IN THE EQUALITY COURT OF SOUTH AFRICA

HELD AT THE GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO. EQ2/2018

In the matter between:

NELSON MANDELA FOUNDATION TRUST	1st Applicant
THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION	2nd Applicant
And	
AFRIFORUM NPC	1st Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	2nd Respondent
THE DEPARTMENT OF JUSTICE AND CORRECTIONAL SERVICES	3rd Respondent
With	
JOHANNESBURG PRIDE NPC	1st Amicus Curiae
FEDERASIE VAN AFRIKAANSE KULTUURVERENIGINGE NPC	2nd Amicus Curiae

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FILING SHEET: 1ST APPLICANT'S HEADS OF ARGUMENT

PRESENTED FOR ARGUMENT:

1. 1st Applicant's Heads of Argument

DATED AT JOHANNESBURG ON THIS 18th DAY OF FEBRUARY 2019.

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IN THE EQUALITY COURT OF SOUTH AFRICA
(HELD AT THE GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO. EQ 02/18

In the matter between:

NELSON MANDELA FOUNDATION TRUST	**First Applicant**
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	**Second Applicant**
and	
AFRIFORUM NPC	**First Respondent**
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**Second Respondent**
DEPARTMENT OF JUSTICE AND CORRECTIONAL SERVICES	**Third Respondent**
with	
JOHANNESBURG PRIDE NPC	**First Amicus Curiae**
FEDERASIE VAN AFRIKAANSE KULTUURVERENIGINGE NPC	**Second Amicus Curiae**

FIRST APPLICANT'S HEADS OF ARGUMENT

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INTRODUCTION

1. This is an opposed application for a declaratory order, in terms of **section 21(2)(b)** of the **Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000** ("**the Act**"), concerning displays of the previous official flag of South Africa (the "**1928 Flag**" or "**Old Flag**"), which was introduced on 31 May 1928 upon the commencement of the Union Nationality and Flags Act 40 of 1927, and abolished on 27 April 1994 upon the commencement of the Constitution of the Republic of South Africa, 1993.

2. The first applicant ("**the Mandela Foundation**") seeks an order declaring that any display of the 1928 Flag that does not serve any genuine journalistic, academic or artistic purpose in the public interest ("**gratuitous display**") constitutes, as against black people:

   2.1. hate speech, under **section 10** of the Act;

   2.2. harassment, under **section 11** of the Act; and

   2.3. unfair discrimination, under **section 7** of the Act.[1]

3. The first respondent ("**Afriforum**") opposes this relief in its entirety, and contends among others that "*displaying the Old Flag is constitutionally protected expression*" under **section 16(1)** of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**").[2]

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[1] Mandela Foundation's affidavit, §23-25 (**v1 p16-17**).

[2] Afriforum's answering affidavit to the Mandela Foundation, §54 (**v1 p97**).

4. The first amicus curiae ("**Pride**") argues that "*the gratuitous display of the Old Flag amounts to hate speech and/or harassment not only against black people but also against members of the LGBT+ community*".[3]

5. The second amicus curiae ("**FAK**") submits that displays of the 1928 Flag should not be "*banned*".[4]

6. The intervening second applicant ("**SAHRC**") seeks, necessarily in the alternative to the Mandela Foundation's first prayer (para 2.1 above), an order declaring inter alia that section 10 of the Act is "*unconstitutional and invalid to the extent that it restricts the type of expression which may constitute hate speech to 'words' only*", but should be read to encompass all forms of expression while Parliament corrects the defect (within twelve months).[5]

7. Afriforum opposes this alternative relief too, arguing that "*to only prohibit 'words' is not unconstitutional, because the Constitution creates no direct prohibition on any form of expression*".[6]

8. The second and third respondents (together, "**the Department**") "*support[s] the relief sought by the SAHRC*",[7] and sets out how it intends to correct the defect.[8]

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[3] Pride's founding affidavit, §11(a) (**v2 p111**).

[4] FAK's affidavit, §23-25 (**v3 p211**).

[5] SAHRC's notice of motion (**v3 p218-219**).

[6] Afriforum's answering affidavit to the SAHRC, §17 (**v3 255**).

[7] Department's affidavit, §4 (**v3 p264**).

[8] Department's affidavit, §23-25 (**v3 p271**).

FACTUAL BACKGROUND

9. There are no material disputes of fact. The relevant factual background is simply that, in late 2017, there were reports that the 1928 Flag had been displayed by some individuals at public demonstrations about farm murders.[9] In public discussions concerning these reports, a dispute of law arose between the Mandela Foundation and Afriforum, as to whether the alleged displays of the 1928 Flag are, or ought to be, constitutionally protected.[10] This dispute necessitates declaratory relief.

ISSUES

10. This Court must determine:

    10.1. What objective meaning(s) does the 1928 Flag bear?

    10.2. Does any gratuitous display of the 1928 Flag constitute –

    (a) hate speech under section 10 of the Act;

    (b) harassment under section 11 of the Act; and/or

    (c) unfair discrimination under section 7 of the Act?

    10.3. If any of the above, what is an appropriate remedy?

    10.4. *In the alternative to 10.2(a) above* – i.e. if section 10 of the Act cannot apply to any display of the 1928 Flag (as it is not expressed in "*words*") – is section 10 of the Act unconstitutional? If so, what is an appropriate remedy?

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[9] Mandela Foundation's affidavit, §11-12 (**v1 p11**).

[10] Mandela Foundation's affidavit, §19 (**v1 p14-15**).

BALANCING EXERCISE

11. The Mandela Foundation does not, and need not, argue that any gratuitous display of the 1928 Flag, on its own, constitutes expression that is entirely excluded from constitutional protection by virtue of section 16(2) of the Constitution. What the Mandela Foundation contends is that any such display constitutes expression that is prohibited by the Act, specifically sections 10, 11 and 7, which impose justifiable limitations on the right to freedom of expression enshrined in section 16(1) of the Constitution.

12. Afriforum does not challenge the constitutionality of the Act. This Court is thus called upon to determine whether gratuitous displays of the 1928 Flag fall within the scope of sections 10, 11 and 7 of the Act, not whether they fall within the scope of section 16(2) of the Constitution.

13. In applying sections 10, 11 and 7 of the Act to gratuitous displays of the 1928 Flag, this Court must of course balance the right to freedom of expression against the rights to equality and human dignity (enshrined respectively in **sections 9 and 10 of the Constitution**). The Mandela Foundation argues that the declaratory order it seeks strikes the balance that is commanded by the Constitution and the Act.

14. Afriforum disagrees, saying that the right to freedom of expression is so important that it outweighs the rights to equality and human dignity in this case. Afriforum cites a 1994 High Court judgment exalting "*the primacy of the freedom of speech*", as being the "*freedom upon which all the other freedoms depend*".[11] This reliance is inapposite, in light of the many Constitutional Court judgments that came after

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[11] Afriforum's answering affidavit to the Mandela Foundation, §13 (**v1 p81**), citing *Mandela v Falati* 1995 (1) SA 251 (W), 259.

it, affirming that "*the right to freedom of expression cannot be said automatically to trump the right to human dignity*", *which is "at least as worthy of protection*".[12]

15. Indeed, in ***Makwanyane***,[13] the Constitutional Court (per Chaskalson P) held that:

> *The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in [the Bill of Rights]. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.*

16. In the same case, O'Regan J placed this importance in historical context:[14]

> *The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in [the Bill of Rights].*
>
> *Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new constitution.*

17. In ***Islamic Unity***,[15] Langa DCJ directly addressed the appropriate balance between the right to freedom of expression and the rights to equality and human dignity:

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[12] *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC), §41.

[13] *S v Makwanyane & Another* [1995] ZACC 3; 1995 (3) SA 391 (CC), §144.

[14] *Id*, §329.

[15] *Islamic Unity Convention v Independent Broadcasting Authority & Others* [2002] ZACC 3; 2002 (4) SA 294 (CC), §29-30.

Section 1 of the Constitution declares that South Africa is founded on the values of "human dignity, the achievement of equality and the advancement of human rights and freedoms." Thus, open and democratic societies permit reasonable proscription of activity and expression that pose a real and substantial threat to such values and to the constitutional order itself...

There is thus recognition of the potential that expression has to impair the exercise and enjoyment of other important rights, such as the right to dignity, as well as other state interests, such as the pursuit of national unity and reconciliation. The right is accordingly not absolute; it is, like other rights, subject to limitation under section 36(1) of the Constitution.

MEANING(S) OF THE 1928 FLAG

18. This Court must first consider what a gratuitous display of the 1928 Flag means. The test is objective, asking what the reasonable observer would deem it to mean. In ***Afriforum v Malema***,[16] this Court held as follows (assessing the lyrics of a song against section 10 of the Act):

Words can simultaneously:
(1) have different meanings;
(2) mean different things to different people.

If the words have different meanings, then each meaning must be considered and be accepted as a meaning. The search is not to discover an exclusive meaning but to find the meaning the target group would reasonably attribute to the words.

If the words mean different things to different portions of society then <u>each meaning, for the reasonable listener in each portion of society, must be considered as being the appropriate meaning.</u>

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[16] *Afriforum v Malema* [2011] ZAEQC 2; 2011 (6) SA 240 (EqC), §109.6 to §109.8.

The history of the 1928 Flag in context

19. History always matters.[17] Especially the history of racialised inequality in South Africa – the unique attribute of which was the denial of human dignity to black South Africans. One of the specific goals of the Constitution is to redress the legacy of race-based inequality which was characterised by the denial of dignity to black South Africans.

20. This was confirmed in ***Dawood***, when the Constitutional Court noted the express purpose of the value and right to dignity as being "*to contradict*" the past:[18]

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

21. History matters for equality, too. Recently, in ***Rahube***, the Constitutional Court stated:[19]

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

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[17] See, for example, *Daniels v Scribante and Another* [2017] ZACC 13; 2017 (4) SA 341 (CC), §14-23.

[18] *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC), §35 (emphasis added).

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

> *"As in other national constitutions, section 8 is the product of our own particular history. Perhaps more than any of the other provisions in [the Bill of Rights], its interpretation must be based on the specific language of section [9], as well as our own constitutional context. Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life... The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted."*[20]

22. Finally, a lesson from our history, as underscored by the Constitutional Court in ***Garvas***,[21] is that "*ours is a 'never again' Constitution: never again will we allow the right of ordinary people to freedom in all its forms to be taken away*".

23. Consequently, to ascertain the objective meaning(s) of displaying the 1928 Flag, and in turn its implications for the rights to dignity and equality, it is necessary, first, to understand its origins and history.

24. Prior to the adoption of the 1928 flag, the British flag – the Union Jack – was the official flag of the country, because the Union of South Africa was considered to be part of the British Empire. The first call for the recognition of a "*national flag*" was made by the Cape conference of the Nationalist Party in 1919, a demand which was repeated in 1921 when the Free State branch of the Nationalist Party held its Congress. Then, the justification for the new flag was that the Union Jack represented only one section of the population.

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[20] *Brink v Kitshoff N.O.* [1996] ZACC 9; 1996 (4) SA 197 (CC), §40.

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

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

26. In 1925, the Minister of Interior, DF Malan, was responsible for the introduction of Afrikaans as the second national language, replacing Dutch. He was also instrumental in proposing a new flag through the Nationality and Flag Bill. The Bill, however, would not see the light of day as it was withdrawn before its second reading, although Malan pointed to the need for a new flag that would be *"accepted as the united choice of all sections of the nation through their recognised political leaders"*.[22] Of course, "*all sections of the nation*" denoted only white people.

27. When the flag was re-introduced in 1926, Malan motivated for it on the grounds that the history of division between Afrikaners and English had to be forgotten and *"both sections"* had to forge unity for the future of South Africa. His speech delivered on 20 May 1926 is significant for its clarity as to the intentions behind the Bill.

28. Malan first explained why a flag was important, noting that a flag is not a mere cloth, but a symbol of national existence: *"a flag is a living thing; it is the repository*

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[22] Quoted in Harry Saker, *The South African Flag Controversy, 1925-1928* (PhD dissertation, University of Cape Town, 1977), 64-65.

of national sentiment".[23] As to why it was being introduced, Malan was again explicit:[24]

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

29. In other words, Malan saw the resolution of the flag question as connected to the race question. Its resolution carried the potential for the resolution of the racial reconciliation between the Afrikaners and the English. The proposed flag was not adopted, however, on 26 May 1926. Instead, it was postponed, owing to the resistance from "*both sections*" of the population.

30. When the Union Nationality and Flag Bill was re-introduced on 16 May 1927, it still bore its distinctive features – fusion of the Afrikaner and English invented traditions – which, as explained by Malan, comprised two parts. The first was "*a legal recognition by ourselves and for the legal information of other nations, that we exist as a South African nation*".[25] Moreover:

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

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[23] Hansard, *Debates of the House of Assembly*, 20 May 1926.

[24] *Id.*

[25] Hansard, *Debates of the House of Assembly*, 26 May 1927.

31. By 1927 the situation had moved along. The English and Afrikaans speaking representatives in the whites-only Parliament were now able to "*reconcile*" their differences and agree on a new flag. Most importantly, the Imperial Conference had resolved to recognise South Africa's "*equal status*" with Britain, meaning that it was entitled to have its own flag, distinct from the Union Jack.

32. The Flag was finally adopted in June 1927 (and would enter into force in 1928). Its purpose was plain – it would serve as a distinctive marker for severing the ties with the imperial power, Britain. But most importantly, it was a nationalist symbol of unity between English and Afrikaans speakers.

33. Excluded from the discussion, of course, were Africans and other people of colour. Their rights to vote had been curtailed since the Treaty of Vereeniging, and the exclusion was entrenched in 1910 when the remaining elements of native franchise were subjected wholly to the whims of the whites-only Parliament. As the debate was raging concerning the Flag Bill, Hertzog's government was introducing other legislative steps designed to consign blacks into the status of subservience. Smuts' warning was not heeded:[26]

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

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[26] Quoted in Harry Saker, *The South African Flag Controversy, 1925-1928* (PhD dissertation, University of Cape Town, 1977), 152.

34. Indeed, the Union Nationality and Flag Act of 1927 ("**the Flag Act**") was passed alongside the odious Immorality Act of 1927 (which outlawed "*illicit intercourse between Europeans and natives*"), and the devastating Native Administration Act of 1927 (which made the Governor-General "*the supreme chief of all natives*" and gave him vast powers to appoint and depose chiefs, and generally to control how black people occupied and used land, moved, married, inherited, settled disputes, and even spoke). These laws paved the way for the subsequent notorious "*Hertzog Bills*" of 1936: the Native Representation Bill (to further limit native franchise); the Native Trust and Land Bill (to intensify the land ownership restrictions set by the Native Land Act of 1913); and the Urban Areas Amendment Bill (to limit natives to residing in urban areas only as labourers). Viewed in this context, the Flag Act was unapologetically part of a scheme of statutes that were intended to entrench racialised segregation and white supremacy.

35. On its face, the 1928 Flag itself was a vivid symbol of white supremacy and black disenfranchisement. It combined four flags of European provenance – the British Union Jack and the flags of the Transvaal and Oranje Vrystaat republics founded by Boer settlers, on the background of the "Oranje Blanje Blou" Dutch Prinsevlag. It gave expression only to European heritage and heraldry, excluding black people entirely from Malan's project of "*binding together of all sections of the people in one common sentiment*", and ultimately from any sense of national belonging in the land of their birth.

36. The Flag Act was superseded and repealed by the 1961 "Republican" Constitution, which retained the 1928 Flag,[27] entrenched electoral exclusion of everybody other

[27] Republic of South Africa Constitution Act, 1961, §5.

than "*white persons*",[28] and vested the State President with absolute authority over "*Bantu affairs*", including "*Bantu locations*".[29]

37. The 1928 Flag was retained in the 1983 'Tricameral' Constitution,[30] which gave limited electoral rights to "*Coloured*" and "*Indian*" persons,[31] but excluded African people from the definition of South Africa's "*population groups*" that were entitled to "*self-determination*".[32] The 1983 Constitution elevated the 1928 Flag to sacred status, making it a criminal offence, punishable by five years' imprisonment, to "*hold the National Flag of the Republic in contempt*".[33]

38. It is against the backdrop of this history that the meaning(s) of the 1928 Flag must be assessed.

Meanings to the parties

39. The Mandela Foundation testified that:[34]

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

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[28] *Id*, §34 and §46.

[29] *Id*, §111.

[30] Republic of South Africa Constitution Act, 1983, §4.

[31] *Id*, §52.

[32] *Id*, §100(1)(ix), read with the preamble.

[33] *Id*, §92.

[34] Mandela Foundation's affidavit, §14 (**v1 p12**).

40. Further, "*apartheid was a crime against humanity. Displaying the flag of apartheid South Africa represents support for that crime*",[35] and "*a total rejection of tolerance, reconciliation and all of the values underlying the Constitution*".[36]

41. Pride's expert, similarly, "*associate[s] the Old Flag with autocracy, oppression and denial of human rights, injustice, inequality and hate*".[37]

42. The SAHRC testified that the 1928 Flag:

    42.1. "*constitutes a symbol of the racist and oppressive regime that governed South Africa prior to democracy and the dehumanising ideologies espoused during that regime, specifically that of the racial superiority of white South Africans and, inter alia, the corresponding inferiority of black South Africans*";[38] and

    42.2. "*has also been adopted and used by white supremacists around the world as a symbol of hatred, oppression and racial superiority*".[39]

43. The Department, meanwhile, described the 1928 Flag as:

    43.1. "*a particularly invidious image used during apartheid as the national symbol of a country that created, promoted and brutally enforced a political system that, at its core, was aimed at discrimination and oppression*";[40]

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[35] Mandela Foundation's affidavit, §18 (**v1 p14**).

[36] Mandela Foundation's affidavit, §22 (**v1 p16**).

[37] Pride's expert affidavit, §29 (**v2 p146**).

[38] SAHRC's affidavit, §24 (**v3 p229-230**).

[39] SAHRC's affidavit, §27 (**v3 230**).

[40] Department's affidavit, §31 (**v3 p273-274**).

43.2. "*the international symbol of apartheid*";[41]

43.3. "*an image [that] is widely, if not universally recognised, as one that promotes white racial supremacy*";[42] and

43.4. "*akin and comparable to other international symbols of political oppression that comprise crimes against humanity as defined in the Rome Statute [of the International Criminal Court], for example the [Nazi] swastika as a symbol of ethnic genocide*".[43]

44. Afriforum does not dispute any of these meanings, and itself testified that: "*During Apartheid the old flag was held aloft as a symbol of the past regime's power. At the time it was seen as a constant reminder of an oppressive and racist system.*"[44]

45. Only FAK begs to differ:[45]

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

46. FAK testified that the 1928 Flag can also be seen as "*a symbol of reconciliation and unity between the English- and Afrikaans-speaking population*",[46] and an "*example*

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[41] Department's affidavit, §31 (**v3 p274**).

[42] Department's affidavit, §31 (**v3 p274**).

[43] Department's affidavit, §32 (**v3 p274**).

[44] Afriforum's answering affidavit to the Mandela Foundation, §60 (**v1 p98**).

[45] FAK's affidavit, §8 (**v3 p204-205**).

[46] FAK's affidavit, §11 (**v3 p206**).

of how two warring nations (the Boers and the British) found a way to reconcile".[47] FAK thus claimed that the 1928 Flag could be displayed "*for reasons that are based on an appreciation of its culturally historic value*".[48]

47. FAK euphemistically acknowledges that the 1928 Flag was not "*fully representative of all the people of South Africa*",[49] but fails to accept that this non-representivity is rooted in racism. FAK further fails to acknowledge that "*the Boers and the British found a way to reconcile*" only through the disenfranchisement, dispossession and denigration of black people, to the exclusive benefit of themselves as white people. These failures reflect a revisionist attitude, denounced as follows by Froneman J and Cameron J in ***Tshwane v Afriforum***:[50]

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

48. Even if the Boer-British reconciliation (allegedly symbolised by the 1928 Flag) was capable of "*appreciation*" for its "*culturally historic value*", this appreciation would not qualify for recognition under our current Constitution. As Jafta J held, also in ***Tshwane v Afriforum***:[51]

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

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[47] FAK's affidavit, §13 (**v3 p206**).

[48] FAK's affidavit, §21.3 (**v3 p209**).

[49] FAK's affidavit, §18 (**v3 p207**).

[50] *City of Tshwane Metropolitan Municipality v Afriforum & Another* [2016] ZACC 19; 2016 (6) SA 279 (CC), §122.

[51] *Id*, §169 and §175.

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

Dominant meaning

49. Even if it were possible to construe a gratuitous display of the 1928 Flag as benign "*appreciation*" of its "*culturally historic value*" (which is denied), that could never be the dominant meaning. As Mogoeng CJ held in ***Tshwane v Afriforum***:[52]

> *White South Africans must enjoy a sense of belonging. But unlike before, that cannot and should never again be allowed to override all other people's interests. South Africa no longer "belongs" to white people only. It belongs to all of us who live in it, united in our diversity. Any indirect or even inadvertent display of an attitude of racial intolerance, racial marginalisation and insensitivity, by white or black people, must be resoundingly rejected by all South Africans in line with the Preamble and our values, if our constitutional aspirations are to be realised.*

50. To the majority of South Africans, and undoubtedly the majority of black South Africans, a gratuitous display of the 1928 Flag can never mean anything other than an endorsement of the system of apartheid. Afriforum in fact concedes that "*most South Africans recoil from the old flag and openly denounce apartheid as a crime against humanity*".[53]

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[52] *Id*, §11.

[53] Afriforum's answering affidavit to the Mandela Foundation, §58 (**v1 p98**).

51. In ***Makwanyane***,[54] Mahomed J (as he then was) held that the Constitution –

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

52. The 1928 Flag is a symbol – indeed, the quintessential symbol – of "*that part of the past which is disgracefully racist, authoritarian, insular, and repressive*".

53. It is submitted that the dominant meaning of displaying the 1928 Flag (outside the context of genuine journalistic, artistic or academic endeavour) is an endorsement of precisely "*that part of the past*".

HATE SPEECH

54. **Section 10(1)** of the Act states:

> *Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to –*
> *(a) be hurtful;*
> *(b) be harmful or to incite harm;*
> *(c) promote or propagate hatred.*

55. **Section 1(1)** defines "*prohibited grounds*" to include innate characteristics such as race, sexual orientation, or "*any other ground where discrimination based on that*

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[54] *S v Makwanyane & Another* [1995] ZACC 3; 1995 (3) SA 391, §262 (emphasis added).

other ground causes or perpetuates systemic disadvantage [or] undermines human dignity".

56. The referenced "***proviso in section 12***" is 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 ...*

Is it applicable to symbols such as flags?

57. Afriforum contends that section 10 "*only regulates words as opposed to other forms of expression like symbols*", and thus "*does not regulate displays of the old flag*".[55]

58. The SAHRC submits, in less certain terms, that "*it is difficult to interpret 'words' so broadly as to include the display of a flag such as the Old Flag, without ignoring the language of this provision*", and that "*applying ordinary principles of statutory interpretation, 'words' probably does not encompass the display of a flag*".[56]

59. This narrow construction cannot be correct, at the level of common law statutory interpretation, let alone at the level of constitutional interpretation.

60. In ***New Clicks***,[57] the Constitutional Court adopted the interpretive rule laid down over a century ago in ***Venter***,[58] that a court may depart from the clear language of

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[55] Afriforum's answering affidavit to the Mandela Foundation, §29 (**v1 p87**).

[56] SAHRC's founding affidavit, §21 (**v3 p228-229**).

[57] *Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Another as Amici Curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC), §232.

[58] *Venter v R* 1907 TS 910 at 915.

a statute where it "*would lead to absurdity so glaring that it could never have been contemplated by the legislature, or ... to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account*".

61. Afriforum's construction entails, for example, that section 10 of the Act prohibits a racist from describing a black colleague as a "*baboon*" in front of other colleagues but does not prohibit him from circulating an image of her face pasted onto the body of a baboon. Thus, it would indeed "*lead to absurdity so glaring that it could never have been contemplated by the legislature*".

62. It would also lead to "*a result contrary to the intention of the legislature*", as **section 2(h)** expressly states that the Act's objects include "*compliance with international law obligations including treaty obligations*", specifically naming the International Convention on the Elimination of All Forms of Racial Discrimination ("**ICERD**"), which obliges State Parties to prohibit "*all dissemination of ideas based on racial superiority or hatred*".[59]

63. The absurdity and incongruence of Afriforum's narrow construction of section 10 is borne out by the SAHRC's own testimony: "*It is therefore clear that the display of the Old Flag plainly amounts to hate speech in certain circumstances, despite not amounting to the communication of 'words'*" (emphasis added).[60] The Department too admits that the narrow construction leads to a "*legislative anomaly*".[61]

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[59] ICERD, §4(a) (emphasis added). South Africa became a party to the ICERD in 1998.

[60] SAHRC's founding affidavit, §28 (**v3 p230**).

[61] Department's affidavit, §12 (**v3 p266**).

64. The exclusion of all non-verbal expression from the scope of section 10 of the Act would be so arbitrary, anomalous and absurd that, even at common law, it simply cannot be countenanced as a reasonable interpretation of the statute.

65. Even if it could, the principles of constitutional interpretation dictate in any event that the Court must adopt an alternative reasonable construction that is consistent (or more consistent) with the Constitution.[62]

66. Afriforum's construction is clearly unconstitutional, not only because it accords different treatment to equally egregious violations of equality and dignity, on the arbitrary basis of the medium of expression used, but also by virtue of **section 233 of the Constitution**:

> *When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.*

67. Even if Afriforum's construction were somehow consistent with the Constitution, the Mandela Foundation's wider construction is to be preferred as it gives greater recognition and protection to the rights to dignity and equality, and thus "*better promotes the spirit, purport and objects of the Bill of Rights*".[63]

68. The only question, then, is whether it is reasonable to construe "*words*" to include symbols such as flags. Undoubtedly it is. For example, when applying the law of defamation – where the authorities overwhelmingly refer to "*words*" – our courts

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[62] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* [2000] ZACC 12; 2001 (1) SA 545 (CC), §22-23; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another* [2008] ZACC 12; 2009 (1) SA 337 (CC), §45-46, §84 and §107.

[63] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another* [2008] ZACC 12; 2009 (1) SA 337 (CC), §45.

have had no hesitation in applying the same authorities to non-verbal expression, such as cartoons.[64] Hence, in ***Le Roux v Dey***,[65] where a manipulated photograph had no caption but a defamatory meaning, the Constitutional Court accepted that: "*Meaning is usually conveyed by words, but a picture may also convey a message, sometimes even stronger than words.*" Indeed, in ***Qwelane (on merits)***,[66] this Court experienced no impediments to applying section 10 of the Act to a cartoon which likened same-sex marriage to bestiality.

69. It is also important to heed the constitutional injunction against placing form over substance, expressed as follows by Mogoeng CJ in ***Tshwane v Afriforum***:[67]

> *Our peculiarity as a nation impels us to remember always, that our Constitution and law could never have been meant to facilitate the frustration of real justice and equity through technicalities. The kind of justice that our constitutional dispensation holds out to all our people is substantive justice. This is the kind that does not ignore the overall constitutional vision, the challenges that cry out for a just and equitable solution in particular circumstances and the context within which the issues arose and are steeped. We cannot emphasise enough, that form should never be allowed to triumph over substance.*

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[64] See *Golding v Torch Printing & Publishing Co (Pty) Ltd & Others* 1948 (3) SA 1067 (C), 1087. It is instructive to note the ubiquity of the term "*words*" in the authorities cited by the Court, which nevertheless had no difficulty applying them to a cartoon.

[65] *Le Roux & Others v Dey* [2011] ZACC 4; 2011 (3) SA 274 (CC), §39; also see §86: "*Apart from the obvious forms of speech or print, the injurious information can also be published through photographs, sketches, cartoons or caricatures.*"

[66] *South African Human Rights Commission v Qwelane* [2017] ZAGPJHC 218; 2018 (2) SA 149 (GJ).

[67] *City of Tshwane Metropolitan Municipality v Afriforum & Another* [2016] ZACC 19; 2016 (6) SA 279 (CC), §8.

70. The principles of both common law and constitutional interpretation dictate that the Mandela Foundation's alternative, appropriately inclusive construction, which is not unreasonable, must be adopted. Section 10 of the Act is thus applicable to symbols such as flags, including the 1928 Flag.

Is incitement required?

71. Afriforum seems to assume that "*incitement to cause harm*" is an essential element of hate speech, and argues that displaying the 1928 Flag cannot be hate speech as it "*does not meet the threshold of incitement to cause harm*".[68]

72. This is incorrect. First, speech demonstrating an intention "*to incite harm*" is but one of the forms of hate speech prohibited by section 10(1) of the Act, alongside speech demonstrating an intention to "*be hurtful*", "*be harmful*", and "*promote or propagate hatred*".[69] Second, even for that particular form of speech, section 10(1) does not require that incitement must actually be established, only that the speech must *objectively demonstrate an intention* to incite harm.[70]

73. Thus, the courts have declared various expressions to violate section 10 of the Act, without finding (or even considering) whether the speech constituted incitement (or even demonstrated an intention to incite any harm). Examples include:

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[68] Afriforum's answering affidavit to the Mandela Foundation, §36 (**v1 p89**).

[69] *South African Human Rights Commission v Qwelane* [2017] ZAGPJHC 218; 2018 (2) SA 149 (GJ), §53: "*Section 10(1) is manifestly broader in scope than section 16(2) of the Constitution, since it includes in its section 1, sexual orientation as a prohibited ground, whereas section 16(2) of the Constitution does not contain such a ground; further ... section 10(1) does not require incitement to cause harm to be proved for purposes of all subsections (a), (b) and (c) ... and prohibits speech that might not necessarily constitute advocacy of hatred.*"

[70] *Sonke Gender Justice Network v Malema* [2010] ZAEQC 2; 2010 (7) BCLR 729 (EqC), §11.

73.1. calling black people "*kaffirs*",[71] "*baboons*",[72] and "*monkeys*";[73]

73.2. making "generalisations about women, sex and rape";[74]

73.3. likening same-sex relationships to bestiality.[75]

74. There is also no 'incitement' requirement in international law. The **ICERD** obliges State Parties to prohibit <u>not only</u> "*incitement to racial discrimination*" but <u>also</u> "*all dissemination of ideas based on racial superiority or hatred*".[76]

75. It is thus no anomaly in foreign law to find many democratic countries prohibiting hate speech without any element of 'incitement'. A ubiquitous example is the ban on denying or downplaying the Holocaust.[77]

76. In **France**, for example, the **Gayssot Act** (enacted to give effect to the ICERD) prohibits not only "*discrimination on the basis of belonging or non-belonging to an ethnic group, nation, race or religion*",[78] but also any expression "*challenging the*

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[71] *Thembani v Swanepoel* [2016] ZAECMHC 37; 2017 (3) SA 70 (ECM); *Kente v Van Deventer*, unreported Case No EC 9/13, Cape Town Magistrates' Court (24 October 2014); *Mdladla v Smith* [2006] ZAEQC 3; *Khoza v Saeed and Another* [2006] ZAEQC 2.

[72] *Herselman v Geleba* (231/2009) [2011] ZAEQC 1; *Strydom v Chiloane* [2007] ZAGPHC 234; 2008 (2) SA 247 (T).

[73] *African National Congress v Sparrow* [2016] ZAEQC 1; *M v R* [2004] ZAEQC 2.

[74] *Sonke Gender Justice Network v Malema* [2010] ZAEQC 2; 2010 (7) BCLR 729 (EqC).

[75] *South African Human Rights Commission v Qwelane* [2017] ZAGPJHC 218; 2018 (2) SA 149 (GJ).

[76] ICERD, §4(a).

[77] Countries applying specific prohibitions on Holocaust denial include Germany, Austria, Belgium, Czech Republic, France, Hungary, Liechtenstein, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia and Switzerland.

[78] Law 90-615 to repress any racist, antisemitic or xenophobic act ("**Gayssot Act**"), §1.

existence of the existence of one or more crimes against humanity as defined by Article 6 of the Statute of the [Nuremburg] International Military Tribunal".[79] In ***Faurisson***, the Gayssot Act was challenged as a violation of the right to freedom of expression under the International Covenant on Civil and Political Rights, 1966 ("**ICCPR**"), and the United Nations Human Rights Committee found that a ban on Holocaust denial was necessary "*to serve the struggle against racism and anti-Semitism*" and enable "*the Jewish community to live free from fear of an atmosphere of anti-Semitism*".[80]

77. In another case concerning Holocaust denial, ***Keegstra***,[81] the Canadian Supreme Court upheld a criminal prohibition on "*wilfully promot[ing] hatred against any identifiable group*", that is, "*any section of the public distinguished by colour, race, religion or ethnic origin*" (§319(2) of the Criminal Code) – an offence distinct from that of "*incit[ing] hatred against any identifiable group where such incitement is likely to lead to a breach of the peace*" (§319(1) of the Criminal Code).

78. Indeed, in ***Islamic Unity***,[82] also concerning Holocaust denial (not accompanied by any 'incitement'), our Constitutional Court approved ***Keegstra*** as authority for the proposition that:

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[79] Gayssot Act, §9 (inserting §24a of the 1881 Law on freedom of the press).

[80] *Robert Faurisson v France*, United Nations Human Rights Commission, Communication No. 550/1993, UN Doc CCPR/C/58/D/550/1993(1996), §9.6 and §9.7; also see the separate opinion of Commissioner Bhagwati: "*the Gayssot Act was necessary for securing respect for the rights and interests of the Jewish community to live in society with full human dignity and free from an atmosphere of anti-Semitism.*"

[81] *R v Keegstra* [1990] 3 SCR 697 (SCC).

[82] *Islamic Unity Convention v Independent Broadcasting Authority & Others* [2002] ZACC 3; 2002 (4) SA 294 (CC), §45 (emphasis added)

> ... *the limitation of the right to freedom of expression may be justifiable in the interests of human dignity and equality, which are founding values of the Constitution, and national unity, which is an important and legitimate state objective... This is because of the critical need, for the South African community, to promote and protect human dignity, equality, freedom, the healing of the divisions of the past and the building of a united society... Expression that advocates hatred and stereotyping of people on the basis of immutable characteristics is particularly harmful to the achievement of these values as it reinforces and perpetuates patterns of discrimination and inequality.*

79. While this passage is commonly misquoted as referring to the kind of expression described in section 16(2)(c) of the Constitution, which is excluded from the ambit of "*the right to freedom of expression*", the Court was in fact referring to expression which falls within the ambit of section 16(1) but which could be justifiably limited under section 36(1) of the Constitution.[83] The Court struck down the prohibition on broadcasting material that is "*likely to prejudice relations between sections of the population*", only because it was "*far too extensive*" and it had "*not been shown that the very real need to protect dignity, equality and the development of national unity could not be adequately served by the enactment of a provision which is appropriately tailored and more narrowly focussed*".[84]

80. Section 10(1) of the Act is indeed such a provision, and Afriforum does not here suggest otherwise. There is thus no warrant for reading section 10(1) as providing no more than the "*minimal level*"[85] of regulation contemplated in section 16(2) of

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[83] *Id*, §38-51.

[84] *Id*, §51 (emphasis added).

[85] *Id*, §57.

the Constitution, nor for any other reason requiring 'incitement' for a finding that certain expression contravenes section 10 of the Act.

Is intention required?

81. Afriforum further claims that "*the wide-reaching ban ... sought by the applicant is inappropriate on the basis that different people may have different intentions when they display the old flag*", and "*the Act only regulates words that are communicated by people with particular intentions*".[86]

82. This is squarely contradicted by all of the available authorities on section 10 of the Act, which unanimously hold that the speaker's subjective intention is irrelevant, and the test is only whether the speech objectively demonstrates a hurtful, harmful or hateful intention.[87]

83. The Court is thus fully equipped to determine and declare that *any* display of the 1928 Flag which is *gratuitous* (i.e. which falls outside the protection of the proviso in section 12), objectively demonstrates an intention to be hurtful, harmful or to promote hatred.

What intention is objectively demonstrated by displaying the 1928 Flag?

84. Testifying for the Mandela Foundation, Mr Sello Hatang imputes the following intention to people gratuitously displaying the 1928 Flag:[88]

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[86] Afriforum's answering affidavit to the Mandela Foundation, §30 (**v1 p87-88**).

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

[88] Mandela Foundation's affidavit, §15 (**v1 p13**).

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

85. The SAHRC testified that a gratuitous display of the 1928 Flag:

    85.1. "*can ... only plausibly and reasonably be construed as a means of asserting one's affinity with, endorsement of and mourning for the apartheid regime which resulted in the undignified, degrading and detestable treatment of black people*";[89]

    85.2. "*promotes the apartheid regime and laments its downfall, and, in turn, promotes hatred and harm towards those who suffered, and continue to suffer, as a result of this regime*";[90]

    85.3. "*is also extremely hurtful and dehumanising to those who suffered under apartheid as it has the potential to diminish their suffering or indicate a support for such suffering*".[91]

86. The Department testified that a gratuitous display of the 1928 Flag "*imputes to those hoisting [it] that they reminisce and long for the days when the old flag was the national flag of the country between 1928 and 1994*".[92]

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[89] SAHRC's founding affidavit, §26 (**v3 p229-230**).

[90] SAHRC's affidavit, §28 (**v3 p230**).

[91] SAHRC's affidavit, §28 (**v3 p230**).

[92] Department's affidavit, §27 (**v3 p272**).

87. Afriforum fails to engage with this evidence, and concedes only that displaying the 1928 Flag "*has the capacity to cause offence and emotional distress*",[93] in the same way as "*other flags that are offensive and cause emotional distress*", such as "*the flags of the African National Congress (ANC), the South African Communist Party (SACP), the British Union Jack, as well as the Gay Pride Rainbow flag*".[94]

88. But displaying the Rainbow Flag does not say to heterosexuals, religious adherents, or any other group of persons, that they are subhuman or even inferior in any way. On the contrary, as Pride's expert testified (and Afriforum did not challenge), the Rainbow Flag "*celebrates freedom, equality and acceptance for sexuality and gender identity*",[95] and "*is universally recognised as a symbol of acceptance, pride and equality for the marginalized group of people who have been historically persecuted for their sexual orientation and gender identity*".[96]

89. Comparing the 1928 Flag to the Union Jack and the ANC and SACP flags is also a false analogy, as those flags have no apparent association (or at least Afriforum has not demonstrated any association) with exclusivity, superiority or hatred based on any of the Act's "*prohibited grounds*".

90. A more appropriate analogy may lie with the Confederate Flag used by secessionist Southern states during the American Civil War, the display of which is not legally unlimited, despite the United States' near-absolute First Amendment guarantee of free speech. Appellate courts have held that displays of the Confederate Flag may

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[93] Afriforum's answering affidavit to the Mandela Foundation, §6 (**v1 p79**).

[94] Afriforum's answering affidavit to the Mandela Foundation, §41 (**v1 p91**).

[95] Pride's expert affidavit, §16 (**v2 p142**).

[96] Pride's expert affidavit, §19 (**v2 p143**).

be prohibited in schools to prevent discord,[97] and may in other contexts be deemed to impute racist motives to the persons displaying it:

90.1. In ***Blanding***,[98] the US Court of Appeals (Fourth Circuit) held that it was reasonable to impute racial bias to a juror who displayed Confederate Flag bumper stickers on his car:

> *It is the sincerely held view of many Americans, of all races, that the confederate flag is a symbol of racial separation and oppression. And, unfortunately, as uncomfortable as it is to admit, there are still those today who affirm allegiance to the confederate flag precisely because, for them, that flag is identified with racial separation. Because there are citizens who not only continue to hold separatist views, but who revere the confederate flag precisely for its symbolism of those views, it is not an irrational inference that one who displays the confederate flag may harbor racial bias against African-Americans.*

90.2. In ***Dixon v Coburg***,[99] the same Court decided against an employee who had been dismissed for racial harassment, as he had displayed Confederate Flag stickers on his toolbox. In a separate concurrence, Gregory J expanded as follows:

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[97] See *Barr v Lafon* [2008] USCA6 482; *Scott v School Board of Alachua County* [2003] USCA11 100; 324 F.3d 1246; *West v Derby Unified School District* [2000] USCA10 58; 206 F.3d 1358; *Denno v School Board of Volusia County, Florida* [2000] USCA11 234; 218 F.3d 1267: "*The fact that Denno alleges that he had no racist intentions, an allegation which we accept as true, is not dispositive. Similarly, it is not dispositive that common experience teaches us that the Confederate flag is honored by many people as a non-racist memorial to their Southern heritage; common experience also teaches that many people perceive the flag as offensive, constituting either a racist message or at least reflecting an uncivil lack of sensitivity to the sensibilities of many people. The more relevant factor is that the school official might reasonably think that other students would perceive the display as racist or otherwise uncivil.*"

[98] *United States of America v Blanding* [2001] USCA4 110; 250 F.3d 858.

[99] *Dixon v Coburg Dairy Incorporated* [2004] USCA4 104; 369 F.3d 811.

> *While many Southerners unquestionably embrace the flag, not out of malice or continued belief in racial subordination, but out of genuine respect for their ancestors, we must also acknowledge that some minorities and other individuals feel offended, threatened or harassed by the symbol. Unfortunately, to its supporters at the time of its creation as well as some proponents today... the Confederate flag undeniably represented, and represents, support for slavery [and] belief in Blacks as an inferior class... [T]hey have had difficulty divorcing it from slavery, white supremacy and the beginnings of Jim Crow and American Apartheid...*
>
> *Against this historical backdrop, it becomes more apparent why co-workers might feel offended, harassed and even threatened by the Confederate battle flag in the workplace, even if those who display the flag do so with no ill will.*

91. In any event, gratuitously displaying the 1928 Flag does much more than merely "*cause offence and emotional distress*". All of the evidence shows that it demeans and dehumanises people on the basis of their race. It impairs their human dignity, a concept well explained by the Canadian Supreme Court in ***Law***:[100]

> *Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with ... psychological integrity and empowerment ... Human dignity is harmed when individuals and groups are marginalised, ignored or devalued.*

92. A gratuitous display of the 1928 Flag is "*hurtful*", within the meaning of section 10(1)(a) of the Act, in that it wounds (and objectively demonstrates an intention to wound) people's human dignity and undermines their equal worth. It is doubly injurious and thus especially egregious, as Yacoob J explained in ***Le Roux v Dey***:[101]

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[100] *Law v Canada* [1999] 170 DLR 4th 1 (SCC), §53.

[101] *Le Roux & Others v Dey* [2011] ZACC 4; 2011 (3) SA 274 (CC), §46.

> *[I]t must be remembered that some attacks on human dignity are more serious than others: the violation of dignity in the context of the violation of other constitutional rights would ordinarily be regarded as more serious than otherwise... The violation of human dignity in the context of unfair discrimination on any of the grounds listed in the Constitution would be unarguably egregious.*

93. As explained in ***Sparrow*** (where black people had been referred to as "*monkeys*"), one of the hurtful effects of racist hate speech is that "*the memories of humiliation, suffering and indignity endured by black people for so long ... come flooding back*".[102]

94. Mr Hatang's unchallenged testimony poignantly illustrates the same hurtful effect of gratuitous displays of the 1928 Flag, of which mere news reports caused him to relive the apartheid indignity of being called "*kaffir*" and hearing his grandmother called "*bobbejaan*".[103] For black people to see the 1928 Flag gratuitously displayed is thus "*hurtful*" in a sense that is qualitatively no different to expressions that are, as a matter of trite law, already accepted as constituting hate speech.[104]

95. Afriforum's high-handed assertion that black people should simply "*tolerate*" such displays,[105] or indeed use them as an "*opportunity to reflect on how far we have come as a nation*",[106] is profoundly insensitive, destructive of human dignity and

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

[103] Mandela Foundation's affidavit, §13 (**v1 p12**).

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

[105] Afriforum's answering affidavit to the Mandela Foundation, §24-25 (**v1 p84-85**).

[106] Afriforum's answering affidavit to the Mandela Foundation, §61 (**v1 p99**).

equality, and thus constitutionally untenable. Mogoeng CJ discredited similar suggestions in ***Tswhane v Afriforum***:[107]

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

96. Displaying the 1928 Flag in all-white homes, suburbs and schools is not necessarily "*hurtful*" (except to the extent that black people are employed in these places), but it will still constitute hate speech under the Act, as it objectively demonstrates an intention to "*be harmful or to incite harm*" as well as to "*promote hatred*" (section 10(1)(a) and (b)), by communicating to others, including children, that apartheid was acceptable. Such displays, the Mandela Foundation explained, "*make young people believe that it is acceptable to harbour racist views and then to manifest them in public*".[108]

97. Accordingly, any gratuitous display of the 1928 Flag (that is, a display beyond the protection of the proviso in section 12) objectively demonstrates a clear intention:

    97.1. to be hurtful to black people (in contravention of section 10(1)(a)); and

    97.2. to be harmful and promote hatred against black people (in contravention of section 10(1)(b) and (c), even if no black people are exposed to it.

98. It must be so declared.

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[107] *City of Tshwane Metropolitan Municipality v Afriforum & Another* [2016] ZACC 19; 2016 (6) SA 279 (CC), §15-16.

[108] Mandela Foundation's affidavit, §19.d (**v1 p15**).

HARASSMENT

99. **Section 11** of the **Equality Act** states, unequivocally:

> *No person may subject any person to harassment.*

100. In turn, **section 1(1)** defines "*harassment*" to include:

> *... unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment ... related to ... a person's membership or presumed membership of a group identified by one or more of the prohibited grounds ...*

101. The Mandela Foundation testified that any gratuitous display of the 1928 Flag "*seriously demeans, humiliates and creates a hostile and intimidating environment for victims of apartheid and its legacy, particularly black people*".[109]

102. Pride contends that gratuitous display "*demeans, humiliates, and creates a hostile and intimidating environment toward members of the LGBT+ community, who were also victims of apartheid and its legacy*".[110]

103. Afriforum does not deny these allegations but claims that for conduct to constitute harassment, "*it must amount to torment that is persistent and repetitive*".[111] There is no such requirement in the Act, and thus there is no basis to deny the Mandela Foundation an order declaring that any gratuitous display of the 1928 Flag constitutes harassment under section 11 of the Act.

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[109] Mandela Foundation's affidavit, §23.c (**v1 p17**).

[110] Pride's founding affidavit, §10(c) (**v2 p111**); also Pride's expert affidavit, §31 (**v2 p146-147**).

[111] Afriforum's answering affidavit to the Mandela Foundation, §56 (**v1 p98**).

UNFAIR DISCRIMINATION

104. **Section 7** of the **Equality Act** states inter alia that:

> *... no person may unfairly discriminate against any person on the ground of race, including –*
> *(a) the dissemination of any ... idea, which propounds the racial superiority or inferiority of any person ...*
> *(b) the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race ...*

105. The Mandela Foundation pleaded and testified that any gratuitous display of the 1928 Flag "*propounds racial superiority and promotes racial exclusivity*".[112]

106. Again, Afriforum does not dispute this, but claims that "*the intention of a person displaying the Old Flag would need to be assessed on a case by case basis to determine whether it constitutes unfair discrimination*".[113]

107. Again, there is no such requirement in the Act, and thus there is no basis to deny the Mandela Foundation an order declaring that any gratuitous display of the 1928 Flag constitutes unfair discrimination under section 7.

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[112] Mandela Foundation's affidavit, §23.a (**v1 p16**).

[113] Afriforum's answering affidavit to the Mandela Foundation, §53 (**v1 p97**).

REMEDY

108. Section 4 of the Act obliges this Court to take into account "*the use of corrective or restorative measures in conjunction with measures of a deterrent nature*".[114] Thus, in ***Sparrow***,[115] emphasis was placed on the need for deterrence:

> *Sections of society that are painfully slow to change or that refuse to, given our disgraceful history, should perhaps be compelled to do so under the threat of criminal sanction. Persons who transgress would then be more cautious to act in a way which accords respect for the dignity of fellow human beings.*

109. The relief sought by the Mandela Foundation is far more modest, as it seeks only an order that will declare to all South Africans (including would-be offenders and complainants) that displays of the 1928 Flag must be confined to genuine artistic, academic or journalistic expression in the public interest (i.e. must qualify for the proviso in section 12 of the Act). Any display beyond that may be brought before the Equality Court for the displayer to prove that the display was defensible (under the proviso) or to prevail on the Court to make an appropriate remedy, which will not even include any criminal sanction.

110. Nevertheless, Afriforum cries that this relief amounts to a "*banning*", which they argue "*may backfire and cause people to display it in protest of the banning*".[116] FAK similarly argues that "*if an order is granted in effect to ban displays of the old flag, it is not too farfetched to envision some sort of rebellious upsurge in the politically-*

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[114] Act, §4(1)(d).

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

[116] Afriforum;s answering affidavit to the Mandela Foundation, §40 (**v1 p90**).

motivated display of the old flag, which is something that almost never occurs at the moment".[117]

111. Similar speculative arguments were roundly rejected by this Court in ***Afriforum v Malema*** (where the contested relief was a permanent prohibitive interdict, not a mere declaratory order):[118]

> *It was submitted that the law might be unable to enforce its order in the form of an interdict as people are passionate about the right to sing the song and will ignore the order. They will sing the song in private or in circumstances where it is difficult or impossible to prevent its singing (e.g. where people unexpectedly and spontaneously burst into song). The answer is that such people must pursue new ideals and find a new morality. They must develop new customs and rejoice in a developing society by giving up old practices which are hurtful to members who live in that society with them...*
>
> *... Persons who are not parties to the proceedings must be dealt with by way of structuring the order so that society knows what conduct is acceptable. Persons who are aware of the line which has been drawn by the Court are as a matter of both law and ubuntu obliged to obey it. There may be no immediate criminal sanction. Their breach of the standard set by this Court will however surely result in the appropriate proceedings under the Equality Act being taken against them. Non-participants are bound by orders setting such standards. The Equality Act contemplates that they will be so bound. The orders of the Court which set the law are no different from any order of any Court which determines what the law is. The course open to a non-participant who is aggrieved is to try to persuade the Court hearing his particular matter that the order of the other Court is clearly wrong.*

112. Accordingly, Afriforum (and FAK) have shown no basis for refusing the relief the Mandela Foundation seeks.

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[117] FAK's affidavit, §23 (**v3 p211**).

[118] *Afriforum v Malema* [2011] ZAEQC 2; 2011 (6) SA 240 (EqC), §110-111.

CONCLUSION

113. For the reasons set out in these heads of argument, the Mandela Foundation prays for relief in the terms set out in the founding papers.

TEMBEKA NGCUKAITOBI

AYANDA MSIMANG

BEN WINKS

Johannesburg

17 February 2019

FIRST APPLICANT'S LIST OF AUTHORITIES

Constitution and statutes

1. Constitution of the Republic of South Africa, 1996
2. Promotion of Equality and Prevention of Unfair Discrimination Act, 2000
3. Republic of South Africa Constitution Act, 1961
4. Republic of South Africa Constitution Act, 1983

Case law

5. *African National Congress v Sparrow* [2016] ZAEQC 1
6. *Afriforum v Malema* [2011] ZAEQC 2; 2011 (6) SA 240 (EqC)
7. *Brink v Kitshoff N.O.* [1996] ZACC 9; 1996 (4) SA 197 (CC)
8. *City of Tshwane Metropolitan Municipality v Afriforum & Another* [2016] ZACC 19; 2016 (6) SA 279 (CC)
9. *Daniels v Scribante and Another* [2017] ZACC 13; 2017 (4) SA 341 (CC)
10. *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC)
11. *Golding v Torch Printing & Publishing Co (Pty) Ltd & Others* 1948 (3) SA 1067 (C)
12. *Herselman v Geleba* (231/2009) [2011] ZAEQC 1
13. *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* [2000] ZACC 12; 2001 (1) SA 545 (CC)
14. *Islamic Unity Convention v Independent Broadcasting Authority & Others* [2002] ZACC 3; 2002 (4) SA 294 (CC)
15. *Kente v Van Deventer*, unreported Case No EC 9/13, Cape Town Magistrates' Court (24 October 2014)
16. *Khoza v Saeed and Another* [2006] ZAEQC 2

17. *Le Roux & Others v Dey* [2011] ZACC 4; 2011 (3) SA 274 (CC)

18. *M v R* [2004] ZAEQC 2

19. *Mdladla v Smith* [2006] ZAEQC 3

20. *Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Another as Amici Curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC)

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

22. *S v Makwanyane & Another* [1995] ZACC 3; 1995 (3) SA 391 (CC)

23. *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC)

24. *Smith v Mgoqi and Another* [2007] ZAEQC 2

25. *Sonke Gender Justice Network v Malema* [2010] ZAEQC 2; 2010 (7) BCLR 729 (EqC)

26. *South African Human Rights Commission v Qwelane* [2017] ZAGPJHC 218; 2018 (2) SA 149 (GJ)

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

28. *Strydom v Chiloane* [2007] ZAGPHC 234; 2008 (2) SA 247 (T)

29. *Thembani v Swanepoel* [2016] ZAECMHC 37; 2017 (3) SA 70 (ECM)

30. *Venter v R* 1907 TS 910

31. *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another* [2008] ZACC 12; 2009 (1) SA 337 (CC)

Other

32. Harry Saker, *The South African Flag Controversy, 1925-1928* (PhD dissertation, University of Cape Town, 1977)

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

34. Hansard, *Debates of the House of Assembly*, 26 May 1927

International and foreign law

35. *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965

36. (France) Law 90-615 to repress any racist, antisemitic or xenophobic act (Gayssot Act)

37. *Faurisson v France*, United Nations Human Rights Commission, Communication No. 550/1993, UN Doc CCPR/C/58/D/550/1993(1996)

38. (Canadian) Criminal Code, RSC 1985

39. *Law v Canada* [1999] 170 DLR 4th 1 (SCC)

40. *R v Keegstra* [1990] 3 SCR 697 (SCC)

41. *Barr v Lafon* [2008] USCA6 482

42. *Denno v School Board of Volusia County, Florida* [2000] USCA11 234; 218 F.3d 1267

43. *Dixon v Coburg Dairy Incorporated* [2004] USCA4 104; 369 F.3d 811

44. *Scott v School Board of Alachua County* [2003] USCA11 100; 324 F.3d 1246

45. *West v Derby Unified School District* [2000] USCA10 58; 206 F.3d 1358

46. *United States of America v Blanding* [2001] USCA4 110; 250 F.3d 858