IN THE EQUALITY COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: EC04/2020

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

and

In the counter application between:

BELOFTEBOS WEDDING VENUE	First Applicant
COIA DE VILLIERS	Second Applicant
ANDRIES DE VILLERS	Third Applicant

and

SOUTH AFRICAN HUMAN RIGHTS COMMISSION	First Respondent

COMMISSION FOR GENDER EQUALITY	Second Respondent
PIERRE DE VOS	Third Respondent
WESLEY WHITEBOY	Fourth Respondent
FAIEZ JACOBS	Fifth Respondent
CATHERINE WILLIAMS	Sixth Respondent
ALEXANDRA THORNE	Seventh Respondent
ALEX LU	Eighth Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Tenth Respondent

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SOUTH AFRICAN HUMAN RIGHTS COMMISSION'S COMBINED REPLYING AFFIDAVIT IN MAIN APPLICATION AND ANSWERING AFFIDAVIT TO THE COUNTER APPLICATION

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I, the undersigned,

ANDRÉ HURTLEY GAUM

do hereby make oath and state that:

1. I am the deponent to the South African Human Rights Commission's ('the Commission's) founding affidavit ('**FA**') in the application in convention. I confirm that my details are as contained in paragraph 1 of the FA. For consistency, I employ the defined terms from the FA in this affidavit.

2. The facts contained in this affidavit are true and correct. Unless indicated otherwise or apparent from the context, they are within my personal knowledge and belief. Where I rely on information conveyed to me by others, I state the source and believe that information to be correct. Where I make legal submissions, I do so on the advice of the Commission's legal representatives, whose advice I believe to be correct.

3. I am duly authorized to make this affidavit in support of the Commissions' application, which I confirm was instituted in terms of section 7(4)(a) of the SAHRC Act.

4. I make this affidavit in response to the answering affidavit of Cornelia Jacoba de Villiers with its annexures ('**AA**'), the affidavit of Michael Cassidy and the confirmatory affidavits of Andries Stephanus de Villiers, Gerhardus Kemp Claassen and Madelein Soné Botha, which I have read and understood.

5. Ms de Villiers's affidavit contains a discrete section entitled '*COUNTER-APPLICATION*' with numbered paragraphs that follow in sequence from the paragraph numbering of the main body of the AA. Because of this, I have treated the former as

part of the AA for referencing purposes. References to the AA appear in parentheses as 'AA:' followed by the paragraph number(s).

OVERVIEW OF THIS AFFIDAVIT

6. The Commission seeks declaratory, interdictory and directory relief against the Beloftebos Respondents for breaching sections 6 and 29 (read with item 9 of the Schedule) of the Equality Act ('**main application**'). The Beloftebos Respondents oppose the main application.

7. The Beloftebos Respondents have also brought a counter application, in which they seek declaratory and directory relief against the Commission (alleging misconduct) and conditionally attack the constitutionality of section 14 of the Equality Act, in the event that they are unsuccessful in the main application ('**counter application**').

8. Significantly, the Beloftebos Respondents do not dispute any of the factual bases on which the relief in the main application is predicated. They admit that they—

   8.1. discriminated against the affected couple by refusing to host their wedding because of the latter's sexual orientation, being a same-sex couple;

   8.2. apply a blanket exclusionary policy, which discriminates against all same-sex couples on the same ground, and intend to continue doing so; and

   8.3. discriminated against Ms Megan Marion Watling and Ms Sasha Lee Heekes ('**second couple**') by applying the exclusionary policy (although the

Commission does not seek redress in respect of the second couple, who are separately represented).

Those facts are common cause.

9. The Beloftebos Respondents, accordingly, accept that the Commission has made out a case of discrimination on a prohibited ground against them in relation to the first two facts (i.e. discrimination on a prohibited ground against the affected couple and through implementation of the exclusionary policy). This, *per* se, attracts a statutory presumption of unfairness.

10. In contention, for the purposes of the main application, is whether the Beloftebos Respondents have discharged the onus of proving that the discrimination is fair. They accept that they bear this onus in terms of section 13(2)(a) of the Equality Act.

11. There are two aspects to the counter application:

11.1. First, only if they are unable to discharge the onus of proving that the discrimination is fair in the main application, the Beloftebos Respondents attack the constitutionality of section 14 of the Equality Act on the basis that it does not factor their right to freedom of religion, among others, into the fairness analysis. This is a conditional challenge. Notably, the Beloftebos Respondents themselves expressly acknowledge that the foundation of their conditional challenge is open to doubt.

11.2. Secondly, as an unconditional element of their counter application, the Beloftebos Respondents impugn certain conduct of the Commission. For the

reasons I set out in a separate section in this affidavit, there is no merit in their complaint. I have endeavoured to disentangle the Beloftebos Respondents' defence to the merits of the main application from their complaint against the Commission by responding to them in separate sections in this affidavit for conceptual clarity.

12. The Commission does not dispute that the Beloftebos Respondents sincerely hold the belief that marriage should be heterosexual and monogamous. At issue, however, is whether the factors on which the Beloftebos Respondents rely, including their belief, adequately discharge their onus of proving that their admittedly discriminatory conduct was and is fair, in terms of section 14 of the Equality Act and having regard to the right to equality and fundamental values of the Constitution.

13. Owing to the commonality of issues raised in the main application and in the counter application, it is convenient to respond to all issues in a combined affidavit. The Commission, therefore, asks that this affidavit be read as a combined replying affidavit in the main application and answering affidavit in the counter application.

14. In this affidavit, I address the following matters in turn:

    14.1. The inadequacy of the Beloftebos Respondents' defence to the main application.

    14.2. The allegation that the Commission lacks *locus standi*.

    14.3. The allegations that the main application has not been instituted *bona fide*.

14.4. Explanation for the delay in instituting the main application and condonation for the late delivery of this affidavit.

14.5. Costs in the main application.

14.6. The lack of merit in the Beloftebos Respondents' counter application.

15. To avoid repetition, I do not respond *seriatim* to each paragraph of the AA and other affidavits delivered in support of Beloftebos Respondents. I, therefore, ask that any allegations not specifically traversed or inconsistent with the contents of this affidavit be taken as denied.

INADEQUACY OF THE BELOFTEBOS RESPONDENTS' DEFENCE

Summary of the Beloftebos Respondents' defence

16. The Beloftebos Respondents admit that their impugned conduct is discriminatory on the prohibited ground of sexual orientation, but contend that the discrimination is fair. They, therefore, locate their defence in section 13(2)(a) of the Equality Act.

17. In support of their defence, the Beloftebos Respondents invoke their constitutional rights to freedom of religion, freedom of expression, equality, dignity and property (AA: paras 56, 101 and 116).

18. The contents of the Beloftebos Respondents' AA are repetitive and argumentative. It appears that their defence can be summarised fairly as follows:

18.1. They are adherents to a school of Christianity that recognises and supports only heterosexual, monogamous marriage (AA: para 38, 40, 47, 49, 108, 121, 131.2, 137) and not same-sex marriage (AA: para 46).

18.2. Their religious beliefs are sincerely held (AA: para 33), integral to their identities and sense of dignity (AA: para 13), and inform everything that they do, including the running of their business (AA: paras 10, 12, 22, 32). In accordance with their beliefs, they pray daily (AA: paras 15, 16), take care of their workers' housing, educational, financial, social and spiritual needs (AA: paras 18-20), intervene in situations of domestic violence among workers (AA: para 19) and give generously to charity (AA: para 21).

18.3. They believe that marriage is a religious sacrament (AA: paras 12, 23, 26, 43) that serves a higher and social purpose (AA: para 41). Marriage, to them, is a religious ceremony, not a legal construct (AA: para 131.4). They run their wedding business to promote, protect and nurture marriage according to their faith (AA: paras 13, 26, 33) and to earn a profit in order to help others (AA: para 23).

18.4. They regard the institution of heterosexual, monogamous marriage as sacred (AA: para 47), outranking all other relationships (AA: para 39), foundational to a healthy society and the best model for rearing children (AA: para 46). They consider it to be the panacea for numerous social ills like violence, rape and substance abuse, among others (AA: para 50).

18.5. They, therefore, try to encourage the institution of heterosexual, monogamous marriage (AA: paras 50 and 55). Conversely, they believe that taking any steps

to encourage same-sex marriage – including hosting same-sex weddings – '*diminishes*' the institution of marriage (AA: para 47) and would be '*a grave disservice to [their] neighbour*' (AA: para 30).

18.6. They attempted to refuse the affected couple's request with dignity (AA: para 59), not hatefully or out of prejudice (AA: para 107).

18.7. They are open to hosting weddings of non-Christians (AA: paras 43, 49, 131.4, 135), provided that the wedding event does not conflict with their own scriptural beliefs. For example, they would not encourage or support polygamous marriages, fortune telling or séances (AA: para 49, 50 and 131.4).

18.8. Their wedding services include accommodating heterosexual couples for a wedding weekend, family dinners and family functions (AA: para 92).

18.9. Barring the wedding venue, same-sex couples may use their other facilities like accommodation, conference venue and adventure outings (AA: paras 53 and 122). Those are purely business, and not religious services (AA: para 135).

18.10. There are other wedding venues in the Western Cape where same-sex couples can celebrate their marriages (AA: paras 58, 106). The affected couple, in fact, held their wedding at another venue in the area (AA: para 109.4).

18.11. In bringing this application, they argue, the Commission wants to force them '*to turn [their] backs on [their] Lord*', to abandon their belief system and to give up their '*discipleship of Jesus*' by compelling, harassing and intimidating

them to host weddings for same-sex couples (AA: paras 24, 25, 28, 33, 57, 58, 61, 96, 140, 143).

18.12. If the application succeeds, they argue, it would impose an artificial dualism on their faith (AA: paras 24, 25, 28) and undermine their dignity (AA: para 61). It would also amount to state-sanctioned '*thought polic[ing]*' (AA: para 103).

18.13. They contend that there is no hierarchy of rights in the Bill of Rights (AA: paras 5, 72.6). The Constitution, they reason, requires that the rights, on which they rely in refusing to host weddings of same-sex couples, should not be superseded by same-sex couples' right to equality (AA: para 117). If forced to host same-sex weddings, their belief system would not be treated as being equal to the belief system that supports same-sex unions (AA: para 97). The Commission should protect their right to freedom of religion and not just the rights of same-sex couples (AA: para 71.1).

18.14. The institution of marriage is older than South African law (para 45). It has been in existence since time immemorial, with Christianity's teachings on marriage being nearly two thousand years old. They believe that the institution of marriage was the design of '*the Creator*' (AA: paras 42 and 50).

18.15. A large number of religions, including many denominations of Christianity, recognise and solemnise only heterosexual monogamous marriages, and have historically done so (AA: para 46). Theirs is, therefore, not a '*fringe belief held by a small group of "bigots"*' (AA: para 62.1); it is a '*mainstream view*' of the Church (AA: para 46) and '*conventional for committed Christians*' (AA: para 72.5). Although a liberal, Westernised interpretation of the Bible does not

restrict marriage to heterosexuals, they themselves do not share that viewpoint (AA: paras 46 and 62.3, 70).

18.16. Based on the relatively higher numbers of heterosexual marriages than same-sex marriages recorded in 2018 (AA: para 62.4), they conclude that the '*overwhelming majority*' of South Africans apparently believe that marriage should be heterosexual and monogamous (AA paras 46, 62.4, 73.2, 105).

18.17. They consider it instructive that, as at 2018, only about 1% of registered marriages in 2018 were same-sex marriages (AA: para 62.4). The rest of society, therefore, should not be compelled to refrain from offending that 1% or their heterosexual allies. If so compelled, it would result in no Christian, Jew, Muslim or atheist being able to act on her beliefs (in opposing same-sex marriage) (AA: paras 63 and 103). On the opposite end of the scale, only '*certain people*' are offended by their views on marriage (AA: para 58).

18.18. Other African countries share their stance on same-sex marriage (AA: para 62.2). The South African law on marriage equality is inconsistent with African jurisprudence (AA: paras 62.3, 70).

18.19. Granting the Commission's relief would have a disproportionately adverse impact on them compared to the affected couple (AA: para 138), set an undesirable precedent (AA: para 104) and condone '*a stark example of intolerance*' (AA: para 58).

18.20. They, therefore, contend that '*the discrimination that they exercise when it comes to marriage is fair discrimination as envisaged in the Equality Act read with the Constitution*' (AA: para 98).

19. The affidavit of Michael Cassidy echoes the view that mainstream Christianity recognises and supports only heterosexual and monogamous marriages. He suggests, additionally, that same sex marriage is '*a new form of social engineering*' comparable to the social experiment of apartheid, which dislocated families and did violence to the institution of marriage and the traditional family unit (Affidavit of Cassidy: para 32).

The Beloftebos Respondents' defence must fail

20. The Beloftebos Respondents' attempt to prove that their discrimination is fair is riddled with argumentation fallacies and unsupportable inferences from facts and uncreditworthy assumptions. I address them in this section of my affidavit.

21. However, prior to doing so I set out the factors that must be considered under section 14(2) of the Equality Act in order to determine whether a respondent has proven that the discrimination is fair, which are:

21.1. The context;

21.2. The factors referred to in subsection 2 (b):

21.2.1. whether the discrimination impairs or is likely to impair human dignity;

21.2.2. the impact or likely impact of the discrimination on the complainant;

21.2.3. the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;

21.2.4. the nature and extent of the discrimination;

21.2.5. whether the discrimination is systemic in nature;

21.2.6. whether the discrimination has a legitimate purpose;

21.2.7. whether and to what extent the discrimination achieves its purpose;

21.2.8. whether there are less restrictive and less disadvantageous means to achieve the purpose;

21.2.9. whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to: (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or (ii) accommodate diversity.

21.3. whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

22. As regards the application of these factors to the present matter, I refer to what I state under the heading of '*Failure to prove fairness of the discrimination in terms of section 14 of the Equality Act*'. For present purposes, I emphasise only that in as much as the Beloftebos Respondents seek to justify their conduct on the basis of an assertion of their

religious beliefs, the impact of their conduct in the present circumstances is undeniably as follows:

22.1. First, the consequence of their conduct is to impair the dignity of same sex couples who seek access to their venue and facilities.

22.2. Second, their conduct has a serious and grave impact on same sex couples who are excluded from access to the venue and facilities on the basis of their sexual orientation.

22.3. Third, persons in same sex relationships have long been historically discriminated against; they constitute a vulnerable group that has faced and continue to face deep-rooted discrimination and disadvantage in society.

22.4. Fourth, the discrimination perpetrated by the Beloftebos Respondents is systemic in nature and does not serve a legitimate purpose. As shown elsewhere in this affidavit, it creates and applies arbitrary distinctions.

22.5. Fifth, the effect of this litigation is by no means to suggest that the Beloftebos Respondents may not hold the beliefs they do (despite how deeply discriminatory and offensive it may be). The complaint is underpinned by a central assertion, *viz*, that the Beloftebos Respondents have decided to render a service to the public; when they do so their personal belief must yield to constitutional prescript as to the terms on which they render the service.

22.6. Sixth, on the plain wording of the Constitution, persons belonging to religious communities may not be denied the right to practice their religion, provided that

they do not exercise this right in a manner that is inconsistent with any provision of the Bill of Rights. The Constitution therefore makes clear that religious freedom must yield to constitutional prescript. Yet, the Beloftesbos Respondents seek to elevate their religious rights so as to take precedence over the fundamental rights and values of equality and dignity.

Rejection of explanation does not imply failure to understand

23. The Beloftebos Respondents' assertion that the Commission's rejection of their explanation for the discriminatory conduct and policy denotes a failure to *understand* their beliefs, is fallacious. Understanding does not imply acceptance; conversely, non-acceptance does not imply a lack of understanding.

24. The Commission considered the representations made by the Beloftebos Respondents through their erstwhile attorney during the investigation phase in respect of the first complaint, as well as the defence set out at length in the AA. Their position in relation to their discriminatory conduct and policy has not fundamentally changed.

25. The Commission understands the Beloftebos Respondents' argument, but does not consider their attempt to justify the discrimination to be sufficient for discharging the onus of proving fairness.

Conceptual error: not a balancing of beliefs, but defence to breach of a statutory obligation

26. The Beloftebos Respondents' suggestion that the Commission was tasked with weighing up the competing *beliefs* of the affected couple (in favour of same-sex

marriage) against their own beliefs (denouncing same-sex marriage) sets up a false paradigm for the disposition of the main application.

27. Correctly viewed, the Commission had to evaluate whether the Beloftebos Respondents' explanation for their discriminatory conduct and policy discharged their onus of proving that the discrimination was fair, in terms of section 13 and 14 of the Equality Act.

28. That did not present a contestation of faith- or conscience-based beliefs or opinions. The question before the Commission was – and before this Court is – whether the statutory infraction is excusable, given their religious beliefs.

29. What the Beloftebos Respondents refer to as the '*belief system*', which supports marriage equality, is in fact law in the Republic and not merely a matter of conscience or opinion. But the Commission's case is not whether the Beloftebos Respondents bore and discharged any duty to give effect to, or not to frustrate, the affected couples' right to marry. Nor is it about the mere offence caused to the affected couple, those who support same-sex marriage or the '*select pressure group*' that lodged the complaint (AA: para 112).

30. The issue is whether, in offering wedding services to the public, the Beloftebos Respondents were entitled, on the strength of their religious convictions, **(i)** to reject the affected couples' offer to contract with them for the provision of those services on account of their sexual orientation and **(ii)** to exclude a section of the public because of their sexual orientation. The Commission contends that both (i) and (ii) must be answered in the negative.

31. It is irrelevant whether other wedding businesses also discriminate against same sex couples on the same ground. That some may not do so is of no assistance to the Beloftebos Respondents' defence.

Wedding services both constitute a trade and have subjective religious significance primarily for the Beloftebos Respondents and incidentally for clients, if at all

32. The Beloftebos Respondents attempt to counter the Commission's averment that section 29 of the Equality Act (read with item 9 to the Schedule) applies to their wedding business, is flawed. They argue that, while their accommodation, conference and adventure facilities are services of a business nature, their wedding services are not because of the religious significance that they themselves attach to marriage.

33. There are at least three problems with this proposition:

33.1. First, whether particular conduct constitutes a trade or service is a legal question that must be answered objectively. The Beloftebos Respondents' subjective appreciation of their wedding services constituting a religious sacrament is irrelevant to that characterisation.

33.2. Secondly, the secular and the sacred need not be mutually exclusive from a regulatory perspective: a trade or service can also have a religious dimension, as it does in this instance for, at least, the Beloftebos Respondents. The religious quality of a particular trade or provision of a service or facility does not render the activity immune from state regulation and legal scrutiny.

33.3. The Beloftebos Respondents apparently recognise this overlap, insofar as they contend that their '*faith is intrinsic to all [their] day to day activities*' and that every decision they take should please Jesus (AA: para 10, 15), while simultaneously accepting that their accommodation and adventure services could be described as business services (AA: para 135). There is no principled reason for treating their wedding business as a religious enterprise to the exclusion of it being a trade or service.

33.4. Thirdly, the religious significance to be attached to the wedding services, for the purposes of this case, is limited to the Beloftebos Respondents' *own* religious convictions, which are protected under section 15 of the Constitution.

33.5. The Beloftebos Respondents have themselves indicated that they offer wedding services to couples of various beliefs (both religious and non-religious), provided that the wedding event does not conflict with what they consider to be acceptable according to their own religion. There is no faith-based homogeneity among their clients or target market. Indeed, the clients '*need not even acknowledge*' God (AA: para 135) or share in any of the Beloftebos Respondents' beliefs. Any religious significance that their clients attach to their own wedding ceremonies is purely incidental.

33.6. Therefore, it cannot be said that the Beloftebos Respondents host weddings as a function of their *associative* religious rights under section 31 of the Constitution, as they do not limit their offering to members of their own faith as part of a faith-based practice. The common denominator is that all the couples, who host their weddings at Beloftebos, do so by contracting with the

Beloftebos Respondents for the use of those facilities and services. That is the unifying and defining characteristic of the activity.

33.7. Yet, despite not invoking the right in section 31 of the Constitution, the Beloftebos Respondents seek to justify their discriminatory conduct with reference to group religious beliefs and practices. I address the lack of merit in the appeal to majoritarianism in a separate sub-section below. For present purposes, I point out that, given the nature of the wedding business, associative religious rights do not avail the Beloftebos Respondents of a defence.

34. Any reading of the AA to suggest that the Beloftebos Respondents' wedding services are not, or ought not to be, subject to regulation in terms of secular law falls to be rejected for the following reasons:

34.1. In the first instance, they expressly accept that section 6 of the Equality Act applies to their impugned conduct. Their real dispute is whether their discrimination on a prohibited ground should be regarded as fair.

34.2. In the second instance, they evidently regard it as obligatory to comply with other forms of regulations that apply to their wedding business. For instance, Mrs de Villiers is the holder of a liquor license (WCP/041059) for the consumption of alcohol on the premises named '*Beloftebos*'. I attach, in this regard, a redacted list of liquor license holders in the Western Cape as **"AG _"**.

34.3. The Beloftebos Respondents would need to comply with other regulatory measures for the purpose of conducting their wedding business lawfully. They are invited to dispute whether they consider their wedding business exempt, by

virtue of the religious significance that they attach to it, from the taxation, health and safety (including Covid-related measures), employment and other applicable laws.

35. It is uncontroversial that law may impose conditions and restrictions on the carrying on of a trade with the public, regardless of whether the trader subjectively regards the trade as having religious significance. It is equally trite that the law may curtail trade practices that impinge upon fundamental rights in the name of religion. There is also nothing surprising about the law regulating even purely religious practices.

36. Further, the Beloftebos Respondents' enjoy an attenuated reasonable expectation of privacy in the expression of their own religious views, which amounts to imposition of those views on members of the public in the course of offering wedding services to them. By virtue of their engagement with the public, the Beloftebos Respondents' wedding business moves from their most intimate realm into the secular public space, thereby submitting itself more readily to state and public scrutiny.

37. There is, therefore, no legal or policy basis for regarding the Beloftebos Respondents' discriminatory conduct as fair solely because the motive behind it is religious. Insofar as the Beloftebos Respondents seek to rely on the dictum of Sachs J in *Fourie* at para 91, they do so out of context and inappropriately. (I quote and explain the proviso omitted from the AA's reference to *Fourie* below.)

Not thought-control but conduct-regulation

38. The Beloftebos Respondents have dubbed the Commission's endeavours to bring about an abatement of their discriminatory practice as state-sanctioned thought control. This rhetorical device lacks foundation for the following reasons:

38.1. Unlike the Beloftebos Respondents' religion, the law is primarily concerned with their deeds and not their innermost convictions or motives.

38.2. The context in which the discriminatory conduct occurred and persists includes the following: The Beloftebos Respondents invite the public to make an offer to them to use their wedding services. They reserve the right to accept or decline that offer. In doing so, the Equality Act prohibits the Beloftebos Respondents from discriminating unfairly against the public on the basis of a prohibited ground.

38.3. The Equality Act's prohibition pertains to conduct, regardless of the underlying motive.

38.4. However, since the Beloftebos Respondents rely on their religious beliefs to justify their discriminatory conduct, the legal question turns on an evaluation of whether the belief sufficiently satisfies the burden of proof contemplated in section 13 and the test in section 14 of the Equality Act.

38.5. If the belief does not discharge the onus of proving fairness, the ensuing consequence would not be a prohibition against holding the *belief*; it would instead redress the *conduct* and remedy resultant *harm*. Equally, a finding that

the belief does discharge the onus of proving fairness is not tantamount to condoning the belief. In neither event does the state seek to control thought, belief, conscience or opinion. It is the impact of the conduct of the Beloftebos Respondents on the constitutional rights of same sex couples who seek access to their venue and facilities that is at issue.

False dichotomy: abandon their beliefs or break the law

39. The Beloftebos Respondents postulate a false dichotomy in their AA. They contend that the Commission presents them with a choice either **(i)** to abandon their religious beliefs by hosting same-sex weddings or **(ii)** to break the law by continuing to discriminate against same-sex couples in accordance with their faith.

40. The supposition that the Commission wishes to compel the Beloftebos Respondents to host same-sex marriages is false. The Commission's object is to prevent unfair discrimination. It is endeavouring to ensure that, *if* the Beloftebos Respondents choose to run their wedding business, then they do not unfairly discriminate in doing so.

41. The dichotomy is false because the Beloftebos Respondents fail to recognise the third option available to them, which is not to run the wedding business at all. The Beloftebos Respondents have not alleged that, by not hosting monogamous, heterosexual weddings, they will be acting contrary to their faith. The third alternative thus enables them to respect the law and their religious beliefs simultaneously.

42. It is, therefore, inaccurate and simplistic to describe the Commission's case as being tailored to force the Beloftebos Respondents to trade in violation of their religious beliefs. The Commission does not seek to impose any artificial dualism on their faith.

There is also no merit in the Beloftebos Respondents' contention that the Commission seeks to '*outlaw the beliefs*' of Christians or other religions concerning marriage equality (AA: para 103).

43. The Beloftebos Respondents are, therefore, not forced to assume the risk of '*eternal consequences*' for disobeying a religious injunction (AA: para 131.5). This argument is, in any event, a fallacious *argumentum ad baculum* – an appeal to a threat to support a conclusion – which is misplaced in rational debate.

44. The voluntary nature of their wedding business as an aspect of their professed faith is a factor that affects the weight to be attached to the relative importance of the competing interests. I address this when discussing the application of section 14 of the Equality Act below.

Heterosexual, monogamous marriages as the best model for child-rearing and a panacea for social ills

45. The Beloftebos Respondents make the claim that heterosexual, monogamous marriages are preferable to other kinds of relationships because they are the best model for rearing children and would curb violence in society and other social ills, if encouraged. The implication is that same-sex marriages are sub-optimal models for rearing children and would either not curb or contribute to violence in society and other social ills, if encouraged.

46. Insofar as reliance is placed on these assertions to prove that the Beloftebos Respondents' discriminatory conduct is fair, it does not turn on a religious belief as much as on claims of a psychological and sociological nature. It, therefore, does not

rely on section 15 of the Constitution. The claims thus dispose themselves to empirical and factual examination.

47. The Beloftebos Respondents' claims are problematic for, at least, the following reasons:

47.1. They are bald assertions made without any evidential or reasoned substantiation.

47.2. Our law recognises that there is no one paradigm of family life and no optimal family model. In the absence of any credible evidence to suggest that families headed by same-sex married couples are less suitable for child-rearing than a heteronormative family, the Beloftebos Respondents' assertion should be rejected as speculative.

47.3. During the relatively short period of time in which same-sex marriages have been legal, it is highly improbable that any causal link could be drawn between the existence of same-sex marriage and the prevalence of violence in society or other social ills.

47.4. According to the Beloftebos Respondents' own arithmetic, only about 1% of marriages in South Africa are same-sex marriages. It is difficult to conceive of how any statistically sound conclusions can be drawn from that data in support of their contentions.

47.5. In the history of marriage, there is nothing to suggest a causal link between the prevalence of heterosexual, monogamous marriages and (i) better parenting

outcomes and/or (ii) a lower incidence of violent crimes and social ills like substance abuse and alcoholism. The Beloftebos Respondents proffer nothing more than unparticularised anecdotal assertions to verify their hypothesis.

47.6. Moreover, there is nothing to suggest that had the 1% not solemnized same-sex marriages, their members would necessarily have entered into heterosexual marriages. The Beloftebos Respondents do not explain any link between the two as a function of a zero-sum game.

48. Quite apart from these claims being specious, the Beloftebos Respondents fail to explain why, even if there were some causal relationship between same-sex marriages and sub-optimal parenting and the prevalence of violent crimes, it would be fair to refuse to host same-sex weddings in the ordinary course of their business. The contention, therefore, is of no assistance in proving the fairness of their discrimination.

Antiquity of marriage as an institution

49. The Beloftebos Respondents suggest that because marriage according to the Christian religion predates marriage in South African law, their own conception of marriage should be deferred to in the fairness analysis. The result, as they would have it, is that the antiquity and provenance of marriage renders their discrimination fair.

50. There are several problems with the proposition:

50.1. It is false that Christian marriage antedates the institution of marriage recognised in secular law. It is also false that the South African law of marriage is rooted in the Christian conception of marriage. Reference will be made to

the authorities that trace the history of the law of marriage received into South African law.

50.2. It produces a clash between public policy, which supports the right to marry irrespective of sex and gender, and the Beloftebos Respondents' own religious views. That in itself must be resolved based on public policy considerations, informed by the values in the Constitution; it does not give way to religious sentiments that happen to predate the advent of the Constitution by dint of that fact alone.

50.3. It presupposes that the Beloftebos Respondents have the necessary standing to represent the views of other Christians or members of other religions. But, the Beloftebos Respondents defend the main proceedings in their personal capacities and have instituted the counter application based on self-interest standing. Their defence rests on their own religious convictions and not those of any religious community or a portion of the population.

51. In any event, the conception of marriage in South African law, as with rights in the Bill of Rights, is not to be ascribed meaning through the lens of religious doctrine.

Appeal to majoritarianism

52. Even if the Beloftebos Respondents' religious views on same-sex marriage were the prevalent view, it matters not for the purposes of the fairness analysis under section 14 of the Equality Act. It is a well-settled precept of our human rights jurisprudence that majoritarian views are not determinative of the content of rights or disputes concerning alleged rights violations or threats of future violations.

53. The Beloftebos Respondents superficially acknowledge this principle, but nonetheless expatiate on why, in their view, their perceived sentiment of '*the overwhelming majority*' of South Africans regarding same-sex marriage is relevant to their defence. That they consider their beliefs to be '*mainstream*' and '*conventional*' is of no moment.

54. Inasmuch as their defence seeks to resurrect a now settled debate about the acceptability of same-sex marriage in South African society, it presses a moot point. The Constitutional Court's jurisprudence is settled and clear: marriage equality is constitutionally required. The Beloftebos Respondents' invocation of (unspecified) '*African jurisprudence*' is, accordingly, misplaced.

55. Their defence also misses the mark by not addressing the factors in section 14 of the Equality Act, which is the crux of the matter. I refer to what I state elsewhere in this affidavit in this regard.

56. The Beloftebos Respondents' own numerical analysis of the proportion of same-sex marriages solemnised under South African law as at 2018 poses the following problems for their defence:

56.1. First, even assuming that majority sentiments on same-sex marriage were relevant, the mere fact that 99% of recorded marriages were opposite-sex marriages is no indicator of how '*the overwhelming majority*' of South Africans feel about marriage equality. No such normative conclusions can be inferred from this statistic.

56.2. Secondly, if '*the overwhelming majority*' of South Africans shared the Beloftebos Respondents' attitude towards marriage equality and were permitted

to refuse services to same-sex couples because of their sexual orientation, their contention that same-sex couples could simply find other venues loses any credence. This inherent tension should redound to the rejection of the alternative-venue assertion as a valid defence to the main application.

The Beloftebos Respondents' characters and absence of ill-will are irrelevant

57. Much is made of the charitable activities and community work that the Beloftebos Respondents do, in order to illustrate that they are devoutly religious. However admirable that may be, it is not germane to the fairness analysis or, at least, not determinative of whether they have disproved unfairness. Ill-will is not a necessary requirement for unfair discrimination, and its absence cannot *per se* render discrimination fair.

58. It is equally irrelevant that the Beloftebos Respondents do not discriminate '*and celebrate heterosexual weddings for people from all races and creeds*' (AA: para 123.4) in evaluating whether their discrimination on the basis of sexual orientation is fair.

Discriminatory policy leads to arbitrary treatment of married same-sex couples

59. The Beloftebos Respondents attempt to persuade the Court that their exclusionary policy is fair because they are not prejudiced against same-sex couples, as evidenced by the fact that they impose no restriction on their accommodation, conference and adventure services. However, this itself exposes the arbitrariness of the exclusionary policy and as such, strongly militates against their conduct meeting the threshold of fairness.

60. On the Beloftebos Respondents' own version, they would have no objection allowing

60.1. married same-sex couples to use their accommodation, conference or adventure services for the celebration of their honeymoons (having solemnized their marriage elsewhere), wedding anniversaries, family birthdays, Mothers' Day or Fathers' Day or similar events;

60.2. families that do not fit a heteronormative mould to use any of those facilities; and/or

60.3. businesses or individuals from hosting events in their conference facility, where married same-sex couples are depicted in presentations, whether favourably or neutrally.

61. This stance is irreconcilable with the Beloftebos Respondents' avowed stance not be party to anything that would encourage or support same-sex marriages. Taken to its logical extremity, Beloftebos could notionally become a popular holiday destination for married same-sex couples, but absurdly exclude same-sex couples from use of their wedding services. That would not be rationally sustainable.

62. The Beloftebos Respondents' allowances for same-sex couples instead reveals that their true opposition is to a same-sex wedding *ceremony* rather than to the same-sex married life. On their account, they oppose the *making* of the promise, but not the *abiding* by the promise, to the extent that they would welcome same-sex married couples at Beloftebos for the enjoyment of aspects of family life and the consortium of marriage.

63. It will be submitted that for discrimination to be fair, it must, at its core, be rational. The Beloftebos Respondents' discriminatory conduct differentiates arbitrarily and, therefore, irrationally, which supplants fairness.

Differentiation based on sex- and gender-presentation only

64. Our law has evolved to recognise that sex and gender are separate concepts that need not necessarily coincide. The Civil Union Act was designed to overcome the artificial strictures that previously existed in South African marriage law by dispensing of sex and gender as material variables for solemnizing a marriage. The binary notion of being a 'woman' or a 'man' has effectively been dissolved for this purpose.

65. The law also recognises that marriages solemnized under the Marriage Act need not remain heterosexual for their continued validity. This is due to the fact that there is no parallel system of marriage created by statute; the statutes (the Marriage Act and Civil Union Act for exclusively monogamous marriages), each with their distinct requirements, merely create different pathways to the unitary system of marriage.

66. The Beloftebos Respondents' exclusionary policy, therefore, would give rise to the following anomalies:

66.1. A marriage that may apparently be heterosexual or opposite-sex for legal purposes could validly become a same-sex marriage, if one or either of the parties alters his, her or their sex officially in the population register to align with his, her or their gender. Yet, the Beloftebos Respondents' policy would not have excluded them from their wedding services.

66.2. A marriage that may apparently be same-sex for legal purposes could in law become a heterosexual or opposite-sex marriage, if one or either of the parties alters his, her or their sex officially in the population register to align with his, her or their gender. Yet, the Beloftebos Respondents' policy would have excluded them from their wedding services.

66.3. A couple who presents as heterosexual or opposite-sex may for legal purposes be a same-sex couple, irrespective of whether either party has altered his, her or their sex officially in the population register to align with his, her or their gender. Yet, the Beloftebos Respondents' policy would probably not exclude them from their wedding services.

66.4. A couple who presents as same-sex may for legal purposes be heterosexual or opposite-sex, irrespective of whether either party has altered his, her or their sex officially in the population register to align with his, her or their gender. Yet, the Beloftebos Respondents' policy would probably exclude them from their wedding services.

66.5. A couple who does not present as either opposite- or same-sex, irrespective of whether either party has altered his, her or their sex officially in the population register to align with his, her or their gender, would have an indeterminate fate under the Beloftebos Respondent's policy.

67. These combinations are not intended to be exhaustive and are relied on for illustrative purposes only. They do not, for instance, account for intersexed, non-binary, gender fluid, gender queer or asexual people. However, they do serve to highlight the inconsistency and arbitrariness of outcomes that could arise from application of the

exclusionary policy. And, to the extent that the Beloftebos Respondents' discriminatory policy places emphasis on the outward appearance of a couple as an indicator of heterosexuality, it conduces to arbitrariness.

68. Arbitrariness is the antithesis of rationality and reasonableness. Fair discrimination ought, at least, to be rational to pass muster under section 13 and 14 of the Equality Act, which the Beloftebos Respondents' conduct demonstrably does not do.

Failure to prove fairness of the discrimination in terms of section 14 of the Equality Act

69. In considering the factors enumerated in section 14, the Commission does not assume any onus of proving unfairness. I discuss the relevant test purely to highlight the shortcomings in the Beloftebos Respondents' AA.

70. As indicated in paragraph 38.2, the context includes the manner in which the Beloftebos Respondents advertise their wedding services to the public. They entertain offers from the public to contract for their wedding services. The manner in which they do so is regulated by law.

71. The Beloftebos Respondents' case is that their wedding services have religious significance for them personally, but need not have religious significance for their clients. The activity is not necessarily an inherently religious activity for the participants, even though it may be thought of that way by the Beloftebos Respondents themselves. The wedding services are not organised in the exercise of any associational religious right.

72. Significant to the context is the position of the affected couple and non-heteronormative couples in society. They are part of a group that has suffered, and continues to suffer, patterns of disadvantaged. The group includes among them women, who face the additional challenge of sex- and gender-discrimination, which overlaps with and exacerbates the discrimination that they face because of their sexual orientations.

73. I illustrated above that the Beloftebos Respondents' policy does not accurately distinguish based on objective criteria such as sex and gender, but only on their *perception* of a couple's sex and gender. The Beloftebos Respondents do not restrict their wedding services to marriages to be solemnized in terms of the Marriage Act. Whether they accept an offer from a couple to use their wedding services thus turns on whether the couple presents to them as heterosexual, which can easily lead to arbitrary outcomes.

74. The respective sex and gender of the members of the couple that intend to wed is not '*intrinsic to the activity concerned*', the South African law on marriage being sex- and gender-neutral. If a couple chooses to solemnize their marriage in terms of the Civil Union Act (which is not against the Beloftebos Respondents' policy, provided that they are not same-sex), their respective sex and gender are irrelevant. It follows that sex and gender are not intrinsic to the activity of offering wedding services to the public.

75. An arbitrary and non-rational method of differentiation cannot be reasonable or justifiable. It would fail an elementary feature of the principle of legality. I refer to the analysis above which demonstrates how the exclusionary policy could produce arbitrary outcomes.

76. In this case, the discrimination did impair the dignity of the affected couple and is likely to impair the dignity of other couples who are not heterosexual. It is not merely a matter of personal offence, but infringement of fundamental rights.

77. The Beloftebos Respondents do not dispute that the impact of the discriminatory conduct on the couple was adverse. Notwithstanding the fact that they evidently did marry elsewhere, the impact was directed at obstructing their desire to enter into an honourable estate and was thus considerable.

78. The discriminatory conduct completely denied the affected couple access to the wedding services and similarly excludes all same-sex couples totally. The exclusionary policy reinforces systemic prejudice against couples who are not heterosexual.

79. The Beloftebos Respondents' discriminatory conduct and policy achieves the purpose of preventing non-heterosexual couples from solemnizing their marriages at Beloftebos. They achieve the purpose through blanket exclusion and by limiting diversity.

80. Far from being irrelevant to the fairness analysis, the Beloftebos Respondents' religious views, as pleaded, are indeed pertinent. Reference will be made to authorities where the Courts have evaluated reliance on the right to freedom of religion as a defence, in the context of section 14 of the Equality Act, to established discrimination on a prohibited ground.

81. However, for the reasons discussed above, the Beloftebos Respondents' defence, based on section 15 of the Constitution, fails to meet the minimum standard of justification, which is rationality. The only relevant religious beliefs to the analysis are their own,

as they have no standing to speak on behalf of members of other religious communities who are not before the Court; what they say about other religions or South Africans' sentiments on marriage equality is irrelevant.

82. Further, the Beloftebos Respondents have omitted to have regard to the proviso in the dictum of Sachs J in *Fourie*: However honestly and sincerely held their religious beliefs may be, that '*cannot influence what the Constitution dictates in regard to discrimination on the grounds of sexual orientation.*' The exercise of religious freedom ought not to prejudice the fundamental rights of any person or group.

83. Additionally, Sachs J held: '*It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom.*'

84. Although the views of Sachs J were expressed in the broader context of state limitation of fundamental rights, they were uttered specifically in response to the submission on behalf of adherents to the belief that marriage should be heterosexual only. The proviso is, accordingly, applicable to this case.

85. The Beloftebos Respondents do not dispute that their discriminatory conduct and policy retards the achievement of human dignity, equality and freedom for the affected couple and all couples whom they would not regard as heterosexual. This, on its own, calls the legitimacy of the purpose of the differentiation into question.

86. However, their averments concerning the impact on them, if they were ordered not to discriminate on the ground of sexual orientation, are at best incomplete. They are silent on how respecting the law and their religion simultaneously, by not running an exclusionary wedding service, would, if at all, impinge upon the fundamental rights on which they rely. Instead, they confine their case to elaborating on how being forced to host same-sex weddings would expose them to '*eternal consequences*' presumably of an unfavourable kind; but the Commission seeks no order to compel them to trade as such, only to refrain from trading in an unlawfully discriminatory manner.

87. The Beloftebos Respondents do not claim that running their wedding service is a mandatory tenet of their religion. The voluntary nature of the activity, therefore, would not mean that an order putting them to an election between trading without unfairly discriminating or not operating the wedding service would breach a religious injunction. At worst it would curtail a voluntary, exclusionary practice in the name of religion. It will be submitted that this does not outweigh the effects of the harm caused by the exclusionary conduct and policy.

88. Despite invoking the right in name only, the Beloftebos Respondents have made no attempt to explain why their right to property is relevant to the main application.

89. Because of their failure to put forward a supportable and rational defence to the main application, the Beloftebos Respondents' reliance on the right to equal enjoyment of their right to religious freedom treated on the same footing as the rights of the affected couples and other couples – other than heterosexual couples – not to be unfairly discriminated against based on their sexual orientation does not lead to a stalemate.

90. Accordingly, the Beloftebos Respondents have not discharged the onus of proving that their discrimination was and is fair, and the Commission should succeed in the main application.

ALLEGED LACK OF *LOCUS STANDI*

91. The Commission disputes the Beloftebos Respondents' objection to its standing to institute these proceedings. I have already set out in the FA the provisions of the SAHRC Act and Constitution on which the Commission relies.

92. The Beloftebos Respondents' objection is based on the erroneous assumption that, because the relief that the Commission seeks could deter or prevent other religious South Africans from discriminating against same-sex couples contrary to their religious beliefs in the future, the relief sought is against the public interest and, consequently, the Commission lacks public interest standing.

93. The Commission's standing is not a function of the effect the relief it seeks might have on curbing discrimination. Legal argument will be submitted on this score in due course, if necessary.

ALLEGED LACK OF *BONA FIDES* IN INSTITUTING THE MAIN APPLICATION

94. The Beloftebos Respondents make the error of attributing the remarks of third parties on social media and by the Fifth Respondent, Prof de Vos, to the Commission. The Commission neither authorised nor endorsed any pejorative or perceived pejorative remarks directed at the Beloftebos Respondents.

95. It is also incorrect that Prof de Vos provided legal advice to the Commission or drafted the FA or this affidavit. The Commission has independent legal representation for that purpose.

96. The Beloftebos Respondents' allegations of bad faith are, in the main, predicated on the alleged failure to investigate the complaint of the second couple adequately. Yet, in the same breath, they also deny that the second couple's complaint is the basis of the main application. With this the Commission agrees, and it avers that any alleged defects in the investigation of the second couple's complaint is immaterial. When the Commission considered the Beloftebos Respondents' response, which left no room to cure their unconstitutional conduct given their non-negotiable stance, the Commission decided to institute proceedings in terms of section 13(3)(b) of the SAHRC Act.

97. In any event, the Commission did assess the complaint of the second couple (in terms of its Complaints Handling Procedures) which was materially the same as that of the affected couple and sent an allegations letter to the Beloftebos Respondents in this regard. The Commission received a detailed response from the Beloftebos Respondents' erstwhile attorney in relation to the first complaint, and there was no reasonable basis to regard their rationale for the discriminatory conduct to have altered significantly. In the event, it did not. After considering the aforementioned response, which left no room to cure their unconstitutional conduct given their non-negotiable stance, the Commission saw no other option than to proceed to institute proceedings against the Beloftebos Respondents in terms of section 13(3)(b) of the SAHRC Act.

98. Further, I have already canvassed the Commission's engagement with the Beloftebos Respondents regarding the discriminatory conduct and policy, which are the subject

matter of the main application. The Beloftebos Respondents made their submissions to the Commission via their erstwhile attorney. There can be no suggestion that they were denied an opportunity to be heard.

99. The fact that the Commission met with a representative of the second couple can have no bearing on the institution of the main application, which seeks relief in respect of the unfairly discriminatory treatment of the affected couple and of the exclusionary policy. The Beloftebos Respondents themselves accept this. Their conflicting allegation that it was unclear whether the Commission was seeking relief on behalf of the second couple, therefore, is baseless and there is no ensuing prejudice. The Commission expressly stated in its FA that it referred to the fact of the second complaint to give the full context and to illustrate that the exclusionary policy was still being applied.

100. The Commission denies that it is hostile to the Beloftebos Respondents' religious views and beliefs. The statement lacks foundation. Disagreeing with the Beloftebos Respondents does not evidence hostility towards their beliefs, and there are no other objective factors to denote any antipathy towards them.

101. The Beloftebos Respondents criticise the statement in paragraph 60 of the FA. They say that my averment that they 'cannot' discharge their onus of proving fairness is indicative of bias against them. They omit the qualification to that statement: '*the Beloftebos Respondents have not, and cannot, discharge that onus on the facts.*' Those being the facts as set out in the FA, read with the supporting annexures. I submit that there is no impropriety in drawing this conclusion from the pleaded cause of action.

The Commission was not restricted to forming only a *prima facie* view before instituting these proceedings (AA: para 113).

102. Additionally, no criticism can properly be levelled at the Commission for not pursuing mediation as an alternative to litigation. The Commission is empowered, but not obligated, to mediate disputes in terms of the SAHRC Act. And Uniform Rule of Court 41 applies to proceedings in the High Court under its parochial jurisdiction, not when it sits as an Equality Court. The stance taken by the Beloftebos Respondents in their AA is evident of the fact that no reasonable prospect of successful mediation exists.

103. It is competent and appropriate for the Commission to approach this Court for relief and there is no obligation on it to exhaust alternative dispute resolution mechanisms before litigating. The institution of the main application does not evidence any ill will against the Beloftebos Respondents or a desire to embarrass them, and I aver that the Commission does not bear any.

104. If anything, the Beloftebos Respondents' own case is that they '*feel very insecure*' about whether the Commission will treat them fairly. If that is indeed the case, then it seems that little point could be served by attempting to mediate.

105. The Commission was not obliged to produce a report on its investigation before instituting these proceedings. No adverse inferences can be drawn from the fact that it did not.

106. That the affected couple may have relocated subsequent to the investigation is irrelevant to the main application. In any event, the Commission was not aware that the affected

couple were no longer resident at their address in Cape Town and did not attempt to mislead the Court in that regard.

107. The Beloftebos Respondents' accusation that the Commission is behaving '*exactly opposite to how Jesus acted*' is, with respect, irrelevant. The Commission is not attempting to force the Beloftebos Respondents to change their religious views, but rather to modify their conduct in accordance with the law.

CONDONATION FOR LATE INSTITUTION OF THE PROCEEDINGS AND LATE DELIVERY OF THIS AFFIDAVIT

Delay in instituting proceedings

108. I do not accept that there was an undue delay in the institution of these proceedings. However, to the extent that the Court determines otherwise, I explain the timing as follows and ask that on the basis thereof, this Court grant condonation to the extent necessary:

108.1. On 18 September 2017, the Commission received a complaint against Beloftesbos from Faiz Jacobs, which was delivered to the Provincial Manager for assessment.

108.2. On 6 October 2017, the complaint was assessed and delivered to the intake officer for further processing.

108.3. On 17 October 2017, the matter was allocated to a file handler.

108.4. On 13 November 2017 the matter was received by a file handler.

108.5. On 31 January 2018, the correspondence containing the allegation was sent to the Beloftesbos Respondents.

108.6. On 24 April 2018, when no response was received, a follow up letter was sent to the Beloftebos Respondents.

108.7. On 2 May 2018, the Beloftebos Respondents' attorney sought an extension of time for a response until 31 May 2018.

108.8. The Commission raised no objection to the request for an extension and the response from the Beloftebos Respondents was delivered on 31 May 2018.

108.9. On 18 June 2018, the CGE was contacted to discuss a joint investigation.

108.10. On 18 July 2018, a meeting took place with the CGE to discuss the way forward and whether the CGE intended to litigate on the matter. This process of engagement resulted in some measure of delay.

108.11. On 18 November 2018 a motivation for the institution of these proceedings was submitted to the relevant internal department of the Commission.

108.12. Thereafter, legal representation was obtained, consultations were arranged and this application was instituted on 2 March 2019.

Delay in delivering this affidavit

109. I seek condonation for the late delivery of this affidavit.

110. The answering affidavit / counter application was delivered on or about 14 May 2020.

111. The drafting of this affidavit was constrained on account of the ordinary limitations of the various lockdown restrictions.

112. I submit further that the Commission, upon receipt of the counterapplication herein, which raised a challenge of the constitutionality of section 14 of the Equality Act, decided to appoint Senior Counsel to address this new dimension of the case. This appointment cost further time and necessitated further consultation and instruction.

113. I submit it is also noteworthy that the Commission's legal representatives are acting pro bono herein.

114. On 2 September 2020, an application for leave to intervene was instituted in this matter which is opposed by the Beloftebos Respondents and is to be decided on a date to be determined with the Registrar.

115. On 21 September 2020, the country moved to Level 1. However, the legal representatives were not immediately available to commence drafting on this matter. Thereafter, instructions were obtained and this affidavit was filed as soon as was reasonably possible.

116. I respectfully say that there is no prejudice occasioned by the late filing of this affidavit, particularly in light of the pending intervention application.

COSTS IN THE MAIN APPLICATION

117. The Commission seeks costs against the Beloftebos Respondents in the main proceedings, if they are successful or substantially successful in obtaining the relief sought.

118. The *Biowatch* principle, to which the Beloftebos Respondents refer, avails a private party that institutes legal proceedings to vindicate a constitutional right. The Beloftebos Respondents are not such a party in the main application. Accordingly, they cannot claim the benefit of this principle as to costs.

COUNTER APPLICATION

Unconditional element: criticism of Commission's conduct

119. The Commission opposes the unconditional aspect of the counter application, in which the Beloftebos Respondents attack the Commission's conduct and good faith in instituting these proceedings. I refer, in this regard, to paragraphs 94 to 107 above, which set out the Commission's grounds of opposition, as well as paragraphs 108 to 116 above, which show that any delays on the part of the Commission in this matter are due to circumstance and process; not ill intent toward the Beloftebos Respondents.

120. The Commission, therefore, denies that it has breached the obligations under sections 1, 2(b)(i) and 6 of the Equality Act, read with section 9(1), (3) and (4) of the Constitution. (cf. AA: para 173.2)

Conditional element: challenge to section 14 of the Equality Act

121. The case that the Commission has been called on to meet in this regard is as follows:

121.1. The Equality Act '*arguably unreservedly privileges the right to equality over all other rights, in that it makes no provision for the weighing or balancing of other rights against the right to equality.*' (AA: para 162)

121.2. '*If this is the case, [the Beloftebos Respondents'] claims to freedom of conscience, religion and belief, expression and the right to dignity are simply brushed aside by the [Equality] Act for the right to equality.*' (AA: para 163)

121.3. However, section 2(b)(i) of the Equality Act supports the view that '*section 14 . . . may in effect permit the same balancing of competing rights we find in the Bill of Rights in the Constitution.*' (AA: para 163)

121.4. The problem, therefore, is that there is a '*lack of clarity . . . whether the [Equality] Act has a mechanism to reconcile the competing claims of the rights that the party . . . relies on as a defence.*' (AA: para 171)

122. The Beloftebos Respondents' challenge can be resolved at an interpretive level. The principles of statutory construction make it plain that when construing legislation an interpretation that gives better effect to the rights in the Bill of Rights should be preferred.

123. The Beloftebos Respondents recognise the reasonable alternative interpretation to section 14 of the Equality Act, which does not exclude their rights to freedom of conscience, religion and belief, expression and dignity from the evaluation. It follows

that this is the interpretation to be preferred. This is supported by the language of 14(3), which does not create a closed or exhaustive list of factors.

124. It is, further, the manner in which this Court has approached balancing the right to freedom of religion against competing rights of a complainant under the Equality Act.

125. The conditional attack on section 14 of the Equality Act, therefore, should fail.

126. In the alternative, even if the attack on section 14 of the Equality Act should succeed, the proposed reading in as an interim remedy would add nothing to the section for the reasons given above.

127. Although not part of their conditional challenge to section 14 of the Equality Act, the Beloftebos Respondents suggest that the statute's applicability to private relationships, taken together with the allegedly more expansive definition of '*equality*', is unconstitutional because it would place a duty on them not to discriminate unfairly against same-sex couples. (AA: para 164, 166)

128. The allegations are untethered to any relief directed at the operative sections of the Equality Act, such as sections 6 and 29, read with item 9 of the Schedule, on which the Commission relies in the main application. They are, therefore, to be regarded as gratuitous and irrelevant to the counter application.

129. To the extent that the Beloftebos Respondents rely on the constitutional challenge to the definition of '*hate speech*' in the Equality Act as evidence of the statutes' alleged over-breadth, that is not a point well made. It is immaterial to their conditional

challenge to section 14, which has no bearing on hate speech, as expressly articulated in section 15.

130. The Commission accordingly persists in seeking an order in terms of the notice of motion and that the counter application be dismissed with costs, which costs are to include the costs of two counsel.

ANDRÉ HURTLEY GAUM

I certify that the above affidavit was signed and sworn to by the deponent at Cape Town... before me on this the 26 November 2020, after he had declared that he knew and understood the contents of this affidavit, that he had no objection to taking the prescribed oath which he regarded as binding on his conscience, and after he uttered the words: "*I swear that the contents of this affidavit are true, so help me God*".

JOHANNES BRAND FERREIRA
Commissioner of Oaths
Practising Attorney RSA
3rd Floor, ABSA Building
132 Adderley Street
CAPE TOWN

COMMISSIONER OF OATHS

(ex officio)

FULL NAME: _____

DESIGNATION: _____

BUSINESS ADDRESS: _____

AREA: _____