



South African Human Rights Commission

SOUTH AFRICAN HUMAN RIGHTS COMMISSION SUBMISSION:

Public Comment on the Display of South Africa's Apartheid-Era Flag and Moderation of Coded Symbols and Implicit Attacks on Protected Groups

20 October 2024

Introduction

The South African Human Rights Commission (SAHRC/Commission) appreciates the opportunity to submit its comments to the Meta Oversight Board (MOB) regarding the ongoing display of South Africa's apartheid-era flag on Facebook and the challenges associated with moderating related content. In light of South Africa's historical context, the Commission is deeply concerned about the impact such symbols have on national unity and social cohesion, especially during politically sensitive periods like the 2024 General Election.

Our comments draw upon both local and international legal frameworks, particularly the recent judgment in *Afriforum NPC v Nelson Mandela Foundation Trust and Others* (Case No: 371/2020), and South Africa's obligations under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act/PEPUDA). The SAHRC firmly believes that platforms like Facebook must adopt a zero-tolerance policy towards hate symbols—whether overt or coded—to ensure their platforms are not misused to perpetuate racial division and historical trauma.

Background

The SAHRC is an independent constitutional body established under Section 184 of the South African Constitution and governed by the South African Human Rights Commission Act, 2013 (SAHRC Act). The Commission's core mandate is to promote respect for human rights, protect human rights, and monitor human rights observance nationwide. In carrying out this mandate, the Commission plays a vital role in upholding the principles of equality, dignity, and non-discrimination—cornerstones of South Africa's democratic society, shaped by its history of apartheid.

The SAHRC Act empowers the Commission to investigate human rights violations and take necessary steps towards redress. Specifically, in cases of hate speech, the Commission has the authority, under Section 13(3)(b) of the SAHRC Act, to bring proceedings in court in its own name or on behalf of individuals or groups. Additionally, the SAHRC reviews government policies, makes recommendations, and may suggest new legislation to Parliament to promote human rights.

Section 9 of the Bill of Rights guarantees the right to equality, explicitly prohibiting unfair discrimination by both public and private entities on multiple grounds, including race, gender, and sexual orientation. This clause serves as the constitutional foundation for PEPUDA, which operationalizes the right to equality by providing legal mechanisms to address discrimination and hate speech. PEPUDA further strengthens the SAHRC's role, granting it authority to act as a complainant in hate speech and discrimination cases and take these matters to court.

Thus, the SAHRC plays a pivotal role in ensuring that online platforms like Facebook align with legal standards that safeguard equality and dignity as enshrined in the Constitution and South Africa's legal framework.

Current Jurisprudence

The *Afriforum* judgment sets a clear legal precedent in South Africa concerning the display of the apartheid-era flag. In its 2023 ruling, the Supreme Court of Appeal (SCA) unequivocally declared that the gratuitous public display of the apartheid-era flag constitutes hate speech, unfair discrimination, and harassment. This decision is consistent with Section 10 of PEPUDA, which prohibits hate speech in South Africa.

The *Afriforum* case is crucial for the MOB's consideration as it reflects South Africa's settled jurisprudence on hate symbols and discriminatory speech. The SCA found that symbols like the apartheid flag perpetuate racial superiority and nostalgia for apartheid, a regime classified as a crime against humanity under international law. Displaying such symbols endorses the systemic racial oppression central to apartheid.

Section 12 of PEPUDA and Hate Speech

Under Section 12 of PEPUDA, coupled with the *Afriforum* ruling, the display of symbols that amount to hate speech or unfair discrimination is prohibited, with exceptions only for legitimate academic, journalistic, or artistic purposes. The apartheid-era flag, according to the court's ruling, represents a symbol of oppression that degrades the dignity of Black South Africans.

The legal framework under PEPUDA leaves no room for gratuitous displays of symbols that promote racism or discrimination. This aligns with South Africa's constitutional mandate to uphold dignity and equality by prohibiting hate speech.

Clear Jurisprudence: No Need for Deviation

Given South Africa's established legal stance on this issue, the *Afriforum* judgment provides a solid basis for content platforms like Meta to remove content violating this principle. There is no need for platforms to reconsider or deviate from this jurisprudence. The SCA has already determined that displaying the apartheid flag constitutes hate speech, and platforms operating in South Africa must adhere to this legal standard.

The Commission believes there is no justification for allowing content that has already been deemed unlawful. Such content is not only offensive but violates South Africa's legal standards and perpetuates racial harm. Failure to act on this issue may lead to an influx of complaints and legal challenges while damaging Meta's commitment to respecting human rights within the jurisdictions it operates.

Chain of Publication Responsibility

In addition to the *Afriforum* precedent, the principle of chain of publication responsibility is important. Platforms like Meta, which enable the dissemination of content, may bear legal liability for harmful material that remains on their platform, particularly when it

constitutes hate speech. Under South African law, liability for defamatory or harmful content may extend beyond the original creator to intermediaries who allow its continued distribution. In the case of hate symbols such as the apartheid flag, Meta could face legal consequences for enabling the ongoing display of content that violates domestic laws. Therefore, platforms must act responsibly by removing harmful content once it is flagged or identified, or risk being deemed complicit.

Section 16(1) of the South African Constitution guarantees the right to freedom of expression for all persons. This right is fundamental to most other rights and is vital for the functioning of a democratic society. However, freedom of expression can, and often does, infringe upon the rights and interests of others. This limitation is recognized in Section 16(2) of the Constitution, which excludes hate speech from the right to free expression. As the Constitutional Court highlighted in the *Qwelane v South African Human Rights Commission and Another (CCT 13/20) [2021]* judgment, hate speech is the antithesis of the values advanced by free speech. While free speech promotes democracy, hate speech is destructive to it, as it undermines the constitutional project of substantive equality and social acceptance.

Furthermore, in the *Rustenburg Platinum Mine v SAEWA obo Bester and Others (CCT127/17) [2018]* case, the court observed that South Africa's history is marked by deep societal divisions, conflict, and racial prejudices. The judgment emphasized that although apartheid has ended, racism and racial prejudice persist. These discriminatory beliefs, rooted in the false notion of racial superiority, continue to manifest in society, not only concerning race but also in relation to gender discrimination.

Internationally, Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) obliges state parties to condemn and take immediate, positive measures to eradicate racial hatred and discrimination. This includes making the dissemination of ideas based on racial superiority or incitement to racial discrimination punishable by law, as well as prohibiting any support for racist activities, including their financing.

This legal framework—both domestic and international—underscores the importance of preventing the propagation of harmful content that incites hate, including on digital

platforms, and affirms the necessity of strict content moderation to uphold the principles of equality and human dignity.

No Hierarchy of Atrocities

The Commission also draws the MOB's attention to its October 2020 ruling, which removed Holocaust denial content from Facebook. In that decision, the MOB recognized Holocaust denial as a form of hate speech, not merely a matter of free expression or academic debate. The apartheid regime, like the Holocaust, has been classified as a crime against humanity. Therefore, Meta must adopt a consistent approach and remove all apartheid-related symbols, which similarly glorify atrocities.

There should be no hierarchy when addressing content related to crimes against humanity. The same standard applied to Holocaust denial should be applied to the display of apartheid-era symbols.

Impact on the Work of the SAHRC

As a National Human Rights Institution (NHRI) governed by the Paris Principles, the SAHRC is tasked with promoting and protecting human rights. However, if platforms like Meta allow harmful content such as the apartheid flag to remain, the SAHRC will be inundated with complaints, straining its resources and capacity. While the Commission is mandated to investigate human rights violations, it should not have to clean up after platforms that fail to moderate their content properly.

The SAHRC's role is to proactively promote human rights, not to manage the fallout from inadequate content moderation by private platforms. Should Meta fail to address these issues, it risks overburdening the Commission, diverting its resources away from addressing broader systemic human rights concerns.

Moderating Visual Content

The Commission believes that Meta's content moderation must account for the cultural and historical context in which symbols are used. In countries with legacies of racial oppression, like South Africa, symbols such as the apartheid flag or certain coded images (e.g., the 'OK' hand emoji) carry harmful connotations. These symbols, when paired with apartheid rhetoric or racist ideologies, should be immediately flagged for review.

The SAHRC is finalizing a lexicon of harmful symbols and phrases specific to the South African context, which can be a valuable resource for Meta in moderating such content. The lexicon includes not only symbols like the apartheid flag but also visual content historically used to dehumanize and attack individuals based on race.

Conclusion

The SAHRC urges the Meta Oversight Board to adopt a firm stance against the use of hate symbols on its platforms, whether explicit or coded. The display of the apartheid-era flag, in particular, has the potential to incite racial hatred, glorify oppressive systems, and undermine the dignity of South Africans.

As a global platform, Meta has an obligation to adhere to international human rights standards while respecting local laws and cultural contexts. The Commission recommends that Meta's moderation practices evolve to include deeper contextual awareness, intent-based reviews, and transparent processes for identifying and moderating coded hate speech.

The SAHRC remains committed to promoting human dignity, equality, and the protection of all people from racial discrimination. We look forward to continued engagement on these critical issues and urge Meta to consider our recommendations in shaping its future content moderation policies.

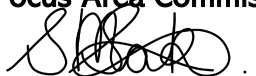
Sincerely,



SAHRC Commissioner T Madlingozi
Focus Area Commissioner: Anti-Racism and Justice



SAHRC Commissioner N Khwinana
Focus Area Commissioner: Freedom of Expression



SAHRC Commissioner S Makoasha
Focus Area Commissioner: Business and Human Rights