

Public display of old SA flag is hate speech, rules SCA

By [Tania Broughton](#)

25 Apr 2023

Ruling on the display of the flag in private homes to be determined at another hearing, if brought before a court.



Image source: Rabia Elif Aksoy – [123RF.com](#)

- The Supreme Court of Appeal (SCA) has ruled that displaying the old South African flag is hate speech, unfair discrimination on the basis of race, and harassment, upholding an Equality Court ruling.
- The SCA however amended the outlawing of the flag in private homes, saying that the issue was not “properly ventilated” in either the Equality Court or the SCA.
- Afriforum had argued that bringing the old flag to public gatherings should not be unlawful.

The Supreme Court of Appeal (SCA) has unanimously ruled that any gratuitous public display of the old South African flag constitutes hate speech, unfair discrimination on the basis of race, and harassment in terms of equality legislation.

However, the court amended a similar ruling handed down by the Equality Court, which had also outlawed the display of the flag in private homes. The SCA said that issue had not been properly ventilated either in the Equality Court or in the appeal to the SCA, launched by Afriforum, and was best left to be determined if and when such an application was brought before a court.

Writing for the court, Judge Ashton Schippers said the case brought into sharp focus the potency of a symbol of the cruel ideology of apartheid.

[Read the judgment](#)

Afriforum, he said, played a leading role in nationwide demonstrations in 2017, labelled “Black Monday protests” to protest against the murder of farmers. It was widely reported that at some of these protests, the old flag was displayed. ([GroundUp reported on the Cape Town protest](#) and our journalists did not see widespread use of the old flag. - *GroundUp* Editor)



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This led to a complaint being lodged against Afriforum by the Nelson Mandela Foundation Trust (NMFT) with the Equality Court, sitting in the Johannesburg High Court.

Judge Schippers said the basic facts were largely undisputed.

NMFT chief executive officer Sello Hatang testified that on the day of the protests he was giving tourists a guided tour of Robben Island. The display of the old flag brought painful memories of his childhood to mind, including when he was called the K-word by two white boys when he was ten years old. He said it was his first experience of being told that he was less than human because of the colour of his skin.

Hatang said the old flag represented the inhumane system of apartheid and its gratuitous display, more than a generation after the abolition of apartheid, reminded him that some South Africans still see him and black people as being “other” and would deny them the opportunity to be human.

During a debate on national television about the issue, Afriforum CEO Kallie Kriel, denied that the old flag had been displayed. Afriforum, he said, discouraged its members from bringing the old flag to public gatherings as it could offend people. However, he argued, it should not be unlawful.

In its application before the Equality Court, the NMFT said the flag served no genuine journalistic, academic or artistic purpose and it did nothing to advance social justice, national unity and human dignity.

Afriforum’s deputy CEO, Ernst Roets, who deposed to the answering affidavit, conceded that the old flag had the capacity to cause offence and emotional distress.

However, the organisation was opposed to an outright ban because it would be an infringement of the right to freedom of expression.

The Equality Court, however, ruled that the display of the old flag constituted hate speech, unfair discrimination and harassment.



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Judge Schippers said that in its appeal, Afriforum had failed to make out a case why the ban violated rights to freedom of expression, dignity and freedom of assembly “and this is simply because the rights are not implicated at all”.

He said the message conveyed by the gratuitous display of the old flag was plainly one based on race - apartheid and white

supremacy.

“The old flag is an awful reminder of the anguish suffered by millions of people under apartheid South Africa.

“As stated in the founding affidavit of the South African Human Rights Commission (also an applicant in the Equality Court), the old flag represents precisely that racist and repressive regime and the dehumanising ideologies espoused during its rule - the racial superiority of white South Africans and the corresponding inferiority of Black South Africans.

“The gratuitous displays by people of the old flag brings into unmistakeable view, their affinity and mourning for the apartheid regime ... the message conveyed is a longing for the days of apartheid and the restoration of white minority rule.”

Judge Schippers said the Constitutional Court had already ruled that racist conduct must be dealt with firmly.

He said such displays of the old flag were calculated to be harmful and were extremely degrading and dehumanising.

“There is no escaping it, the message legitimises white supremacy ... it provides fertile ground for the violence and brutality of racism.”

The court dismissed the appeal and made no order as to costs because the appeal had raised the protection of fundamental rights.

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