

Attorney:
Thina Dlungwana LLB (UKZN)
Zakayo Sentongo BCOM, LLB (UNISA)



OUR REF : CGE23/01/01/TD#433
YOUR REF :

DATE: 1 August 2024

**TO The Honorable Madam Justice Pakati
The Presiding officer.**

The Equality Court, Held at the High Court, Eastern Cape Division,
Gqeberha:
By email: ttshiva@judiciary.org.za

Yousha Tayob Attorneys

The Respondents Attorneys
Johannesburg
By email: yousha@youshatayob.co.za

Lithemba Ncanywa Attorneys

First applicant's attorneys
Gqeberha
By email: lithemba.ncanywa@gmail.com

Power and Associates

Attorneys for the third applicant (*amicus curie*)
Rosebank
By email: fina.power@powerlaw.africa / claire.dehosse@powerlaw.africa /
legal@powerlaw.africa

Dear Madam/ Sirs

**RE: THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION AND 2 OTHERS / DAWOOD
LARGADIEN: CASE NO: 2391/23: HEADS OF ARGUMENT;**

1. The above matter has reference.
2. Please find attached the second Applicant's Heads of Argument.
3. Kindly acknowledge receipt.

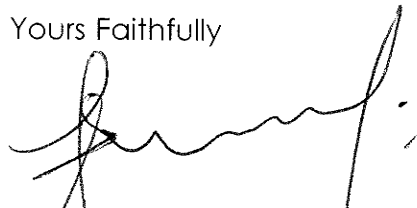
Office 1, 1st Floor,
Wembly Centre,
60 Chief Albert Luthuli
Pietermaritzburg, 3201

www.apngubo.co.za
reception@apngubo.co.za
Tel: 033 342 3308

PO Box 11944
Dorpspruit
3206



Yours Faithfully



A.P. NGUBO ATTORNEY

Office 1, 1st Floor,
Wembly Centre,
60 Chief Albert Luthuli
Pietermaritzburg, 3201

www.apngubo.co.za
reception@apngubo.co.za
Tel: 033 342 3308

PO Box 11944
Dorpspruit
3206



**IN THE EQUALITY COURT OF SOUTH AFRICA
EASTER CAPE DIVISION HELD AT GQEBERHA**

CASE NO: EQ 2391/2023

In the matter between:

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

FIRST APPLICANT

THE COMMISSION FOR GENDER EQUALITY

SECOND APPLICANT

MEDIA MONITORING AFRICAN TRUST

AMICUS CURIAE

And

DAWOOD LAGARDIEN

RESPONDENT

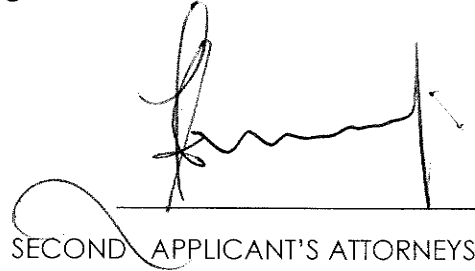
FILING NOTICE:

SECOND APPLICANT'S HEADS OF ARGUMENT:

Dear Sirs

PLEASE TAKE NOTICE that the second Applicant herein files its Heads of Argument.

Dated at **Pietermaritzburg** on this **1st** day of **August** 2024



SECOND APPLICANT'S ATTORNEYS

A.P NGUBO ATTORNEYS

60 CHIEF ALBERT LUTHULI STREET

FIRST FLOOR, OFFICE 1

WEMBLEY CENTRE

PIETERMARITZBURG

T: 033 342 3308

F: 086 718 2430

E: reception@apngubo.co.za

REF: CGE23/01/01ZS#433

C/O MBEWANA ATTORNEYS' INC

55 GREEN STREET

CNR GREEN AND PERKIN ST

NORTH END

GQEBERHA

Tel: 041 487 3542

TO: **THE REGISTRAR OF THE HIGH COURT**
THE EQUALITY COURT, SITTING AT
THE HIGH COURT
EASTERN CAPE DIVISION

AND TO: **LITHEMBA NCANYWA INC**

1ST APPLICANT'S ATTORNEYS
3RD FLOOR, AFRICA HOUSE
6 GRAHAM STREET
NORTH END
GQEBERHA:
REF: L Ncanywa/SOW/1
Email: lithemba.ncanywa@gmail.com

AND TO: **POWER AND ASSOCIATES**

ATTORNEYS FOR THE *AMICUS CURIAE*
20 BAKER STRETT, ROSEBANK
JOHANNESBURG
2196
TEL; 010 8227860
EMAIL: tina.power@powerlaw.africa
Claire.dehosse@powerlaw.africa
legal@powerlaw.africa
REF: PLMM-202313

C/O McWILLIAMS & ELLIOT INC

152 CAPE ROAD, MILL PARK
GQEBERHA
TEL: 041 582 1250
EMAIL: cheryldene@mcwilliams.co.za
law@mcwilliams.co.za

AND TO: **YOUSHA TAYOB ATTORNEY**
ATTORNEYS FOR THE RESPONDENT
1st FLOOR OSGO BUILDING
7 BONANZA ST
EXT 19
JOHANNESBURG
Tel: 011 838 3342
Email: yousha@youshatayob.co.za
REF: YOUSHA/380/YT

**IN THE EQUALITY COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION HELD AT GQEBERHA**

CASE NO: EQ 2391/2023

In the matter between:

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

FIRST APPLICANT

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SECOND APPLICANT

MEDIA MONITORING AFRICAN TRUST

AMICUS CURIAE

And

DAWOOD LAGARDIEN

RESPONDENT

SECOND APPLICANT'S HEADS OF ARGUMENT

INTRODUCTION:

1. This is an opposed application, brought by the **South African Human Rights Commission** (the SAHRC) in which it seeks relief amongst other things a declarator against the respondent, referral of the complaint to

the National Prosecution Authority, payment of a fine and issuing a public apology to those affected by his conduct¹.

2. **The Commission for Gender Equality** ("CGE") joined the proceedings considering its mandate to promote, monitor and evaluate gender equality through research public education, policy development and litigation. Furthermore, the CGE 's participation can be found in section 20 (1)(f) of PEPUDA, which empowers the CGE to institute of participate in proceedings under the act².
3. Furthermore, the CGE's participation in the matter is since its mandate entails representation of those marginalised members of society who are perceived to break the break the gender norms, and their identity and lifestyle, may be punished verbal, psychological and physical abuse.
4. The CGE is of the view that the actions of the Respondent constitute discrimination, hate speech and harassment, and seeks the following relief:
 - 4.1 The Respondent issue a public apology on all social media platforms.
 - 4.2 A deceleration order that the conduct of the respondent constitutes unfair discrimination.

¹ SAHRC founding Affidavit, Pg 4, para 1

² CGE further affidavit para14

- 4.3 Primarily, an order that the respondent undergo training on LGBTQIA+ and related matters.³
5. **The Media Monitoring Africa Trust** ("MMA") as the *amicus curiae* has provided insight into that the court may consider when making its determination, especially where two competing fundamental human rights seem at odds with each other and it has indicated importance of alternative and restorative justice, and the issuing of an apology as remedies⁴.
6. The Respondent has opposed the application⁵.

FACTUAL BACKGROUND:

7. It is common cause that the respondent displayed a sign outside his shop that stated "**NO LGBTQIA+ ALLOWED. SAVE OUR CHILDREN**"⁶. It also common cause that the respondent started and administered a WhatsApp group that promoted hatred and abuse directed at the LGBTQIA+ community⁷.

THE ISSUE:

8. Following an inquiry, the Court must determine:

³ CGE Further Affidavit page 32 para 92

⁴ MMA heads of argument para 18

⁵ Respondents answering affidavit, para 3

⁶ SAHRC Founding Affidavit para 38

⁷ SAHRC Founding Affidavit para 41

8.1 whether the respondent's actions of displaying the sign outside his shop, and the initiating and administering the WhatsApp group propagating the hatred and banishment of the LGBTQIA+ community amounted to:

- a) Hate speech.
- b) Harassment
- c) Unfair discrimination

8.2 If the Court does indeed find that the respondent actions amounted to the above, what is the appropriate remedy?

COMPETING FUNDAMENTAL RIGHTS AND THE DETERMINATION THEREOF:

9. The CGE maintains that the actions of the respondent constitute hatred, unfair discrimination, and harassment⁸, and these actions are a direct violation of the LGBTQIA+ community's right to dignity and security.

10. The CGE submits, and as it will illustrate below, that our Courts, when interpreting, or making determinations, are required to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Furthermore **section 9 of the Constitution of South Africa of 1996**⁹, demands or requires that previously disadvantaged persons, who were marginalised by this country's past laws, are adequately protected.

⁸ CGE Further Affidavits para 35

⁹ The constitution of the republic of South Africa, 108 of 1996 s9

11. The Respondent, in his answering affidavit to the SAHRC's complaint, states that he is a Muslim, and that his religion is a practical way of life. The respondent further states that the state must ensure that his religious beliefs are not infringed, otherwise his practical way of life – being a Muslim, will be compromised, and in turn impair his dignity¹⁰.

12. The Respondent has stated in his replying affidavit to the CGE that his actions were in protection of his community and religion;

"I created a WhatsApp group for the purposes of keeping the community informed about the threats and the issues at hand, including creating awareness regarding the teachings of Islam as it relates to homosexuality and its prohibition in Islam¹¹."

and

"...homosexuality is prohibited and considered as an abomination in Islam¹²"

13. It is apparent that there are competing rights that require the determination of the Court. In this regard, it is trite to recognise that South Africa is diverse, consisting of different races, cultures, beliefs, lifestyles and religions.

¹⁰ Respondent's answering affidavit para 6.

¹¹ Respondent's answering affidavit: CGE para 25

¹² Respondent's answering affidavit: CGE para: 26

14. In addressing an optimal framework to resolve conflicts between competing rights **Bilchitz** argues for a middle ground approach based on egalitarianism. He states that, "freedom of religion should only be protected only to the extent that it does not undermine the capacity of other individuals to do likewise¹³."

15. It is fair to assert that the drafters of both the interim constitution, and the final constitution of were mindful of the historical injustices and prejudices that had afflicted, not only the majority of black South Africans, but also vulnerable minority like members of the LGBTQIA+ community. The preamble and the founding provisions of the **Constitution of 1996**¹⁴ is a clear indication that these past injustices were not to be repeated and the values and rights enshrined in this document will be extended to all.

16. From the onset, the CGE does not challenge the respondent's right to religion, or the freedom to express his religious beliefs. **Section 15(1) of the Constitution** specifically establishes and protects freedom of religion and belief¹⁵. The right to religion is entrenched in our Constitution and our Courts have acknowledged that.

¹³ Bilchitz: Tension between Freedom of religion and Equality in Liberal Constitutionalism Pg 12

¹⁴ The constitution of the republic of South Africa 108 of 1996

¹⁵ The constitution of the republic of South Africa 108 of 1996 section 15.

17. In **Prince v President of the Law Society, and Others 2000ZACC1:2002(2)**

SA 744 the court remarked that *the right to freedoms of religion is one of the most important of all human rights. The court held further that this right was especially important in South Africa, whose population is diverse and comprises of so many different faiths.*

18. The CGE is mindful and respectful not to make any unqualified in-depth comments on Islam and its practices as a religion, however it has been submitted that Islam is the second largest religion in the world. *It has also been submitted that there are a growing number of scholars, mainly in the west, that have started re-examining Islamic teachings on same sex relationships and whether a blanket condemnation of LGBTQIA+ people is a misrepresentation*¹⁶.

19. The CGE respectfully submits that the submissions made by the respondent regarding the practice of Islam and the imposed existence, beliefs and of the LGBTQIA+ community, and how they impair his right to dignity are **relative and open to interpretation**. For this reason, the CGE will direct its arguments on the respondent's right to exercise his religion.

¹⁶ Stances of faith on LGBTQIA+ issues – Sunni and Shia: Online publication by HRC Foundation

FREEDOM OF RELIGION v FREEDOM OF EQUALITY AND FREEDOM

20. In **Strydom v Nederduiste, Geeformeeerde Gemmente Moreleta Park**

26926/05 (2008) ZAGPHC¹⁷ a church dismissed a teacher upon learning that he is in a homosexual relationship. The church argued that it dismissed the claimant on religious grounds. It was of the view that a homosexual relationship was not a proper moral example to students. The court found that unfair discrimination had indeed occurred, with the church relying on its right to freedom of religion as entrenched in the Constitution.

21. In the **Strydom** case the Court further referred to **Woolmer et al:**

Constitutional Law of South Africa¹⁸, "*The rights to Freedom can potentially be outweighed by other constitutionally protected rights. Religious freedom is apt to run most often against demands of equality. These demands will be most compelling with regard to discrimination on the basis of race, sex and sexual orientation*"

22. Granted that the respondent is within his constitutional right to practice and uphold his religious beliefs/values, and that his misguided actions were because of the alleged conduct of 2 LGBTQIA+ persons in his

¹⁷ Strydom v Nederduiste, Geeformeeerde Gemmente Moreleta Park 26926/05 (2008) ZAGPHC

¹⁸ Woolmer et al: Constitutional Law of South Africa page 41-46):

establishment, there is still no justification for his generalised discriminatory conduct targeting the LGBTQIA+ community.

23. The CGE submits that the court must **condense its focus on the respondent's conduct** – displaying a sign with language that is discriminatory, dehumanising, inciteful and aimed at a previously marginalised group.

24. A significant consideration presented by the court in **Qwelane v South African Human Rights Commission (2021) ZACC22**¹⁹ was that an objective standard was required, when considering the effect hate speech has on an individual – in essence, what would the hate speech have on a reasonable person. The **intentions of the person who publishes, expresses, or communicates the hate speech are irrelevant.**

25. The reasons or justifications submitted by the Respondent do not qualify his conduct. If the respondent felt that his life, his business and wellbeing threatened, he had alternative, and less dehumanising options – he was within his right to approach the nearest harassment court to seek appropriate relief, alternatively he could have reported the alleged threatening conduct to the police²⁰.

¹⁹ Qwelane v South African Human Rights Commission (2021) ZACC22

²⁰ Respondent's answering affidavit: SAHRC para 14

HATE SPEECH:

26. **Section 10(1)**²¹ of the act provides that:

Subject to the provisions 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 hateful or incite harm*
- c) *Promote or propagate hate.*

27. Prohibited grounds (**section 1 (1)**)²², include characteristics such as *race, sexual orientation, or any other grounds where discrimination based on that ground or causes, or perpetuates systematic disadvantage or undermines human dignity.*

28. The court in **Strydom**²³ in determining whether discrimination against a teacher who was gay, first described discrimination within the scope of PEPUDA, Discrimination is defined as any policy or action that would impose a burden on or deny opportunities to an individual because of his membership in a protected class. If the discrimination was fair, then the Act would not apply.

²¹ Promotions of Equality and Prevention of Discrimination Act 4 of 2000. Section 10

²² Promotion of Equality and Prevention of Discrimination Act 4 of 2000

²³ Strydon v Nederduiste, Geeformeede Gemmente Moreleta Park 26926/05 (2008) ZAGPHC

29. The church's argument that the discrimination was fair because of the religious norms required by church leaders, including a celibate lifestyle for homosexuals, was rejected by the court. The court further found that the claimant's right to dignity had been infringed as he was no longer employed and unable to earn a living.

30. **In Isimangaliso Wetland Park and another V Jordaan Bay Guest Lodge and Another 01/2017[2018] ZAKZDHC60**²⁴ the court held that the right to religion cannot be used a tool to destroy the right to equality and human dignity.

31. The court in this case found that utterances and dogmas regarding his religious beliefs did not hold any substance. With reference to the case **Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others CCT 60/04[2005] ZACC19,2006 (3) BCLR355(CC) 2006(1) SA 526 CC**²⁵ in which the court held that, "*A democratic universalistic caring and egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who they are is profoundly disrespectful of the human personality and violatory to equality.*"

32. The CGE submits that our courts are reluctant to afford protection to conduct – irrespective of its constitutional weight, that is deemed or

²⁴ **Isimangaliso Wetland Park and another V Jordaan Bay Guest Lodge and Another (01/2017)[2018]ZAKZDHC 60(30 November 2018)**

²⁵ **Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others CCT 60/04[2005] ZACC19,2006 (3) BCLR355(CC) 2006(1) SA 526 CC**

intended to wilfully compromise enshrined rights of an already marginalised group, or a group that has historically been marginalised.

In **Islamic Unity Convention v Independent Broadcasting Authority**

2002(4) SA 294²⁶ Langa DCJ, as he was then, stated, "...*certain expression does not deserve Constitutional protection because amongst other things, it has the potential to impinge adversely on the dignity of others and cause harm.*"

HARRASMENT

33. The **Section 1 of PEPUDA**²⁷ describes harassment as unwanted conduct which is persistent or serious and demeans and humiliates or creates a hostile environment, or intimidating environment, or is calculated to induce submission by actual or adverse consequences, and which are related to:

- a) Sex, gender or sexual orientation
- b) A person's membership or presumed membership of a group identified by one or more prohibited grounds, or a characteristic associated with such a group.

34. Section 11²⁸ of the Act provides that no person may subject any person to harassment.

²⁶ Islamic Unity Convention v Independent Broadcasting Authority 2002(4) SA 294

²⁷ PEPUDA section 1

²⁸ PEPUDA section 11

35. The CGE submits that the conduct of the respondent, by displaying a sign targeted at a specific group amounts to harassment. The respondent's conduct is further extended to the creation of WhatsApp group that promotes violence against a specified group.

36. It is common cause that the sign outside the respondent's shop was displayed for at least 3 or more days, before it was eventually removed. Inference can be made that this conduct was persistent. The persistence element can also be gleaned from the fact the respondent made a concerted effort to start a WhatsApp group specifically aimed at promoting the abomination of the LGBTQIA+ community.

37. The court in **AfriForum V Nelson Mandela Childrens Trust & Others (371/2020) (2023)**²⁹ ruled that the display of an old flag seriously demeans, humiliates, and creates a hostile and intimidating environment for victim of apartheid and such a display constitutes harassment under section 11 of the Act.

THE WhatsApp Group:

38. It is common cause that the Respondent created a WhatsApp group and administered a WhatsApp group called Our rights- anti-LGBTQIA+.

²⁹ AfriForum V Nelson Mandela Children's Trust & Others (371/2020) (2023)

39. The group was created shortly after the Respondent had displayed the offending sign outside his shop. According to Mamba, an online queer publication, the group has almost 683 members.

40. Some of the messages that have been exchanged or communicated between the members include:

"We need to find the sauce of these evil.....we must finish them³⁰."

"Fight this pure demonic evil, and LGBTQI+ is a blatant attack on Islam³¹"

41. The Respondent argues that the messages communicated on the chat group do not constitute dissemination and publication of discriminatory information as required by the Act.³²

42. The Respondent further argues that he has no control over the content of the of the group, or the messages exchanged between the members, and can therefore, not be liable for any conduct emanating from that forum. The respondent further argues that the messages of the group were not exchanged on a public platform or sent to persons that could have been offended by such messages. It may be inferred that the Respondent argues that the messages exchanged or posted on the

³⁰ Mamba online: Published 19 2023

³¹ Ibid.

³² Respondent's answering affidavit: SAHRC para 39.4

WhatsApp group were **not sufficiently public** to fall within the Act's definition of hate speech³³.

43. The recent judgement of **Amaning & Others v Ackerman EQ3/2023**³⁴ in the Equality Court, sitting at the Johannesburg High Court, involved the exchange of text messages between two white business males. The messages contained the use of the word "Kaffir ", with reference to black people.

44. The Respondent argued that these communications were private and should not extend to harassment, as defined by the act. The respondent in his defence referred to the **Qwalane**³⁵, where the court distinguished the differences between private and public communications.

45. The court found that the statements by Justice Majjet were made in passing and were of no value to the respondent.

46. The court also referred to the words of Langa DP, as he was then, in the case **Hyundai Motor Distributors (pty) Ltd v Smit No & Others (2000) ZACC**³⁶,

"Privacy is a right which becomes intense, the closer it moves to the intimate sphere of life of human beings, and less intense, as it moves away from that core."

³³ Respondent's answering affidavit: SAHRC para 39.4

³⁴ Amaning & Others v Ackerman EQ3/2023

³⁵ South African Human Rights Commission v Qwelane (2017)ZAGP218:2018 (2) SA 149

³⁶ Hyundai Motor Distributors (pty) Ltd v Smit No & Others (2000) ZACC

47. In **Bernstein & Others v Bester NO & Others (CCT23/95)**³⁷ the court held that; *"privacy is acknowledged in the truly personal realm, but as persons move into communal relations and activities such as business and social interactions the scope of personal space shrinks accordingly."*

48. With reference to the above decisions, the court in **Aminang** found that the communication sent by the respondent to his business associate amounted to hate speech and harassment in terms of the Act. The Court also found the respondent's defence to be long, convoluted, and dishonest. A punitive cost order followed.

49. The CGE submits that having regard to the **section 10(1)** of the Act, as well as the decisions in **Aminang, Bernstein** and **Qwalane**, the conduct of the respondent amount to hate speech and harassment and unfair discrimination.

49.1 The Respondent, as the administrator could have removed the hateful content of the posts as soon as he became aware them, but he failed to do so. The Respondent was an active participant in the "chain of publication", as argued by the SAHRC in its founding affidavit.

³⁷ **Bernstein & Others v Bester NO & Others (CCT23/95)**

49.2 The content of the WhatsApp group had a large following. Any argument that the communications were private should be disregarded. The communications had gone beyond the private inner sanctum.

49.3 The language used in the posts is intended to instil fear, incite violence and propagate hate against a marginalised community.

49.4 Some of the content on the WhatsApp group received wide circulation, after MambaOnline, a queer internet publication, published some of the messages exchanged between members on the platform. In so doing, those who were not intended to be recipients of the hurtful and abusive messages did see these messages. It is immaterial whether the Respondent intended for such persons to see the messages or not.

APPROPRIATE RELIEF:

50. The CGE has in its further affidavit provided in some detail the suffering and inhumane treatment experienced by members of this community – including physical assaults and murder. These unlawful acts are some instances, stoked by hate speech targeted at this minority group, as well as endorsement by cultural and religious groups that being member of this community is contrary to acceptable social norms.

51. The Respondent has opposed this application. Some of the profound misguided comments include:

"This slogan shows the intent behind the act, which is an outward manifestation of a globally share sentiment to push back against the perversion that the LGBTQIA+ movement now is³⁸"

"It has become a movement that poses a real threat to our children³⁹"

"...the LGBTQIA+ who are not a weak vulnerable group. They are very influential group with mass media and financial support⁴⁰"

52. The tone of the Respondent's papers has been unrelenting, full of bigotry, plain bias and unsubstantiated.

53. The Respondent has with vigour opposed the relief of education and sensitization, as sought by the CGE. *"The relief sought goes against my religious beliefs and convictions."*, as well as *"Islam does not allow such training and sensitization to desensitize the strong anti-homosexual/lesbian feelings and belief of Muslims⁴¹"*

54. Sensitizing and education is aimed at breaking down stereotypes and biases that may impede on the rights, and quality of life, and self-worth of others. The Respondent's argument should be disregarded. He is not being stripped of his prejudices or opinions that he may have against the LGBTQAI+ community, nor is he being compelled to harbour, entertain

³⁸ Respondents answering affidavit: SAHRC par 34.1

³⁹ Respondent's answering affidavit: SAHRC 34.2

⁴⁰ Respondent's answering affidavit: SAHRC para 34.5

⁴¹ Respondent's answering affidavit para: CGE 38

of embrace this lifestyle – the whole purpose of a sensitization programme is that the Respondent respects the worth and existence of another human being, however differing his opinion may be of such human being.

55. Notwithstanding that there are competing fundamental rights for the determination of the court, the CGE is also mindful that this is a social dynamic that is bound to be part of a country as diverse as ours. Tolerance, mutual respect and acceptance should be acknowledged and promoted. The CGE further submitted in its application to join, that it was seeking relief that was restorative, and not punitive.⁴²

56. The relief that the CGE seeks is mindful of the respondent's religious convictions and his age. Furthermore, this relief is aimed at promoting tolerance, mutual respect and social cohesion⁴³

57. In this regard we agree with the submissions made by the MMA in respect of the value of restorative justice and the accompanying sanctions.⁴⁴

⁴² CGE application to join par 12.4

⁴³ MMA heads of argument pars 63 - 71

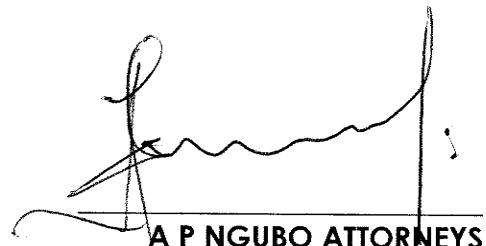
⁴⁴ MMA heads of argument pars 63 - 71

CONCLUSION

58. Considering the above averments, the CGE submits that the publication and display of the offending sign, aimed at the LGBTQI+ community, as well as the creation and administering of a WhatsApp group containing offensive and inciteful language aimed at this community, amounts to hate speech, harassment and unfair discrimination that compromises the right to dignity, security and equality.

59. The CGE persists with the relief sought in its founding papers.

60. For the reasons set out in these heads of argument, the CGE prays for the relief contained in its further affidavit.

A handwritten signature in black ink, appearing to read 'A P Ngubo', written over a horizontal line.

A P NGUBO ATTORNEYS
ATTORNEYS FOR THE SECOND APPLICANT
A DA SILVA, SC
COUNSEL FOR THE SECOND APPLICANT

Bibliography

Case law.

1. AfriForum v Nelson Mandela Children's Trust & Others (371/2020) (2023)
2. Amaning & Others v Ackerman EQ3/2023
3. Bernstein & Others v Bester NO & Others (CCT23/95)
4. Hyundai Motor Distributors (pty) Ltd v Smit No & Others (2000) ZACC
5. Isimangaliso Wetland Park and another V Jordaan Bay Guest Lodge and Another (01/2017)[2018]ZAKZDHC 60(30 November 2018)
6. Islamic Unity Convention v Independent Broadcasting Authority 2002(4) SA 294
7. Minister of home affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others CCT 60/04[2005] ZACC19,2006 (3) BCLR355(CC) 2006(1) SA 526 CC
8. Prince v President of the Law Society, and Others: 2002 ZACC1: 2002(2): SA 794
9. South African Human Rights Commission v Qwelane(2017)ZAGP 218:2018 (2) SA 149
10. Strydon v Nederduiste, Geeformeede Gemmente Moreleta Park 26926/05 (2008) ZAGPHC

Legislation:

1. Protection and Prevention of Unfair Discrimination Act 4 of 2000 section 1, 10, 11 and 12
2. The Constitution of the Republic of South Africa 108 of 1996 sections 9,15

Publications

1. Bilchitz: Tension between Freedom of religion and Equality in Liberal Constitutionalism Pg 12
2. Mamba online: Published 19 2023
3. Stances of Faith on LGBTQI+ issues – Sunni and Shia: Online publication by HRC Foundation
4. Woolmer et al: Constitutional Law of South Africa page 41-46):

Pleadings

1. The Commission for Gender Equality: Further affidavit.
2. The Commission for Gender Equality: Application to join.
3. Media monitoring African Trust: Heads of arguments.
4. Respondent's Answering affidavit.
5. South African Human Rights Commission: Founding affidavit.