



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

### MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 21 April 2023

**Status:** Immediate

*The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgment of the Supreme Court of Appeal*

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

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Today the Supreme Court of Appeal (SCA) dismissed an appeal by Afriforum NPC (Afriforum), against an order by the Equality Court, Gauteng Division of the High Court, Johannesburg, sitting as an Equality Court (the high court). The main issue in the appeal was whether the high court was correct in holding that the display of the old 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).

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 Nelson Mandela Foundation Trust (NMF) with the high court, that the public displays of the old flag at the Black Monday protests was a contravention of the Equality Act. The Minister of Justice and Constitutional Development and the Department of Justice and Correctional Services were joined as parties in the proceedings in the high court by the South African Human Rights Commission (SAHRC). The SAHRC 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.

The high court 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. The high court issued a declaratory order 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. 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.

The SCA held that the constitutional rights to dignity and freedom of assembly of persons who gratuitously display the old flag, were not implicated at all. It dismissed Afriforum’s procedural defences that the Equality Court had no power to grant the declaratory order that it did, and that the matter was not ripe for hearing, for the following reasons. The Equality Court was obliged, under s 21(1) of the Equality Act, to determine whether the NMF’s complaint that the displays of the old flag at the Black Monday protests, constituted hate speech, unfair discrimination or harassment. Having decided

that it was, the Equality Court was empowered to issue the declaratory order in terms of s 21(2) of the Equality Act. The issue before the Equality Court was not hypothetical as there was a public controversy about the lawfulness of public displays of the old flag.

The SCA held that when the prohibition of hate speech in s 10(1) is read with the proviso in s 12 of the Equality Act (as amended by the Constitutional Court in *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22; 2021 (6) SA 579 (CC)), 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.

The SCA held that the publication, propagation, or communication of words in s 10(1) includes the expression of ideas by conduct. The gratuitous public display of the old flag was on a prohibited ground, namely race. The old flag symbolises, clearly and painfully, apartheid and white supremacy. Objectively, the displays of the old flag could reasonably be construed as demonstrating a clear intention to be harmful and to incite harm. Those who publicly hold up or wave the old flag, convey a brazen, destructive message that they celebrate and long for the racisms of our past, in which only white people were treated as first-class citizens while black people were then degraded and demeaned. This results in deep emotional and psychological harm that severely undermines the dignity of black people. It also incites harm because it can ignite exclusion, hostility, discrimination and violence against them.

The SCA found that 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 is extremely degrading and dehumanising to those who suffered under apartheid. It exposes them the racial bigotry, detestation and vilification, and inspires hatred and extreme ill-will against them. White supremacists around the world have used the old flag as a symbol of hatred, oppression and racial superiority. In this regard, the SCA referred to the case of the convicted murderer, Mr Dylann Roof (Roof), who was convicted of ‘nine counts of racially motivated hate crimes resulting in death’. He murdered nine black people gathered for a bible study in Charleston, South Carolina in the United States. Roof posted a photo on the internet showing him wearing a black jacket with a patch of the old flag conspicuously affixed to the front of it.

The SCA dismissed Afriforum’s claim 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 high court did not impose a wholesale ban on displays of the old flag. Its public display for genuine artistic, academic or journalistic expression in the public interest, is not prohibited.

The SCA concluded that the gratuitous public display of the old flag also constitutes unfair discrimination as envisaged in s 7 of the Equality Act on the grounds of race. Afriforum did not challenge the evidence that the public displays of the old flag at the Black Monday protests were actual, and not merely prima facie proof of racial discrimination. The gratuitous public displays of the old flag also constitute harassment within the meaning of s 11 of the Equality Act, because it seriously demeans, humiliates and creates a hostile and intimidating environment for the victims of apartheid.

The SCA found that the high court erred in issuing a declaratory order prohibiting ‘any’ display of the old flag, which would include a display within the privacy of a home. The NMF failed to state a claim on which such relief could be granted. Its case was squarely founded on public displays of the old flag at the Black Monday protests. Further, the issue as to whether private displays of the old flag would contravene the Equality Act, was not properly and fully argued; neither in the high court nor in the SCA. It was therefore imprudent and inappropriate for the SCA to pronounce upon it. Consequently, the SCA set aside the high court’s order prohibiting ‘any’ display of the old flag and replaced it with an order prohibiting ‘gratuitous public displays’ of the old flag, subject to the proviso in s 12 of the Equality Act. The SCA made no order as to costs.