

**IN THE EQUALITY COURT OF SOUTH AFRICA  
HELD AT THE HIGH COURT OF SOUTH AFRICA,  
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: **EC04/2016**

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

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**REPLYING AFFIDAVIT**

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I, the undersigned

**GILAD (GERALD) STERN**

do hereby make oath and say that:

1. I am the first applicant and I make this affidavit on behalf of the three applicants.
2. We have read the affidavits of Mr Eric Michael Marx, Mary Julia Kluk and Chief Rabbi of South Africa Warren Goldstein all dated 26 April 2016 (the answering affidavits) filed on behalf of the Respondent in answer to the founding affidavit.

3. This affidavit is made in reply to the affidavits. I do not intend to deal with each and every aspect of the answering affidavits, a large portion of which deal with legal argument which will be dealt in written and oral argument by the applicants. Averments made in the answering affidavits not expressly denied herein are to be regarded as denied.
4. However, there are certain facts which are pertinent to this matter which require the applicants to put the record straight and to demonstrate why the respondent has not been entirely candid in its description of my offer to settle this application. There are also certain aspects of Rabbi Goldstein's affidavit which require an answer, despite the applicant's view that his entire affidavit is irrelevant to the application.
5. In reaction to this application the respondent issued a public statement in the media on **Wednesday 20 April 2016** stating:

" STATEMENT TO THE COMMUNITY - YOM HASHOAH

As mentioned in our first communication, legal proceedings have been launched in the Equality Court against the Cape Board to, inter alia, compel the Board to permit Women to sing at the Yom Hashoah ceremony.

Yom Hashoah was, prior to the Board's involvement, run under the aegis of the **religious bodies** in Cape Town. Through various circumstances, the Board was asked to assume responsibility for this ceremony, which it has done for decades. In its oversight of this ceremony, the Board has endeavoured to ensure that the ceremony is as **widely representative** of all Members of our Community. It has not been an easy task to balance the competing interests of the various sectors of the Community.

**In every other facet of the Board's operations and activities, it has demonstrated its complete commitment to gender equity.** Women participate at all levels, including taking up National and Local leadership positions, and there is full participation, including Women singing at other events under its aegis.

The matter of Yom Hashoah is not simple: On the one hand, we have the perceived issue of **discrimination** against Women and, on the other, the potential **religious discrimination** against those members of our Orthodox community including but not limited to its Rabbinic Leadership.

Either way, there will be members of our broad community that will feel excluded, having regard to the approach adopted by the Board. The Board's approach up to now has been

to endeavor to balance conflicting views and interests of the community as a whole and to achieve a position which is in the best interests of the community.

This has now been challenged. In the face of an uncompromising legal challenge, the Board has no choice but to defend the proceedings.

That said, the Cape Board recognizes that this is a community issue that is best and appropriately solved by the community itself. To this end, the Board has resolved to convene a colloquium comprising all interested parties and stakeholders in our Community to air all points of view and guide us in regard to future ceremonies. We will arrange this within the next two months.

We firmly believe that it is in the interests of all in our Community that we should resolve this matter, which is why we are arranging this colloquium. We are appealing to everyone, including the Litigants, to allow this process to unfold.

We need to be mindful of this most important point: that we gather on 5 May, as we have done in our thousands for many years, to commemorate, in unity with the Survivors, the six million of our people who perished in the Holocaust, merely because they were Jews.

I invite any Member of the Community to contact me if they wish to.

Finally, I take this opportunity to wish you Chag Sameach – as we sit together at our Seder tables with family and friends, let us strive to be unified as a Community, and deal with this issue of Yom Hashoah respectfully.”

(emphasis added)

6. Effectively the Board, while committed to gender equality (equity), had concerns that were it to adopt a gender equality approach to the ceremony it could have the effect of excluding certain persons from attending the event.
7. The applicants appreciated the concerns raised by the Board, although we did not (and do not) deem the concerns sufficient to ban women from singing solo at the ceremony.
8. We recognised that it was preferable to find a “reasonable accommodation” between our gender equality, Constitution based approach, on one hand, with, on the other hand, those who regard men and women as not equal, and adopt a paternalistic and discriminatory attitude towards one or other gender.

9. The Board, we contend, may not ever unfairly discriminate on the basis of, inter alia, race and gender, but to the extent it felt it could not do otherwise, it had and has at all times a duty to find such a reasonable accommodation.
10. In order to settle the matter in an open letter, written with prejudice, we made an open tender to the respondents, which was served on the respondent's attorneys the day after the Board's media statement on Thursday 21 April, 2016.
11. The applicants open tender, which was also published in the media, stated:

"The applicants have also considered the JBD's approach in terms of the Holocaust Memorial ceremony which includes leniency towards those who choose to discriminate on the basis of gender. The applicants continue to believe that discrimination on any basis such as gender or race, are utterly unacceptable and deserve the highest form of censure, and not leniency or protection.

Notwithstanding the applicants' beliefs, the applicants agree that the JBD's proposal of an inclusive colloquium on the issue to be held within two months is a good one subject to what is suggested in this statement regarding the appointment of a Chairperson and facilitator and the suggestion relating to the woman singing at the end of the Holocaust Memorial ceremony. The applicants propose that former Constitutional Court Judge Albie Sachs, be the Chairperson and facilitator of an independent colloquium. Justice Sachs has agreed to chair and facilitate the colloquium.

As far as this year's Holocaust Memorial ceremony is concerned, scheduled for 5<sup>th</sup> May, 2016, the applicants propose that a female singer lead the attendees in the singing of national anthems at the end of the service. Those who choose to leave the ceremony early, will be free to do so, before the singing of national anthems at the end.

The applicants issue this statement and proposal for two reasons: First, to emphasize the principle of non-discrimination and equality for all. And second, to recognise that those who don't hold the same views on equality may exercise their rights in that regard, by absenting themselves."

(emphasis added)

12. The essence of the applicants' open proposal was that a female would lead the singing of the national anthems at the very end of the ceremony and those who chose to leave the service before then could do so.

13. If what we regard as an eminently reasonable proposal was accepted by the respondent that would mean that the parties could resolve this matter without the court's intervention.
14. Those who feel it inappropriate, unlawful or irreligious to listen to a women sing would not be forced to do so. They could attend the ceremony, leave at an appropriate juncture.
15. Those who believe in gender equality would be reasonably accommodated by the Board permitting a women to sing at the end of the ceremony.
16. The respondent flatly rejected our offer on Monday 25 April 2016, stating that it would make no counter offer and that it would be filing its answering affidavit on the next day.
17. It is worth noting that on 24 April 2016 the University of Cape Town SA Union of Jewish Students (SAUJS) published the following statement on Facebook:

"Statement on Kol Isha controversy

[Please note: this statement represents the views of the UCT branch of the South African Union of Jewish Students and its members only, and does not necessarily represent the views of the national organisation or of any other organisation to which SAUJS UCT is affiliated.]

SAUJS UCT's mandate to 'represent the interests of Jewish students' has two parts. The first part (which usually forms the bulk of our work) entails representing the interests of Jewish students in structures outside of the Jewish community, including University management and student politics. The second part comprises of representing our constituents within the Jewish community itself. When an issue arises within the community that demands a voice which represents the sentiments of Jewish university students to be heard, our job is to be that voice.

The past month has seen a contentious issue arise within the Cape Town Jewish community. Legal proceedings have been brought against the South African Jewish Board of Deputies Cape Council ('The Board') with the aim of compelling the Board to permit women to sing at the community's Yom HaShoah (Holocaust Memorial Day) ceremony. The basis of this ban, as we understand it, is the Board's desire to balance all competing interests of the various sectors of our Community, including those of Orthodox Jews who observe a religious prohibition known as Kol Isha. This prohibition, which we understand to be controversial even within Orthodoxy, prevents men from hearing women sing, as this may be sexually arousing and thus immodest.

Our desire is not to enter into a conversation about the halakhic validity of this prohibition. We respect the rights of all Jews to hold—and act in accordance with—their interpretations of Jewish law, and we believe this right is one which needs to be fundamentally protected. On the other

hand, we take very seriously the principle of gender equality and the desire for women to resist against practices which they find oppressive and patriarchal. Most importantly however, we support the right of all our constituents to fully participate in Jewish communal life in a way which best includes them and allows the expression of their beliefs.

We have undergone a thorough process of consultation with our members about this issue. As a committee, we have spoken to a wide variety of Jewish students – women and men; Orthodox, Reform and secular. As a result, we have been led to believe that the majority of our members disagree with the ban on women singing at events which are meant to be representative of the whole community, not just a small contingent of extremely observant religious people. Preventing women from singing at the Yom HaShoah tekkes is not something which makes *most of us feel included, but rather excluded and marginalised.* The ban favours the beliefs of a small group of powerful people over the prevailing beliefs of our constituents. Enforcement of laws like Kol Isha at community events, we believe, could likely be one of the contributing factors to many young Jews' believing that communal events are becoming increasingly irrelevant to them.

While SAUJS UCT does not wish to comment on whether or not we believe legal proceedings are the best means to achieve the desired inclusivity described above, we do believe that the fact that the community has been unable to reach a decision internally without the assistance of a secular court speaks volumes about how power works within the community. We believe that any decision of this nature should be reached through broad internal consultation with all sectors and interest groups in the community, not only so that it is representative of the majority, but also so that the experiences of people who have been marginalised by those in power can be taken into serious consideration. Furthermore, in the interests of reversing this marginalisation, we believe that those in positions of religious power may have to compromise (by leaving the ceremony at a given time, for example), and relinquish their claim to being the only group whose beliefs are important and worthy of inclusion.

SAUJS UCT remains committed to working towards a Jewish community which takes the views of students into consideration, and takes active steps towards making us feel like our beliefs are important and relevant to the community as a whole. We look forward to participating in any process of community consultation which may occur in the upcoming months around this issue, and any issue in the future which may concern the Jewish communal involvement of our members."

(emphasis added)

18. The applicants once again propose that the Board permit a woman to sing at the end of the ceremony to enable those who wish to absent themselves from the singing women to do so.
19. **We invite the Board to explain before Thursday 5 May 2016 why it has rejected our reasonable offer.**
20. Were the Board to accept our reasonable offer "the marginalization and exclusion of the majority" of the Jewish community so powerfully identified by SAUJS would be ameliorated, if not entirely, then at least to some degree.

21. The applicants accept that this Court ought as a general rule not to get entangled in religious issues underpinning any dispute.
22. The dispute in issue in the case is not religious as we explained in our founding affidavit.
23. The dispute is between the applicants and the Board, which is a secular civic body in relation to an event which is civil, not religious in nature.
24. However, we are constrained to point to definite Jewish Orthodox learning which is contrary to the assertions of Mr Marx and Rabbi Goldstein concerning the Kol Isha doctrine.
25. Rabbi Mosheh Lichtenstein has addressed the issue in a piece entitled ***Kol Isha: A Woman's Voice*** published by the Rabbinical Council of America in Tradition, a Journal of Orthodox Jewish Thought, 46:1 (2013), a copy of which is annexed hereto marked "X."

Orthodox Rabbi Lichtenstein concludes:

"We may summarize as follows: **Under circumstances in which the song does not arouse sexual desire, does not emphasize femininity in a sensual manner, and the listener estimates that he will not come to have sexual thoughts – we should not forbid listening to a woman's voice, whether in speech or in song.** This conclusion not only relies upon the explicit stance of the greatest of the Rishonim – Rambam, Rashba and Ra'aviah; it appears in the literature of the Aharonim as a recognized opinion, and it has been applied in our generation by an eminent posek. This opinion takes into account the present societal reality together with its needs and constraints, while at the same time rules stringently regarding the obligation to preserve man's dignity and embolden his image as a spiritual creature who is not controlled by biological drives alone.

In terms of day-to-day life, this means that we may permit women's singing of Shabbat zemirot, participation in official ceremonies of a serious and formal nature, listening to random radio commercials, and the like. It is both possible and appropriate within the framework of Halakhah to permit these scenarios, and one who does so rules faithfully and legitimately."

(emphasis added, footnotes omitted)

26. The Yom Hashoah memorial has in the past in Cape Town included women singing solo. In this regard we invite the Board to make available to this Court programs of the Cape Town Yom Hashoah memorial service for the past 15 years.

27. I have been informed that indeed, on consideration of halachic principles in this regard, one knows that halachic doctrine has varied over the centuries – between Sephardic and Ashkenazi communities, and amongst different communities in different countries, at different times, in Jewish history.

During the rabbinate of Rabbi Schrock (OBM), and Rabbi Lapin (OBM), women were regular members in the mixed choir at the Yeoville Synagogue, a constituent of the United Hebrew Congregation of Johannesburg (an Orthodox synagogue).

At that time the late Rabbi Israel Kossowsky (OBM) was the esteemed and highly respected Dayan Gadol of the Johannesburg Beth Din and the Rabbi of the Beth Hamidrash Synagogue in Saratoga Avenue, Johannesburg.

28. The respondent seems to suggest it has tried to resolve the matter by organising a colloquium and that we have created our own urgency.

29. The Board's own answering affidavits confirms that many discussions have already taken place and it, notwithstanding the views of the applicants and other likeminded persons, decided to prohibit woman singing along at the ceremony.

30. It is not true, as the Board claims that the only way to satisfy all sectors of the community is to prevent women from singing.

31. There are other options other than discrimination against women based on gender.

32. First, those persons who do not want to hear a woman sing can exit 5 minutes before the conclusion of the Ceremony, before the anthems. That would not be a great, if any, hardship to them or disruption to the proceedings. That would be a simple, practical, equitable and reasonable solution.
33. Secondly, as the Respondent claims that there are prayers which render the Ceremony partly a religious ceremony; these prayers could be omitted, so as to ensure inclusivity. We would deeply regret the omission of the prayers, but the Holocaust can be commemorated in an appropriate manner without prayers, should the Respondent feel that the inclusion of prayers gives rise to the quasi-religious nature of the Ceremony.
34. Finally, the Respondent has tendered a colloquium to consider the matter. Our view is that such a colloquium will need to be conducted in an impartial and independent manner. The Respondent cannot be both player and referee. An independent facilitator is required and we have proposed Justice Albie Sachs, who has agreed to play such a role.
35. The resolution which is sought at the colloquium cannot of course ignore the supremacy of the Constitution's central principle of equality.
36. In the Respondent's affidavit at paragraph 22, they state that the prohibition on a man's hearing a woman sing solo has "been observed by many Orthodox Jews for thousands of years". This statement is incorrect as pointed out by Rabbi Lichtenstein with reference to established doctrine.
37. In any event the Holocaust Memorial Ceremony is not a religious ceremony of one or other grouping of the Jewish community but a ceremony to commemorate the Holocaust.

As such woman and men are not separated as required at an Orthodox synagogue, for example. Why then, does the Board require a part only of the Orthodox grouping's beliefs, which is that a woman should not sing to men other than their husbands?

38. The Board suggests that the rights to freedom of association, freedom of religion, freedom of choice and dignity are implicated if woman are allowed to sing alone. This defies logic. By prohibiting woman from singing alone you are limiting their right to freedom of association, freedom of choice and their dignity, in that they can only have freedom to associate at this ceremony if they do not sing. Secondly, the Respondents are favouring one grouping of the Jewish community's freedom of religion over that of the others. So in fact the right to freedom of association and religion is in fact a right that woman and those, such as the applicants assert in this matter. It is our freedom of religion and association that is being violated.
39. Banning solo singing by a woman marginalises and excludes the majority. The ban is a violation, *inter alia*, the rights of dignity, freedom of religion, freedom of association of the applicants and likeminded people, not of the Board and the rabbis.
40. In turning to Rabbi Goldstein's affidavit we wish to emphasize that our understanding is that the Board accept that the ban on women singing solo is discrimination on the basis of gender, but that it is fair or justified because of the inclusivity imperative. The applicants contend that can never be a constitutionally valid reason to discriminate on the basis of one of the listed ground.
41. We hope our understanding of Rabbi Goldstein's is not correct. If our understanding is correct we have some unfortunate and indeed harsh comments to make.
42. We reiterate that the religious basis of the ban on women singing is irrelevant as the ban was imposed by a secular body in relation to a secular event/ceremony commemorating the Holocaust, a crime against humanity, which was not in any way a religious event. As mentioned before, Hitler and the Nazis did not discriminate against woman. Jewish men, women and children were all subject to the monstrous crimes committed by the Nazis.
43. Despite the irrelevance of Rabbi Goldstein's affidavit, we are constrained to unfortunately comment on his views, such as they are.

44. Rabbi Goldstein seems to suggest that a ban on women singing does not constitute discrimination at all. This is a different stance to that taken by the Board.

45. Rabbi Goldstein says (in paragraph 6) in terms that “discrimination against women is not tolerated in the context of Jewish Law’s values and ethics.”<sup>1</sup>

Equality of all people is a central value of Judaism, he suggests.

46. The reasons, so we understand Rabbi Goldstein’s stance in this regard, is that the “injunction against a woman singing in the presence of men” is to “protect the dignity of women and nurture the sanctity of human sexuality.”

47. The applicants, as already pointed out above, take issue with that reasoning and conclusion. (see the piece by Rabbi Lichtenstein)

48. But the difficulty is the paternalist attitude contained in Rabbi Goldstein’s explanation for the ban or injunction.

49. Indeed, apartheid was justified on biblical notions that different races should be ruled and governed separately for their own protection and in their own interests and right to dignity. These doctrines were universally condemned as crimes against humanity. One wonders what future generations will make of the notion of an injunction against women singing in front of men to protect “the women’s dignity.”

50. Indeed, in looking back just 104 years ago this Court will recall the seminal decision of the then Appellate Division in the *Wookey* case. In *Incorporated Law Society v Wookey* 1912 AD 623 Ms Wookey was prohibited from being admitted as an attorney only on the basis of womanhood. This was because Roman Dutch Law “*protect[ed] women, but protected them as being the weaker vessels, and subject to natural and legal disabilities*”. That type of reasoning would be regarded as quaint and bizarre today. That is what I stated in an interview with television station ENCA, and I stand by

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<sup>1</sup> Rabbi Goldstein is not correct in this regard. Two simple examples suffice. First, women (and slaves and the mentally unstable) may not be witnesses in Jewish law courts. Men can be witnesses. Secondly, Women who want to divorce, require a divorce (“*get*”) to be granted by their husbands. If a man refuses to grant a *get*, the woman is “chained” in the marriage. A woman cannot give her husband a *get*.

those views. The principles and thinking in Wookey are a thing of the past and in terms of the Constitution, men and woman are equal and have the right to be treated equally and not be unfairly discriminated against.

51. Before concluding with a repeated tender to allow a woman to sing at the end of the ceremony we are constrained to point out that on 10 December 2013 a memorial service for the death of former President Nelson Mandela was held in which Rabbi Goldstein attended the memorial and gave a sermon. At President Mandela's memorial a woman, Ms Baleka Mbete, sang solo. Rabbi Goldstein sat throughout Ms Mbete's singing a song solo. He did not absent himself from listening to a woman sing solo. We respect Rabbi Goldstein's decision to do so, and we hope and trust that he can lead the rabbis and members of the Board to adopt a dignified response to our proposal.

52. We submit that a proper case has been made out that the Board has committed unconstitutional discrimination on the basis of gender, and has violated the law. Accordingly, this Court is empowered and indeed ought to grant appropriate just and equitable relief to remedy the wrong.

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**GILAD (GERALD) STERN**

I certify that:

1. The deponent acknowledged 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            day of **MAY 2016**.

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**COMMISSIONER OF OATHS**