Public Comment, Posts Displaying South Africa’s Apartheid-Era Flag (2025-001-FB-UA, 2025-002-FB-UA)

Juha Tuovinen

The Board asked for public comment on:

“The sociopolitical context in South Africa, in particular the nature of public and political discourse around apartheid and racial inequality, including in the lead-up to the 2024 elections, the impact of displaying the apartheid flag since 1994, and the role of supremacist and apartheid-sympathetic groups in social and political life.”

In general, South African political discourse is robust and “[t]he language we often use is as colourful as our rainbow nation and as informal and unruly as our people sometimes are” (*Democratic Alliance v. African National Congress & Independent Electoral Committee* [2015] ZACC 1 para 174). The political engagment with the country’s past is complex given the enduring legacy of Apartheid. While some mainstream politicians will engage in some defence of some aspects of colonialism and apartheid or its overall character (eg. <https://www.bbc.co.uk/news/world-africa-40143710>), denouncing both is the strongly prevailing norm. There is, however, a rising “right wing populism” that endorses an “enclave nationalism” which may spread pro-Apartheid sentiment, including through the use of the Apartheid flag. (<https://theconversation.com/south-africas-white-right-the-alt-right-and-the-alternative-103544>: <https://www.scielo.org.za/pdf/hts/v72n4/31.pdf>).

As part of that rise, the use of the Apartheid flag has been considered judicially. The case arose after the Apartheid flag was displayed at protests against farm murders organized by a civil society group called AfriForum. The group describes itself as advocating for the rights of Afrikaaners, critics consider them a “white nationalist group” (<https://www.washingtonpost.com/politics/dangerous-and-poisoned-critics-blast-trump-for-endorsing-white-nationalist-conspiracy-theory-on-south-africa/2018/08/23/6c3b160e-a6df-11e8-a656-943eefab5daf_story.html>). Both the Equality Court (*Nelson Mandela Foundation Trust and Another v Afriforum NPC and Others* [2019] ZAEQC 2 and the Supreme Court of Appeal (*Afriforum NPC v. Nelson Mandela Foundation Trust and Others* [2023] ZASCA 58) found, in the case of the latter, unanimously, that any “gratuitious public display” of the Apartheid flag is has been found to constitute speech in terms of section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the “Equality Act”), harassment in terms section 11 of the Equality and unfair discrimination in terms of 7 of the Equality Act. While this is not binding on the Oversight Board, I would encourage the Board to read the judgments as they pertain to the meaning of the Apartheid flag as they contain wealth of historical material and social analysis that may assist the Board in deciding the case.

In brief, it is unlikely that an informed and benign interpretation of the use of the Apartheid flag is possible. Of course, anyone may use the flag misunderstaning its context without meaning any harm, especially if its use is normalized. However, given the history of the flag and its use primarily by the rising right-wing populists described above, it is unlikely that sincere use of the Apartheid flag for a benign purpose would be likely.