and vilification which risks provoking discriminatory activities’ against the target group. The first of these cases, *Canada v Taylor*,⁶² defined ‘hatred’ as, ‘strong and deep felt emotions of detestation, calumny and vilification’. In the second, *R v Andrews*,⁶³ it was said that ‘[t]o promote hatred is to instill detestation, enmity, ill-will and malevolence in another’. Finally, in *R v Keegstra*, the court stated that hatred is ‘the most severe and deeply felt form of opprobrium’, that ‘is predicated on destruction, and hatred against identifiable groups therefore thrives on insensitivity, bigotry and destruction of both the target group and the values of our society’.⁶⁴

[53] The gratuitous public display of the old flag is extremely degrading and dehumanising to those who suffered under apartheid. This was not disputed by Afriforum as the high court noted in its judgment. The display exposes those who suffered to racial bigotry, detestation and vilification, and inspires hatred and extreme ill-will against them. The message being sent, intentionally, is that life in South Africa was better under apartheid and black people are to be downtrodden, despised and denied their humanity, solely on account of their race. There is no escaping it: the message legitimises white supremacy.

[54] It is therefore unsurprising that white supremacists around the world have adopted and used the old flag as a symbol of hatred, oppression, and racial superiority. The founding affidavit of the SAHRC refers to the case of the convicted murderer, 21-year old Mr Dylann Roof (Roof), who shot and killed nine black people gathered for a Bible study in Charleston, South Carolina in the United States, in June 2015. He posted a photograph on the internet, annexed to the affidavit, which shows him wearing a black jacket with two

⁶² *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892 at 928.

⁶³ *R v Andrews* [1990] 3 SCR 697 at 870.

⁶⁴ *R v Keegstra* fn 56 at fn 700 and 777 of the judgment.

conspicuous patches affixed to the right front of it: the old flag and below it, the flag of white-ruled Rhodesia, which was forced to concede power to a non-racial democracy, now Zimbabwe. Roof's choice of symbols and the murder of black worshippers, could hardly send a stronger message of white supremacy and hatred.

[55] The United States Court of Appeals for the Fourth Circuit upheld Roof's conviction on, inter alia, 'nine counts of racially motivated hate crimes resulting in death'.⁶⁵ The Court's description of Roof's claim of white supremacy and hatred that caused him to commit these heinous crimes, is chilling:

'He also used the internet to propagate his racist ideology. In a journal that the police found in Roof's home, Roof had written the name of a website he had created. The website was hosted by a foreign internet server, to which Roof made monthly payments. Hours before the shootings, Roof uploaded racist material to the website. The website included hyperlinks to text and photos. The text linked to a document where Roof expressed his virulent racist ideology, claimed white superiority, and called African Americans "stupid and violent." He discussed black-on-white crime, claiming it was a crisis that the media ignored. He issued a call to action, explaining that it was not "too late" to take America back and "by no means should we wait any longer to take drastic action." He stated that nobody "was doing anything but talking on the internet," that "someone has to have the bravery to take it to the real world," and "I guess that has to be me."'⁶⁶

[56] For the above reasons, any gratuitous public display of the old flag satisfies the requirement of promoting and propagating hatred as envisaged in s 10(1) of the Equality Act. It provides fertile ground for the violence and brutality of racism. No wonder the Equality Act is aimed at 'the *eradication* of unfair discrimination, hate speech and harassment, particularly on the grounds of race'.⁶⁷

⁶⁵ *United States of America v Dylann Storm Roof* decided on 25 August, 2021 225 F. Supp. 3D413 (D.S.C. 2016).

⁶⁶ *US v Roof* fn 65 4623–4627.

⁶⁷ Section 2(c) of the Equality Act, emphasis added.

(d) The proviso in section 12

[57] The prohibition of hate speech in s 10 is subject to the proviso in s 12 of the Equality Act.⁶⁸ The high court therefore rightly made its declaratory order subject to s 12, ie that a display of the old flag for artistic, academic or journalistic purposes, is not prohibited.

[58] Afriforum argued that the high court's order constitutes a 'wide-reaching ban' on the display of the old flag, and an unconstitutional infringement of the right to freedom of expression. The argument is groundless. The high court emphasised that the NMF had not sought an order banning the old flag, but that its public display be confined to genuine artistic, academic or journalistic expression in the public interest. For this reason, the court did not impose a wholesale ban on displays of the old flag. Instead, it declared that displays of the old flag that do not fall within the proviso in s 12, constitute hate speech, unfair discrimination and harassment.

Section 7 of the Equality Act: unfair discrimination

[59] In terms of the Equality Act, 'discrimination' includes any act, omission or situation which imposes disadvantage on any person on one or more of the prohibited grounds'. For present purposes, the prohibited ground is race. Section 7(a) provides:

'Prohibition of unfair discrimination on grounds of race

Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including-

⁶⁸ Section 12 of the Equality Act provides:

'Prohibition of dissemination and publication of information that unfairly discriminates

No person may-

(a) disseminate or broadcast any information;

(b) publish or display any advertisement or notice,

that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: 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.'

(a) the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence;⁶⁹

[60] As in the case of hate speech in terms of s 10(1) of the Equality Act, the prohibitions of unfair discrimination on the ground of race and harassment, are statutory delicts actionable in the Equality Court.⁷⁰ The elements of these statutory delicts must be established objectively,⁷¹ on a balance of probabilities.⁷²

[61] Section 13(1) requires a respondent to show the absence of racial discrimination. It reads:

‘Burden of proof

(1) If the complainant makes out a *prima facie* case of discrimination-

(a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or

(b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds.

(2) If the discrimination did take place-

(a) on a ground in paragraph (a) of the definition of “prohibited grounds”, then it is unfair, unless the respondent proves that the discrimination is fair;

(b) on a ground in paragraph (b) of the definition of “prohibited grounds”, then it is unfair-

(i) if one or more of the conditions set out in paragraph (b) of the definition of “prohibited grounds” is established; and

(ii) unless the respondent proves that the discrimination is fair.’

⁶⁹ Section 6 of the Equality Act contains a general prohibition of unfair discrimination. It states: ‘Neither the State nor any person may unfairly discriminate against any person.’

⁷⁰ *Qwelane* fn 1 para 95

⁷¹ *Qwelane* fn 1 paras 96-101.

⁷² *Social Justice Coalition and Others v Minister of Police and Others* [2018] ZAWCHC 181; 2019 (4) SA 82 (WCC) paras 67-68.

[62] Section 14(2) provides that in deciding whether a respondent has proved that the discrimination is fair, the context and the factors referred to in subsection (3) must be taken into account. These factors include the following:

- ‘(a) whether the discrimination impairs or is likely to impair human dignity;
- (b) the impact of likely impact of the discrimination on the complainant;
- (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
- (d) the nature and extent of the discrimination;
- (e) whether the discrimination is systemic in nature;
- ...’

[63] The evidence established that the displays of the old flag at the Black Monday protests propounded the racial superiority of white people and the racial inferiority of black people. Having regard to the factors listed in ss 14(2) and (3) of the Equality Act, the public displays of the old flag at the Black Monday protests were plainly actual, and not merely *prima facie*, proof of racial discrimination. Afriforum did not challenge this evidence; neither did it adduce any evidence to show that the discrimination did not take place, nor that the public displays of the old flag were not based on race, as required by s 13(1).

[64] It follows that the gratuitous public display of the old flag constitutes unfair discrimination based on race, within the meaning of s 7 of the Equality Act. This interpretation, and that of s 10(1) referred to above, accords with the objects of the Act, which include facilitating compliance with the State’s treaty obligations under the ICERD and the International Covenant on Civil and Political Rights (ICCPR), that are binding on this country.⁷³ South Africa ratified the ICERD on 9 January 1999, and the ICCPR on 10 December 1998.

⁷³ In terms of s 2(h) of the Equality Act, its objects include ‘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’. The preamble to the Act also refers to South Africa’s international obligations under binding treaties and customary international law.

[65] The ICERD obliges State Parties to take positive measures to eradicate all incitement of racial hatred or acts of discrimination in any form; and to declare all dissemination of ideas based on racial superiority, hatred, discrimination, acts of violence and incitement to such acts, offences punishable by law.⁷⁴ The ICCPR prohibits ‘any advocacy’ of racial hatred ‘that constitutes incitement to discrimination’.⁷⁵

Section 11 of the Equality Act: harassment

[66] Section 11 of the Equality Act states:

‘No person may subject any person to harassment.’

The Act defines ‘harassment’ as,

‘unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile and intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to-

(a) sex, gender or sexual orientation;

(b) a person’s membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group;’

[67] The high court correctly concluded that Afriforum’s argument that the display of the flag did not constitute harassment because it did not amount to torment that was persistent and repetitive, was unsound. In the light of the evidence that any gratuitous public display of the old flag seriously demeans, humiliates and creates a hostile and intimidating environment for victims of

⁷⁴ Article 4 of the ICERD provides:

‘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 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 racist activities, including the financing thereof.

⁷⁵ Article 20 para 2 of the ICCPR provides that ‘[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’.

apartheid, particularly black people, the finding that such a display constitutes harassment under s 11, cannot be faulted.

[68] Before us, Afriforum conceded that a display of the old flag could be used to harass a person, but argued that not all displays envisaged in the high court's order would constitute harassment. It cited the private display of the flag, which is not aimed at any person, as an example of this. In cases where all those witnessing the display are willing participants, so it was argued, they would also not be subject to unwanted conduct and none of them would have been harassed. However, Afriforum misses the point. It is the gratuitous public display of the old flag that constitutes harassment as defined in the Equality Act. It cannot be suggested that those who witness the display of the old flag in the privacy of a home, are all 'willing participants'. They may or may not subscribe to the racist ideology that the old flag represents.

[69] What remains is Afriforum's argument that private displays of the flag are protected by the right to privacy in s 14 of the Constitution.⁷⁶ Paragraph (2) of the high court's order states that 'any' display of the old flag constitutes hate speech, unfair discrimination and harassment. The court reasoned that in modern-day South Africa, there is hardly any space which is private to one race to the exclusion of another; and that 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'.

[70] There can be no dispute that the gratuitous display of the old flag at a school, be it public or private, would fall foul of ss 10(1), 7 and 11 of the

⁷⁶ Section 14 of the Constitution provides:

'Everyone has the right to privacy, which includes the right not to have –

(a) their person or home searched;
(b) their property searched;
(c) their possessions seized; or
(d) the privacy of their communications infringed.'

Equality Act: it is a public space. The high court however erred in issuing a declaratory order which includes any display of the old flag within the privacy of a home, as being a contravention of the Act, for two reasons. First, the NMF failed to state a claim on which such relief could be granted. The inquiry before the high court as to whether hate speech, unfair discrimination or harassment had taken place, was squarely founded on gratuitous public displays of the old flag at the Black Monday protests. That was the conduct ‘alleged’ within the meaning of s 21(1) of the Equality Act, and the issue the court was called upon to decide.

[71] Second, the issue as to whether a private display of the old flag would contravene the Equality Act was not properly and fully argued; neither in the high court nor in this Court. It is therefore imprudent and inappropriate for this Court to pronounce upon it. The issue is not fit for judicial decision in this case, and no hardship will be caused to any of the parties if its consideration is withheld, until such a complaint is lodged with the Equality Court. It follows that paragraph (2) of the high court’s order must be amended.

[72] Afriforum relies on *Qwelane* for its submission that the high court erred in declaring private displays of the old flag as hate speech. The Constitutional Court stated that the concepts to ‘promote’, and ‘propagate’ hatred in s 10(1)(c) of the Equality Act ‘do not fit the notion of communicating in private’; and the word, ‘communicate’ in s 10(1) excludes private conversations.⁷⁷ The Court went on to say that our most private communications form part of the ‘inner sanctum of the person’, which is in the ‘truly personal realm’,⁷⁸ and are thus protected by the right to privacy. The prohibition of hate speech should not extend to private communications.⁷⁹

⁷⁷ *Qwelane* fn 1 para 116.

⁷⁸ *Qwelane* fn 1 para 117.

⁷⁹ *Qwelane* fn 1 paras 117-118.

[73] However, Afriforum's reliance on these statements by the Constitutional Court, merely underscores the inappropriateness of deciding, in the present case, the question whether private displays of the old flag contravene the Equality Act. This however, is not to say that a private display of the old flag can never breach the provisions of the Equality Act. It is hard to see how a display of the old flag in the privacy of a home to which, for example, family members, children or young people are invited and indoctrinated in racism and white supremacy, would not entitle a person to institute proceedings in the Equality Court for an order that there has been a breach of the Act. But that is a case for another day.

[74] Finally, there is the question of costs. In the high court the parties agreed that there should be no costs order. However, in this Court Afriforum, relying on *Biowatch*,⁸⁰ submitted that it was entitled to costs if the appeal succeeded and if not, each party should pay its own costs. By reason of this stance, the NMF contended that it was entitled to costs should the appeal fail. The SAHRC did not seek a costs order on appeal. There is no reason why the *Biowatch* principle should not apply: this is constitutional litigation in which Afriforum proffered defences based on the protection of fundamental rights. It is thus appropriate that there should be no costs order on appeal.

[75] In the result, the following order is issued:

1 Paragraph (2) of the order of the court below is set aside and replaced with the following order:

‘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 gratuitous public display of the Old Flag constitutes:

⁸⁰ *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 32 (CC); 2009 (10) BCLR 1014 (CC).

- (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 Save as aforesaid, the appeal is dismissed. There is no order as to costs of the appeal.

A SCHIPPERS
JUDGE OF APPEAL

Appearances:

For appellant: M Oppenheimer

Instructed by: Hurter Spies Inc, Centurion
Rossouw & Conradie Inc, Bloemfontein

For first respondent: T Ngcukaitobi SC (with B Winks and J Chanza)

Instructed by: Rupert Candy Attorneys, Sandton
Mphafi Khang Inc, Bloemfontein

For second and
third respondent:

S Kazee
Instructed by: The State Attorney, Johannesburg
The State Attorney, Bloemfontein

For fourth respondent: W Trengrove SC (with J L Griffiths)

Instructed by: Webber Wentzel Attorneys, Johannesburg
Symington De Kok, Bloemfontein