

IN THE EQUALITY COURT OF SOUTH AFRICA
HELD AT THE HIGH COURT OF SOUTH AFRICA

CASE NO: EC 04/2016

In the matter between:-

GILAD GERALD STERN

First Complainant

SOUTH AFRICAN CENTRE FOR RELIGIOUS
EQUALITY AND DIVERSITY

Second Complainant

SARAH GOLDSTEIN

Third Complainant

and

SOUTH AFRICAN JEWISH BOARD OF DEPUTIES,
CAPE COUNCIL

Respondent

FILING SHEET

DOCUMENT TO BE FILED: Respondent's answering affidavits.

Dated at **CAPE TOWN** on this the **26TH** day of **APRIL 2016**.

BVPG Attorneys

R Kudo – 0214053800



BERNADT VUKIC POTASH & GETZ

Attorneys for Respondent

11th floor

No. 1 Thibault Square

CAPE TOWN

(Ref: R Kudo)

TO: **The Registrar**
Equality Court
CAPE TOWN
(Ref: Ms S Space)

AND TO: **FAIRBRIDGE WETHEIM BECKER**
Complainants' Attorneys
16th Floor
South Tower
The Towers
CAPE TOWN
(Ref: D Olivier)

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Respondent

RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

ERIC MICHAEL MARX

do hereby make oath and state:

1. I am the Chairperson of the South African Jewish Board of Deputies, Cape Council, the Respondent. I am duly authorised to depose to this affidavit on its behalf.





2. The facts I describe in this affidavit fall within my personal knowledge, unless I state otherwise or the context of what I say makes it clear that they do not. I confirm that those facts are, to the best of my knowledge and belief, true and correct. Where I rely herein on information conveyed to me by others, I verily believe same to be true. Some of the allegations, inferences and conclusions made in the founding affidavit will inevitably require me to make submissions on legal matters. To the extent that I do so, I rely on the legal advice of the Respondent's legal representatives.
3. At the core of this application lies the question of whether the fact that women are not permitted to sing solo at the *Yom Hashoah* ceremony ("**the Ceremony**"), constitutes unfair discrimination.
4. In responding to the challenge, I address the following issues in turn hereunder:
 - 4.1. First, I provide some background in respect of the Respondent and, more particularly, its objectives.
 - 4.2. Second, I provide an overview of the Ceremony, its purpose and objectives.
 - 4.3. Third, I briefly address the prohibition in Jewish law against a man hearing a woman sing. This is an issue more fully addressed by the Chief Rabbi in the solemn declaration filed together with this affidavit.
 - 4.4. Fourth, I explain why the relief sought in this application ought not to be granted.



- 4.5. Finally, I answer *seriatim* to the founding and supporting affidavits.
5. Before responding to each of these issues, I should explain at the outset that the Complainants have presented the Respondent with an open settlement proposal in this matter, the effect of which would be, *inter alia*, for a woman to sing solo at the end of the Ceremony. The proposal is not acceptable to the Respondent because it will ultimately result in *Kol Isha* not being adhered to and the Orthodox leadership (together with some members of their communities) not attending the Ceremony. This will undermine the unifying objective of the Ceremony (which I explain in more detail at a later stage). The proposal was accordingly rejected by the Respondent.

OVERVIEW OF THE SOUTH AFRICAN JEWISH BOARD OF DEPUTIES, CAPE COUNCIL

6. At the outset, it is important to provide some background in respect of the Respondent. A copy of its Constitution is not attached to this affidavit, given that it has been attached to the founding affidavit as "FA2".
7. As is apparent from the Respondent's Constitution, it is a representative body of the Jewish community in the Western Cape. In accordance with its objects, the Respondent carries out a range of functions in conformity with, *inter alia*, its own Constitution and the South African Constitution, which includes:
- 7.1. Safeguarding the religious and civil rights, the status and the welfare of the Jewish community in South Africa.

- 7.2. Acting on behalf of the Jewish community in all matters affecting its relationship with government at all levels as well as non-governmental organisations and entities.
 - 7.3. Promoting and harmonizing relations between the Jewish community and all sections of the population.
 - 7.4. Furthering respect for and the application of fundamental human rights for all sections of the population.
8. It must at the outset be emphasised that the Jewish community (as with all other communities) is not a homogeneous one. Indeed, it comprises two main groupings: (a) Orthodox; and (b) Reform, which, though equally firm in their commitment to the religion, vary in respect of elements or aspects of how it is practised.
 9. In passing, I should explain the Reform movement arose in the 1800s, since when there has been tension between Orthodox Judaism and Reform Judaism. In the context of the Ceremony, the Respondent treads cautiously and carefully preventing discord between both these groups of the Jewish community.
 10. In this regard, the Respondent plays a role in ensuring harmony and cohesion within the Jewish community and not acting in a way that is divisive or undermining of either grouping, particularly for the purposes of the Ceremony which, as I explain later on, is aimed at being an inclusive and unifying event within the community.



11. Consistent with its objects, the Respondent:
 - 11.1. Represents no particular brand of Judaism and represents all Jews within the community. In particular, it exhibits no doctrinal preferences or allegiances.
 - 11.2. Genuinely strives to improve the welfare of the Jewish community, protect the Jewish way of life and the integration of Jewish persons into society.
 - 11.3. In the exercise of its own administrative and other functions, its oversight of the community and its execution of programmes in matters which have no religious significance whatsoever, there is no restriction whatsoever on women's participation. By way of example, there have been at least two female Chairpersons of the Respondent. Furthermore, the current President of the South African Jewish Board of Deputies – who is also its immediate past Chairperson – Mary Kluk, is a woman.

THE NATURE OF THE CEREMONY

12. The *Yom Hashoah* ceremony commemorates the victims of the Holocaust (some six million Jews) who perished in the Holocaust as a result of the actions carried out by Nazi Germany and its cohorts throughout Europe. It is also known as the Day of Remembrance of the Holocaust. A major purpose of the Ceremony is to ensure that the youth never forgets the Holocaust.



13. Due to the poignancy of the occasion, the Respondent places great emphasis on the entire community being present. Indeed, all sectors of the Jewish community have a desire to be present, in marking the poignancy of the occasion. The value of coming together as a community is immeasurable; it also sends an important message to the youth, who attend in great numbers. The Ceremony occurs once a year and the Respondent takes its responsibility to host the Ceremony very seriously and in a way that the Jewish community stands shoulder to shoulder to mark as a community.
14. The Day of Remembrance is marked globally on the 27th day of the month of Nissan on the Hebrew calendar, which this year corresponds with 5 May 2016.
15. The date for the Ceremony was established by the Israeli government in 1953 with a view to it being a date on the global Jewish calendar. It has become a day commemorated by Jewish communities and individuals worldwide. While there are some differences in rituals marking the day, there is no question that the day holds enormous emotional and spiritual meaning for Jews worldwide. The overwhelming theme that runs through all observances is the importance of remembering and recalling the murdered victims, and ensuring that such a tragedy never happens again. There is great significance to this being done in a unified and inclusive way.
16. Most Jewish communities hold a solemn ceremony on the day. Lighting memorial candles and reciting the *Kaddish* (the prayer for the departed) are common. Some Jews observe the day within the synagogue, as well as in the broader Jewish communal infrastructure. Commemorations range from synagogue services to communal vigils and educational programmes. Many



ceremony programmes feature a talk by a Holocaust survivor or a direct descendant, recitation of appropriate psalms, songs and readings, or viewing of a Holocaust-themed film. Some communities choose to emphasise the depth of loss that Jews experienced in the Holocaust by reading the names of Holocaust victims one after another. Many Jewish schools also hold Holocaust related educational programmes.

17. Against this background, I was shocked to the core by the First Complainant's statements on 21 April 2016 on the national television news channel, eNCA. I annex marked "AA1" a copy of the transcript, which I confirm to be accurate, having seen a recorded version of the First Complainant's interview by Leigh-Anne Jansen. As will appear therefrom, the First Complainant made the following unseemly and alarmingly disrespectful remarks in regard to the possibility of women singing at the Ceremony. He said, inter alia:

17.1. *"My problem is not with the Rabbis that don't want to hear women sing. I regard that as quite quaint. A bit weird.";*

17.2. *"If a Rabbi has got a problem with women singing. They think it is going to affect them in the mind or in their heart or in some other part of their anatomy. The need to take a cold shower.";*

18. Historically, there was a time in the history of the Cape Town Jewish community that the Union of Orthodox Synagogues ("UOS") commemorated the Ceremony under its aegis; it was organised by this orthodox religious body and proceeded along orthodox lines. Eventually, the mantle of custody for the event was handed over to the Respondent. The reason for this shift was to



ensure that the Ceremony was acceptable to both the Orthodox and Reform parts of the community. This has been the position since 2001.

19. Since 1976 the commemoration service has taken place at Pinelands cemetery and has been attended by between 1000 and 1800 people annually. An important element of this event is the keynote address and over the years there has been an impressive array of speakers, including both overseas and local academics, communal leaders and religious leaders from all sectors of the community.

20. As regards the ceremony in South Africa, I attach a copy of the programme for the 2015 proceedings as "**AA2**" and emphasise the following:

20.1. The Ceremony itself is not entirely a religious one; however, it is undeniably a bridge between the secular and the holy.

20.2. As regards the holy aspects:

20.2.1. It takes place on holy ground; in Cape Town, being the Jewish cemetery in Pinelands.

20.2.2. It includes an ancient Jewish prayer, *Yizkor*, which is a special memorial prayer for the departed. *Yizkor*, in Hebrew, means "Remember." It is not only the first word of the prayer, it also represents its overall theme. In this prayer, God is implored to remember the souls of persons that have passed on. Reciting *Yizkor* is said to renew and strengthen the connection with the departed souls, elevating them in their celestial homes. It is not



possible to determine a unique day for each of the persons who died, so the Day of Remembrance was specifically determined.

20.2.3. Significantly, spiritual leaders desire to and attend the Ceremony.

20.3. As regards the secular aspects:

20.3.1. Very often survivors of the Holocaust present their remembrances to the communities.


20.3.2. The Ambassador of Israel sometimes gives a message.

20.3.3. Sometimes, speakers address their impression of the concentration camps.

20.3.4. Persons from outside the community are also invited, for example, Members of Parliament.

20.3.5. Deeply emotional folk songs are sung.

21. I must accordingly emphasise that the Ceremony itself is not a strictly religious one, but has both secular and religious aspects to it. Spiritual leaders attend the entire ceremony together with many members of their congregations. I can state without reservation that in the event that the Order sought before this Court is granted, many – if not all – Orthodox spiritual leaders will not attend the Ceremony; this was categorically conveyed to me by Rabbi Deren, who is the head of the Western Cape Rabbinical Association, who also told me that



the Orthodox Rabbis would not endorse the Ceremony to their congregants. Such a consequence will inevitably compromise the Ceremony and, more fundamentally, its underlying purpose. It will result in the exclusion of many Orthodox Jews (and their leaders) from the Ceremony, a result that is entirely at odds with the Respondent's approach to the Ceremony. As I have stated, it is intended to be a unifying event that brings together Jews from different sectors in order to mark the poignancy of this solemn occasion. Many survivors of the Holocaust have no knowledge of exactly when or where their families were murdered. This occasion allows for Jews to stand together as a group commemorating a catastrophe in our history. In fact, many Holocaust survivors or children of those who perished in the Holocaust observe the Day of Remembrance as the anniversary of the death of their loved ones.

THE PROHIBITION IN JEWISH LAW AGAINST A MAN HEARING A WOMAN SING

22. In Jewish law, there is a prohibition against a man hearing a woman sing solo, known as *Kol Isha*. This is a rule that has been observed by many Orthodox Jews for thousands of years. Further detail as to its purpose is addressed in the affidavit of the Chief Rabbi filed together with this affidavit.

23. While the prohibition is not adhered to by Reform Jews, it is very much a part of Orthodox Judaism and is not a matter that they have an authority to reinterpret or redesign to suit their will. The result is that if the relief sought in this application were granted, it will infringe the principle of *Kol Isha*, to which the Orthodox leadership in South Africa has a unified approach.



24. The principle of *Kol Isha* is underpinned by questions of modesty, preventing women from objectification and abuse. Given the view held by the South African Orthodox Rabbinic Orthodox leadership on this issue, should they be present during such an event, they will, undoubtedly be transgressing Orthodox Jewish law; this is an issue that is core to their identity and there is no question of compromise in respect of it. In this regard I refer to the accompanying affidavit of the Chief Rabbi, Dr Warren Goldstein.

THE RELIEF SOUGHT IN THIS APPLICATION OUGHT NOT TO BE GRANTED

25. I respectfully aver that the relief sought in this application ought to be refused for the following reasons:
- 25.1. First, this application is founded on self-created urgency and for that reason alone ought not to receive the sanction of this Court. Furthermore, this application directly implicates the doctrine of entanglement. In addition, it raises exceedingly complex issues on the merits.
- 25.2. Second, given the nature of the matter the Respondent is firmly of the view that it is premature for it to be determined by a Court at this stage. Of key relevance in this regard is the following: (a) that the Applicants have not properly engaged with the Respondent regarding the issues raised in this application until shortly prior to the institution of these proceedings; (b) that the Respondent intends convening a colloquium and allowing this issue to be more fully ventilated and debated within the community. It intends doing so within two months



from the date hereof. I respectfully aver that until that occurs the determination of this application would be premature.

- 25.3. Third, the effect of the relief sought in this application will inevitably be to deprive the Ceremony of the benefit of certain of its religious leaders and many of their congregants being in attendance, which will run counter to the unifying purpose of the Ceremony.
- 25.4. Fourth, the further effect of the Order (if granted) would be to exclude the Orthodox religious leaders and many of their congregants from attending and participating in the ceremony. Attendance (with women singing) will mean their transgressing their religious laws, in respect of which there is no compromise.
- 25.5. Fifth, any Order by the Court granting the relief sought will have a very divisive impact on the Jewish community which has worked hard for a cohesive community. Significantly, a Court Order in terms sought also leaves no room for compromise within the Jewish community, which a colloquium may yield. Given the importance of the Ceremony, the significance of such a course cannot be under-estimated. Significantly, the Respondent's approach to *Kol Isha* as observed at the Ceremony for many years, has remained untested and unremarked for years. The significance of the commemoration ought not to be undermined. I maintain that an order in the terms sought will cause an implosion of what is a unifying Ceremony. Contrary to its core objectives, an order in the terms sought will result in divisiveness and disunity within the Jewish community.



25.6. Sixth, while I accept that the right to equality is implicated in the present matter, so too are the rights to dignity, freedom of association, religious freedom and freedom of choice. I am advised that it will be argued at the hearing of this matter that on a proper balancing of these competing rights, the relief sought in this application must fail.

SERIATIM ANSWER TO FOUNDING AFFIDAVIT OF GILAD GERALD STERN

Ad paragraphs 1 and 2

26. Save to deny the truth and correctness of all the allegations made in the affidavit under answer, I note the content of these paragraphs.

AD "THE PARTIES"

Ad paragraphs 3 to 12

27. While I have no personal knowledge of all the averments set forth in these paragraphs, I do not put them in issue for the purposes of this application.

Ad paragraphs 13 to 16

28. The content of these paragraphs are admitted to the extent that they are consistent with the Respondent's Constitution (FA2 to the Founding Affidavit).

Ad paragraph 17

29. The Respondent is only entitled to speak on its behalf.

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Ad paragraph 18

30. The content of this paragraph is admitted.

Ad paragraph 19

31. The content of this paragraph is admitted.

Ad paragraph 20

32. While I accept that the Ceremony is attended by both Jewish and non-Jewish individuals and organisations and that, strictly speaking, it is not a religious event, I maintain that there are important religious aspects to it. I refer to what I have already stated in this regard and to the Chief Rabbi's affidavit.

AD "LOCUS STANDI"

Ad paragraphs 21 and 22

33. I do not place the Complainants' locus standi to institute these proceedings in issue in these proceedings.

Ad paragraph 23

34. It is correct that the Respondent has taken a decision to preclude women from singing solo at the ceremony. I deny the "ostensible" reason referred to and state that the underlying reason for the decision is that a woman singing at the ceremony is inconsistent with Orthodox Jewish law and would result in spiritual



leaders and some members of the Orthodox Jewish community not attending the event at all.

Ad paragraphs 24 and 25

35. I deny that the exclusion of women singing solo at the Ceremony constitutes a violation of the right to equality and non-discrimination on the basis of gender or indeed that the right to gender equality must be preferred over the other competing rights that I have identified above.

Ad paragraph 26

36. I do not deny that this matter implicates the right to equality. However, I maintain that such right cannot be considered in isolation of the various other competing rights.

AD "RELIEF SOUGHT"

Ad paragraphs 27 and 28

37. I note the relief sought, but deny that the Complainants have demonstrated any basis in law or in fact for such relief to be granted.

AD "RELEVANT BACKGROUND FACTS"

Ad paragraph 29

38. As I have already explained, it is correct that the Ceremony is not a purely religious event; however, as explained, there are religious aspects to it. It is also

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correct that men and women are seated together, which would not be the case were it to be a purely Orthodox prayer service.

Ad paragraph 30

39. I have already explained the form of the Ceremony and once more emphasise that the Jewish prayer is an important aspect to it, as is the fact that it is held on what is considered to be on holy ground.

Ad paragraph 31

40. It is indeed correct that the Ceremony is scheduled to be held on 5 May 2016.

Ad paragraphs 32 to 34

41. The averments made in these paragraphs are, strictly speaking, not correct. It is correct that for some years the Respondent has debated the issue of women singing at the Ceremony. As I have explained, the issue of women singing at the event is a controversial one, with strongly held views on both sides. It requires that the right to gender equality be balanced against other competing rights.
42. In recognising this careful balance, the Respondent has to date, enforced the principle of *Kol Isha* and not permitted women to sing at the Ceremony. As I have explained, *Kol Isha* has its roots in Orthodox Jewish law. In the event that it were not enforced by the Respondent, the Ceremony would not be attended by Orthodox spiritual leaders (whose attendance plays an important



role in the event) and some members of the Orthodox Jewish community (due to their adherence to *Kol Isha*).

Ad paragraph 35

43. It is correct that on 8 March 2016 the Respondent conducted a debate on the issue. It culminated in a decision to maintain the *status quo* at least for 2016.

AD "THE NATURE OF THE CLAIM"

Ad paragraph 36

44. I reiterate that, while the Ceremony is not entirely a religious one, it does have religious aspects to it. I refer to what I have already stated as regards the Respondent. In particular, I clarify that the Respondent represents Jews; however, as stated it represents no particular brand of Judaism and applies to all Jews within the community. It also exhibits no doctrinal preferences or allegiances.

Ad paragraph 37

45. In suggesting that the answer to the vexed question of whether women should be permitted to sing at the ceremony is for the Rabbis to absent themselves altogether from the event or for that part of the Ceremony fails to properly appreciate the following:

- 45.1. That there are religious aspects of the Ceremony.

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The reason underlying the rule has been explained as courts needing to avoid becoming enmeshed in "internecine quarrels within communities regarding the content or the truth of particular beliefs." Despite the underlying reason for women not being permitted to sing at the ceremony being *Kol Isha*, which is a principle of Jewish law which is strictly adhered to by some Orthodox Jewish members and the SA Orthodox leadership community, it will be disregarded and undermined by the Order sought before this Court. That, I am advised, pre-eminently involves the doctrine of entanglement.

51. I refer to what I have already stated regarding the nature of the Ceremony and the Respondent.

Ad paragraphs 42 and 43

52. The averments made in these paragraphs indicate precisely that the issue of doctrinal entanglement does arise.

53. I say the following in response:

53.1. With respect, the deponent to the founding affidavit is by no means qualified as an expert who can competently pronounce on whether *Kol Isha* is a religious requirement or how it is applied.

53.2. I maintain that the Respondent's decision not to permit women to sing at the Ceremony is underpinned by *Kol Isha*. The relief sought in these proceedings will have the effect of fundamentally undermining that principle. I refer to the affidavit of the Chief Rabbi in that regard.



53.3. The Order sought will also result in the exclusion of Orthodox spiritual leaders and some Orthodox Jews from the Ceremony, notwithstanding: (a) the significance of the Ceremony for them; and (b) the decision to exclude women from singing at the Ceremony is founded on Orthodox religious prescript. This will seriously erode the abovementioned principle of inclusivity which the Respondent has strived to achieve.

Ad paragraph 44

54. It is indeed correct that the Respondent has acted in a manner to ensure inclusivity at the Ceremony. It is also correct that it has not prescribed that men or women dress in accordance with Jewish religious laws. These issues, I respectfully submit, demonstrate the complexity of the situation; the Respondent has not sought to be prescriptive in respect of the Ceremony unless by failing to prescribe on certain issues (such as *Kol Isha*) the sanctity, significance and inclusivity of the Ceremony would be compromised. The simple point of the matter is that issues of dress code and seating arrangements do not, in the scheme of things, rank as matters of such significance whereby religious leaders would not attend on account of an Orthodox agenda not being followed in respect thereof. The position in respect of *Kol Isha* is, however, different, as I have explained.

Ad paragraph 45

55. I refer to what I have already stated as regards the framing of the issue and the reasons for the decision.

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Ad paragraphs 46 to 55

56. I do not accept that the analysis of the issues underpinned by this application are as simple (or indeed as stark) as the Complainants would have it. While I accept that the right to gender equality is implicated, so too are a range of other rights including those of freedom of association and freedom of religion.
57. On a proper analysis and balancing of the rights, I do not accept that the Respondent's decision to apply *Kol Isha* results in an infringement of either the right to equality or dignity. I am advised that legal argument will be addressed in this regard.

Ad paragraphs 56 to 60

58. I am advised that an analysis of the relevant constitutional rights will be addressed in argument at the hearing of this matter. For present purposes, I do not accept that the right to gender equality falls to be elevated as the singular right of relevance and significance in this application or that it warrants absolute protection. Equally important, are:
- 58.1. The rights of the Orthodox Jewish community (and their adherence to *Kol Isha*).
- 58.2. Ensuring the attendance of Orthodox spiritual leaders at the Ceremony and the entire Jewish community having the benefit of their attendance at an inclusive event. It should be emphasised that, by women not singing, nobody is precluded from attending the ceremony. Neither is solemnity of the occasion diminished.



Ad paragraphs 61 and 62

59. It is correct that over the past few years the issue has been discussed and debated. I accept that the compromise proposals (many of which have been made previously) may find favour with the various groupings represented by the Respondent; the views of those groupings (including the Orthodox religious leaders) will ultimately inform any decision that the Respondent will adopt.
60. The Respondent intends convening a colloquium where the entire community is afforded the opportunity to express their views on the issue. While I accept that it may not yield a unanimous outcome, it would certainly represent an important platform for dialogue and the different sectors of the community to properly hear, engage and ultimately understand the basis of the arguments on both sides of the spectrum. Should the matter proceed in that way, it could well yield a far less divisive outcome for the community than litigation would. It may also result in some form of compromise outcome (if one is possible); there is no prospect of there being such an outcome in the event that the litigation proceeds.

Ad paragraph 63

61. I do not accept that mediation has no place in the current debate or that it not appropriate. I also do not accept that "the law is so clear and unambiguous". The Respondent remains of the firm view that a non-litigious course could well yield the best outcome to what is by all accounts an extremely complex situation.



Ad paragraphs 64 to 67

62. I do not accept that the complaints giving rise to this litigation are comparable to a situation of race discrimination as cited by the Complainants. I again emphasise that the basis for the decision is *Kol Isha*, which is a prescript of Jewish law and an Orthodox Jewish practice. I refer to what I have already stated as regards the consequences of it not being adhered to. Race discrimination has no foundation in Jewish prescript and indeed is wholly inconsistent with the principles of Judaism. The deponent's purported example is irrelevant.

AD "URGENCY"**Ad paragraphs 68 and 69**

63. It is correct that the Ceremony is due to take place on 5 May 2016. I do not, however, accept that the Complainants are entitled to an order on the urgent basis that they seek. I say the following in this regard:

63.1. The impugned decision was taken on 8 March 2016. On the deponent's version, he was aware of that decision on the same day.

63.2. Yet, this application was only served on the Respondents on 5 April 2016.

63.3. The Respondent is required to file answering affidavits barely fourteen court days later in an application of this nature which gives rise to complex issues pertaining to Judaism. This timeframe was woefully



inadequate, also taking into account the religious holiday of the Passover on 23 and 24 April 2016.

- 63.4. In the period between 26 April 2016 (the filing of this affidavit) and 5 May 2016 (the scheduled event), the Complainants seek to: (a) have a directions hearing convened; (b) file replying affidavits; (c) have both parties file heads of argument; (d) have the hearing; and (e) have judgment handed down in the matter prior to 5 May 2016. The effect of this timeframe is that neither party will be able to exercise a right of appeal prior to the scheduled event notwithstanding the critical issues that this application gives rise to or indeed the final nature of the relief sought. This in circumstances where the Ceremony was advertised many months ago and the Complainants have for years been abundantly aware that women did not sing solo at the Ceremony.
- 63.5. The timeframes that the Complainants have embarked upon also do not allow for any proper engagement with the community (for example, by way of a colloquium as I have explained); in addition, the relief sought does not allow for any prospect of a community compromise on the issues raised.
- 63.6. In all the circumstances, the Respondent contends that the application falls to be dismissed, alternatively struck from the roll, for this reason alone.
64. For all of these reasons, I respectfully aver that this application is underpinned by self-created urgency and ought not to be hastily disposed of, particularly

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given the far-reaching and potentially dire consequences for the entire Jewish community. In this regard, the Ceremony ought to be permitted to proceed on the basis that the Respondent has decided it will. Thereafter, the colloquium will be convened. I am advised that the proper course would be for separate litigation to be instituted after the colloquium in the event that the Complainants remain aggrieved.

Ad paragraph 70

65. As regards the alleged "several messages" that the deponent left for Mr Daniel Levitt, who is currently in Johannesburg, Mr Levitt informs me that he received but one message from the Complainant.

Ad paragraphs 71 to 73

66. The contents of these paragraphs are admitted.

Ad paragraphs 74 to 78

67. I have held a single meeting with the First Complainant, together with a member of the Respondent, John Zieff, and I have had one telephone conversation with him.

68. No other member of the Respondent has been mandated to communicate with him.

69. The suggestion by us at the meeting, as contained in paragraph 75, was rejected out of hand by the First Complainant.

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70. I do not accept that "any compromise" would allow for unlawful discrimination of women to continue. I contend that an opportunity for engagement on this issue may yield a workable outcome that is not viewed in terms as absolute as the Complainants propose.

71. I refer to what I have already stated in respect of mediation and self-created urgency of the matter.

SERIATIM ANSWER TO FOUNDING AFFIDAVIT OF JAMES RICHARD LOMBERG

Ad paragraphs 1 to 3

72. Save to deny the truth and correctness of all the allegations made in the affidavit under answer, I note the content of these paragraphs.

Ad paragraph 4

73. I refer to what I have already stated in response to the affidavit of the First Complainant.

Ad paragraph 5

74. I have no personal knowledge of the allegations made in this paragraph but do not place them in issue. I do, however, reiterate that the Jewish community is not a homogeneous one.

Ad paragraphs 6 and 7

75. I do not place SACRED's locus standi in issue.

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Ad paragraph 8

76. I refer to what I have already stated in respect of the right to equality. I reiterate that that right cannot be considered in isolation of other competing constitutional rights, nor can it be elevated to the exclusion of other rights.

SERIATIM ANSWER TO FOUNDING AFFIDAVIT OF SARAH GOLDSTEIN

Ad paragraphs 1 and 2

77. Save to deny the truth and correctness of all the allegations made in the affidavit under answer, I note the content of these paragraphs.

Ad paragraphs 3 to 6

78. I refer to what I have already stated in response to the affidavit of the First Complainant.

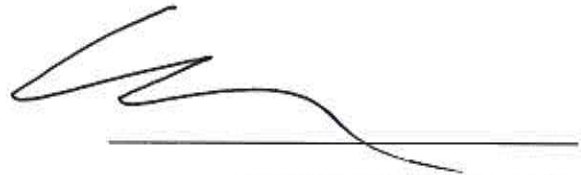
79. In the circumstances, I ask that the application be dismissed with costs, including the costs of two counsel.


ERIC MICHAEL MARX



I certify that:

1. The deponent acknowledges to me that:
 - 1.1 he knows and understands the contents of this declaration;
 - 1.2 he has no objection to taking the prescribed oath;
 - 1.3 he considers the prescribed oath to be binding on his conscience.
2. the deponent thereafter uttered the words "I swear that the contents of this declaration are true, so help me God".
3. the deponent signed this declaration in my presence at the address set out hereunder on this **26th** day of **APRIL 2016**.



COMMISSIONER OF OATHS

Grant Quixley
Member of the Cape Bar
Practising Advocate
Commissioner of Oaths
16th Floor, Huguenot Chambers
40 Queen Victoria Street
Cape Town 8001



"AAI"

ENCA interview with Gilad Stern

21 April 2016

Leigh-Anne Jansen	<p>It's this ceremony that is causing all the stir; the annual Holocaust Remembrance Day to be held in two weeks' time.</p> <p>For years women have been barred from singing at the ceremony for fear that they will offend Orthodox Rabbis. Now some in the Jewish community have had enough.</p>
Gilad Stern	<p>My problem is not with the Rabbis that don't want to hear women sing. I regard that as quite quaint. A bit weird.</p> <p>My problem and our problem in going to court is that the Jewish community has, the Jewish Board of Deputies has responded to this, instead of saying, "Listen guys don't talk rubbish, women not singing – that's ridiculous". The Jewish Board of Deputies is saying, "Oh well that's a problem, how can we accommodate you?"</p> <p>They shouldn't be accommodating the Rabbis they should be saying, "Guys get a grip".</p>
Leigh-Anne Jansen	<p>Renowned Opera Singer Aviva Pelham was scheduled to perform at this year's ceremony. Stern and a group of Cape Town based Jews are now threatening to take the matter to the Equality Court If the South African Jewish Board of Deputies doesn't budge.</p>
Gilad Stern	<p>If a Rabbi has got a problem with women singing. They think it is going to affect them in the mind or in their heart or in some other part of their anatomy. They need to take a cold shower.</p> <p>They need to go for a walk around the block. They need to deal with a course in gender sensitivity. It is unacceptable for the Jewish Board of Deputies to play ball with discrimination. The Jewish Board of Deputies which should be opposing discrimination especially at a ceremony to commemorate the victims of discrimination.</p>
Leigh-Anne Jansen	<p>In a written statement the Jewish Board of Deputies suggests it's caught between a rock and a hard place. Either affect the women or the Orthodox Rabbinic leadership.</p> <p>A decision on whether to take the matter to court will be made later this week.</p>

<http://www.enca.com/south-africa/jewish-board-deputies-could-face-equality-court-lawsuit>



Without memory, we would live the curse of an isolated present, a moment in time without history, and therefore without future. It would be a life without texture and meaning, without pain or pleasure, without sadness or joy, without ugliness or beauty, without memory or perspective. Yet memories may not be pleasant or kind. They may arrive at the worst possible time, but they give our life its special quality. I state affirmatively: I remember, therefore I am. The Holocaust continued to pierce, to haunt, to stir up emotions not only in us, the survivors, but also in our children and their children. When the last living survivor of the Holocaust dies, the obligation to remember what happened will fall on generations who were not there. All we have now are family memories and the ceremonial commemoration on Yom Hashoah. Remembrance can be a painful burden and we hope the flame of the survivors will be kept alive to be handed over from one generation to the next with the message NEVER AGAIN.

Xavier Piat, Cape Town survivor

PROGRAMME

IN THE CHAIR	Eric Marx, Chairman, Cape SA Jewish Board of
Deputies	
KINDLING OF THE LIGHTS She'erith Hapletah	She'erith Hapletah
ANI MA'AMIN (Please rise and participate, to be sung while the lights are being kindled)	Cantor Choni Goldman and Cape Town Hebrew Congregation Choir
SURVIVORS SPEAK ON LIBERATION Lichterman	Ella Blumenthal and Miriam
MUSICAL ITEM Yiddish Lullaby.	Kira Stone (piano) and Gabriella Saven (flute)
MESSAGE FROM STATE OF ISRAEL	His Excellency Ambassador Lenk
PARTISAN SONG (Please rise and participate)	Cantor and choir
YIDDISH READING And So Should You Speak to the Orphan <i>Avraham Sutzkever (1913-2010)</i>	Veronica Belling
LADINO READING In Sacred memory of my people <i>Isaac Habib</i>	Isaac Habib
ADDRESS: MARCH OF THE LIVING HAZKARAH (Please rise)	Michael Cohen Cantor Goldman and Choir
PLACING OF MAGENEI DAVID Shagom AND WREATHS Sanzul (Remain standing till conclusion of service) Barry Mosselson	Standard bearer SAJEX: Capt Howard SA Jewish Ex-Service League: Pincus Volunteers Machal (1948) and Nachal (1956): Jewish Maritime League: Alvin Kushner SA Air Force: Col Donovan Chetty SA Navv, Flag Officer Fleet: Captain Richard R. Defence Reserve: Lt Col Bryan Sterne MMM, SA Defence Provincial Liaison Council (Western Cape): Capt Trunell Morom British High Commission: Col John McCardle SA Legion of Military Veterans: Col Lionel Crook MOTHS (Western Cape): Ivor Jacobson
OBE RM	
LAST POST (1 minute silence) and REVEILLE	SANDF Band Trumpeters (Cape Town)
COMMUNAL KADDISH	Led by Cantor
South African National Anthem NKOSI SIKELEL iAFRIKA	Led by Cantor
Israeli National Anthem HATIKVAH – The Hope	

Front Cover by Joshua Saxe

**IN THE EQUALITY COURT OF SOUTH AFRICA
HELD AT THE HIGH COURT OF SOUTH AFRICA**

CASE NO: EC 04/2016

In the matter between:-

GILAD GERALD STERN

First Complainant

**SOUTH AFRICAN CENTRE FOR RELIGIOUS
EQUALITY AND DIVERSITY**

Second Complainant

SARAH GOLDSTEIN

Third Complainant

and

**SOUTH AFRICAN JEWISH BOARD OF DEPUTIES,
CAPE COUNCIL**

Respondent

AFFIDAVIT

I, the undersigned,

MARY JULIA KLUK

do hereby make oath and state:

1. I am the National President of the South African Jewish Board of Deputies ("SAJBD") and the immediate past Chairperson of the SAJBD. I am duly authorised to depose to this affidavit on its behalf.



2. The facts I describe in this affidavit fall within my personal knowledge, unless I state otherwise or the context of what I say makes it clear that they do not. I confirm that those facts are, to the best of my knowledge and belief, true and correct. Some of the allegations, inferences and conclusions made in the founding affidavit will inevitably require me to make submissions on legal matters. To the extent that I do so, I rely on the legal advice of the Respondent's legal representatives.

3. I have read the answering affidavit of Eric Michael Marx and confirm the contents thereof in respect of the nature of the Ceremony and in particular that:
 - 3.1. The *Yom Hashoah* ceremony commemorates the victims of the Holocaust (some six million Jews) who perished in the Holocaust as a result of the actions carried out by Nazi Germany and its cohorts throughout Europe. It is also known as the Day of Remembrance of the Holocaust.

 - 3.2. Due to the poignancy of the occasion, the Respondent places great emphasis on the entire community being present. Indeed, all sectors of the Jewish community have a desire to be present, in marking the poignancy of the occasion. The value of coming together as a community is immeasurable; it also sends an important message to the youth. The Ceremony occurs once a year and the Respondent takes its responsibility to host the Ceremony very seriously and in a way that the Jewish community stands shoulder to shoulder to mark the occasion as a community.



4. I am of the firm view that should this Court be inclined to grant an order of the nature sought by the Complainants, it will have a divisive and exclusionary result in that the Orthodox Rabbinate (and many members of its congregations) will not attend the Ceremony. Such a result will undermine one of the key objectives of the Ceremony and ought not to receive the sanction of this Court.



MARY JULIA KLUK

I certify that:

1. The deponent acknowledges to me that:
 - 1.1 She knows and understands the contents of this declaration;
 - 1.2 She has no objection to taking the prescribed oath;
 - 1.3 She considers the prescribed oath to be binding on her conscience.
- 2 the deponent thereafter uttered the words "I swear that the contents of this declaration are true, so help me God".



3 the deponent signed this declaration in my presence at the address set
out hereunder on this **26TH** day of **APRIL 2016**



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Third Complainant

and

SOUTH AFRICAN JEWISH BOARD OF DEPUTIES,
CAPE COUNCIL

Respondent

SOLEMN DECLARATION: CHIEF RABBI OF SOUTH AFRICA

I, the undersigned,

WARREN GOLDSTEIN

do hereby state that :

1. I am the Chief Rabbi of South Africa and have served in the position since 1 January 2005.
2. The Holocaust memorial service held on Holocaust Day, also known as Yom HaShoah, has been a solemn occasion hosted by the Jewish Board of



Deputies for many years. It has long been the accepted practice of the South African Jewish community to conduct the Yom HaShoah memorial service in such a manner that conforms with the precepts of Jewish religious law and practice. Thus the service includes the traditional memorial prayers recited for departed people, as well as those memorial prayers especially dedicated for martyrs.

3. This compliance with Jewish religious law and practice has been adhered to for two reasons. Firstly, to ensure that the service has the full dignity that is culturally acceptable to the Jewish community, with adherence to the precepts of Judaism. Secondly, to ensure that all members of the Jewish community feel comfortable to attend such a service which is in full compliance with Jewish religious law and practice.
4. One element of Jewish religious law and practice is that of the injunction against a woman singing as a solo voice in front of an audience which includes men. This injunction is very ancient and is derived from the most primary of Jewish law sources: the Talmud as well as the Code of Jewish Law.
5. Communal unity at a sensitive time such as Holocaust memorial is a very important value. As a result the organisers of the Yom HaShoah service, the Jewish Board of Deputies, although a secular umbrella organisation, nevertheless aims to create a widely inclusive event that every member of the Cape Town Jewish community feels comfortable to attend.

A handwritten signature in black ink, consisting of a stylized 'W' followed by a horizontal line and a vertical line extending upwards.

6. The injunction against women singing solo must be seen in the context of Jewish Law's values and ethics, in terms of which discrimination against women is not tolerated. This cannot be otherwise, given the wider ethos and moral principles of Judaism. One of the central values of Judaism is that of the equality of all people, as the Talmud states: "*Beloved is the human being created in the image of G-d.*" There is a religious and ethical duty in Jewish law to treat every human being with respect and dignity, irrespective of race, or gender, or social and financial status. The equal worth and equal right to dignity of men and women is a central ethical value within the overarching structure of Judaism and Jewish religious law. The injunction against a woman singing in the presence of men is to be understood in the context of a broader ethic and value system within Jewish religious law, one which seeks to protect the dignity of women and nurture the sanctity of human sexuality.
7. Discrimination against women is anathema to Judaism, which reveres the prominent role of women, both in Jewish history as well as in daily Jewish life. The many heroes of the Hebrew Bible are women, most notably the four founding mothers of the Jewish people – Sarah, Rebecca, Rachel and Leah. When the Jewish people left Egypt and were in the desert for forty years, the leadership governing the people was a triumvirate of Moses, Aaron and Miriam. There are endless examples of the dynamic and important leadership roles that women play, and have played, within the context of Jewish religious life.
8. Thus the Jewish religious law injunction against women singing in the presence of men is to be understood not in the context of discrimination which

A handwritten signature, possibly 'by [unclear]', followed by a large, stylized flourish or checkmark-like mark.

undermines the dignity of women, but rather in the broader context of Judaism's worldview and ethos concerning human sexuality.

9. Unlike other certain religious philosophies which view human sexuality as an affront to holiness, Judaism takes the opposite view. It sees within human sexuality the potential for achieving holiness, provided that sexuality is expressed within the sacred privacy of marriage. The crucial words here are "private" and "holy". In fact the Talmudic word for "marriage" is "kedushin", which means holiness and also means specially designated. And so within the sanctity and privacy of marriage the expression of sexuality becomes an important value. There are many laws within Judaism that aim to preserve and protect sexuality within the framework of a private and holy relationship between husband and wife. Thus there are many laws governing the sanctity of the sexuality of a woman including that she should dress modestly, and that a man ought not to even look at any other woman, other than his wife, who is immodestly dressed. This has nothing to do with discrimination and everything to do with holiness. A woman's singing voice is regarded as being in the same category as her body and therefore Jewish law requires that it be reserved only for private occasions with her husband, or only in the presence of other women where it doesn't constitute a breach of the bounds of holiness.
10. Judaism operates as a legal system with laws that apply under all circumstances, even if the context may change somewhat. And so the laws

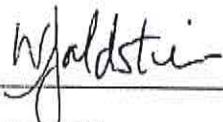


of sanctity and modesty apply even, and some would argue especially, in the context of a memorial service for the Holocaust.

11. Another of Jewish law's concerns is that of women being treated as objects of sexual gratification. Thus there are many laws which relate to how a woman should dress in a way which covers her body. These laws are not aimed at discriminating against women, but on the contrary are intended to protect the dignity of women. A woman's singing voice is treated in a similar way to her body. Judaism teaches the importance of people relating to one another as equal human beings, where bodies are covered with dignity and sanctity so that we relate to each other's souls, personalities and intellectual and emotional aspects. When too much of the physical body is exposed attention is drawn to the externalities of the person and the tendency is to objectify such externalities and detract from the dignity and worth of the human being concerned.
12. Thus Judaism's approach emerges from a completely different culture to that of modern Western culture, in which sexuality is exposed in every possible way. In the interests of cultural and religious diversity we all need to be respectful of each other's values and norms.
13. It follows that to argue that the injunction against a woman singing in public in the presence of men constitutes a form of discrimination is offensive to Judaism's own value system in which women are venerated and protected. Furthermore, the argument is false as is clear from the facts of the situation. The fact is that women play a prominent role in the Yom HaShoah service. The



sole and minor limitation on women's public participation relates to singing alone. Nothing else. Thus two recent past Chairpersons of the Cape Board of Deputies were women who presided over previous Yom HaShoah services. Women are often the keynote speakers and poetry readings are done by women of all ages. It is thus fair to say that women play a major role in the Yom HaShoah service.



DEPONENT

I certify that the Deponent has signed this solemn declaration before me at Zimbali, this 26th day of APRIL 2016, and that he acknowledged that he knows and understands the contents hereof, and confirms that the contents are true and correct.



COMMISSIONER OF OATHS

DALE GORDON COHEN

Practicing Attorney RSA

21 West Street

Houghton

Johannesburg