**IN THE EQUALITY COURT OF SOUTH AFRICA**

**(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: **EC04/2020**

In application for admission as *amicus curiae*:

|  |  |
| --- | --- |
| **THULISILE MHLUNGU N.O.** | First intervening applicant |
| **DEIDRE LOUISE SMYTHE N.O.** | Second intervening applicant |
| **PUMLA DINEO GQOLA N.O.** | Third intervening applicant |
| **BUHLE DESIREE LEKOKOTLA N.O.** | Fourth intervening applicant |
| **SIPHOKAZI MTHATHI N.O.** | Fifth intervening applicant |
| **ANIEKAH GAMIET N.O.** | Sixth intervening applicant |
| **NOZIZWE SILINDILE VUNDLA N.O.** | Seventh intervening applicant |
| *Acting in their capacities as:*  **THE TRUSTEES FOR THE TIME BEING OF THE WOMEN’S LEGAL CENTRE TRUST** | |

In the matter between:

**SOUTH AFRICAN HUMAN RIGHTS COMMISSION**  Applicant

and

**BELOFTEBOS WEDDING VENUE** First Respondent

**COIA DE VILLIERS** Second Respondent

**ANDRIES DE VILLIERS** Third Respondent

**COMMISSION FOR GENDER EQUALITY** Fourth Respondent

**PIERRE DE VOS** Fifth Respondent

**WESLEY WHITEBOY** Sixth Respondent

**FAIEZ JACOBS** Seventh Respondent

**CATHERINE WILLIAMS**  Eighth Respondent

**ALEXANDRA THORNE** Ninth Respondent

**ALEX LU** Tenth Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

**SEEHAAM SAMAAI**

do hereby make oath and state:

1. I am the Director of the Women’s Legal Centreand I am duly authorised to depose to this affidavit on behalf of the first to sixth intervening applicants, being the Trustees of the time being of the Women’s Legal Centre Trust (‘WLC Trust’) and to bring this application on behalf of the WLC Trust. I annex hereto marked “**SS**”, a resolution of by the WLC Trust’s Board of Trustees dated [date] authoring me as aforesaid.
2. The WLC Trust is a registered non-profit organisation with registration number 032-685-NPO and a registered public benefit organisation with tax exemption number 930-00-242, with its address at 2nd Floor, 5 St George’s Mall Cape Town.
3. To avoid prolixity, the Trust Deed of the WLC Trust is not annexed to this affidavit but can be made available to Court should it be necessary to do so.
4. I attached hereto marked “**SS**” a copy of the Master’s Certificate authorising the first to sixth intervening applicants (‘the Trustees’) to act on behalf of the WLC Trust.
5. The facts deposed to in this affidavit are within my knowledge, save where the contrary is stated or the context indicates otherwise, and are true and correct.

# **INTRODUCTION**

1. At the outset, I emphasise this case is not about defending the right to freedom of religion.
2. It is about a business, which is open to the public, and which claims a right to discriminate against persons on the basis of the religious beliefs of the owners of the business. Businesses which open their doors to the public are required to be value-neutral in their dealings with the public, which, as will be explained below is to the benefit of all parties and is in the public interest.
3. No one is discriminating against the First to Third Respondents (‘the Beloftebos respondents”) as a result of their religion/religious beliefs. No one is asking the Beloftebos respondents to abandon their religious beliefs and/or to solemnise a marriage.
4. The relief sought by the applicants requires nothing more than for the Beloftebos respondents to act in accordance with the Constitution when dealing with the members of the public who patronise their business.
5. Notwithstanding the attempt by the Beloftebos respondents to cast themselves as victims, they are not. If anything, the conduct of the Beloftebos respondents, in seeking to advance a case which would, in effect, undermine the rights of persons with diverse sexual orientations, is demonstrative of a far more sinister global trend, which we similarly address in this affidavit.

# **THE PURPOSE AND STRUCTURE OF THIS AFFIDAVIT**

1. The WLC Trust seeks to be admitted as an *amicus curiae* in this matter in terms of Rule 16A of the Uniform Rules of Court.
2. This affidavit is structured as follows:
   1. First, I address the language used by the WLC Trust, particularly, as it relates to sexual orientation, gender identity, gender expression and sex characteristics;
   2. Second, I address the WLC Trust’s interest in this application;
   3. Third, I set out the submissions and evidence to be advanced by the WLC Trust, which, in turn, is dealt with as follows:
      1. I address the South African historical context of religion as a basis for discrimination;
      2. I deal with the trend, both globally and in South Africa, of the utilisation of the right to religion as a weapon either to undermine the rights of sexual and gender diverse persons, or alternatively, to seek to, proverbially, “roll-back” the rights of such persons;
      3. I examine the use of religion in this case, and in particular, the manner in which the Beloftebos respondents purport to use the right to religion and the impact on society of the manner in which the right is particularised;
      4. I seek to provide a constitutionally appropriate analysis of the right to freedom of religion, belief and opinion; and
      5. I examine the concept of value-neutrality and religion in the context of private individuals.
   4. Fourth, I deal with requirements for admission as *amicus* and condonation.
3. I pause, at this juncture, to note that the submissions that the WLC Trust seeks to make address aspects of the matter which are relevant to the determination of the issues before this Court and which have not been canvassed by the parties to the litigation.
4. Further, in the response to the WLC Trust’s letter seeking consent to be admitted as *amicus curiae* from the Beleftobos Respondents they noted that they are three state institutions participating in the litigation, including the Commission for Gender Equality. The Beloftebos respondents specifically noted that ‘*we do not see how admitting you as an amicus curiae would assist the court with anything not already covered by those opposing our clients. Nor do we see how your entry would promote justice to all the parties involved*.’
5. This characterisation of the submissions sought to be made by WLC Trust is incorrect for the following reasons.
6. The South African Human Rights Commission (‘SAHRC’) is the applicant in the main application and a respondent in the counter-application.
   1. In the founding affidavit, the SAHRC primarily focuses on setting out the incidents of discrimination experienced by same-sex couples seeking the services of the Beloftebos respondents at their wedding venue. Further, the SAHRC explains the reasons why it is of the view that the hosting policy of the Beloftebos respondents is unconstitutional and contrary to the Equality Act as well as setting out the relief that it seeks in light of the identified discrimination.
   2. In its replying affidavit, the SAHRC lists the common cause facts, the presumption of unfairness, and deals with whether the Beloftebos respondents have discharged the burden of demonstrating that the discrimination is fair.
   3. This includes a summary of what has been explained as constituting the Beloftebos respondents’ religious beliefs; the section 14(2) factors; the responses to the positions advanced on the role and function of the SAHRC; the application of section 29 of the Equality Act; whether Beloftebos is a business subject to secular law; defences related to the argument of State-sanctioned thought control; the ‘false dichotomy of abandon beliefs or break the law’; the arguments favouring heterosexual and monogamous marriages; the antiquity of marriage as an institution; the majoritarian focus of the defence and its interaction with section 14; and that character and absence of ill-intent are irrelevant to the enquiry. The SAHRC contends that all these factors cumulatively demonstrate a failure to prove fair discrimination.
   4. The Commission for Gender Equality (‘CGE’) addresses five main issues in its affidavit as explained in paragraphs 9 – 13 of the answering affidavit, which can be summarised as following –
      1. freedom of religion does not justify setting aside section 14 of the Equality Act,
      2. a finding that the Beloftebos respondents hosting policy is unconstitutional does not impact their rights,
      3. if the Court was to find that wedding venues and service providers may refuse same-sex couples for religious reasons the Beloftebos respondents do not qualify for such protection because they have hosted weddings for divorcees, as well as for Muslim and Jewish couples.
      4. the impact of the Beloftebos hosting policy on the LGBTQIA+ persons and
      5. the declaratory relief sought in the counter-application is ‘incompetent’.
   5. I note that the submissions made by the ninth respondent do not address any of the issues that the WLC Trust seeks to. The ninth respondent’s submissions focus on the constitutionality of Equality Act as challenged by the intervening parties which the WLC Trust does not address.
7. I submit that the submission that the WLC Trust are substantively different form those of the three state parties involved in this matter. The WLC Trust’s submissions specifically focus on assisting the Court in determining the matter by providing a legal framework through which to view the facts and evidence submitted by other parties, but also to assist the Court in focussing on the legal questions being posed and the impact on a broader category of persons than merely the parties before the Court.

# **THE LANGUAGE USED BY THE WLC TRUST**

1. Commonly, in South African and beyond, lesbian women, gay men, bisexual persons, transgender persons, non-binary persons, queer persons, intersex persons and other individuals whose sexuality, gender or bodies differ from the cultural expectations of society are referred to as LGBTQI+.
2. The utilisation of this acronym, can, in certain instances create the impression that only the classes of persons mentioned in acronym are recognised and protected.
3. The term “SOGIESC” is often used in human rights discourse to recognise that rights belong to all people, which include LGBTQI+ persons as well as those not listed explicitly but implied under the plus sign.
4. SOGIESC as an acronym is derived from the fact that everyone has a sexual orientation (“SO”); a gender identity (“GI”) , a gender expression (“E”), and sex characteristics (“SC”).
5. In referring to classes of persons who have diverse sexual orientations, gender identities and expressions, and sex characteristics the WLC Trust does so to obviate the perpetuation of language which may render certain identities, bodies and individuals as invisible, by relegating their identity to a plus sign. I pause to note that the work of the WLC Trust focuses on those persons who identify as women. In our work and in this affidavit, we recognise the fact that women are not homogenous and not just cisgender, not just heteronormative by utilising the term women in their diversity.
6. Moreover, and for this Court’s ease of reference I set out below a definition for each of constituent elements of SOGIESC as derived from the “*Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007*” (“Yogyakarta 2007”)and“*The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, 10 November 2017.*” (“Yogyakarta 2017”).
   1. “**Sexual Orientation**”is understood to refer to each person’s capacity for“*profound emotional, affectional and sexual attraction to, and intimate* *and sexual relations with, individuals of a different gender or the same gender or more than one gender.*” (Yogyakarta, 2007, Preamble).
   2. “**Gender Identity”** is understood to refer to “*each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms*.” (Yogyakarta, 2007, Preamble).
   3. **“Gender Expression”** is understood to refer to *“as each person’s presentation of the person’s gender through physical appearance – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioural patterns, names and personal references, and noting further that gender expression may or may not conform to a person’s gender identity”* (Yogyakarta, 2017, Preamble).
   4. **“Sex Characteristics”** – are understood to refer to *each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty* (Yogyakarta, 2017, Preamble).
7. To the extent necessary, clarification of the foregoing will be provided should the Court require it. Simply put, the WLC Trust is mindful that the sexual orientation, gender expression, gender identity and sex characteristics, should not be reduced to be plus sign in an acronym.

# **THE WLC TRUST’S INTEREST IN THIS MATTER**

1. The WLC Trust is an African feminist law centre, established over 20 years ago, which seeks to advance the rights of women in their diversity to substantive equality by using the law as a tool for change and justice.
2. The WLC Trust has as one of its key objectives, the development of feminist jurisprudence. The work that the WLC Trust does through its Centre is based on intersectional feminism which recognises that women in their diversity and their experiences, based upon a number factors, are not homogenous.
3. Women in their diversity experience discrimination very differently - based on where they are positioned within their homes, families, communities and places of work, often in varying degrees of egregiousness, the more vulnerable a woman may be.
4. The work of the WLC Trust aims to challenge the multiple intersecting forms of disadvantage that women in their diversity face daily. One of the focus areas of the WLC Trust is its Relationship Recognition focus area that seeks to promote equality of, and in, all relationships. This focus area aims to advocate for all relationships regulated by family law to be provided equal recognition and protection before the law.
5. In order to achieve its objectives, the WLC Trust uses different methodologies, including litigation, strategic advocacy, and education and training.
   1. Since its inception, the WLC Trust has acted as *amicus curiae* in several cases in respect of issues related to the equal recognition of relationships in law, including matters pertaining to recognition of Muslim marriages, customary marriages and domestic partnerships.
   2. The WLC Trust has also presented written and oral submissions in several law reform processes aimed at ensuring that legislation and policies adopted specifically related to relationships are consistent with a framework that affirms, recognises and protects all types of families, persons and relationships.
   3. The WLC Trust has also presented written and oral submissions focused on laws, policies and relating to the protection, visibility and inclusion of rights related to SOGIESC in South Africa and internationally.
   4. The WLC Trust through the Women’s Legal Centre (“WLC”) hosts a Legal Advice Unit through which women in their diversity can obtain legal advice, support and representation in respect of discrimination that they face as a result their sex, gender, race, sexual orientation or gender identity. Most queries that the WLC receives on an annual basis relate to the rights of women in their diversity in relationships and the discrimination that they face in their personal relationships.
6. This matter, and its outcome, will have a fundamental effect on how, *inter alia*, the rights to equality and dignity are to be balanced against the right to religion, which will, in turn have a profound effect in how those rights are applied to women in their diversity, and in particular, marginalised and vulnerable women. The impact will not only stop at negatively affecting equality and religion but will also impact the rights of women in their diversity to sexual and reproductive health rights specifically the ability to make free and informed decisions about their bodies and reproduction, the right to bodily autonomy, the right to education, the right to health generally and as explained by the Constitutional Court could possibly lend them to live with violence and stigma among other violations and prejudice.
7. Accordingly, I submit that given the work which the WLC Trust conducts, particularly, *vis à vis*, relationship recognition, that the WLC Trust is uniquely placed to assist the Court in these proceedings.

# **THE WLC TRUST’S SUBMISSIONS**

1. In explaining the position advanced by the WLC Trust, the submissions are grouped into the five interlinked parts identified above, we address each heading in turn below.

## **Religion as a tool for discrimination in the South African Historical Context**

1. It is not contentious that South Africa’s particular historical context is one which pointedly used religion as a guise to justify apartheid. The use of religion as a tool for discrimination is, with respect, the oldest trick in the conservative arsenal. It is for this reason that South Africa’s current position is one which is religiously neutral, this has been explained in the Minister of Justice’s affidavit dated 4 March 2021.
2. South African courts have accepted that our particular history has subjected people with diverse SOGIESC to unfair discrimination, prejudice and violence.
3. In this regard, we note that, Justice Cameron, as he then was, dealt with the historical treatment of people with diverse SOGIESC in some detail in an article entitled “*Sexual Orientation and the Constitution: A Test Case for Human Rights*”, (1993) 110 South African Law Journal 450. This article is attached marked “**SS**”.
4. Justice Ackerman, as he then was, referred to Justice Cameron’s article in the matter of *S v H*, 1995 (1) SA 120 (C). Justice Ackerman also noted a study that found that most countries in the Anglo-American legal group continued to punish private same sex sexual acts. He went on to note that the evolution of the criminalisation of same sex sexual offences ‘*was greatly influenced by Canon Law; Matthaeus De Criminibus, relying heavily on theological considerations.*’
5. *S v H* has been referred and cited by the Constitutional Court in a number of cases relating to SOGIESC rights including *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 and *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC).
6. Justice Cameron’s article was also cited by the Constitutional Court in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517. In fact, Justice Ackerman, indicated that he relied heavily on Justice Cameron’s article, in the context of the impact that the criminalisation of sodomy had on members of the affected group.
7. It is perhaps, also apposite to note that the Constitutional Court in *National Coalition*, quoting *S v H*,stated the following:

“*As far as religious views and influences are concerned, I would repeat what was stated in S v H:*

‘*There is still a substantial body of theological thought which holds that the basic purpose of the sexual relationship is procreation and for that reason also proscribes contraception. There is an equally strong body of theological thought that no longer holds this view. Societal attitudes to contraception and marriages which are deliberately childless are also changing. These changing attitudes must inevitably cause a change in attitudes to homosexuality.’*

*It would not be judicially proper to go further than that in the absence of properly admitted expert evidence. I think it necessary to point out, in the context of the present case, that apart from freedom of expression, freedom of conscience, religion, thought, belief and opinion are also constitutionally protected values under the 1996 Constitution. The issues in this case touch on deep convictions and evoke strong emotions. It must not be thought that the view that holds that sexual expression should be limited to marriage between men and women with procreation as its dominant or sole purpose, is held by crude bigots only. On the contrary, it is also sincerely held, for considered and nuanced religious and other reasons, by persons who would wish not to have the physical expression of sexual orientation differing from their own proscribed by the law. It is nevertheless equally important to point out that such views, however honestly and sincerely held, cannot influence what the Constitution dictates in regard to the grounds of sexual orientation.”* [emphasis added]

1. I also pause to mention the following two academic works which may be of assistance to the court, Professor Sylvia Tamale’s *Exploring the contours of African sexualities: Religion, law and power*’ which I attach hereto as “**SS**”**.**
2. I also refer to the work of Calista Struby titled ‘*Church and State: The Impact of Christianity on South African Politics during and Post-Apartheid’* which I attached hereto marked “**SS**”.
3. The following bears mention as regards the attached articles:
   1. Professor Tamale indicates that even in South Africa, the only country on the African continent that outlaws discrimination on grounds of sexual orientation, the legislative gains for sexual citizenship are constantly threatened by those who wish to reinstate the hegemonic sexual discourse and the hegemonic, heteronormative hold on women. Moreover, Professor Tamale notes that the *“capacity of ... women to control their sexual and reproductive lives and to break free from the chains of domesticity is continually curtailed by law, culture and religion*.”
   2. Struby in her article notes, *inter alia*, that Christianity played a role in the justification of the oppression and subjugation of people. She argues that one of chief phenomena which allowed Apartheid to flourish was the biblical justification of racial segregation. Moreover, a biblical justification was adopted by the Dutch Reformed Church and ‘*based on hermeneutics of experience and is another example of contextual theology*’ leading Struby to argue that the Dutch Reformed Church was ‘*hugely influential in establishing segregation ... giving doctrinal substance to racial prejudices*

## **The current use of religion as a weapon to discrimination sexually and gender diverse persons**

1. Notwithstanding the fall of Apartheid and the shift to a religiously neutral state – religious groups have sought to influence policy and politics, and to advance a particular agenda.
2. Seeking to utilise the right to religion to discriminate on the basis of sexual orientation has garnered attention globally in recent years.
3. A decision of the United States Supreme Court in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1728 (2018) and *Lee v. Ashers Baking Co. Ltd.*, [2018] UKSC 49 in the United Kingdom Supreme Court are demonstrative of the use of religion by private persons as an attempt to use religion to refuse service to persons of diverse SOGIESC. We discuss more examples later in the affidavit.
4. The post-apartheid use of religion to justify constitutionally aberrant behaviour is also not unknown South Africa:
   1. In ***Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*** (26926/05) [2008] ZAGPHC 269; (2009) 30 ILJ 868 (EqC) (27 August 2008) - an independent contractor of a church organisation teaching music to students had his contract terminated because he was in a same-sex relationship. The church organisation sought to rely on the right to freedom of religion as entrenched in section 15 of the Constitution to justify the unfair discrimination based on the complainant’s sexual orientation. The Equality Court rejected these arguments.
   2. In ***Isimangaliso Wetland Park and Another v Sodwana Bay Guest Lodge and Another*** (01/2017) [2018] ZAKZDHC 60, the respondent refused to offer services to black people because *“black people were servants and the Bible made it clear”.* The matter was a review of the decision of a Magistrate sitting as an Equality Court, the Magistrate’s finding was ultimately confirmed.
   3. The conduct complained of, as appears from the judgment, was, *inter alia*, the following:
      1. “*An email that reflected the following:*

*We do not accommodate blacks or government employees any longer*

*Sodwana Bay Guest House*

*Enki Andre M Slade*

*The Book of Revelation 10. .* .”

* + 1. The second complaint relates to discriminatory comments that were made in an interview by the second respondent and to a presenter of ‘Vuma FM’:

‘1*. We work according to Gods law and according to Gods law, we have to have some sort of segregation between the creation that he left here. . .the law you have in South Africa is Satan’s law.*

*2. Black people were servants and the Bible made it very clear. . .his Bible said he could not mix with another race. . .*

*3. We do not have the same blood, skin, hair and there are about 300 differences between you and me. . .*

*4. You are classified in the Bible as an animal, you are not homosapien.*

*5. Black people were not people. . .*”

1. The use of such tactics to undermine the advance of rights is part of a global trend of international conservatives seeking to create spaces where their agendas are allowed to flourish, usually on the African continent. One such example is the passing of Uganda’s Anti-Homosexuality Act, which was, in part, spearheaded by American religious conservatives.
2. As explained by the United Nations Independent Expert on Sexual Orientation and Gender Identity, Victor Madrigal Borloz, in his report to the General Assembly in July 2019 (attached marked “**SS**”):

*“The rise of ultraconservative and ultranationalist groups reclaiming “identities” at the expense of sexual and gender minorities has challenged advances and prevented the development of laws and policies inclusive of LGBT people in several countries. In recent years, these groups have developed discourses that undermine rights related to gender and sexuality and have built new strategic alliances and increased their advocacy efforts in international spaces in the hope that progress already made will be rolled back. Such discourse encourages the perception of LGBT people as “others”. Such discourse promotes exclusion and increases hate crimes*

1. It is not only ultraconservative or ultranationalists groups that seek to undermine, for example, rights of women in their diversity – the reinstatement of the global gag rule (i.e. the United States withdrawal of funding for abortion clinics, in various countries) each time a Republican government is elected is well documented. The fundamental basis of these decisions derive from a purported adherence to particular religious views.
2. The current United Nations Special Rapporteur on Freedom of Religion, Dr Ahmed Shaheed, has engaged with the intersection of freedom of religion and the gender equality including SOGIESC rights.
3. Following a series of conferences held by the Special Rapporteur with over 42 countries (including South Africa) represented, from May to December 2019, Dr Shaheed prepared a report in March 2020 (which is attached hereto marked “**SS**”). I highlight certain salient features of the report below.
   1. The Special Rapporteur found that in all regions there was evidence of religion or belief being increasing used to deny reproductive health and sexual rights; criminalise protected conduct and deny equal personhood of persons with diverse SOGIESC; or to undermine the right to freedom of religion or belief to women, girls, and persons with diverse SOGIESC.
   2. The Special Rapporteur further explained that, in every region of the world, laws have been enacted with the aim of mandating standards of conduct purportedly demanded by a particular religion that effectively deny women and other individuals the right to equality and non-discrimination on the basis of their sex, sexual orientation or gender identity.
   3. Further, laws identified as intended to protect the right of all individuals to manifest their religion or belief have been applied in a manner that has resulted in discrimination in practice on the same bases. Governments in all regions of the world have also failed to uphold their obligation to protect people from gender-based violence and discrimination perpetrated against them by private individuals or entities claiming a religious justification for their actions and to sanction the perpetrators of such acts. Gender-based violence and discrimination is being perpetuated both in the public sphere and by and within religious communities and entities.
   4. Specifically, in relation to private actors discrimination and violence linked to religion by private actors, the Special Rapporteur expressed deep concern from available evidence that religious interest groups or actors are invoking religious tenets as well as pseudoscience to support their arguments in the ‘*defence of traditional values rooted in interpretations of religious teachings about the social roles for men and women in accordance with their alleged naturally different physical and mental capacities; often calling on governments to enact discriminatory policies*.’
   5. The Special Rapporteur went on to note that at the Africa-based consultations, participants highlighted the role-played religious actors based in the United States who provide training and funding to religious leaders to mobilize communities to support the adoption of laws like the Anti-Homosexuality Act in 2014 in Uganda.
   6. He went on to note that in countries that do not criminalize homosexuality, *‘some religious groups have successfully campaigned against the introduction of school books on sex education by arguing that the books promoted homosexuality. Regionally, some States are advocating for hegemonic interpretations of ‘African Values’ within the African Charter on Human and Peoples’ Rights, in order to exclude LGBT+ and abortion rights.’*
   7. The Special Rapporteur also noted that he had received information on discrimination against women and persons with diverse SOGIESC by private persons refusing to provide medical or other services to these persons based on religious views. Further, that in keeping with the increasing discrimination against women and persons with diverse SOGIESC, he had also received information indicating that legal exemptions to anti-discrimination measures on the grounds of religious commitments are being increasingly accommodated.
4. The issue relating to the use of religion to promote SOGIESC based discrimination also received some attention from the previous Special Rapporteur on Freedom of Religion who served in this role from 2012 – 2016.
5. In exploring this topic further, the former Special Rapporteur Mr. Heiner Bielefeldt held a conference on Freedom of Religion or Belief and Sexuality in June 2016. Following this conference, a report titled Special Rapporteur’s Compilation of Articles on Freedom of religion or belief and Sexuality was developed. The relevant articles of the report are attached marked “**SS**”. Only the relevant parts of this report are annexed to avoid rendering this application overly prolix.
6. The former Special Rapporteur noted that in the period of his tenure he came across views that assume that freedom of religion or belief conflicts with demands for recognizing people in their sexual diversity or gender diversity. The relationship between these rights was described as *“tense”* and that some have construed the rights from a zero-sum conflict. Some have referred to this zero-sum conflict as the weaponization of religion.
7. I pause, at this point, to provide context about the zero-sum approach and to explain the weaponization of religion.
8. The zero-sum understanding of freedom of religion and SOGIESC rights is at the heart of this litigation. The Beloftebos respondents must necessarily take the view that their loss amounts to a fundamental breach of their religious rights.
9. In a more global context, the belief of religious organisations is that any victory or breakthrough promoting SOGIESC rights amounts to *“lost territory for freedom of religion and belief”*.
10. Utilised in this manner, the zero-sum approach seeks to undermine constitutionally enshrined rights, is at odds with, not only the principles underlying international human rights jurisprudence but also our Constitution.
11. In this regard:
    1. Freedom of religion and SOGIESC rights form part of broader human rights context, these rights must necessarily be balanced;
    2. The failure to consider the rights in context allows litigants to cast their cases as a normative dichotomy (i.e. they are defined in opposition and a loss necessarily results in a breach of the right to freedom of religion, when this is not so);
    3. The right to religion does not empower any person to discriminate or to engage in conduct which is unconstitutional;
    4. That a belief may be founded in a religion does not axiomatically mean that it is constitutionally permissible.
    5. Fundamentally, the fact that the Constitution requires a balancing of rights approach, ultimately disposes of a zero-sum conception of the right to freedom of religion.
12. That the Beloftebos respondents have sought to characterise their case as “zero-sum” is telling. Even if their motivations are predicated upon sincerely held religious beliefs, the sincerity of which is disputed for reasons set out below, I respectfully submit that were this Court to grant the Beloftebos respondents the relief they seek, it would create a dangerous and deleterious precedent for the rights of persons with diverse SOGIESC, and moreover, would create an inroad to seek to undermine other rights on the basis of religion.
13. It must be noted that the Beloftebos respondents have, on their website, a link to a YouTube video which seems to have been created jointly with Freedom of Religion SA (“ForSA”) as Michael Swain, the Executive Director of FoRSA and the Beloftobos respondents both appear in it, this video, is provided to this court on a flashdrive marked “SSXX”. It is available on this link <http://www.beloftebos.co.za/our-values/> The video is also hosted on the FoRSA YouTube page.
14. The video seems to intimate that ForSA is desirous of this case becoming a test case, along the lines of *Lee v. Ashers Baking Co. Ltd*., [2018] UKSC 49. Legal argument will be addressed as to why the analogy between this matter and *Lee v Ashers Baking Co. Ltd* is fundamentally misguided.
15. Whether or not the Beloftebos respondents themselves conceive of this case as a test case is unclear, it seems that their concern is that they do not wish to host events which contravene their religious beliefs.
16. It is, however, perplexing that they would have taken a principled stance when approached by a homosexual couple in 2019, given the public outcry in 2017.
17. The Court is left to draw inferences about whether or not the Beloftebos respondents are attempting to create a test case. At best, the Beloftebos respondents are unwitting pawns, at worst, they are actively engaged in trying to advance a case which seeks to undermine fundamental rights in disregard of constitutional norms.
18. I point out that there is a growing movement in South Africa which seeks to promote the position of religious rights enjoy supremacy in society, a position that would undermine s 1 of the Constitution which provides that the Republic of South Africa is one, sovereign, democratic State founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism, and the supremacy of the Constitution and the rule of law.
19. It is also of import to note that in the Special Rapporteur Report on Cultural Rights (January 2017) an explanation was given as to the tactics utilised by extremist and/or fundamentalist interest groups.
20. One such tactic is that fundamentalists often seek to exploit democratic society’s recognition of differing viewpoints and the rights to freedom of association and expression as a way to deny these rights to others. Campaigning or militating against entire groups of people — such as religious or ethnic minorities, non-religious persons, women, refugees and migrants or lesbian, gay, bisexual and transgender persons — or seeking to impose one interpretation of religion on all. This conduct is constitutionally impermissible.
21. It is of interest to note that the Beloftebos respondents seek to employ this precise tactic in advancing their case. At its core, their case is that the right to religion entitles them to refuse to host a marriage at a venue that is open to the public.
22. South Africa’s particular historical context is such that public religious expression that was enforced by the apartheid state through its politics. Same sex practices and expression were viewed as problematic and were relegated to the private sphere of people’s lives, on penalty of criminal sanction.
23. In a number of judgments, some mentioned in this affidavit, our courts have found that this dark history was discriminatory and have compelled the state to act in terms of its constitutional obligation to address this discrimination in keeping with our democratic values.
24. The change brought about through judicial intervention on same sex marriage has meant that South Africa is very different to other countries on the African continent. As noted, this formal equality has not led to necessary change in the lived reality by many sexual and gender diverse persons in South Africa as violence and bias is very much present in everyday life and largely fuelled by religious doctrine
    1. In March 2011 the Department of Justice and Constitutional Development (DOJ & CD) established the National Task Team (NTT) on Gender and Sexual Orientation-Based Violence. The aim of the NTT is to address human rights concerns and violations amongst Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) persons.
    2. The Working Group of the National Task Team established the Rapid Response Team comprising the Department of Justice and Constitutional Development, National Prosecuting Authority, South African Police Service and representatives from civil society organisations.
    3. In a meeting of the NTT on 30 June 2021, The Rapid Response Team reported that
       1. As of 24 February 2021, they were 38 pending hate crime cases, 20 were for murder and 18 for rape.
       2. As at 29 June 2021, the following is the breakdown of 42 pending hate crime cases with 30 cases for murder and 12 for rape.
    4. These statistics only reflect cases that are currently in the Court systems or being investigated by the SAPS. These statistics therefore do not reflect the real statistics as the number of cases that are processed by the SAPS or the NPA are impacted by attrition where cases are closed for a number of reasons. These statistics also affected by significant under-reporting of crime in South Africa. They are also severely limited by the levels of under-reporting for rape and other sexual offences.
25. The WLC Trust has also increasingly noted an uptake in South African rights-based discourse by what is often referred to as Evangelical churches which have adopted much more of a literalist approach or fundamentalist approach to the rights of sexual and gender diverse persons. Usually, these churches have their provenance in the global north and in particular the United States.
26. There is a discourse of religious oppression and a likening of oppression of Christian conservatisms to that with the oppression of people of colour in our country. The WLC Trust submits that the Court should be mindful of such arguments as conservative religious doctrine was very much a part of and interwoven with the political rhetoric of apartheid , again, this is consonant with the Beloftebos respondents seeking to cast themselves as victims.
27. Furthermore, as we have noted above, the WLC Trust also notes that while this matter might be a first in South Africa, it is not the first time that such a matter has been litigated upon. The International Network Civil Liberties Organisation (“INCLO”), in a 2015 report (the relevant sections of which are attached hereto marked “**SS**”) considered the types of cases and issues which have been litigated upon in respect of the right to equality and the right to freedom of religion.
28. In a section of the Report entitled *“Religious Freedom and LGBT rights*”, the report discusses the tension between claims of religious freedom and SOGIESC rights. These tensions are discussed in four scenarios namely:
    1. civil servants objecting to solemnise same sex marriages or partnerships;
    2. businesses that serve the public asserting a right to turn away SOGIESC customers or to deny them certain services;
    3. religiously affiliated institutions servicing the public objecting to serving SOGIESC individuals; and
    4. where religiously affiliated institutions object to employing SOGIESC people.
29. The INCLO explains that businesses and other institutions that are open to the public have also sought exemptions from laws prohibiting discrimination based on sexual orientation and gender identity.
30. These claims often involve, but are not limited to, objections to serving couples who are seeking to celebrate their relationships.
31. In these cases, the owners often argue that they cannot be required to engage in acts that facilitate, or may be seen as approving relationships that are not sanctioned by their faith.
32. To date, the trend in the foreign case law is to resist these claims and to do so without regard to whether SOGIESC people could have obtained the good or service elsewhere. In this context the courts have assessed the harm in respect to the rights to equality and dignity.
33. In its discussions of cases litigated relevant to this case, the report summarises the main findings of courts as follows:
    1. The courts have recognised the sincerity of the beliefs motivating the conduct.
    2. The courts reject the notion that religious freedom include a right to impose those views on others.
    3. The courts have acknowledged the significant harm to the dignity of someone turned away from a business because of who they are; and
    4. The courts have articulated how exemptions undermine the equality the laws are meant to serve.
34. These principles were advanced in relation to the following cases discussed in the report:
    1. In *Bull v. Hall [*2013] UKSC 73 a bed and breakfast refused to offer a same-sex couples lodging because of the owner's religious beliefs;
    2. In *Eadie v. Riverbend Bed and Breakfast*  (No. 2), 2012 BCHRT 247 services were terminated by an owner of a bed and breakfast after discovering the sexual orientation of its customers; and
35. In *Elane Photography v. Willock* 309 P.3d 53 (N.M. 2013), cert. denied, 134 S.Ct. 1787 (2014) a same-sex couple was refused service by a photography business for their commitment ceremony.Over and above that which is set out in the INCLO Report, the following cases bear reference:
    1. Ireland:
       1. *Brennan v. Tuitte*, DEC-S2018-020 (2018). In 2018, Ireland’s Workplace Relations Commission (WRC) ruled that a print and design company unlawfully discriminated based on sexual orientation when it refused to print invitations for a civil partnership ceremony for a same-sex couple based on its religious objections.
    2. United Kingdom: 
       1. *Lee v. Ashers Baking Co. Ltd*., [2018] UKSC 49 – it will be explained in argument why *Lee* is not analogous to the present matter.
    3. United States of America:
       1. *Todd and Mark Wathen vs Walder Vacuflo, INC* (2016) 2011SP2489 (11-0703C).
       2. *State Of Washington, V. Arlene's Flowers, Inc., D/B/A Arlene's Flowers and Gifts, And Barronelle Stutzman*, No. 91615-2 EN BANC (2017) (Supreme Court of the State of Washington).
       3. *Bostock v. Clayton County*, 590 U.S. (June 15, 2020).
36. Canada:
    1. *S.R. v Newfoundland and Labrador*, 2017 CanLII 146755 (NL HRC).
    2. *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293.
37. To the extent possible and necessary, further relevant cases will be referred to in argument.
38. What the foregoing demonstrates is a global attempt by persons advancing conservative agenda, under the guise of religion to justify their own iniquitous treatment of persons with diverse SOGIESC.

## The use of religion in this case

1. This section is structured as follows:
   1. First, we deal with the effect of Beloftebos’ conception of religion; and
   2. Second, we deal with the impact of Beloftebos’ use of religion.

### *The Beloftebos Conception of Religion*

1. At the outset, it bears emphasis that Beloftebos is not a church, nor is it a religious institution. It is a business which is open to the public, allows patrons to utilise its venue, at a charge, for, *inter alia*, marriage ceremonies.
2. It also allows wedding ceremonies between couples of all religions, provided they are not same sex.
3. Evidently, their religious beliefs do not extend to a prohibition of non-Christian marriages – it would be difficult for a business to survive were to it adopt such a policy.
4. The basis of the Beloftebos respondents’ case is that their Christian beliefs entitle them to discriminate against persons on the basis of their religious beliefs, which beliefs do not allow for marriage unless it is between a man and woman.
5. The starting point of the analysis is s 15 of the Constitution and s 31 of the Constitution.
6. While it is so that courts are generally reluctant to become involved in doctrinal disputes of a religious character, our courts do engage with doctrine when dealing with religious issues, particularly when the issue is one where the religious doctrine infringes another right in the Bill of Rights.
7. Further, where as in this matter, religious doctrine is specifically pleaded, a court is entitled to examine what is pleaded by the party relying thereon.
8. Much time in the affidavit of Beloftebos respondents is given over to how they view their work as central to their Christian beliefs and how they view marriage as between a man and woman. They contend further that *“most South Africans”* of varying religions view marriage as between a man and a woman. Seemingly, the Beloftebos respondents use the Bible as a basis to justify their view that same-sex marriage is prohibited.
9. While a court must seek to avoid becoming involved in doctrinal issues, a court is entitled to declare that conduct in accordance with religious belief is constitutionally impermissible, regardless of its source.
10. Section 15(1) of the Constitution protects the individual right to *‘practise his or her religion’*. Notably, while s 15(1) does not expressly refer to the protection of religious practice, the courts have accepted that this is an essential component of religious freedom. Even so this right is not absolute.
11. Section 31(1) entitles persons belonging to a religious community not to be denied the right, with other members of the community, to practise their religion. Thus while s 15(1) protects the individual right to freedom of religion, s 31(1) protects the associational aspect, to practice together with others.
12. The rights in ss 15(1) and 31(1) complement and strengthen each other, and accentuate the importance of protecting the practice of religion. There is, however, no authority for the proposition that a court is not entitled to interrogate the invocation of the right to freedom of religion.
13. Section 31(2) expressly limits the rights in s 31(1) and provides that such rights may not be practiced in a manner inconsistent with any provision in the Bill of Rights.
14. Were any of the religious texts to be analysed constitutionally, large portions of any number of religious texts would not meet the constitutional standard. This notwithstanding, the constitution protects the right to believe, but at the same time assesses whether or not acting in accordance with the belief is constitutionally permissible. The same neutrality that applies when dealing with the practice of religion applies when religious persons deal with the public at large.
15. The Beloftebos respondents elide the right to believe with the right to act upon the belief, inasmuch as they view a loss in this matter as being forced to *“adopt a belief system”* in which they do not believe.
16. Once again, this is an example of the zero-sum approach adopted by religious rights organisations in an attempt to undermine rights by the utilisation of religion as a right. It is a pernicious attempt to argue that a victory by same-sex couples would necessarily amount to a breach of their religious rights when this is not so.
17. If Beloftebos’ argument were held to be constitutionally sound it would, for example, entitle a restaurant owner to refuse to serve a same-sex couple on the basis that it was inimical to their religion, or for that matter, to refuse to serve a black couple for the same reason. Put differently, it provides an inroad for other religious institutions to take more conservative positions and to tactically litigate on these issues.
18. By way of further analogy, it would be untenable for even the most ardent Christian to take the position that because slavery is justified in the Bible (Leviticus 25: 44 – 46), they are entitled to engage in the trade of slaves.
19. Although judicial intervention on same sex marriage has meant that South Africa is very different to other African countries from a formal equality perspective, this has not led to necessary change in the lived reality by many sexual and gender diverse persons in South Africa. Discrimination, bias and sometimes violence, are very much present in everyday life and this is in part fuelled by patriarchal religious doctrine.
20. In this regard, and in relation to the violence experienced by persons with diverse SOGIESC, I pause to note that one need go no further than referring to the corrective rape of lesbian women to demonstrate that persons with diverse SOGIESC are at particular risk.
21. The United Nations Special Rapporteur on Violence Against Women, in her report on South Africa found that:

*“Despite an explicit prohibition of discrimination based on sexual orientation in the Constitution, lesbian women and other sexual minorities are very vulnerable to extreme forms of violence purported at “correcting” their bodies, including the so-called “corrective rape” often accompanied by a particularly heinous murder. This type of extreme violence was reported on the rise, despite the difficulty to detect it since victims are unlikely to spontaneously report their sexual orientation and police do not record this information.”*

(Report of the Special Rapporteur on Violence against Women, its causes and consequences on her mission to South Africa 2016 A/HRC/32/42/Add.2 pg. 9, the relevant extract is attached marked “SSXX”).

1. The foregoing demonstrates that notwithstanding the formal equality afforded to persons of diverse SOGIESC, the expression of identity for many remains a privilege.
2. Moreover, the underlying belief of those who perpetrate these crimes is no different from those who seek to exclude persons with diverse SOGIESC from society, namely, a belief that there is something fundamentally wrong with such persons. The dogma, regrettably, runs deep.
3. Whether or not these sorts of beliefs may be held privately is not the subject of this litigation, certainly, however, these beliefs cannot be acted upon inasmuch as the beliefs are constitutionally aberrant.

# A Constitutionally Appropriate Analysis

1. The right of individuals and groups to hold religious beliefs and practice their chosen religion is enshrined in ss 15(1) and 31(1) of the Constitution. The inter-relationship between these two rights is dealt with in *Prince v President, Cape Law Society and others* 2002 (2) SA 794 (CC) where the Constitutional Court cited with approval the approach of the Canadian Supreme Court in the case of *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321; [1985] 1 SCR 295, stating *‘[t]he essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.’*
2. Section 15(1) protects the individual right to ‘practise his or her religion’. Notably, while s 15(1) does not expressly refer to the protection of religious practice, the Constitutional Court has accepted that this is an essential component of religious freedom, this right is not absolute.
3. The Constitutional Court in *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC) explained that freedom of religion includes both the right to have a belief and the right to express such belief in practice.The Court went on to explain that the freedom of religion may be impaired by measures that coerce persons into acting or refraining from acting in a manner contrary to their beliefs.
4. The Special Rapporteur has explained that an individual’s right to form, develop, adopt, and maintain a religious or non-religious belief of their choice is absolute. The freedom to manifest a religion or belief can be restricted, however, only if the limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.
5. Sections 15(1) and 31 of the Constitution are wide ranging provisions protecting both believers and non-believers and all religions irrespective of their creeds or doctrines. The interest protected by ss15(1) and 31 is not a statistical one dependent on counter-balancing of numbers, but a qualitative one based on respect for diversity.
6. While the Constitution recognises freedom of religion, belief and opinion in ss 15 and 31, the manner of application of these rights in private relations between individuals, is subject to a constitutional limitation. It is also so that these rights may not be exercised in a manner inconsistent with any provision of the Bill of Rights or in a manner which infringes the protected rights of others
7. The Constitutional Court has explained that limitations on constitutional rights can pass constitutional muster only if the Court concludes that, considering the nature and importance of the right and the extent to which it is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in this limitation, taking into account the availability of less restrictive means to achieve this purpose.
8. While there might be special concerns attendant on undertaking the limitations analysis in respect of  religious practices, the standard to be applied is standard required by s 36.
9. In assessing the limitation on constitutional rights, the Constitutional Court noted the following :
   1. The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious  communities to define for themselves which laws they will obey and which not.
   2. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding.
   3. Believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land.
   4. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to burdensome choices of either being true to their faith or else respectful of the law.
10. Section 31 of the Constitution establishes the rights of cultural, religious and linguistic communities. The Constitutional Court has explained that s 31 of the Constitution emphasises the protection to be given to members of communities united by a shared language, culture or religion.
11. In the constitutional scheme the right to freedom of religion does not ‘trump’ other rights. Religious groups cannot claim that the practice of their religious is exempt from legislative or constitutional protections, or from constitutional scrutiny. The courts will not protect religious practices which infringe other rights under the Constitution, and cause harm.
12. It has become even more critical, given the seeming rise of conservative groups seeking to undermine rights of persons with SOGIESC, to ensure that the application and reliance on freedom of religion, belief or opinion is done in a manner that does not marginalise and disenfranchise certain individuals particularly those specifically protected by s 9 of the Constitution as well as Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (‘PEPUDA’).
13. In keeping with this, this section of the affidavit highlights the appropriate manner to apply and interpret freedom of religion, belief and opinion in a manner that:
    1. Best achieves the appropriate balance with the rights and values of human dignity, equality, freedom and social justice envisaged by both the Constitution and PEPUDA; and
    2. Promotes equality, prohibits unfair discrimination and eradicates systemic inequalities arising from South Africa’s history of apartheid and patriarchy.
14. First, most rights in the Bill of Rights (except those guaranteed for citizens) are entrenched for everyone. The use of the word ‘everyone’ in guaranteeing most constitutional rights means that constitutional right co-exist as they apply simultaneously, and to all.
15. The interpretation of constitutional rights must promote underlying and informing values of human dignity, equality and freedom. These values are not mutually exclusive but enhance and reinforce each other.
16. Consistent with this understanding of rights, the United Nations has explained the relationship between rights as universal, inalienable; indivisible; interdependent and interrelated. This is explained in the Vienna Declaration and Programme of Action, [(Part I), chapter III, section I, paragraph 5.]
17. There are no hierarchies of rights which must be satisfied first, over others. However, some rights entrenched in the Bill of Rights are classified by the Constitution as non-derogable rights. These include the rights in ss 9, 10 and 12 of the Constitution.
18. Unfair discrimination, by both the state and private parties, including on the grounds of sexual orientation, is specifically prohibited by ss 9(3) and (4) of the Constitution.
19. Section 9(4) of the Constitution mandates the enactment of national legislation to prevent or prohibit unfair discrimination. PEPUDA is the legislation adopted in fulfilling this obligation.
    1. Section 1 of the Equality Act define discrimination as

*‘any act or omission, including a policy, law, rule, practice, condition or*  *situation which directly or indirectly*

* 1. *imposes burdens, obligations or disadvantage on; or*
  2. *withholds benefits, opportunities or advantages from, any person on one or more of the prohibited ground*s.
  3. Section 6 of the Equality Act reiterates the prohibition of unfair discrimination by both the state and private parties on several listed grounds including sexual orientation.

1. When interpreting and applying PEPUSA, s 39(2) of the Constitution is applicable. Accordingly, PEPUDA must be interpreted in a manner that fulfils the spirit, purport and objects of the Bill of Rights.
2. The Constitutional Court, *Pillay*, has explained that interpreting a law, in this instance PEPUDA, in terms of s 39(2) does not mean that it must be interpreted in a manner that simply reinstates s 9 of the Constitution. The Court stated that:

*The legislature, when enacting national legislation to give effect to the right to equality, may extend protection beyond what is conferred by section 9. As long as the Act does not decrease the protection afforded by section 9 or infringe another right, a difference between the Act and section 9 does not violate the Constitution. It would*  *therefore not be a problem if the definition of discrimination in the Act included forms of conduct not covered by section 9 as long as the prohibition of those forms of conduct conformed to the Bill of Rights. [Pillay 43]*

1. Respect for diversity is one of the key reasons underlying the protection of both freedom of religion and right to equality. Within the context of equality diversity is aimed at ensuring that individuals are not disadvantaged nor burdened because of certain characteristics that render their identity and personhood different from other individuals.
2. It is submitted that the prohibited grounds for discrimination provides recognition of the fact that South Africa is comprised of individuals that differ in a variety of ways and that both the state and private parties must not, in general, subject any individual to prejudicial treatment on account of their differences (particularly where such differences have led to discrimination in the past). The concern for equality also, importantly, ensures that individuals are able to exercise their freedom in an equal manner to others: unfair discrimination often prevents the exercise of freedom on the basis of an individual’s difference to another.
3. Moreover, the Constitutional Court has explained that ‘*our future as a nation depends in large measure on how we manage difference. In the past difference has been experienced as a curse, today it can be seen as a source of interactive vitality. The Constitution acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity* of the nation.’
4. Within this framing a religious grouping or individual indeed has the right to claim the right to form, own and follow its religious beliefs and practices which right is founded in the values of respect for freedom, equality and diversity. Once a person forms and expresses opinions about SOGIESC rights or marriage or any other belief/thought informed by their religious beliefs, whether sincerely held or not, this cannot influence what the Constitution dictates regarding the prohibition of discrimination on the grounds of sexual orientation.
5. It follows then that asserting protections of one's religious freedom comes attached with the need to respect these very values being asserted in its treatment of others.
6. To assert one’s right to freedom of religion which is based on the respect for diversity while failing to respect and honour the very diversity that protects demonstrates a desire to gain the benefits of liberal societies without subscribing to its basic foundational values. This understanding is what has led to the zero-sum approach to rights which we have explained above.
7. This understanding of rights clearly shows that the underlying and informing principles of human rights are not understood, ignored or not embraced by those asserting rights.
8. In responding to this zero-sum approach to rights where rights pitted against each other, the Special Rapporteur on Religion or Belief asserts that this overlap between freedom of religion or belief and the right to non-discrimination needs to be addressed not by trade-offs or a hierarchy, but by producing ‘practical concordance’ of all human rights involved.

Value Neutrality, Morals and Justice

1. At the heart of this dispute is the question of tension which exists between the adequate protection of religious beliefs which are evidently constitutionally inimical.
2. One accepts that the Beloftebos respondents, and all persons, are entitled to their beliefs. The reason that this proposition is accepted by society at large is to ensure that no belief is preferred over another.
3. As explained by the Minister of Justice, South Africa is a religiously neutral state, this means that South Africa does not seek to promote one belief system over another, if it does so, such conduct would contravene the Constitution.
4. The right to religious freedom prevents the state from restricting religious practices on the basis that the majority may find such belief objectionable, but does not preclude state interference with religious beliefs where such interference is necessary to protect the safety of others or to prevent harm.
5. Simply put, value-neutrality would simply assert that religious reasons cannot be relied upon in the public sphere as a basis to bend a society (which may have differing beliefs) to the will of a particular religious group.
6. Critically, the Constitution attempts to create a society where people live together with others on the basis of mutual respect. While certain religious people may reject this perspective, on the basis that they are acting on the basis of a sincerely held religious view, in a constitutional state they are required to concede that not everyone can be expected to accept or be compelled to act in accordance with their particular religious view.
7. Neutrality operates to the benefit of all.
8. By way of example neutrality would preclude a business, owned by an atheist, from refusing to serve the Beloftebos respondents because of their religious beliefs.
9. Given that the underlying purpose of the Bill of Rights is to seek to secure some semblance of value neutrality, it must inform a reading of the Bill of Rights. Put differently, even if the majority’s contempt for certain conduct is justifiable, the majority’s outrage cannot, without objective proof of harm, be translated into a legal prohibition. This serves both believers and non-believers.

**APPLICATION TO BE ADMITTED AS AMICI CURIAE AND CONDONATION**

1. The WLC Trust notes that the Rule 16A Notice was issued on 19 May 2020 and that its request for consent is out of the timelines prescribed in the notice.
   1. It was important for the WLC Trust to consider the arguments by other parties in the matter in order to one consider its position. Indeed, the Minister of Justice only filed his affidavit on 4 March 2021.
   2. This was also important in the WLC Trust determining where it would be of most use to the Court in determining the matter.
   3. At this stage pleadings are still being exchanged but we are reasonably confident that we will not duplicate arguments. It does not appear that any party has addressed the weaponization of religion and the international jurisprudence concerning the interplay between the right to religion and SOGIESC rights.
   4. The WLC Trust is of the view that the request in no way prejudices any of the parties.
2. The WLC Trust, if admitted as amicus curiae, will comply with the time-frames for filing as agreed to by the parties or as determined by the court.
3. The terms and conditions that it proposes are as follows:
   1. That the Trust be given consent to enter as *amicus curiae* in the matter.
   2. The Trust be given permission to lodge evidence on affidavit as described above.
   3. That the *amicus curiae* be given consent to lodge written submissions in this matter.
   4. That the *amicus curiae* be given consent to present oral submissions at the hearing of this matter.

**CONDONATION**

1. The WLC Trust made various attempts over a period of months to obtain the pleadings from the other parties to the matter, so as to ascertain arguments and ensure that there would be no duplication.
2. WLC Trust’s first attempt was on 3 March 2020, when it reached out to South African Human Rights Commission (SAHRC) to request if they could share their pleadings in the matter. To this enquiry we received no response.
3. On 27 July 2020, the WLC Trust reached out to SAHRC again. Mr Matthew Du Plessis responded to the WLC Trust’s request by sharing the SAHRC’s pleadings in the main application on 28 July 2020.
4. On 31 July 2020, the WLC Trust wrote to the Commission for Gender Equality (CGE) to ascertain its position in the matter. Marissa van Niekerk responded by putting the WLC Trust in touch with the attorney for the CGE, Candice Grieve of Norton Rose Fulbright and legal officers from the CGE.
5. On the same day, the WLC Trust also made an enquiry regarding the timetable for the filing of further pleadings in the matter and was informed that a timetable had not yet been determined.
6. At this stage, the WLC Trust thought it pertinent to carefully determine its position and how it could best be of assistance in the matter as there were now two applications: the main application and the counter-application. During this time, the first couple who was previously denied the use of the Beloftebos Wedding Venue, Sasha-Lee Heeks and Megan Watling, on 2 September 2020 filed an application to intervene in the matter, which also required the WLC Trust to consider whether or not they would raise similar arguments to the arguments which the WLC Trust intends to raise.
7. On 20 October 2020, the WLC Trust again reached out to the CGE as well as their counsel in order to ascertain their position. At this stage, the CGE had filed their answering affidavit but had not received any replying affidavits. This finally gave the WLC Trust insight into the arguments the CGE would be advancing and a sense of what the WLC Trust could contribute to the matter, which had not been addressed by the SAHRC or the CGE.
8. On 3 November 2020, the WLC Trust reached out to the State Attorney on behalf of the Minister of Justice who is cited as the ninth respondent in the counter-application to ascertain their position. Mr Mark Owen responded on the same day to notify the WLC Trust that the Minister would be opposing but focusing primarily on the constitutional challenge raised by the respondents. However, at that stage, no pleadings had been filed on behalf of the Minister of Justice.
9. On 1 December 2020, the WLC Trust once again reached out to the State Attorney in an attempt to ascertain whether pleadings had been filed on behalf of the Minister of Justice. A response was received stating that no answering affidavit had been filed as yet. On 7 December 2020, Mr Owen responded by sharing the answering affidavit of the Minister of Justice in the counter-application.
10. On the same day, the WLC Trust reached out to attorneys for Sasha-Lee Heeks and Megan Watling, who earlier in the year had filed an application to intervene, which the Beloftebos respondents had opposed during or about November 2020, in an effort to find out if they would be filing any further pleadings in the matter. The response received indicated that they intended to reply but had not yet done so.
11. On 10 December 2020 the WLC Trust sent a letter in which it requested all the parties to the proceedings to consent to the WLC Trust joining the matter as amicus curiae.
    1. On the same day, the WLC Trust received consent from the Fifth Respondent in the main application, Pierre de Vos.
    2. On 11 December 2020, the WLC Trust received consent from the intervening parties, Sasha-Lee Heeks and Megan Watling, as well as the Minister of Justice and Constitutional Development.
    3. On 14 January 2021, the WLC Trust received consent from the CGE.
    4. Copies of the letters of consent are attached marked “**SS**”.
12. On 28 January 2021 the WLC Trust sent a follow-up email to its letter of 10 December 2020. Following this the WLC Trust received correspondence from:
    1. The First, Second and Third Respondents in the main application indicating that they would abide by the decision of Court in considering the WLC Trust’s application. A copy of that letter is attached hereot marked “**SS**”.
    2. The Eight Respondent also provided consent for the WLC Trust to join the matter. A copy of that letter is attached marked “**SS**”.
13. The WLC Trust are still awaiting responses to our letter from the SAHRC; and the sixth to the tenth respondents in the main application.
14. On 4 March 2021 we received the 9th Respondent’s Answering Affidavit as it was kindly shared with our attorney as they had been following up with the State Attorney in this regard.
15. On 10 March 2021 our candidate attorney Lulama Shongwe reported to Judge Steyn’s chambers to make sure that there were no pleadings filed in Court that we did not have and uplift any copies that we did not have.
16. On 25 June 2021 Ms Shongwe called the Equality Court Registrar to inquire on whether nay further papers had been filed. She was advised that she was not up to date and she was further advised to rather call Judge Registrar. On the same date, she tried to call Judge Steyn’s registrar without success.
17. On 14 July 2021 Ms. Shongwe also made telephonic inquiries with Judge Steyn’s registrar on whether any parties had filed any further papers and she advised that no papers had been filed.
18. As we were finalising this application for admission, our attorneys decided to check again if papers had been filed. We accordingly engaged with the corresponding attorneys of the Intervening Parties who kindly shared an affidavit filed by the Beleftobos Respondents with a filing sheet dated 31 March 2021. We received this supplementary affidavit on 5 August 2021.

# **CONCLUSION**

1. In the circumstances, the WLC Trust submits that:
   1. it has an interest in the issues raised by this application;
   2. that it will assist the Court by making submissions which are novel in relation to the only party presently participating in the proceedings before this Court, and
   3. the submissions it intends to make are important to this Court’s assessment of the issues raised in these proceedings.

We accordingly pray for the relief as set out in the Notice of Motion to which this affidavit is attached.

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**SEEHAAM SAMAAI**

The Deponent has acknowledged that they know and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at  on this the day of 2021, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.