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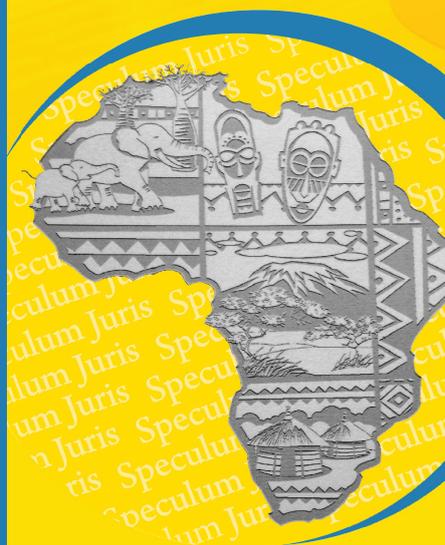
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Cite as: Molaba and Bapela  
“National Symbols, Freedom of  
Expression and Hate Speech: A  
Legal Analysis of Afriforum NPC  
v Nelson Mandela Foundation  
Trust” 2025 (39) Spec Juris  
262–276



# National Symbols, Freedom of Expression and Hate Speech: A Legal Analysis of *Afriforum NPC v Nelson Mandela Foundation Trust*

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## Abstract

*This contribution provides a legal analysis of the Afriforum NPC v Nelson Mandela Foundation Trust case, focusing on national symbols, freedom of expression, and hate speech. The analysis proceeds within the context of South Africa’s apartheid legacy and its transformative post-apartheid Constitution. Recognising the significance of freedom of expression in a democratic country like South Africa, and acknowledging the limitations placed on this right, this article raises two issues: first, whether such limitations can be applied to a symbol or a symbolic expression, such as a flag, in this case; and secondly, whether such a display qualifies as hate speech. To explore these issues, the paper examines the historical context of the flag, namely its symbolism and association with South Africa’s history of apartheid and white supremacy. This is followed by the legal implications, where constitutional principles, international law, and the Equality Act are considered. The article*

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*also considers South Africa's transformative constitutional ideals, which seek to establish a society founded on democratic values, social justice, and fundamental human rights.*

**Keywords:** Freedom of expression; hate speech; human rights; constitutional values; apartheid; international law

## 1 INTRODUCTION

On 21 August 2019, the Equality Court handed down judgment in the matter of *Nelson Mandela Foundation Trust v Afriforum NPC*,<sup>1</sup> in which the court held that the gratuitous display of the old South African flag, popularly known as the apartheid flag, amounted to hate speech, unfair discrimination, and harassment in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act). The matter subsequently went on appeal before the Supreme Court of Appeal. On 21 April 2023, the Supreme Court of Appeal handed down its judgment in<sup>2</sup> which it found that the Equality Court was correct in finding that the gratuitous display of the apartheid flag, particularly the public display of the flag, constituted hate speech, unfair discrimination, and harassment in terms of the Equality Act. The court, therefore, confirmed the decision of the Equality Court and dismissed the appeal. However, a key distinction exists between the order made by the Equality Court and the Supreme Court of Appeal. The Equality Court made an order stating that the display of the flag in both private or public spaces constitutes hate speech, unfair discrimination, and harassment in terms of the Act. The Supreme Court of Appeal, however, replaced that order with an order stating that only the public display of the flag constitutes hate speech, unfair discrimination, and harassment in terms of the Act.

This case raises novel questions about the right to freedom of expression in South Africa, particularly in the context of South Africa's apartheid legacy and the transformative post-apartheid Constitution that places a strong emphasis on the recognition and safeguarding of fundamental human rights. At the heart of these judgments, pivotal questions emerge. Firstly, while freedom of expression is not absolute, can the limitation be applied to a symbolic expression? In this case, a flag? Secondly, does the public display of this symbol constitute hate speech, or is it merely an exercise of the right to freedom of expression?

The issue of the apartheid flag is a controversial one in South Africa, and to date, it remains a source of contention. On the one hand, proponents contend that the flag should not be prohibited in South Africa, citing that it should be used for educational purposes<sup>3</sup> as it forms part of the right to freedom of expression.<sup>4</sup> On the other hand, opponents see it as a symbol of oppression and argue that it should be prohibited since South Africa is now a constitutional democracy that has replaced the old regime.<sup>5</sup> The ideological arguments regarding this call for a legal inquiry rooted in both the Constitution and international law. In light thereof, this note attempts to analyse the judgments and the points at issue. We consider whether the court's reasoning is justified in light of the Constitution, international law, and the Equality Act.

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1 *Nelson Mandela Foundation Trust v Afriforum NPC* 2019 6 SA 327 (GJ).

2 *Afriforum NPC v Nelson Mandela Foundation Trust* 2023 ZASCA 58.

3 eNCA "Banning the old South African Flag" <<https://www.youtube.com/watch?v=UqH1APtmBuA>> (accessed 30-04-2024).

4 SABC "EFF, AfriForum React to Apartheid Flag Judgment" <<https://www.youtube.com/watch?v=9yj4X35UK48>> (accessed 30-04-2024).

5 eNCA <<https://www.youtube.com/watch?v=UqH1APtmBuA>> (accessed 30-04-2024).

## 2 FACTS AND BACKGROUND

South Africa saw nationwide protests in October 2017. The protests were ostensibly in response to the murdering of farmers in South Africa. During these protests, participants prominently displayed the apartheid flag. Many people were not happy with the display of the flag during these protests, and among those angered was the Nelson Mandela Foundation, that filed an application with the Equality Court, arguing that the displaying of the flag was against the spirit of South Africa's constitutional framework.

In his affidavit, the Foundation's CEO, Mr. Sello Hatang, described how the events surrounding the displaying of the flag affected him. He mentioned that these demonstrations triggered unpleasant personal recollections and specifically recalled two incidents he witnessed as a young man growing up under the apartheid government. He described how, at one time, when he was ten years old, he and his brother were subjected to racial slurs, including being called the pejorative epithet, the "k-word" (kaffir) by white men. His brother explained to him that this word was used to belittle and humiliate black people. Mr. Hatang further described a second incident in which he heard white children singing the song "daar kom 'n bobbejaan" (the English version "there comes a baboon") to his grandmother. He explained how this incident disturbed him, particularly because his grandmother had no power to address the abuse.

The application was defended by Afriforum, the first respondent before the Equality Court. Afriforum challenged the application on the basis that displaying the flag was within the scope of the right to freedom of expression, a right guaranteed in the Constitution of South Africa.<sup>6</sup>

Deputy Judge President (DJP) Mojepelo penned the Equality Court judgment and, as a starting point, looked into how the events affected Mr. Hatang and stated the following:

It is common cause that the description of how the events were experienced by, and affected, Mr. Hatang reflects the reality of the feelings and experience of the black child raised in apartheid South Africa. This is how black people would have experienced the display. It is common cause also that the feelings are real. The feelings and evidence could have been that of any other black person to whom apartheid rule and oppression represented a painful reality. No exaggeration."<sup>7</sup>

The court effectively recognised that Mr. Hatang's experience reflected the painful reality that was suffered by black South Africans growing up during apartheid. The court recognised that their emotions were authentically shared by others who had survived the oppressive regime. The court pointed out that the expectation following 1994 was that such painful recollections should be left to the past, never to recur. This was the post-apartheid regime's aspiration, which the court referred to as a "never-again and never again" hope.<sup>8</sup>

Following this, the court examined the historical context of the flag, its meaning during apartheid, and how it is perceived today. The court pointed out that the apartheid flag, like apartheid legislation, represented racial segregation and white supremacy. The flag signified black people's repression and disenfranchisement. Its display in modern South Africa indicates support for racism, white supremacy, and the subjugation of black people.

The court then considered the impact of the Equality Act on the display of the flag. The court held that the gratuitous display of the flag amounted to hate speech, unfair discrimination, and harassment in terms of the Equality Act. This is in line with sections 10(1), (7), and (11) of the

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6 The Constitution of the Republic of South Africa, 1996 (the Constitution).

7 *Nelson Mandela Foundation* para 24.

8 *Ibid.*

Act, respectively. Section 10(1) of the Act stipulates the following:

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.<sup>9</sup>

Section 7 of the Act prohibits unfair discrimination against any person on the grounds of race, while section 11 prohibits harassment against any individual.<sup>10</sup>

In light of these sections, Afriforum argued that the application of section 10(1) of the Equality Act should only be confined to words. The court rejected this argument, finding that if that was the case, the State would fail in its constitutional responsibility to protect its citizens from hurtful speech propagated through conduct that does not include “words”. The court further emphasised that if that interpretation is accepted, it would run counter to the provisions of the Constitution, particularly section 9 of the Constitution and the Equality Act, which effectively strive to prevent and prohibit unfair discrimination. As a result, the court found that such interpretation was untenable as it was contrary to the intention of the legislature.

It was also submitted by Afriforum that the intention of a person displaying the flag should be assessed on a case-by-case basis to determine whether the display constitutes unfair discrimination. The court rejected this argument. As a result, it was held that the display of the flag fell within the provisions of section 10(1) of the Act.

On the interpretation of the term “speech” as it appears in the heading of section 10 of the Equality Act, the court was of the view that the term should be interpreted to mean and encompass all forms of expression of ideas. On the interpretation of the terms “propagate” and “advocate” within section 10(1) of the Act, the court said these terms should be understood to relate to the conveying of ideas and its effect was that no person is allowed to publish, propagate, or communicate words and ideas that have an intention of inciting harm, propagating hatred or anything hurtful.

On harassment, section 1 of the Equality Act defines harassment as any

unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or 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; or (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.

It was the submission of the Nelson Mandela Foundation that the gratuitous display of the flag infringed this section because the display of the flag seriously demeans, humiliates, and creates a hostile and intimidating environment for victims of apartheid, particularly black people. Although Afriforum did not dispute this submission, it maintained that for conduct to be regarded as constituting harassment, it must be repetitive. The court rejected this view and

<sup>9</sup> It is important to keep in mind that this section read this way before the judgment of *Qwelane v South African Human Rights Commission* 2021 6 SA 579 (CC).

<sup>10</sup> Section 7 provides the following: “Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including— (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; (b) the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race; (c) the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group; (d) the provision or continued provision of inferior services to any racial group, compared to those of another racial group; (e) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons.” Section 11 provides that: “No person may subject any person to harassment.”

found that there was nowhere in the Act where such a stipulation or requirement was made. As a result, harassment was constituted.

On discrimination, the court cited section 1 of the Equality Act, which states the following:

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

In light of this section read together with section 10(1) of the Act, the court found that the display of the flag constituted unfair discrimination. As a result, the court ruled that the demonstrations and the subsequent displaying of the flag constituted hate speech in terms of section 10(1) of the Equality Act, unfair discrimination based on race in terms of section 7, and harassment in terms of section 11 of the Equality Act.

As stated earlier, Afriforum appealed this judgment. However, the appeal was not successful. Central to their appeal before the Supreme Court of Appeal was the submission that the Equality Court had no jurisdiction to grant relief on conduct that had not taken place.<sup>11</sup> This is because, according to Afriforum, the application that was brought by the Nelson Mandela Foundation before the Equality Court was not directed to the display of the flag on the said day, but rather the display of the flag in the future.<sup>12</sup> The reasoning of the Supreme Court of Appeal is briefly set out below.

First and foremost, the court dismissed the above-mentioned submission. The court said the complaint by the Nelson Mandela Foundation was actual and not abstract, academic, or hypothetical. The complaint, the court said, was based on actual contraventions of the Equality Act, based on the events at which the flag was displayed.<sup>13</sup>

Moving on to the next stage of the inquiry, the court had to determine whether the display of the flag constituted hate speech in terms of the Equality Act. First, the court recognised that section 10(1) of the Equality Act is consistent with the Bill of Rights, protecting not only freedom of expression but also the right to equality and dignity. The court noted that while everyone in the Republic of South Africa has the right to freedom of expression, this freedom occasionally impacts the rights of others. To address this concern, the court emphasised that the Constitution was enacted to safeguard persons against hate speech that may result from exercising a right to freedom of expression.

It is important to note that after the Constitutional Court's judgment of *Qwelane v South African Human Rights Commission* section 10(1) of the Equality Act now reads as follows:

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.

In interpreting this section, read together with section 12 of the Act, which states that:

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

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11 *Afriforum NPC* para 20.

12 *Ibid.*

13 *Ibid* para 28.

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,

The court held that, in light of these provisions, the interpretation of the terms “advocate” and “propagate,” as informed by the *Qwelane* Judgment, extends beyond mere words. On the term “communicate”, the court held that “communicate” encompasses the conveyance of ideas through conduct, publicly or by dissemination.

In light of the provisions of the Equality Act and the display thereof, the court found that the flag serves as a sad reminder of South Africa’s dark past. The court said displaying the flag promotes racism, apartheid and white supremacist ideologies, as the flag underscores the trauma and hatred the black community suffered during the dark days of apartheid. The court accordingly deemed the display of the flag harmful because it carries a destructive message, celebrating a racist past. Ultimately, the court held that the gratuitous display of the old flag constituted hate speech, unfair discrimination, and harassment in terms of the Equality Act.

### 3 FREEDOM OF EXPRESSION AND HATE SPEECH

Freedom of expression is universally acknowledged as one of the fundamental tenets of democracy. It is argued that democracy cannot exist without this freedom.<sup>14</sup> The same can be said about its significance and relevance in South Africa, especially considering the country’s checkered history. The Constitutional Court affirmed in *Qwelane* that freedom of expression serves as “the benchmark for a vibrant and animated constitutional democracy.”<sup>15</sup> However, despite its importance and relevance in South Africa, its use occasionally causes problems. People hurt others with their acts or words under the guise of exercising their right to freedom of expression. In *Qwelane*, the court highlighted this concern, recognising that freedom of expression can denigrate, humiliate, and destroy.<sup>16</sup>

This misuse manifests through what is commonly referred to as hate speech. The United Nations recognises the disturbing increase of this type of rhetoric as a concern and threat.<sup>17</sup> De Villiers points out that hate speech is harmful to persons and may promote or propagate hate,<sup>18</sup> manifesting through speech, gesture, writing, conduct, or display.<sup>19</sup> Hate speech challenges the core principles of freedom of expression as it incites violence and has offensive and exclusionary impacts.<sup>20</sup> The Constitutional Court in *Qwelane* emphasised that this type of speech violates human dignity and people’s self-worth.<sup>21</sup> Many international, regional, and domestic instruments have strongly denounced this form of speech. This is underscored by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples’ Rights (ACHPR) and at a domestic level, the Constitution of South Africa

14 Ghanem “Theoretical Foundations of the Right to Freedom of Expression Between the Social Good and Individual Interests” 2022 *Revista Facultatii de Drept Oradea* 120 124.

15 *Qwelane* para 67.

16 *Ibid.*

17 United Nations “Hate Speech is Rising Around the World” <<https://www.un.org/en/hate-speech>> (accessed 22-04-2024).

18 De Villiers “Freedom of Expression and Hate Speech: When Values Collide in Divided Societies” 2022 *Constitutional Review* 184 205.

19 Mrabure “Counteracting Hate-Speech and the Right to Freedom of Expression in Selected Jurisdictions” 2016 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 160 160.

20 *Ibid.*

21 *Qwelane* para 1.

and the Equality Act.

In international law, article 4(a) of ICERD states that:

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

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

Article 20(2) of the ICCPR also expresses that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” Mrabure points out that human rights are significant in international law, and this provision goes to the heart of that, as it attempts to outlaw speech that breaches or denies people’s rights to equality and dignity.<sup>22</sup>

Under regional law, article 28 of the ACHPR places a duty on individuals “to respect and consider [their] fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding, and reinforcing mutual respect and tolerance.”

As mentioned, nationally, the Equality Act and the Constitution similarly prohibit this kind of speech. Section 10(1) of the Equality Act states that:

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.

Preliminary to the discussion of the prohibition of hate speech in the context of the Constitution, it is necessary to precede the discussion with the Constitutional framework concerning freedom of expression. The Constitution safeguards the right to freedom of expression. This is expressed in section 16(1) of the Constitution which states that:

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.

Van Vollenhoven emphasises the importance of this right in South Africa, citing amongst its benefits, granting everyone in South Africa the freedom to express themselves and engage in national affairs without fear or intimidation, an exercise he regards as a privilege that was denied during the apartheid era.<sup>23</sup> It is important to recognise that freedom of expression, like hate speech, extends beyond verbal speech. This assertion is pointed out by Stone and Schauer, who argue that while freedom of expression was historically linked with verbal discourse, it also encompasses non-verbal forms of communication such as picketing, flag-waving, and protests in modern liberal democracies.<sup>24</sup> They further argue that the traditional

22 Mrabure 2016 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 167.

23 Van Vollenhoven “The Right to Freedom of Expression: The Mother of our Democracy” 2015 *PELJ* 2299 2302.

24 Stone and Schauer *The Oxford Handbook of Freedom of Speech* (2021).

use of “speech” rather than “expression” was the primary cause of this, citing that “expression” has a broader connotation than “speech”, and as such, its use in modern times has enabled the addition of non-verbal communication.<sup>25</sup> For this reason, freedom of expression requires a broad interpretation. This was confirmed by the Constitutional Court in *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)*, where the court remarked that freedom of expression, as defined in section 16, should not be interpreted narrowly.<sup>26</sup>

Notwithstanding the provisions of section 16 above, freedom of expression is not absolute in South Africa. This limitation can apply in instances where the expression incites hatred or discrimination. This stems from sections 16(2) and 36 of the Constitution. Section 16(2) states that the right to freedom of expression 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.” Section 36 further limits freedom of expression, but this clause functions as a general right-limiting clause, which allows the Bill of Rights, including freedom of expression, to be fairly and justifiably limited, particularly if its usage violates other constitutional rights.

Against this context, freedom of expression has limitations. It is limited if it is used to inflict harm or pain on others. In the next section, we consider whether a symbol like a flag can be construed as constituting hate speech. We do this in the context of South Africa’s history.

#### 4 SYMBOLISM AND HISTORICAL CONTEXT OF SOUTH AFRICA’S OLD FLAG

To understand the impact of the flag in South Africa’s post-apartheid era, it is important to look into the country’s politics and history before the Constitution of 1996. South Africa’s history is founded on conquest and dispossession.<sup>27</sup> It is a history that is largely characterised by pain, suffering, violence, and blood, stemming from the colonial and apartheid systems implemented in the country.<sup>28</sup> This history evolved under three regimes, classified as unofficial colonisation, official colonisation, and internal colonisation.<sup>29</sup> Unofficial colonisation occurred approximately 2 000 years ago when African tribes invaded and migrated to South Africa.<sup>30</sup> These events eventually sparked unrest among African chiefdoms, leading to other black tribes to step in and take a foothold.<sup>31</sup> Official colonisation, on the other hand, refers to the invasion of European settlers in South Africa in the 1600s.<sup>32</sup> Their invasion brought Western ideologies and civilisations, especially Roman-Dutch law and capitalism, which were unfamiliar to the indigenous people inhabiting the territory.<sup>33</sup> Regarding internal colonisation, Oliver and Oliver point out that this form of colonisation manifested in the rule of law under the National Party’s government.<sup>34</sup> For purposes of this discussion, we restrict this historical context to the historical backdrop of internal colonisation in South Africa, which we submit should be taken into account

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25 *Ibid* 161.

26 *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 406 (CC) para 48.

27 Kloppers and Pienaar “The Historical Context of Land Reform in South Africa and Early Policies” 2014 *PELJ* 676 680.

28 See Barbara “The Ghosts of Colonialism: Economic Inequity in Post Apartheid South Africa” 2015 *Global Societies Journal* 12.

29 Oliver and Oliver “The Colonisation of South Africa: A Unique Case” 2017 *HTS Teologiese Studies/Theological Studies* 1 2.

30 *Ibid* 2.

31 *Ibid* 3.

32 *Ibid* 4.

33 *Ibid* 5.

34 *Ibid*.

when evaluating the impact and context of South Africa's apartheid flag.

During internal colonisation, South Africa was dominated by the politics and governance of the National Party, which was largely recognised as an Afrikaner political party that ruled South Africa from 1948 to 1994.<sup>35</sup> This regime's rule is, to date, regarded as one of the worst of all the colonisations that took place in South Africa,<sup>36</sup> as it formalised an apartheid system under the rule of law.<sup>37</sup> The word "apartheid," which translates to "apartness" in Afrikaans, refers to a system or policy that established a racially discriminatory system that divided and discriminated against individuals based on their race.<sup>38</sup> It called for the separate development of different racial groups in South Africa and enforced laws that forced racial groups to live and develop separately.<sup>39</sup> The apartheid system was rooted in discrimination and a white-dominated framework that sought to uphold white interests while excluding other races. It was a system designed solely for the benefit the white population at the expense of the black population.<sup>40</sup> The apartheid system determined that people would be divided or separated and forced to live, work, and attend school where the government dictated, largely based on race.<sup>41</sup>

Legislation was the most significant tool used to maintain this system. The National Party achieved this through its majority and authority to pass and implement discriminatory laws that perpetuated racial segregation and preserved white dominance over other racial groups. These laws were collectively referred to as apartheid legislation because they institutionalised and maintained racial discrimination in South Africa. By way of example, some of the legislation that were introduced, included the Population Registration Act of 1950, an Act which compelled every South African to be classified into a designated racial group.<sup>42</sup> This Act played a critical role in formalising the entire apartheid system.<sup>43</sup> This was followed by the Bantu Education Act of 1953, an Act which provided for a segregated form of education and unequal quality of education based on race. The Group Areas Act of 1950 was another apartheid Act that criminalised people of colour (particularly black people) from owning property in areas that were reserved for whites.<sup>44</sup> The Act also made it illegal for a person of a race other than the white race to occupy a residence in an exclusively white area.<sup>45</sup> Higgs argues that the Group Areas Act, in particular, had a profound impact on non-white people because it resulted in the loss of their entitlement to property, assets, and livelihoods, as it abolished their basic rights to land, rights they previously held.<sup>46</sup> These rights were eventually expropriated, leaving them poor.<sup>47</sup>

35 Pellicer and Ranchhod "Understanding the Effects of Racial Classification in Apartheid South Africa" 2023 *Journal of Development Economics* 1 2.

36 Oliver and Oliver 2017 *HTS Teologiese Studies/Theological Studies* 5.

37 Olaosebikan "Origin, Nature and Dismantling of Apartheid Policy in the Union of South Africa (1948-1994)" 2011 *An International Multi-Disciplinary Journal* 496 497.

38 Lingaas "The Crime Against Humanity of Apartheid in a Post-Apartheid World" 2015 *Oslo LR* 86 88. See also Dlamini, Tesfamichael and Mokhele "A Review of Place Identity Studies in Post-apartheid South Africa" 2021 *South African Journal of Psychology* 121 130.

39 Lemon, Donaldson and Visser *South African Urban Change Three Decades After Apartheid: Homes Still Apart?* (2021) 1.

40 *Ibid* 21.

41 Clark and Worger *South Africa: The Rise and Fall of Apartheid* 2 ed (2013) 3.

42 Breckenridge "The Book of Life: The South African Population Register and the Invention of Racial Descent, 1950-1980" 2014 *Kronos* 225 227.

43 Erasmus and Ellison "What Can We Learn About the Meaning of Race from the Classification of Population Groups During Apartheid?" 2008 *South African Journal of Science* 450 450.

44 James "Group Areas And The Nature Of Apartheid" 1992 *South African Sociological Review* 41 41.

45 Higgs "The Group Areas Act and Its Effects" 1967 *United Nations, Department of Political and Security Council Affairs, Unit on Apartheid* 1 8.

46 *Ibid* 10.

47 *Ibid* 14.

Another apartheid Act was the Prohibition of Mixed Marriages Act of 1949, which prohibited the union between white, black, and coloured people. Similarly, it was forbidden for a black and white person to engage in sexual relations under the Immorality Amendment Act of 1969.

Notably, nothing in these Acts sought to promote peace or unity. If anything, the laws caused pain, sorrow, and suffering, including inequality and systemic injustice.<sup>48</sup> Clark and Worger point out that despite the expanding economy, the majority of the black community's standard of living did not improve.<sup>49</sup>

Coming back to the flag issue, Brownell argues that flags can create or remove barriers through symbolism,<sup>50</sup> because of their role in nation-building.<sup>51</sup> Cerulo further argues that flags, as national symbols, send a message to people<sup>52</sup> and leaders choose these symbols carefully, based on the message that they want to convey.<sup>53</sup> Consequently, flags, like other symbols, have meaning and should not be treated lightly. This, by extension, includes the apartheid flag, which has sentimental implications in South Africa.<sup>54</sup> Cornish and Tranter argue that the apartheid flag represented the white European and Afrikaner community,<sup>55</sup> and due to its cultural and historical connotations, it has always been seen as a symbol of segregation and racism rather than a symbol of unity.<sup>56</sup> Resane makes a similar argument, stating that the apartheid flag represents the racist past that caused profound pain and suffering for the majority of the non-white population, who were subjected constantly to racism and oppression.<sup>57</sup>

Notwithstanding this history, apartheid eventually ended in South Africa through democratic processes that were preceded by political negotiations, a transition Sibanda described as a "miracle"<sup>58</sup> because of the peaceful transition from a racist regime to a democratic one in which, for the first time in decades, there was a "transmogrification" of former "enemies" into co-sponsors of the "new" South Africa.<sup>59</sup> The new South Africa ushered in a new dispensation underpinned by the supremacy of the Constitution and the rule of law.<sup>60</sup> This new dispensation is also synonymous with the concept of a "rainbow nation." At the heart of this concept is the idea that the new South Africa is now based on equity, reconciliation, and multi-culturalism.<sup>61</sup> In his inaugural speech on 10 May 1994, Nelson Mandela referenced this concept stating that:

We have triumphed in the effort to implant hope in the breasts of the millions of our people. We enter into a covenant that we shall build the society in which all South Africans, both black and white, will be able to walk tall, without any fear in their hearts, assured of their

48 Leal "Constitutional Scapegoat: The Dialectic Between Happiness and Apartheid in South Africa" 2016 *Fundamina* 297 298.

49 Clark and Worger *South Africa: The Rise and Fall of Apartheid* 68.

50 Brownell "Flagging the "New" South Africa, 1910–2010" 2011 *Historia* 42 60.

51 Kolst "National Symbols as Signs of Unity and Division" 2006 *Ethnic and Racial Studies Review* 676 676.

52 Cerulo "Symbols and the World System: National Anthems and Flags" 1993 *Sociological Forum* 243 245.

53 *Ibid.*

54 Cornish and Tranter "Dismissals for Social Media Hate Speech in South Africa: Animalistic Dehumanisation and the Circulation of Racist Words and Images" 2022 *International Journal for the Semiotics of Law* 2267 2289.

55 *Ibid.*

56 *Ibid* 2288.

57 Resane "Statues, Symbols and Signages: Monuments Towards Socio-political Divisions, Dominance and Patriotism?" 2018 *HTS Theological Studies* 1 3.

58 Sibande "When Do You Call Time on a Compromise? South Africa's Discourse on Transformation and the Future of Transformative Constitutionalism" 2020 *LDD* 384 385.

59 *Ibid* 385–386.

60 See s 1(c) of the Constitution.

61 De Raedt "Building the Rainbow Nation. A Critical Analysis of the Role of Architecture in Materializing a Post-apartheid South African Identity" 2012 *Afrika Focus* 7 7.

inalienable right to human dignity - a rainbow nation at peace with itself and the world.<sup>62</sup>

As such, in post-apartheid South Africa, the Constitution plays a vital role, representing a new era marked by constitutionalism and a substantial shift from the old system.<sup>63</sup> The primary objective is to protect people against the legacies of apartheid, encompassing acts like displaying the old South African flag and discriminatory expressions that revive past traumas. This is underscored by section 2 of the Constitution, which establishes a democratic, just, and human rights-based society in which everyone is guaranteed such protections. Furthermore, the Constitution attempts to heal divisions of the past and ensure that everyone is free from racism, inequality, discrimination, harassment, and the violation of their human rights. This is underscored by the expression contained in the preamble that states that the constitutional regime aims to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.” Pius Langa described this expression as a far-reaching vision that requires nothing less than that.<sup>64</sup> This constitutional ethos was better summarised by Mahomed J in *S v Makwanyane*, who stated that:

The South African Constitution is different: it 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.<sup>65</sup>

It is clear what the Constitution requires in post-apartheid South Africa, but a critical question is whether the court’s decision is consistent with the intended objectives of the constitutional order. This question is addressed in the following section.

## 5 WERE THE COURT FINDINGS (IN)CORRECT?

To answer this question, we suggest addressing it by taking into account two factors. One, the adjudicative role of the courts in South Africa’s post-constitutional dispensation; and two, taking into account this important question: does the display of the old flag promote the constitutional objectives of the Bill of Rights?

### 5.1 The Adjudicative Role of Courts in Post-constitutional South Africa

The pre-constitutional South Africa limited the scope of the courts. Their role insofar as protecting and promoting human rights was impacted, and judicial review was regarded as anathema.<sup>66</sup> Although courts accepted positivist jurisprudence, which in principle allowed them to interpret the will of parliament and separate law and morality, these two principles presented problems. On the one hand, John Dugard argued that courts could interpret the will of parliament and not “reason why,” and the distinction between law and morality led to the rejection of legal values.<sup>67</sup> He argued further that the courts’ interpretative functions were constrained and that they were unable to exercise their creative function as they were limited to ascertaining the

62 Nelson Mandela’s inaugural speech <[https://www.africa.upenn.edu/Articles\\_Gen/Inaugural\\_Speech\\_17984.html](https://www.africa.upenn.edu/Articles_Gen/Inaugural_Speech_17984.html)> (accessed 30-04-2024).

63 Geldenhuys and Kelly-Louw “Hate Speech and Racist Slurs in the South African Context: Where to Start?” 2020 *PELJ* 1 5.

64 Langa “The Vision of the Constitution” 2003 *SALJ* 670 670 and 677.

65 *S v Makwanyane* 1995 3 SA 391 para 262.

66 Dugard “Judging the Judges: Towards an Appropriate Role for the Judiciary in South Africa’s Transformation” 2007 *Leiden JIL* 965 967.

67 Dugard “The Judicial Process, Positivism and Civil Liberty” 1971 *SALJ* 181 187.

intentions of parliament.<sup>68</sup> Jackie Dugard extended this by arguing that judges tried to hide from a “jurisprudential conservatism about their limited role in transforming a racially divided society” by hiding behind the “fig leaf of positivism.”<sup>69</sup>

In contrast, the post-apartheid judicial dispensation differs in the manner in which the judiciary performs its adjudicative functions. First, the Constitution vests judicial authority in the courts.<sup>70</sup> Section 165(2) of the Constitution mandates courts to apply the law and the Constitution impartially and without fear, favour, or prejudice. The Constitution further requires courts to apply the constitutional values that underlie South Africa’s constitutional dispensation when adjudicating cases. This is expressed in section 39(1)(a) of the Constitution, which stipulates that “when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.” As affirmed in *S v Makwanyane*,<sup>71</sup> “one of the values of an open and democratic society is precisely that the values of all sections of society must be taken into account and given due weight when matters of public importance are being decided.” Additionally, courts must uphold the spirit, purpose, and goals of the Bill of Rights when interpreting any legislation and when developing the common law or customary law in accordance with section 39(2) of the Constitution. This means that courts must commit to doing more with the law.<sup>72</sup>

One other approach to accomplish this is by applying the law through a transformational lens, namely a constitutional framework grounded on the concept of transformative constitutionalism. The founder of this concept, Klare, writes that transformative constitutionalism is a concept that means:

A long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.<sup>73</sup>

Transformative constitutionalism promotes interpretations that align with the Constitution’s transformational mission.<sup>74</sup> At its centre is the duty to redress South Africa’s injustices.<sup>75</sup> This is underscored by Molaba and Bapela, who argue that courts have a transformative role to play,<sup>76</sup> a duty that enjoins them to interpret laws in a manner that is aligned with the constitutional project and its ideals.<sup>77</sup> Another criterion of transformative constitutionalism is the need for courts to enforce human rights.<sup>78</sup> Mbenenge goes on to add that, in light of transformative ideals, judges are obligated to do more than just use their judicial and interpretive powers to apply laws progressively to better benefit the people; they must also preserve constitutional values or the rights guaranteed in the Constitution.<sup>79</sup> They must also ensure that an exercise of any right in the

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68 *Ibid* 182.

69 Dugard 2007 *Leiden JIL* 969.

70 Section 165(1) of the Constitution.

71 *Makwanyane* para 368.

72 Kibet and Fombad 2017 *AHRLJ* 357.

73 Klare “Legal Culture and Transformative Constitutionalism” 1998 *SAJHR* 146 150.

74 Mashele “The Right to Equality under South Africa’s Transformative Constitutionalism: A Myth or Reality” 2015 *Acta Universitatis Danubius Juridica* 18 27.

75 *Ibid*.

76 Molaba and Bapela “The Evolution of Freedom of Testation in Post-Constitutional South Africa” 2024 *Acta Universitatis Danubius Juridica* 7 15.

77 *Ibid* 15.

78 Kibet and Fombad 2017 *AHRLJ* 366.

79 Mbenenge “Transformative Constitutionalism: A Judicial Perspective from the Eastern Cape” 2018 *Spec J* 1 3.

Constitution does not violate the rights of others.<sup>80</sup> As Ackermann J stated in *National Coalition for Gay and Lesbian Equality v Minister of Justice*,<sup>81</sup> “past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely.” As such, Judges must ensure that they safeguard the rights of others, and where there is a violation, eliminate it in light of the transformative ideals put forward by the Constitution.<sup>82</sup>

Looking at these ideals and what they entail, can we argue that displaying the old flag promotes these ideals? The next section addresses this issue.

## 5 2 Does the Display of the Old Flag Advance Transformative Ideals and the Bill of Rights?

As mentioned above, South Africa’s constitutional dispensation is founded upon pillars of values that are foundational.<sup>83</sup> These pillars include the values of human dignity, the achievement of equality, and the advancement of human rights and freedoms.<sup>84</sup> Vice emphasises that, while these values are not defined within the Constitution itself, they do provide substance to the rights in the Constitution.<sup>85</sup>

Taking into account these values and hate speech, Marais argues that hate speech has an effect on dignity and can contribute to exclusion and discrimination,<sup>86</sup> which could violate the values of equality and human dignity. Given substance by sections 9<sup>87</sup> and 10<sup>88</sup> of the Constitution, respectively, these two rights play a significant role in balancing the exercise of freedom of expression on the one hand with the imperative to halt hate speech on the other hand. It follows that a violation of any fundamental right in the Constitution, particularly if it is not justified in terms of section 36 of the Constitution, is a violation of the Constitution. Wilson highlights that the core objective of our constitutional regime is to ensure that all individuals live a life marked by dignity and respect for their rights.<sup>89</sup> Geldenhuys and Kelly-Louw argue further that the provisions of the Constitution and the Bill of Rights must be understood through the lens of a constitutional project attempting to fix the inequalities and discrimination stemming from the

80 Araromi “Freedom of Expression and Legal Control of Hate Speech on Social Media in Nigeria” (2018) *Entertainment Law Review* 207 207.

81 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 para 60.

82 *Ibid.*

83 Chaskalson “Dignity as a Constitutional Value: A South African Perspective” 2011 *American University ILR* 1377.

84 *Ibid* 1385. Also see s 1(a) of the Constitution.

85 Vice “Dignity and Equality in Barnard” 2015 *CCR* 135 139.

86 Marais “Hate Speech in the Equality Act Following the Constitutional Court Judgment in Qwelane v SAHRC” 2023 *PELJ* 1 7.

87 “(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

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

89 Wilson *Human Rights and the Transformation of Property* (2021) 16.

past.<sup>90</sup> An approach to accomplish this is through the enforcement of transformative ideals as enshrined in the Constitution. One of these transformative ideals is the enforcement of the right to equality and dignity. Writing on human dignity, O'Regan J stated the following:

The value of dignity in our Constitutional framework cannot therefore 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, invest in our democracy respect the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights.<sup>91</sup>

At the centre of this right (human dignity) is respect—respect for other human beings.<sup>92</sup> Respect in this sense is not only limited to respecting the autonomy of individuals or not devaluing or treating people in a degrading manner,<sup>93</sup> but it also includes respect in terms of responses [speech] or behaviour [expression].<sup>94</sup> Steinmann also points out that human dignity is not only violated through actions but also by ideas that offend or directly denigrate a person's worth or their dignity.<sup>95</sup> This was confirmed by Yacoob J in *Le Roux v Dey* when he stated that:

But it 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. Two examples will suffice. The violation of human dignity in the context of unfair discrimination on any of the grounds listed in the Constitution would be unarguably egregious.<sup>96</sup>

The Equality Act is inextricably linked to this right and the right to equality as enshrined in the Constitution.<sup>97</sup> Section 9(4) of the Constitution mandates that “no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.” The Equality Act gives effect to this section. It aims to protect anyone against unfair discrimination, harassment, and hate speech, reflecting its vision as encapsulated in the preamble which states that the Act “endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.” The provisions of this Act are triggered by an individual or group's conduct that violates the right to equality, human dignity, or discriminates unfairly against others. To assess if such conduct constituted such, according to the *Harksen* judgment,<sup>98</sup> the following factors must be assessed: (a) the societal position; here the inquiry is about whether the complainants occupy a position in society that has historically suffered discrimination; (b) the nature of the action; here the inquiry examines the specific action or conduct in question and the intended purpose behind it; and (c) the rights violated, and under this inquiry, the examination is about the extent to which the complainant's rights have been infringed upon and whether their dignity has been

90 Geldenhuys and Kelly-Louw 2020 *PELJ* 5.

91 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 para 35.

92 Vice 2015 *CCR* 141.

93 Steinmann “The Core Meaning of Human Dignity” 2016 *PERL* 1 19.

94 Vice 2015 *CCR* 142.

95 Steinmann 2016 *PERL* 16.

96 *Le Roux and Others v Dey* 2011 3 SA 274 (CC) para 46.

97 *Nelson Mandela Foundation* para 109.

98 *Harksen v Lane NO* 1998 1 SA 300.

compromised.<sup>99</sup>

Taking note of the above, it has been pointed out that flags are not just pieces of clothing, but rather powerful symbols that not only carry the culture but also the history of the country.<sup>100</sup> They are influenced by factors such as historical events, culture, geography and environment, national identity and symbols, and economic, political, and social factors.<sup>101</sup> A celebration of a flag that carries a checkered history only serves to ignite the flames that the Constitution sought to douse (flames of hatred and division). Botha and Kok emphasise that, although a symbol is not verbal, those who feel that their rights have been violated as a result of the symbol can rely on the prohibitions of unfair discrimination and harassment.<sup>102</sup> Consequently, symbols can constitute not only hate speech but also unfair discrimination and harassment, thereby falling under the applicable provisions of the Equality Act. This Act, giving effect to transformative ideals, as mentioned, aims to ensure that no one is unfairly discriminated against and that everyone's right to human dignity is protected. As articulated by Pius Langa, "our society which values dignity, equality, and freedom must therefore require people to act positively to accommodate diversity."<sup>103</sup>

This judgment has two implications, which reinforce the preceding submissions. First, it broadens the scope of South Africa's jurisprudence on freedom of expression and hate speech. Although there is already a proliferation of scholarship and jurisprudence acknowledging that freedom of expression can be limited if it is discriminatory or if it violates other constitutional rights, the Equality Court's Judgment as confirmed by the Supreme Court of Appeal, is unique in that it considers symbols, such as a flag, to be hate speech, based on usage. Secondly, while we must exercise caution with this one, as cases are usually decided on a case-by-case basis or based on their own merits, this case suggests that freedom of expression can be limited if it is exercised through symbols that have negative historical overtones rooted in them.

## 6 CONCLUSION

The article's objective was to examine the reasons behind the respective rulings of the Supreme Court of Appeal and the Equality Court. The decisions, based on the findings of both courts, highlight the delicate balance that must be struck between freedom of expression and other competing rights. These judgments illustrate South Africa's commitment to transformation as mandated by the Constitution. As was seen, the old flag has negative connotations in South Africa. Its display impacts other people's rights, particularly the right to dignity and equality. Notwithstanding the critical role that freedom of expression plays worldwide, including in South Africa, its use, especially when taking into account South Africa's history, must be limited so that it does not infringe upon other people's rights.

99 Currie and De Waal *The Bill of Rights Handbook* 6 edn (2013) 216–217.

100 Shakeel, Arslan and Haroon "An Analysis of Flags as Cultural Icons: A Semiotic Study of 30 Countries" 2023 *Harf-o-Sukhan* 122 141.

101 *Ibid* 142.

102 Botha and Kok "How to Make Sense of the Civil Prohibition of Hate Speech in Terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000" 2019 *SAPL* 1 14.

103 *MEC for Education: Kwazulu-Natal v Pillay* 2007 2 SA 106 (CC) para 75.