IN THE EQUALITY COURT OF SOUTH AFRICA
(HELD AT EASTERN CAPE DIVISION, GQEBERHA)

CASE NO.: 2391/2023

In the application for admission as an *amicus curiae* of:

MEDIA MONITORING AFRICA TRUST	Applicant for admission as *Amicus Curiae*

In the matter between:

SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Complainant
and	
DAWOOD LAGARDIEN	Respondent

AMICUS CURIAE'S **HEADS OF ARGUMENT**

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INTRODUCTION

1. Competing rights and interests are a common characteristic of diverse societies, such as ours.[1] The remedy is to foster respect and tolerance.[2]

2. While our Constitution recognises and celebrates human variability and affirms the right to be different,[3] this diversity may lead to different interests standing in conflict with one another. When rights collide, an appropriate balance is required.[4] Such a balance should be struck in a way that encourages the tolerance and respect for diversity that our Constitution demands from all in our society.[5]

3. Central to the issues before this Court is the need to balance the rights to dignity and equality,[6] freedom of religion,[7] and freedom of expression.[8] This arises against the backdrop of acts of intimacy by two members of the LGBTQI+ community,[9] the placement of a sign, and the creation of a WhatsApp group purportedly as expressions of religious beliefs.[10] This led to a complaint by the

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[1] *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* [2023] ZACC 13 2023 (8) BCLR 905 (CC); 2023 (5) SA 319 (CC) ("***Arena Holdings***") at para 129.
[2] *Prince v President of the Law Society of the Cape of Good Hope* [2002] ZACC 1; 2002 (2) SA 794; 2002 (3) BCLR 231 (CC) ("***Prince***") at para 147.
[3] *Minister of Home Affairs and Another v Fourie and Another* [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) at para 60.
[4] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 at para 114; and *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* [2008] ZAGPHC 269; (2009) 30 ILJ 868 (EqC) ("***Strydom***") at para 8.
[5] *Prince* above n 2 para 147.
[6] Section 9 and 10 of the Constitution.
[7] Section 15 of the Constitution.
[8] Section 16 of the Constitution.
[9] Respondent's Founding Affidavit to Counter Application, para 12.
[10] Respondent's Heads of Argument, para 1.

South African Human Rights Commission ("**SAHRC**"), that the conduct of placing the sign and creating and disseminating information on the WhatsApp group incited harm against the LGBTQI+ community.[11]

4. The Media Monitoring Africa Trust ("**MMA**") seeks to be admitted as an *amicus curiae* in this matter, in accordance with regulation 10(5)(c)(vi) of the Regulations to the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 ("**the Regulations**"), in order to offer assistance to this Court in navigating the required balancing exercise, addressing the complex and nuanced issues that arise in respect of the contemporary modes of communication, and enabling remedies that foster tolerance and embrace diversity.

5. MMA is a not-for-profit organisation that has been operating for 30 years to advocate for access to information, freedom of expression, and the responsible free flow of information to the public. MMA seeks to implement innovative rights-based approaches to expression on- and offline, the promotion of equality and inclusion, and the relation of a fair and just society that respects a culture of human rights.[12] MMA has participated in litigation that centres on the appropriate balance to be struck between freedom of expression and other competing rights and interests, as well as pertinent questions relating to the application of rights in the digital era.[13]

[11] Complainant's Form 2, p 4.
[12] MMA's Founding Affidavit, paras 14-19.
[13] MMA's Founding Affidavit para 16.

6. In line with MMA's particular areas of interest and expertise, and cognisant of the duty of an *amicus curiae* not to repeat any of the submissions that have already been canvassed by the parties, MMA's substantive submissions are narrowly tailored to three issues of law relevant to the present matter:[14]

6.1. First, the appropriate balance to be struck between the constitutional rights raised in this matter: the right to freedom of religion, the right to freedom of expression, and the rights to equality and dignity of members of the LGBTQI+ community.

6.2. Second, the considerations applicable when navigating different forms of public and private communication.

6.3. Third, the remedy sought, with a focus on restorative and alternative justice.

7. These written submissions are structured in two parts. First, we deal with the application for admission as an *amicus curiae*. Thereafter, we deal with the substantive submissions advanced on behalf of MMA.

[14] MMA's application to intervene as *amicus curiae* included reference to an additional substantive submission: the proper interpretation of the fair and accurate reporting in terms of section 12 (MMA's Founding Affidavit, paras 29-35). The Complainants have since addressed this in their Heads of Argument at paras 25-28. Accordingly, and in order not to repeat submissions already canvassed by the parties, MMA will not be making submissions on this point, unless directed to do so by the Court.

MMA'S ADMISSION AS AN AMICUS CURIAE

Role and importance of an *amicus curiae*

8. In ***Hoffman v South African Airways***, the role of an *amicus curiae* was described as follows:

> "An *amicus curiae* assists the Court by furnishing information or argument regarding questions of law or fact. An *amicus* is not a party to litigation but believes that the Court's decision may affect its interest. The *amicus* differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An *amicus* joins proceedings, as its name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the Court because of its expertise on or interest in the matter before the Court. It chooses the side it wishes to join unless requested by the Court to urge a particular position."[15]

9. Furthermore, in ***In Re: Certain Amicus Curiae Applications; Minister of Health v Treatment Action Campaign***, it was explained that the role of the *amicus curiae*—

> "is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an *amicus* has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The *amicus* must not repeat arguments already made but must raise new contentions, and generally,

[15] *Hoffman v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 at para 63.

these new contentions must be raised on the data already before the court."[16]

10. Our courts value the role of *amicus curiae* and have noted their role as "very closely linked to the protection of our constitutional values and the rights enshrined in the Bill of Rights", with the purpose of Rule 16A "to facilitate the role of *amici* in promoting and protecting the public interest."[17]

11. In the present matter, MMA is cognisant of the special duty that it owes to this Court to provide cogent and helpful submissions, to be of assistance to this Court in the determination of this matter, and to promote constitutional rights and values.

Requirements for admission as an *amicus curiae*

12. Regulation 10(5)(c)(vi) of the Regulations afford this Court — sitting in its capacity as an Equality Court — a broad discretion in respect of the admission of *amicus curiae*. Specifically, it provides that a presiding officer may make any order in respect of *amicus curiae* interventions. This should also be read in accordance with the guiding principles contained in section 4 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("**PEPUDA**"), which emphasise that proceedings in terms of PEPUDA are intended to be

[16] *In Re: Certain Amicus Curiae Applications; Minister of Health v Treatment Action Campaign* [2002] ZACC 13 at para 5.
[17] *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others* [2012] ZACC 25; 2013 (2) SA 620 (CC); 2013 (1) BCLR 1 (CC) at para 26.

"expeditious and informal", and further conducted in a manner that facilitates "participation" and "access to justice to all persons"[18]

13. Therefore, this Court, sitting as an Equality Court, is granted a broader discretion than it would ordinarily have by virtue of the provisions of PEPUDA and the Regulations, including in respect of MMA's application for admission as an *amicus curiae*.

14. While PEPUDA and the Regulations are silent on the specific requirements that must be met in order for a prospective *amicus curiae* to be admitted, three requirements can be distilled from the case law: relevance, usefulness, and novelty.[19] MMA submits that it meets all three requirements:

    14.1. Specifically, MMA seeks to advance submissions on the importance of balancing competing rights and interests. While the parties have, to some degree, raised the need for balancing competing rights, the relevant domestic and international law relied on by MMA, presently not before this Court, will assist this Court in its balancing exercise.[20]

    14.2. Further, and mindful of the context of the impugned conduct taking place in the WhatsApp group, MMA seeks to provide this Court with factors to

[18] Section 4(1)(a) – (c) of PEPUDA.
[19] *Institute for Security Studies; In Re: S v Basson* [2005] ZACC 4; 2006 (6) SA 195 (CC) at para 6.
[20] MMA Founding Affidavit, paras 21-25.

consider when offending content is disseminated through messaging platforms.[21]

14.3. Lastly, MMA intends to make brief submissions on remedies aligned with the principles of alternative and restorative justice.[22]

15. MMA does not seek to adduce new evidence but rather raises substantive matters of law. The substantive submissions to be advanced by MMA are directly relevant to the constitutional and contextual underpinnings of this matter and will assist this Court in its adjudication and determination of this dispute. In formulating these submissions, MMA has had regard to the papers to ensure that the submissions are narrowly tailored to the pertinent issues before the Court.

16. Accordingly, considering the relevance, usefulness, and novelty of its submissions, MMA submits that its application for admission as an *amicus curiae* should properly be granted. Given the complex and nuanced issues that arise from the present matter, MMA is of the view that these submissions need to be appropriately considered by this Court, as they have a direct bearing on the potential outcome of this matter.

17. MMA has obtained consent from all parties to intervene in the proceedings and its application is unopposed.[23] MMA therefore submits that in the interest of convenience and expedience, its application should be heard together with the

[21] MMA Founding Affidavit, paras 26-28.
[22] MMA Founding Affidavit, paras 36-38.
[23] MMA Founding Affidavit, paras 7-11.

Main Application. This does not cause prejudice to any parties, and the submissions which MMA seeks to advance are relevant to the proceedings, will assist this Court, and are different from those of the other parties.

SUBSTANTIVE SUBMISSIONS ON BEHALF OF MMA

Balancing the rights relevant to this matter

18. The Complainant asserts that the conduct of the Respondent "propagates hate speech and unfairly discriminates against members of the LGBTQI+ community".[24] The Respondent argues that his conduct was an "expression of religious beliefs" and that he is permitted under section 15 of the Constitution (the right to freedom of religion) to believe that "members of his community should not be exposed to homosexual behaviour".[25] He argues further that given the protections afforded by the right to freedom of religion, his statements should not constitute prohibited speech.[26] In response, the Complainant submits that the Respondent should not be allowed to use the right to freedom of religion to justify his offensive conduct.[27]

19. The arguments raised by the parties create tension between the right to freedom of expression, the right to freedom of religion, and the rights of members of the LGBTQI+ community, including the rights to equality and dignity.

[24] Complainant's Heads of Argument, para 7.
[25] Respondent's Heads of Argument, paras 57-58.
[26] Respondent's Heads of Argument, para 71.
[27] Complainant's Heads of Argument, paras 4-5.

20. It is not uncommon in a diverse society for rights and interests to come into conflict. These tensions can arise in the context of sexuality, expression, and religion.[28] No rights-based hierarchy exists that swiftly resolves the conflict, as such conflict must invariably be approached by balancing those rights and interests.[29]

21. MMA submits that the Court ought to embark on such an exercise and provides three interlinking factors that should inform this Court's approach:

    21.1. Religious and expressive rights are not absolute and must be consistent with the Constitution;[30]

    21.2. A cautious approach should be adopted to religious "justifications"; and

    21.3. The right to freedom of religion and the rights of LGBTQI+ persons are not mutually exclusive.

[28] For example, *Strydom* above n 4.
[29] *Arena Holdings* above n 1 at para 129.
[30] The term "expressive rights" is used to describe the right to freedom including the freedom to seek, receive, and impart information and ideas on an equal basis with others and through all forms of communication. See, for example, *Blind SA v Minister of Trade, Industry and Competition and Others* [2022] ZACC 33 at para 40.

Exercising religious and expressive rights must be consistent with the Constitution

22. While "there can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important", it is not absolute.[31] Section 15 of the Constitution provides for the right to freedom of religion, and section 31 provides individuals with the right to practice their religion. Section 31(2) provides that the practice of one religion may not be exercised in a manner inconsistent with any provision in the Bill of Rights.

23. Sachs J in ***Christian Education*** saliently holds that section 31(2) ensures that "religion cannot be used to shield practices which offend the Bill of Rights".[32]

24. Freedom of expression, which lies at the "heart of a democracy", is also not absolute.[33] Where speech and conduct subverts the dignity and self-worth of others, marginalises and delegitimises individuals based on their membership of a group, and violates the rights of another person or group of persons based on group identity, it is not protected under the right to freedom of expression.[34] There is a difference between expression and conduct that may be insulting, offensive,

[31] *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (CC) at para 36 and 42 ("***Christian Education***").
[32] *Id* at para 26.
[33] *South African National Defence Union v Minister of Defence and Another* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC); *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC) ("***Qwelane***").
[34] *Qwelane id* at paras 1 and 81

or contrarian and expression and conduct that advocates, incites, propagates and promotes discrimination and hatred towards a particular group.[35]

25. In ***Islamic Unity***, the Constitutional Court confirmed that there are "boundaries beyond which the right to freedom of expression does not extend" and "certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm".[36]

26. While the right to freedom of religion, the right to practice one's religion, and the right to freedom of expression are constitutionally protected, they do not automatically trump other rights. To the extent they infringe on the rights of others, and are contrary to the Bill of Rights, such expression or conduct may fall outside the realm of constitutional protection and may lead to consequences as envisaged in PEPUDA.

27. Accordingly, the exercise of religious and expressive rights must be consistent with the Constitution and cannot be misused as a shield to justify unconstitutional conduct.

[35] *Id* paras 73-76.
[36] *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) ("***Islamic Unity***") at para 32.

Adopting a cautious approach to religious "justifications"

28. In addition to constitutional protections, international human rights law provides for the rights to freedom of religion, freedom of expression, and equality and non-discrimination [37] Article 18 of the International Covenant on Civil and Political Rights ("**ICCPR**"),[38] protects everyone's freedom to have or to adopt and to manifest a religion or belief of their choice. Article 19 of the ICCPR provides for the right to freedom of expression. Non-discrimination is guaranteed by Article 2(1) and in Article 26 of the ICCPR. That all persons should live free from violence and discrimination based on their sexual orientation and/or gender identity has also been accepted by the international human rights system.[39]

29. As is the case here, tensions between these rights have attracted the attention of recognised international independent experts. In particular, the concerns with religious narratives that are used to justify violence and discrimination and that constitute actions contrary to the human rights of LGBTQI+ persons.[40]

[37] Section 39(1)(b) of the Constitution requires all South African courts to consider international law when interpreting the Bill of Rights. Section 3(2) of PEPUDA similarly enjoins Courts to be mindful of international law when interpreting the Act.

[38] International Covenant on Civil and Political Rights (1976) ("**ICCPR**"). South Africa has signed and ratified the ICCPR.

[39] Report of the Independent Expert on Protection against Violence and discrimination based on sexual orientation and gender Identity (2017) A/HRC/35/36 at para 24; and Report of the Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity, 'Freedom of religion or belief, and freedom from violence and discrimination based on sexual orientation and gender identity' (2023) A/HRC/53/37 ("**Independent Expert on SOGI Report, 2023**") at para 9.

[40] *Id*.

30. The Special Rapporteur on Freedom of Religion or Belief ("**UNSR on FoRB**") has recorded reports of the rising number of hate crimes based on sexual orientation and gender identity worldwide by faith-based groups using interpretations of religious teachings that promote gender-based violence and discrimination and that violate the human rights of LGBTQI+ persons.[41] In an effort to guard against such "justifications" the UNSR on FoRB has called on States to publicly condemn expressions of hostility against LGBTQI+ persons, including by religious figures or when "justified" with reference to religious belief.[42]

31. More recently, the United Nations Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity ("**Independent Expert on SOGI**") has captured some of the harms associated with justifying religious narratives that lead to acts of violence and discrimination based on sexual orientation and gender identity. For example, interpretations of religious doctrines that result in "denunciations of LGBT people needing to be 'cured' or punished leads to significant harm, exile from communities, emotional distress and suicidality, or cruel, inhuman, or degrading treatment or punishment."[43]

32. An additional caution against blanket justifications pertains to the need to recognise that religious communities themselves are not necessarily monolith

[41] Report of the Special Rapporteur on freedom of religion or belief, 'Gender-based violence and discrimination in the name of religion or belief' (2020) A/HRC/43/48 ("**UNSR on FoRB Report**") at paras 13, 41, and 42.
[42] *Id* at para 52.
[43] *Id* at para 25.

and that a variety of views and interpretations can exist within a religious group. The UNSR on FoRB explains that—

> "A multitude of voices exist within religious groups and institutions, including faith-based actors who campaign for the rights of women, girls and LGBT+ persons and work to promote gender equality within their faith. Advocates within religions, across multiple traditions, have long sought to challenge norms and expectations that undermine the human rights of women, girls and LGBT+ persons; many have expanded religious leadership and influencer roles for women and challenged interpretations of religious texts that are used to "justify" discrimination and other harmful practices against women, girls and LGBT+ persons.
>
> Their work makes clear that religions are not necessarily the source of gender-based discrimination and violence, but that interpretations of those beliefs, which are not protected per se, and which are not necessarily held by all members of a religious community, are often the source of gender-based violence and discrimination."[44] (Own emphasis.)

33. The UNSR on FoRB further explains that while "religious organisations are entitled to autonomy in the administration of their affairs, such deference should be extended within a holistic conception of human rights grounded in the universality, indivisibility, interdependence and inalienability of all human rights."[45] This means that religion and religious deference are not a license to justify the violations of the rights of others.

34. MMA supports the cautions from international independent experts and submits that blanket justifications for harassment, discrimination, and hate speech in the name of religion are contrary to our Constitution as well as international human rights law.

[44] *Id* at para 38.
[45] *Id* at para 47.

35. Broad religious justifications of statements of a purportedly "globally shared sentiment" to "push back against the perversion what the LGBTQ movement now is",[46] which is something "sinister"[47] may amount to such a justification cautioned against above.

The right to freedom of religion and the rights of LGBTQI+ persons are not mutually exclusive

36. A final consideration in the balancing exercise relates to the acceptance that the right to freedom of religion and the rights of LGBTQI+ persons are not mutually exclusive; one need not trump the other. This position is supported by the Independent Expert on SOGI who found that the right to freedom of religion and freedom from violence and discrimination based on sexual orientation and gender identity are fully compatible under international human rights law.[48]

37. In advancing this position, the Independent Expert on SOGI drew on examples that demonstrate how religion can incorporate inclusive and supportive approaches. A notable example stems from Cape Town where a homosexual Imam advocates for the inclusion of LGBTQI+ persons in the Muslim faith[49] — illustrating that these rights can be balanced in order to ensure that the dignity

[46] Respondent's Answering Affidavit in the Main Application and Founding Affidavit in the Counter Application, para 34.1.
[47] *Id* at para 34.2
[48] Independent Expert on SOGI 2023 Report above n 39 at para 8.
[49] *Id* at 57.

and safety and security of all are protected and are fully compatible.[50] Another example is the progressive Islamic organisation, the Al-Fatiha Foundation, which argues that laws that discriminate against LGBTQI+ persons are "incompatible with the values of peace and tolerance adopted by the Prophet Muhammad".[51]

38. A tension of rights has arisen, and a balance must be struck. This entails a recognition that expression, including religious expression, may not be protected if it impairs the exercise of other rights. Moreover, in line with international law guidance, a cautionary approach is required when religious justifications are used to validate hateful and discriminatory expressions. Finally, as evidenced a balance is achievable that can foster tolerance and respect, rather than hate.

39. Within the context of the present matter, it may be that the religious justification should not be permitted significant leeway in defence of the impugned conduct. The right to freedom of religion is not a blanket justification that creates immunity against prohibitions under PEPUDA. A balance in favour of equality may be appropriate.

Public and private forms of communication

40. It appears common cause that the Respondent started a WhatsApp group, "Our rights - anti LGBTQ+" which had over 600 members.[52] The SAHRC submits that

[50] *Id* at para 8.
[51] *Id* at para 58.
[52] Complainant's Founding Affidavit at para 41. Respondent's Founding Affidavit in the Counter Application at para 17, Complainant's Heads of Argument at para 19.

the 633 members meant the information was shared publicly.[53] The Respondent argues that this Court is tasked with determining whether the creation of a WhatsApp Group constitutes dissemination and publication of discriminatory information when the communications were not made by the person who created the group.[54] He submits further that neither the group nor its contents were broadcast on any public platform or to persons that could have been offended, and that the group was created for awareness purposes for the community.[55]

41. The WhatsApp group raises two important questions:

41.1. The bounds of public and private "communication" in the context of a WhatsApp group; and

41.2. The bounds of "advocacy" and "propagation" in the creation of a WhatsApp group.

The bounds of public and private communication

42. Section 10 of PEPUDA prohibits the publishing, propagating, advocating, or communicating hate speech. In ***Qwelane***, the Constitutional Court found that to "publish"; "propagate" or "advocate" requires some form of public

[53] Complainant's Heads of Argument, para 19.
[54] Respondent's Heads of Argument, para 5.2.
[55] Respondent's Founding Affidavit to the Counter Application, paras 39.

dissemination.[56] The Court held that "communicate" is capable of both being public and private.[57] The Court held that "our most private communications — and being able to freely communicate in one's private and personal sphere — form part and parcel of the "inner sanctum of the person" and are in the "the truly personal realm".[58] As such, private communication would fall outside the scope of hate speech.

43. MMA supports this distinction between public and private communication.[59] Private communications that fall within the "inner sanctum of the person"[60] should not fall within the prohibition of hate as this could amount to a limitation on the right to privacy. However, MMA equally recognises that as one moves away from the inner sanctum of one's life to more communal spaces, the scope of that personal space shrinks and the claim to individual autonomy and the right of privacy that attaches to it becomes less pressing.[61]

44. WhatsApp, and WhatsApp groups in particular, are a unique and contemporary form of publication. Unlike publishing an article in a newspaper,[62] gratuitously

[56] *Qwelane* above n 33 at para 116. The Court relied on the following definitions from *Lexico:* "publish" refers to "prepare and issue (a book, journal, piece of music, etc.) for public sale, distribution or readership"; "advocate" means to "publicly recommend or support"; and "propagate" means "to spread and promote (an idea, theory etc.) widely".
[57] *Id*.
[58] *Id*.
[59] For example, MMA addressed this point in its submissions as amicus in *Qwelane.* MMA Heads of Argument in *Qwelane* (23 April 2020).
[60] *Bernstein v Bester N.N.O* 1996 (2) SA 751 (CC) ("***Bernstein***") at para 67.
[61] *Id*. *Arena Holdings* above n 1 at para 142.
[62] *Qwelane* above n 33 at para 2.

publicly displaying the old South African flag,[63] making utterances on a website,[64] and posting comments on a Facebook page,[65] — which are all more clearly forms of public communication — content shared on WhatsApp groups traverse the bounds of public and private communication.

45. The range and different types of WhatsApp groups may make delineating the bounds of communication somewhat challenging. A WhatsApp group could consist of three family members, multiple people who may never have met living in a similar area, or over 600 people who subscribe to a particular religion.

46. WhatsApp groups therefore pose unique considerations in the context of PEPUDA and the scope of "communication" in section 10. MMA does not seek to suggest a prescriptive approach as to when a WhatsApp group is public and when it is private, nor does it suggest that the default position be that WhatsApp groups are public. However, MMA proffers several interrelated factors that may be of use to the Court in its determination of the scope of communication:

    46.1. Nature and purpose of the group: This enquiry considers the intention or objective of the WhatsApp group. Taking guidance from the Protection of Personal Information Act 2 of 2014 which provides for processing information "in the course of a purely personal or household activity",[66] a

[63] *Afriforum NPC v Nelson Mandela Foundation Trust and Others* [2023] ZASCA 58; 2023 (4) SA 1 (SCA); [2023] 3 All SA 1 (SCA) at paras 37-38.
[64] *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* [2022] ZACC 5; 2022 (4) SA 1 (CC); 2022 (7) BCLR 850 (CC).
[65] *Chinese Association Gauteng (TCA) v Henning and Others* [2022] ZAGPJHC 590 ("***Chinese Association Gauteng***").
[66] 4 of 2014 at section 6(1)(a).

group used for purely personal purposes or household activities will likely fall within the realm of private communication. This aligns with the ***Bernstein*** approach of family life and home environment falling within the personal realm.[67] Whereas a group set up to spread awareness in a community on a certain topic may fall into a more public realm.

46.2. Accessibility of the group: Analogous to one's home, where you can choose to invite someone in, a WhatsApp group that requires an invitation from an existing contact may err on the side of private communication, whereas a larger group that individuals can join without invitation (or where any member of the group may invite other people) may be viewed as a more public forum.

46.3. WhatsApp groups as spaces for social interaction: The Court in ***Bernstein*** captured how the scope of privacy changes as an individual's activities "acquire a social dimension".[68] As people join a WhatsApp group — whether by invitation or signing up — that person moves into communal relations such as social interaction and the scope of personal (and private) space shrinks,[69] suggesting that subject to the other factors, the notion of private communication also shrinks.

46.4. Size of the group: This is a contextual consideration that needs to be considered along with the above factors. MMA does not propose that a

[67] *Berstein* above n 58 at para 67.
[68] *Bernstein* above n 60 at para 77.
[69] *Id* at 67.

specific number of group members move a group from private to public. But as with the other factors, the size of the group can assist in determining, on a reasonable basis, whether the group is public and the communication within the group is more public. The larger the group, the more likely there is that there will be some form of "public dissemination".[70]

47. It is necessary to note that the factors above should viewed as a non-exhaustive list of factors that are not individually decisive but are interrelated and must be considered in the light of the context of a particular matter. They should be considered in line with the objects (section 2), interpretation (section 3), and guiding principles (section 4) of PEPUDA, and alongside the right to privacy.[71]

48. Aligning the above to PEPUDA, and in the context of groups created to raise awareness, consideration should be had as to whether the awareness raising exposes the target group to hatred, perpetuates negative stereotyping and unfair discrimination, and whether the group seeks to propagate hate speech, in other words, "spread and promote (an idea, theory etc.) widely".[72] The Court in ***Qwelane*** viewed "public hateful expression" as undermining the target group's dignity, social standing and assurance against exclusion, hostility, discrimination, and violence.[73]

[70] *Qwelane* above n 33 at para 116.
[71] *Id* and *Bernstein* above n 60.
[72] *Qwelane* above n 33 at para 116 and 118.
[73] *Id* at para 118.

The bounds of advocacy and propagation

49. The Respondent argues that the creation and administration of a WhatsApp Group do not fall within the meaning of unfair discrimination.[74] The Complainant submits that the Respondent's intention for establishing the group is immaterial due to the objective test applied to hate speech.[75] On this point, there appears to be some divergence with the Respondent focused on section 12 and the Complainant on section 10 of PEPUDA. Nevertheless, and similarly to the points above, the creation and administration of a WhatsApp Group raises novel considerations.

50. In this regard, MMA suggests that the above factors, along with the definitions of advocacy (to "publicly recommend or support") and "propagate" ("to spread and promote an idea, theory etc. widely") as cited in ***Qwelane***,[76] may be of use to this Court in understanding the scope of the role of a WhatsApp group's creator and administrator in terms of PEPUDA.

51. For example, in terms of the nature of the group, the Court could have regard to the title and image of the group. An image and title may be illustrative of the advocacy and propagation of hatred. The group description, if available, may also be illustrative. The Court could similarly have regard to the size and accessibility of a group.

[74] Respondent's Heads of Argument, para 41.
[75] Complainant's Heads of Argument, para 20.
[76] *Qwelane* above n 33 at para 116.

52. In applying the above factors to the present matter, it is likely that the WhatsApp group “Our rights - anti LGBTQ+” falls within the bounds of public communication.

53. If this is accepted, it is then for the Court to determine whether this amounts to “public hateful expression”.[77] In doing so, as set out in ***Qwelane*** consideration should be had as to whether the “awareness raising” “undermines the target group’s dignity, social standing and assurance against exclusion, hostility, discrimination and violence”[78] Regard should be had as to “the speech must expose the target group to hatred and be likely to perpetuate negative stereotyping and unfair discrimination”.[79]

54. The creation of a space – virtual or otherwise – that communicates, propagates, or advocates public hateful expression is subject to the prohibitions in PEPUDA.

An effective and appropriate remedy

55. Section 21(2) of PEPUDA grants this Court a wide discretion to craft an appropriate remedy. The Complainants seek final relief in the form of a declarator, coupled with an apology and the payment of damages to an organisation identified by the Complainant.[80] The Commission for Gender Equality (“**CGE**”), an intervening party, seeks additional relief, first in the form of training and or education, as well as an order that the Respondent not use any

[77] *Id* at para 118.
[78] *Id*.
[79] *Qwelane* above n 33 at para 116 and 118.
[80] Complainant’s Heads of Argument, paras 29-31.

platform to spread or incite unlawful messages or statements aimed at the LGBTQI+ community.[81]

56. To the extent the Court makes a finding in terms of sections 10, 11, and/or 12 of PEPUDA, MMA submits the Court should consider a remedy grounded in restorative justice that has the potential to foster tolerance and respect.

57. In ***Dikoko*** the Sachs J captured the value of restorative justice as, among others enabling an opportunity for "victims and offenders to talk about the hurt caused and how the parties are to get on in future".[82] It also creates a path for the "achievement of mutual respect for and mutual commitment to one another".[83]

58. In this regard, MMA emphasises the following potential remedies.

The importance of an apology as a remedy

59. MMA submits that an apology in the present matter is a particularly important remedy, as contemplated in section 21(2)(j) of PEPUDA. Our courts have consistently placed considerable weight on such a remedy. For instance, in the context of defamation, in ***Dikoko*** the majority of the Court, per Mokgoro J, drew a link between the importance of an apology and the idea of ubuntu or both, stating that—

[81] CGE's Application to Intervene, para 9.1.
[82] *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) ("*Dikoko*") at para 114 (Sachs J judgment)
[83] *Id*.

> "A remedy based on the idea of ubuntu or both could go much further in restoring human dignity than an imposed monetary award in which the size of the victory is measured by the quantum ordered and the parties are further estranged rather than brought together by the legal process. It could indeed give better appreciation and sensitise a defendant as to the hurtful impact of his or her unlawful actions, similar to the emerging idea of restorative justice in our sentencing laws."[84]

60. The Court went on to state that—

> "Because an apology serves to recognize the human dignity of the plaintiff, thus acknowledging, in the true sense of ubuntu, his or her inner humanity, the resultant harmony would serve the good of both the plaintiff and the defendant."[85]

61. An apology can serve multiple purposes. It can assist in restoring dignity and repairing the harm caused by the impugned conduct. Additionally, an apology of a public nature can serve a broader purpose. It can act as a deterrent to others both on- and offline, and those who may consider creating a public WhatsApp group with similar intentions.

62. While an apology is typically directed at the individual to whom the harmful content was initially targeted, a public apology in this matter can serve to recognise the broader public harm that the impugned conduct caused towards the LGBTQI+ community as a whole. This is particularly valuable in remedying the harm caused and preventing similar conduct from being perpetrated in the future.

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[84] *Id* at paras 68-69.
[85] *Id*.

Alternative and restorative justice approaches

63. Equality Courts have crafted novel remedies that aim to foster a society founded on human dignity, the achievement of equality, and the advancement of human rights and freedoms.

64. For example, in the ***Chinese Association Gauteng***, a case about hate speech on a social media platform, the Court ordered each respondent to pay R50 000 to a relevant organisation within six months of the order.[86] In the event that the respondents were unable to pay part or all of the amount, the Court ordered that they could approach the Court setting out fully their financial situation and seek a substitution.[87] The substitution could be for part of or the full amount where R1000.00 would be equivalent to ten hours of community service.[88] The Court prescribed the scope of the community service to include:[89]

64.1. Attending a training course on how to remove hate speech from the internet;

64.2. Searching the internet for speech which harms, incites harm or promotes or propagates hatred against the targeted group every week for at least four hours per week;

[86] *Chinese Association Gauteng* above n 65 paras 210-222.
[87] *Id,* see for example para 212(d).
[88] *Id*.
[89] *Id*, see, for example, para 212(d)(i)-(iv).

64.3. Taking reasonable steps to have such hate speech removed from the internet when found using techniques provided as part of the training; and

64.4. Issuing a monthly report to the Complainant recording the hours worked, the hate speech found the steps taken to have it removed and the outcome of those steps.

65. The Court also ordered the Respondents to attend a tolerance training course conducted by the SAHRC to commence within three months or soon thereafter as such course is available.[90]

66. In ***The City of Cape Town v Adams***, the Equality Court, in finding that certain utterances of the Respondent amounted to unfair discrimination, hate speech, and harassment, ordered the Respondent to, among others:[91]

66.1. Remove the social media posts which contained the prohibited speech by a specified date;

66.2. Issue an unconditional public apology for the prohibited speech contained in his social media posts by a specified date;

[90] *Id*, see, for example, para 212(d)(v).
[91] *City of Cape Town v Adams* [2024] ZAEQC 1 at para 54.

66.3. Enrol for and undertake a programme on racial sensitivity training, at his own expense, by the of end a specified date;

66.4. File a report to the Court and serve it upon the Complainant, evidencing his compliance with the above.

67. These are good examples of alternative remedies that infuse notions of restorative justice that may lead to positive outcomes and pave the way forward for engagements aimed at promoting, safeguarding, and reinforcing mutual respect and tolerance.

68. MMA supports the value of a public apology and remedies that seek to sensitise and inform people and submit that relevant and appropriate sensitivity training is suitable certain in circumstances. Additionally, remedies that enable alternative forms of “reparation” such as community service can also have positive social value and restorative value.

69. In recognition of the Respondent’s religion, the above-mentioned submissions on balancing rights, and given recent findings from the Independent Expert on SOGI on examples in South Africa of the inclusion of LGBTQI+ persons in the Muslim faith,[92] there is scope to craft a remedy that empowers the Respondent to learn from and support organisations that accept the inclusion of LGBTQI+ in the context of their religion. For example, this could entail an order that the Respondent find and volunteer at a suitable Muslim-aligned organisation that

[92] Independent Expert Report on SOGI, 2023 above n 39 at 57.

accepts the inclusion of members of the LGBTQI+ community, approved by the Complainant.

70. Accordingly, to the extent the Court makes a finding in terms of sections 10, 11, and/or 12 of PEPUDA, the following remedies may be appropriate:

70.1. A public apology.

70.2. Enrolling for and undertaking a context-appropriate sensitivity and tolerance training programme, approved by the Complaint, that encompasses training on hateful speech both on and offline, at his own expense, by a specified date.

70.3. Undertaking regular community service, for up to six months, at a suitable Muslim-aligned organisation that accepts the inclusion of members of the LGBTQI+ community, approved by the Complainant.

70.4. Filing monthly reports file the Court and serve it upon the Complainant, evidencing his compliance with the above.

71. In the context of discrimination, harassment, and hate speech, restorative justice approaches give those found to have caused harm an opportunity to address the harm by taking responsibility, recognising the humanity and dignity of the targeted group or person, and empowering them to take measures to prevent a recurrence. This speaks to the purpose of PEPUDA and its reconciliatory and transformative potential.

CONCLUSION

72. For the reasons advanced above, MMA should be admitted as an *amicus curiae* and permitted to address this Court on its substantive submissions.

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12 April 2024

[93] I am thankful to Claire Dehosse for her research support in the preparation of these heads of argument.

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