
AFFIDAVIT

I the undersigned

ABDURRAZACK “ZACKIE” ACHMAT

hereby affirm and say :

- 1 I am the national chairperson of the Treatment Action Campaign. The national head office of the Treatment Action Campaign is situated at 34 Main Road, Muizenberg, Cape Town.
- 2 The facts stated in this affidavit are within my personal knowledge and belief and are true and correct.

THE PARTIES

- 3 The Applicant is the Treatment Action Campaign (TAC). The TAC is a company incorporated in terms of section 21 of the Companies Act. It has legal capacity to sue and be sued in its own name. I attach (**ZA1**) a copy of the Constitution of the TAC.
- 4 In my capacity as National Chairperson of the TAC, I am duly authorised by a resolution of the TAC National Executive Committee (“NEC”) to make this

application and depose to this affidavit on its behalf. A copy of the resolution, agreed by TAC National Executive Committee on 23 March 2005, is annexed hereto, marked “**ZA2**”.

THE RESPONDENTS

- 5 The First Respondent is the Dr. Rath Health Foundation Africa of 15th Floor The Terraces, Bree St Cape Town whose attorneys have agreed to accept service on his behalf and that of the Second Respondent at Webber Wentzel Bowens, 13th Floor Picbel Arcade, 58 Strand St Cape Town.
- 6 The Second Respondent is Matthias Rath, whose full name is not known by the Applicant, an adult male businessman of 15th Floor, The Terraces, Bree St Cape Town, whose service address is also care of Webber Wentzel Bowens.

THE PURPOSE OF THESE PROCEEDINGS

- 7 As appears below, the Respondents have engaged and are engaged in a sustained campaign of widespread false, defamatory and highly inflammatory allegations against the TAC and its work. The Respondents have published and are continuing to publish this defamation inter alia in

public media, though the distribution of pamphlets to the public, through putting up posters in public places, and on the website of the Rath Foundation.

- 8 The TAC has attempted to persuade the Respondents to end their campaign of defamation, but without success.

- 9 The TAC now intends instituting action against the Respondents for a permanent interdict, for an apology, and for the payment of damages. We have been advised that it will take a considerable time before this action will come to trial. The Respondents have refused a demand that they end this campaign of defamation. TAC therefore seeks an interdict *pendent lite* to prevent the continuation of this campaign of defamation pending the determination of the action which it will institute.

THE CONTEXT

- 10 The context of this application is the HIV/AIDS pandemic in South Africa.

- 11 In the words of the Constitutional Court in the case of **Minister of Health and others v Treatment Action Campaign and others** 2002 (5) SA 721:

The HIV/AIDS pandemic in South Africa has been described as “an incomprehensible

calamity” and “the most important challenge facing South Africa since the birth of our new democracy” and government’s fight against “this scourge” as “a top priority”. It “has claimed millions of lives, inflicting pain and grief, causing fear and uncertainty, and threatening the economy”. These are not the words of alarmists but are taken from a Department of Health publication in 2000 and a ministerial foreword to an earlier departmental publication.

12 Against that context, the principal objectives of the TAC are set out in paragraph 4 of its Constitution and include the following:

12.1 To campaign for access to affordable treatment for all people with HIV/AIDS;

12.2 To campaign for and support the prevention and elimination of all new HIV infections;

12.3 To promote and sponsor legislation to ensure equal access to social services and equal treatment of all people living with HIV/AIDS;

- 12.4 To challenge by means of litigation, lobbying, advocacy and all forms of legitimate social mobilisation any barrier or obstacle including unfair discrimination that limits access to treatment for HIV/AIDS in the private and public sector;
- 12.5 To educate, promote and develop an understanding and commitment within all communities of developments in HIV/AIDS treatment and care;
- 12.6 To campaign for affordable and quality health care for all people in South Africa; and
- 12.7 To train and develop a representative and effective leadership of people living with HIV/AIDS on the basis of equality and non-discrimination irrespective of race, gender, sexual orientation, disability, religion, sex, socio-economic status, nationality, marital status or any other ground.

THE WORK OF THE TAC

- 13 The activities of the TAC are summarised in the objectives which I have set out above. I also draw the above Honourable Court's attention to the TAC Constitution at

“2.2 The TAC will remain independent of government and the pharmaceutical industry.” (ZA1)

- 14 In addition to its national office in Cape Town, the TAC has provincial offices in the Western Cape, Gauteng, Eastern Cape, KwaZulu-Natal, Limpopo and Mpumalanga. The TAC also has district offices in Lusikisiki, Pietermaritzburg and Queenstown.
- 15 There are more than 200 TAC branches across the country, ranging from the poorest communities in the Eastern Cape (such as Lusikisiki) to the University of Cape Town. Most of our volunteers and staff live in the communities in which they work. In Khayelitsha in the Western Cape, the TAC has more than 1500 active members at community level in several branches.
- 16 A number of organisations and individuals in South Africa are associated with the TAC. They include the *Congress of South African Trade Unions* (COSATU), the *Federation of Unions of South Africa* (FEDUSA), the *Southern African Catholic Bishops Conference* (SACBC), the *South African Council of Churches* (SACC), *Habonim Dror*, *Positive Muslims*, the Children’s Rights Centre, *Médecins Sans Frontières* (MSF), the AIDS Consortium, and a range of other organisations of people with HIV/AIDS and individuals with HIV/AIDS. In addition, the TAC has more than ten thousand individual members.

- 17 Internationally, the TAC is associated with the *Pan African Treatment Access Movement (PATAM)*, itself a coalition of various HIV/AIDS treatment access organisations and individuals across Africa. It is also associated with the *International Treatment Preparedness Coalition*.

- 18 The TAC interacts regularly with the Joint United Nations Programme on HIV/AIDS (“UNAIDS”), the World Health Organisation (“WHO”), and the Global Fund to Fight AIDS, TB and Malaria (“GFATM”) on HIV/AIDS treatment strategy and policy. In July 2004, as a representative of the TAC, I led a delegation to discuss the HIV/AIDS epidemic with the Secretary-General of the United Nations, Dr. Kofi Annan. In June 2004, on behalf of the TAC I addressed a global meeting of all staff members of UNAIDS at the invitation of its head, Dr. Peter Piot. I was also appointed to the World Health Organization’s HIV Strategic and Technical Committee in November 2004.

- 19 The TAC has consistently campaigned to ensure access to affordable and quality treatment for all people with HIV/AIDS in South Africa. It has sought to raise public awareness and understanding about the availability, affordability and use of treatment with anti-retroviral (ARV) medicines. These medicines are registered by the Medicines Control Council, which is the statutory body which has the function of ensuring that only safe and effective medicines are used in South Africa.

- 20 In this work the TAC has challenged both government and the private sector (including pharmaceutical corporations) to take action to make information about treatment more widely available, and to increase the availability and affordability of treatment.
- 21 Since its launch on International Human Rights Day on 10 December 1998, the TAC has consistently called for the State to develop a comprehensive coordinated public sector response to HIV/AIDS.
- 22 In 2001 the TAC litigated against government to adopt and implement a comprehensive programme in the public health sector to prevent the transmission of HIV from mother-to-child. This litigation resulted in the Constitutional Court judgment in July 2002 ordering the state to develop and implement such a programme.
- 23 Given increased morbidity and mortality in our country, TAC has campaigned for a national treatment and prevention plan. This campaign has included marches, protests, negotiation at the National Economic Development and Labour Council (NEDLAC), and a campaign of civil disobedience.
- 24 On 8 August 2003, Cabinet announced its support for a comprehensive plan that included anti-retroviral treatment. Cabinet adopted on 19

November 2003 the *Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa*, a programme that includes the use of ARV medicines.

- 25 The government's "National Antiretroviral Treatment Guideline" published by the National Department of Health in 2004 establishes the clinical and scientific framework of the treatment programme. This can be made available to the Court at its request.

- 26 In addition to its other work, the TAC has initiated a Treatment Project which has managed to raise funds to treat 100 people for a period of three years at current ARV medicine prices. At present, the TAC Treatment Project is funding the cost of ARV medicines for more than 100 people. More than 1000 of our members are in urgent need of treatment in places where they cannot yet access medicines through the public sector programme.

- 27 The TAC has engaged with a number of statutory bodies to achieve its objectives, including the Medicines Control Council, the National Economic, Development and Labour Council, the Council for Medical Schemes, the South African Human Rights Commission and the Commission on Gender Equality. It has also engaged with international and global agencies such as the WHO, UNAIDS, and the GFATM.

THE TAC'S CAMPAIGN AGAINST DRUG COMPANIES FOR ACCESS TO MEDICINES

- 28 The TAC has always taken the view that one of the major obstacles to effective access to treatment for people with HIV/AIDS is the high cost of medicines, and in particular ARV medicines. In the view of the TAC, one of the reasons for this is the excessive prices charged by pharmaceutical companies. Another reason is what we regard as the inappropriate and impermissible use of patent law to prevent competition in this field. The TAC supports the government's desire to take steps to bring down the cost of these medicines.
- 29 For this reason we have actively campaigned, in various ways, against the practices of pharmaceutical companies.
- 30 We are proud of our work in reducing drug company profiteering, which has promoted more affordable access to life-saving medicine by poor people.
- 31 By placing pressure on both government and the private healthcare and pharmaceutical sector, the TAC has sought to reduce the price of medicines in both public and private health sectors so as to increase access to medicines.

- 32 I am myself HIV positive. I started using antiretroviral medicines in August/September 2003. My viral load is now undetectable, and my CD4 count (a measure of my immune response) has increased to over 300. My initial side-effects that included peripheral neuropathy have been managed. My quality of life has been dramatically altered for the better. Today, the ARV medicines I take cost me R400.00 per month through the private sector. When TAC and our allies started our campaign to reduce the cost of medicine, the same medicine cost at least R4 500.00 per month.
- 33 Today our government obtains a locally produced generic first-line combination for about R100.00 for use in the public sector. This is largely, though not only, due to the persistent work of the TAC.
- 34 I describe below some examples of this work.
- 35 In 1998 the Pharmaceutical Manufacturers Association (the PMA) and some of its member companies sought an interdict preventing the President of South Africa from promulgating the *Medicines Amendment Act* 90 of 1997 (Case no. 4183/98 in the Transvaal Provincial Division of the High Court). That Act empowered the government to take steps to reduce the price of medicines. In 2001 the TAC was admitted as *amicus curiae* in support of government's defence of the *Medicines Amendment Act*.

36 On 19 April 2001, six weeks after the TAC had been admitted as *amicus curiae* and following worldwide protests called by the TAC, COSATU and MSF, as well as by our local and international allies against the pharmaceutical industry, the PMA and its co-applicants withdrew their case. I believe that the intervention of the TAC and its allies had a very material impact in leading to this outcome.

37 The TAC has acted in two key ways in seeking to achieve a reduction in the price of medicines.

37.1 First, the TAC has actively made use of the existing (albeit imperfect) statutory framework to reduce the price of medicines used in the treatment of HIV-infection and AIDS-related illnesses and opportunistic infections.

37.1.1 The Christopher Moraka Defiance Campaign, launched by the TAC in 2000 against the pharmaceutical company Pfizer, sought to make the antifungal drug *fluconazole* more widely available to treat opportunistic infections associated with HIV/AIDS. The Diflucan Partnership Programme, in terms of which *fluconazole* is donated by Pfizer to the government and dispensed in the public health sector, was launched as a direct result of the pressure generated by this TAC campaign.

37.1.2 In 2002 the TAC lodged a complaint with the Competition Commission against the pharmaceutical companies GlaxoSmithKline and Boehringer Ingelheim, alleging they that were engaging in anti-competitive behaviour which is prohibited by the Competition Act. In 2003 this complaint resulted in settlement agreements that obliged the two companies to license the local production and importation of more affordable generic ARV medicines.

37.2 Second, the TAC has consistently advocated the development and implementation of a comprehensive statutory and regulatory framework that gives full and meaningful effect to the state's positive constitutional obligations in respect of the right of access to health care and medicines.

37.2.1 The TAC has promoted and sought to develop an understanding within government of the various international regulatory mechanisms available to the state for the purpose of increasing access to medicines. These include the use of the "flexibilities" and "public health safeguards" identified and interpreted in the World Trade Organization ("WTO") *Agreement on Trade-related Aspects of Intellectual Property Rights* ("TRIPs") by the *Declaration on the TRIPs agreement*

and public health, adopted by the WTO at its Doha Ministerial Meeting on 14 November 2001.

37.2.2 In addition, the TAC has repeatedly alerted government to its failure to make use of existing legislative powers to increase access to medicines, in particular ARV drugs, and raised concerns about various provisions in existing legislation (such as the *Patents Act*) that unreasonably and unjustifiably limit the right of access to health care services.

38 The TAC has actively participated and made formal written and oral submissions in the various legislative developments relating to the *Medicines Act* and regulations, including pricing regulations.

39 Most recently, the TAC participated as *amicus curiae* in the Supreme Court of Appeal and the Constitutional Court in the “New Clicks” pharmacy pricing regulations litigation involving the State, the Pharmaceutical Society of South Africa, and others. The TAC took the position that the government was entitled and in fact obliged to take effective measures to regulate and bring down the price of medicines but that it had to do so within the ambit of the Constitution. This matter was heard before the Constitutional Court on 15 and 16 March 2005.

40 The TAC has also worked to bring down the cost of other services to enable people with HIV/AIDS to obtain access to health care. In 2004 the TAC lodged a complaint with the Competition Commission against the National Pathology Group (“the NPG”). The complaint relates to alleged excessive pricing and/or price collusion by members of the NPG, that is, private pathology laboratories in South Africa. The aim of this complaint is to ensure free competition in the pathology market in South Africa, in order that the price of HIV/AIDS (and other) diagnostic and monitoring tests may drop from their present high levels. The Commission has yet to formally refer the complaint (or part of it) to the Competition Tribunal.

NATIONAL AND INTERNATIONAL RECOGNITION OF THE TAC AND ITS WORK

41 The contribution of the TAC to the fight against HIV/AIDS, to the promotion of public health awareness, and to the right of access to health care has been widely recognised both within and outside South Africa.

42 In 2003 the TAC was awarded the 2003 *Nelson Mandela Health and Human and Rights Award*.

43 In 2004 the TAC was nominated for a *Nobel Peace Prize* by the American Friends Service Committee (the Quaker Society).

- 44 The contribution of the TAC has also been recognised through various awards which were conferred on me. These include degrees *honoris causa* from the University of Cape Town and the University of Kwazulu-Natal; the *Desmond Tutu Leadership Award* (2001); the *Jonathan Mann Health and Human Rights Award* of the Global Health Council, Washington DC (2002); and the *Stop Global AIDS 2002 Leadership Award*, Global AIDS Alliance, Washington DC (2002).
- 45 On 16 December 2004 the Government of the Western Cape Province conferred upon me the *Order of the Disa* (member class), in recognition of human rights and HIV/AIDS work since 1976 and for having “never compromised his principles for the sake of political position or favour”. This award was directly related to the work of the TAC.
- 46 I attach **(ZA3)** ”a list of various honours and awards given to the TAC and me, including those mentioned in the preceding paragraphs.
- 47 Throughout its history the TAC has sought to maintain its independence and to speak openly and truthfully about the HIV/AIDS problem in South Africa and responses or non-responses to this. A substantial part of its work has been directed at the practices of pharmaceutical companies. It has successfully campaigned and mobilised national and international pressure on pharmaceutical companies and litigated against them, in order to achieve greater access to treatment for those living with HIV/AIDS.

THE DEFAMATION

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52 The First Respondent sells products, which are said to be multivitamins, which it claims are effective in the treatment or prevention of HIV/AIDS.

53 As part of its campaign to sell its products, the First Respondent attempts to discredit the medicines which have been approved by the Medicines Control Council (MCC). It attacks those who promote the use of these medicines such as the TAC. It also attacks the MCC, and the manufacturers of the medicines concerned, in the most extravagant terms.

54 I believe this mode of operation is a strategy of the First Respondent to increase sales of its products.

55 The First Respondent has now published

56 advertisements in various newspapers in South Africa for approximately a year. These advertisements have attacked the Medicines Control Council

of South Africa, have stated that ARVs are harmful to health, and have made various allegations against pharmaceutical companies.

57 Before about 28 January 2005 these advertisements did not mention or directly attack the TAC.

The ASA complaint

58 On 28 November 2004 the *Mail & Guardian* newspaper carried an advertisement of the First Respondent of the sort referred to above. The TAC was not mentioned in the advertisement. On 14 December 2004 the TAC laid a complaint with the Advertising Standards Authority of South Africa (“the ASA”) under the ASA Code.

59 The reason for TAC’s complaint to the ASA was to prevent the spread of untrue or misleading information about HIV/AIDS ARV treatment so as to avoid confusion among members of the public and persons taking or considering taking ARV treatment.

60 The First Respondent opposed the complaint, and appeared before the ASA where it addressed the ASA Directorate at length on the merits of the matter.

- 61 In January 2005 the First Respondent started attacking the TAC in its advertisements. The TAC expected that once the ASA had given its ruling, the First Respondent would withdraw its false claims, and also cease the attacks on the TAC.
- 62 On 9 March 2005 the ASA issued its ruling on the TAC complaint. The ASA directed the First Respondent to withdraw the advertisements as they contained a variety of assertions and claims which, in the view of the ASA, were unsubstantiated by the supporting materials submitted by the First Respondent in response to the complaint. I attach (**ZA4**) a copy of the ASA Ruling.
- 63 On 11 March 2005 the Applicant's attorneys wrote to the First Respondent stating inter alia as follows:

Notwithstanding the ruling of the Advertising Standards Authority the Rath Foundation and the Traditional Healers Organisation are using SANCO, with whom our client previously enjoyed a good relationship, to spread information contrary to public health interests about the efficacy of anti-retrovirals and in particular AZT.

This disinformation is coupled with defamatory allegations about the TAC.

- 64 The letter (**ZA5**) required that the First Respondent and the THO provide a written undertaking that they would cease such action, failing which the Applicant would make application to this honourable court for appropriate relief.
- 65 Later that day the First Respondent's attorneys replied (**ZA6**), stating that "our client does not accept the contentions set out in your telefax". The letter did not set out which of the "contentions" were disputed. The letter appeared to indicate a refusal by the First Respondent to give the undertaking requested.
- 66 On 15 March 2005 the Applicant's attorneys wrote to the First Respondent's attorneys (**ZA7**), requesting a written undertaking that the First Respondent and its agents:
- *intend to abide by the rulings of the ASA*
 - *will immediately desist from any direct or indirect averments that the TAC is funded by or a front for any pharmaceutical company*
 - *will refrain from any other insinuations or allegations that the TAC is endangering public health in any manner by its activities*

- *will cease conducting its unregistered medical practice at the Child Welfare Building, Site C, Khayelitsha, and will not pursue its intention to open a similar unregistered practice in Nyanga or anywhere else in South Africa.*

67 The First Respondent has not given the undertaking requested. Neither it nor its attorneys have responded in any way to this letter, or denied the allegations which it contains.

68 In the meantime, on 17 December 2004 the *Mail & Guardian* newspaper had publicly stated that it would not carry any of the First Respondent's advertising in future.

69 As appears below, the First Respondent has disregarded the 9 March ruling of the ASA. It has attacked the ASA in extravagant terms, and has continued to repeat a variety of the claims dealt with adversely in the ruling. The First Respondent has also engaged in a campaign of sustained defamation of the TAC.

The first Sowetan advertisement (also published in Business Day)

70 On the 28th January 2005, the First Respondent published in the *Sowetan* newspaper an advertisement carrying Dr Rath's picture and entitled "No censorship of Life-Saving Natural Health Information". I attach (**ZA8**) a

copy of this advertisement, which subsequently also appeared in *Business Day* on 18 February 2005.

71 The advertisement made the following assertions about the TAC which are manifestly defamatory of the TAC. They are false and wrongfully and unlawfully damage the reputation of the TAC:

- The TAC is referred to as the “running dogs of the drug cartel in South Africa.”
- The TAC is listed as one of the “Trojan Horses, organizations who publicly attack and undermine the South African government on behalf of the pharmaceutical industry.”
- The claim is made that “the TAC has received millions of rands from pharmaceutical front organizations such as the Rockefeller Foundation in return for promoting ARV drugs produced by drug companies largely owned by the Rockefeller investment group.”
- Other associated claims (which I also believe to be false and misleading) include that the ASA complaints are politically motivated, that the ASA is not independent of drug companies, that ARVs are unsafe and ineffective, and that vitamins can effectively treat HIV / AIDS.

The second Sowetan advertisement (also published in City Vision)

72 On Friday 4 March 2005 another advertisement of the First Respondent (**ZA9**) appeared in the *Sowetan* entitled “Do you want to march with the TAC? Think!”.

73 That advertisement makes the following assertions:

- The phrase “TAC” is directly connected by arrows to a medicine bottle portrayed as being ARV drugs and labelled with a skull-and-cross bones and the word “Toxic”), to a picture of clearly sick people, and to a block with the enlarged words “Economic drain and Political Destabilization of South African Democracy.” There are dollar signs just above and just to the above right of the word “TAC”.
- It is claimed that “Official TAC financial records show that The Rockefeller Foundation and other Front Organizations of the Pharmaceutical Cartel have donated millions of rands to the TAC.”
- It is stated that “the TAC demands that the South African government buy AIDS drugs that do not cure but actually make people even more sick. The TAC forces the government to spread disease and death

among the people of our country and at the same time ruin our economy.”

- It states that “the TAC promotes drugs such as AZT that are extremely toxic and kill people. They damage the immune system thereby worsening immune deficiency. This is why many people taking AZT get sick with tuberculosis and other infectious diseases.”
- There is an associated statement under the heading “Deadly consequences of Pharma-Aids-fraud” that “South African people pay the price of the pharmaceutical business with AIDS with their lives.”
- The advert states “Did you know that the TAC pays its demonstrators and gives them a free T-shirt to march against our government on behalf of foreign pharmaceutical multinationals and their multibillion-dollar business with HIV/AIDS?”

74 The advertisement is defamatory of the TAC.

75 *City Vision* newspaper has published this advertisement on a number of occasions, most recently on Thursday 17 March (a week after the ASA ruling). We had contacted the newspaper and hoped that the ASA ruling would result in an end to publication of the claims.

The third Sowetan advertisement

- 76 On Friday 11 March (two days after the ASA ruling) the First Respondent published an advertisement in the *Sowetan* (**ZA10**) entitled “There is no place for the ASA in Democratic South Africa” and reproducing (this time in colour) the advertisement of 4 March with the heading “Do you want to march with the TAC? Think!”
- 77 Much of this advertisement attacked the ASA, which it described as “the drug industry-funded Advertising Standards Authority” and “another Trojan horse of the drug cartel”. It also made the following assertions about the TAC
- It repeated the images and associations and the statements described in the 4 March advertisement.
 - It also states that “the most notorious of these [Trojan horses of the drug cartel] is the Treatment Action Campaign (TAC) which specifically targets poor communities as markets for the drug industry. The TAC's credibility has been shattered by simply exposing its pharmaceutical funders. Unable to challenge this fact in any court, and in an attempt to silence the truth, the TAC has turned to another Trojan horse of the drug cartel for help: the Advertising Standards Authority...”

- The advertisement also has a big black and red box, with a row of large dollar signs underneath “pharmaceutical multinationals”, and arrows leading to four groups, among them the TAC, with the words "Misinformation – Deception – Censorship" written underneath.
- Directly under this there is a suggestion that the consequence of the TAC’s activities is loss of life: “For how long will the South African people tolerate this fraud scheme and pay for it with their lives”.

78 The advertisement is defamatory of the TAC.

The Respondents’ community disinformation and defamation campaign

79 The First Respondent has now also taken to publishing defamatory, misleading, dangerous and inflammatory statements in the form of pamphlets and posters which have been widely distributed. The statements are not only false and defamatory, but also create a climate of fear, suspicion, harassment and potential for violence against our members, staff, and volunteers who live in these communities.

80 The advertisement described above as the first Sowetan advertisement entitled “Do you want to march with the TAC? Think!” was distributed in pamphlet form in the Cape Town area before 16 February, which was the date of the TAC’s march on parliament. It has since this time been

distributed in other parts of the Western Cape. I attach (**ZA11**) a copy of that pamphlet.

81 The pamphlet also carries on the reverse the heading “Why Should South Africans continue to be poisoned with AZT?”.

82 A further pamphlet (**ZA12**) has been distributed in Khayelitsha, where the TAC does much of its work. It reproduces the “Do you want to march with the TAC? Think!” advertisement of 4 March. The reverse of this pamphlet is headed “The Last Days of the TAC”. It makes the following assertions about the TAC :

- It states that the TAC “organises rented crowds for the drug industry” but “has been mortally wounded by the unmasking of its funding sources – the drug industry itself.”
- This follows the statement that “the pharmaceutical industry has funded organisations within South Africa that promote toxic dangerous drugs such as AZT and nevirapine and forces the South African government to pay millions of rands to buy them.”
- It states that “GlaxoSmithKline (GSK) pays the TAC to promote AZT via its front organisation ‘GSK Positive Action’ and the ‘European Coalition of Positive People’ in a classic money laundering scheme”.

- It states again that TAC has “received millions of rands from the Rockefeller Foundation. The Rockefeller group has shares in more than 200 drug companies.”

- It states that “news about foreign pharmaceutical corporations funding the TAC spread like a bushfire among the poor communities that it targets with its drug propaganda”.

- It states that only 620 persons attended a TAC-organised march on parliament on 16 February 2005, and that “young people from poor communities” were bussed in (by TAC) with “little idea of what the protest was about and came only for the free T-shirt and the promise of free food”. It is stated that this is “particularly serious for the TAC because its foreign funders expect to get a return on their investment in the form of pictures of thousands of angry people marching against the South African government to demand drugs.”

- The statement is made that four days after TAC was “unmasked in the Western Cape as a pharmaceutical industry front operation”, the TAC held a meeting “to try to calm down disappointed members who were angry about being deceived”.

- It is stated that in TAC's "desperation, they turned to their friends. Unbeknown to the public the pharmaceutical industry does not only fund the TAC but also a private censorship organisation that controls the media in South Africa: the Advertising Standards Association (ASA)."

- Various indirect suggestions are also made, by the association drawn between the TAC and the ASA, that the TAC is involved in conduct that is threatening the lives of people in South Africa.

83 All of the abovementioned advertisements and pamphlets are published by the First Respondent, whose name appears on them. They are defamatory of the TAC.

The poster

84 The First Respondent has now produced a large poster, identical to the pamphlet "Do you want to march with the TAC? Think!". The poster is identical to the pamphlet bearing the same title, except that it is very large.

85 This poster is clearly intended for display in public places. Copies of it have been put up in public places in Khayelitsha, Nyanga and Gugulethu.

- 86 The poster is too large to attach to the papers in these proceedings. The Applicant's attorneys will if so requested make it available to the First Respondent for inspection who in any event is aware of its size and contents, and will also make it available at the hearing of this matter.
- 87 The poster is defamatory of the TAC.

First Respondent's website

- 88 The First Respondent's website also contains a number of statements about the TAC. Many of these are identical or similar to the advertisement and pamphlet / poster claims in relation to the TAC. I attach as annexure "**ZA13**" a print out of some of the web pages. The very front page of the website is headed "Do you want to march with the TAC? Think!" with a link to the assertions made in the advertisements and pamphlets.
- 89 The statements on the website are defamatory of the TAC.

DEFAMATORY NATURE OF THE FIRST RESPONDENT'S STATEMENTS

- 90 The essence of the First Respondent's claims is that the TAC is a dishonest and devious organisation, which is a front for pharmaceutical companies, while pretending to be independent of them. The First Respondent

repeatedly asserts that the TAC encourages people to take medicine which is harmful to them and will kill them; that it forces the South African government to spend millions of rand on toxic drugs; that it forces the government to spread disease and death among the people of our country and at the same time ruin our economy; that it destabilises democracy; and that in order to promote the interests of pharmaceutical companies, it targets poor communities as markets for the drug industry.

91 I submit that these statements are *per se* defamatory.

92 As appears from the advertisements and other publications which I have quoted, the defamatory statements and innuendos are not limited to those I set out above. Those I have set out are however the most important and significant of the defamatory statements. Other defamatory statements are largely made in support of these central themes.

93 These defamatory statements are intended to damage the reputation of the TAC, and to lower the TAC in the esteem of people who read them. They have that effect.

94 This damages the ability of the TAC to carry on its activities and further its aims, including to campaign for access to treatment for all people with HIV/AIDS; to campaign for the prevention and elimination of all new HIV infections; to challenge discrimination relating to the treatment of HIV/AIDS

in the private and public sector; and to educate, promote and develop an understanding and commitment within all communities of developments in HIV/AIDS treatment and care.

- 95 The defamatory statements are intended to strike at the heart of the activities of the TAC.
- 96 It is my belief that the wrongful, unlawful and intentional publication and dissemination by the respondent of false and misleading claims and information:
- is harmful to our local, provincial, national, regional and international reputation.
 - undermines our organisation's ability to carry out its daily public health information work in vulnerable communities across the country.
 - undermines the broader public interest work done by our organisation to ensure quality and affordable health for all people.
 - is dangerous and inflammatory misinformation that, in the course of defaming our organisation, also places our staff, volunteers and members at real risk of physical and mental harm, by painting them

as people who poison and kill people living with HIV/AIDS on behalf of commercial interests such as the drug companies,

- is harmful to the reputations of members of TAC staff in relation to their future possible careers.

97 I refer to the supporting affidavits of Vathiswa Kamkam, Nikiwe Mkhosana, Thando Kamati and Welcome Makele in relation to the current and likely effect of the claims “on the ground” in areas where the TAC works or plans to work. Further evidence can be submitted if necessary.

FALSENESS OF THE CLAIMS

98 The statements made by the First Respondent are false and dishonest.

99 The suggestion that the TAC is the “running dog” or “Trojan horse” or “front organisation” of pharmaceutical companies is manifestly false.

100 As I have described above, the TAC has vigorously campaigned and litigated against pharmaceutical companies. It has done so with substantial success. It is difficult to conceive why a front organisation for the pharmaceutical companies would undertake such activities.

- 101 As a matter of policy, the TAC will not accept any funding from a pharmaceutical company or its agent. Neither the TAC nor I have ever knowingly accepted funding from a pharmaceutical corporation or its agents, nor would we do so.
- 102 The TAC's audited financial statements are open to public scrutiny. They identify the sources of the TAC's funding. Those sources do not include any pharmaceutical companies or their agents.
- 103 In this regard I refer to the affidavits of Nathan Geffen and Alan Velcich which are attached.
- 104 The TAC has not "received millions from the Rockefeller Foundation." The TAC has received R482 683,50 from Rockefeller Foundation, on 26 August 2002. This money was, as I recall, used to fund the Pan African Treatment Access Movement and the TAC Treatment Congress. The TAC has not received any further money from the Rockefeller Foundation.
- 105 The Rockefeller Foundation is one of the best-known and most highly respected philanthropic organisations in the world. Its thematic areas of work, according to its website, are Food Security, Health Equity, Creativity and Culture, and Working Communities. The website identifies who the beneficiaries are. It is preposterous to suggest that in truth it is a front for drug companies.

106 The affidavit of Nathan Geffen sets out further detail with regard to the Rockefeller Foundation.

107 Ironically, the facts in relation to the one practical example given by the First Respondent in support of the general allegation that the TAC is a front organisation for drug companies, prove precisely the opposite. I refer here to the statement in the First Respondent's pamphlet **ZA12** that *"GlaxoSmithKline (GSK) pays the TAC to promote AZT via its front organisation 'GSK Positive Action' and the 'European Coalition of Positive People' in a classic money laundering scheme"*.

108 As appears from the affidavit of Geffen, the facts are as follows.

109 On 20 June 2000 the TAC signed a funding contract with the European Coalition of Positive People (ECP) for R180 000. This was to fund a salary for our national co-ordinator.

110 The TAC – ECP contract is attached to Geffen's affidavit. An express condition of the TAC entering the funding arrangement is that *"No funding shall come from, directly or indirectly, from any pharmaceutical company."* This clause reflects the TAC's desire and need to remain entirely independent of such organisations.

- 111 In the event, the TAC only accepted R120 000 of the ECPP contract amount. This was because we became dissatisfied, after the arrangement was entered into, with the public stance of the ECPP on access to affordable medicines. This stance differed significantly from ours. We came to the view that the ECPP's position was too similar to that of the pharmaceutical industry, to which we were opposed, and was a policy position unlikely to lead to greater access to life-saving medicines.
- 112 We therefore declined to accept the remainder of the grant from the ECPP, nor to accept any further funds from them. We persisted in this despite a request from ECPP that we take the remainder of the money.
- 113 The TAC went to reasonable lengths to ensure that money received from the ECPP was not sourced from drug companies. We have no evidence that the ECPP breached the terms of the funding contract with us on this matter. However, we perceived the ECPP acceptance of a position on access to medicine to be too similar to that of the pharmaceutical industry.
- 114 This decision to decline further funding, made by us even without evidence of any breach of the funding clause, reflects our consistent concern to maintain our independence from the pharmaceutical industry. We consider the fact and perception of this independence to be vital to our ability to operate effectively in terms of our constitutional objectives and institutional ideals.

- 115 For this reason, in many instances our funding contracts contain a clause whereby the donor undertakes and contracts that no funding shall come, directly or indirectly, from any pharmaceutical company.
- 116 For the sake of completeness I state that I have never been paid by any pharmaceutical company, and neither (to the best of my knowledge and belief) has any person acting on behalf of the TAC.
- 117 The TAC does not “promote drugs such as AZT that are extremely toxic and kill people”, as stated by the First Respondent.
- 118 As someone who probably owes his own life to ARVs, and whose organisation is involved in assisting access to life-saving treatment, I find this statement (and those to similar effect set out above) to be highly offensive, inflammatory and defamatory.
- 119 In my long experience with the HIV problem and with treatment policies, what kills people is not ARV drugs but AIDS. Appropriate treatment with ARVs can safely and effectively treat and in some instances prevent the onset of AIDS.
- 120 These issues have previously been debated before the Constitutional Court. The judgment of the Constitutional Court of South Africa in *Hoffmann v*

South African Airways 2001 (1) SA 1 at paras 11-15 clearly sets out internationally accepted scientific and medical information on HIV/AIDS and its treatment. The Court restated those principles in *Minister of Health and Others v Treatment Action Campaign and Others* (2) 2002 (5) SA 721.

121 The TAC supports and promotes the use of ARV medicines which have been approved and registered by the MCC, which is the statutory body with responsibility for regulating the manufacture, sale and use of medicines in South Africa.

122 The First Respondent states that the TAC is destabilising democracy. This statement is ludicrous. It would be counter-productive for us to destabilise democracy, because we rely on the public health system and the appropriate regulation by government of the private sector.

123 The TAC certainly criticises, and litigates and campaigns against, the policies and practices of the South African government where we consider this is appropriate. This is not “destabilising democracy”. It is a necessary element of democracy.

124 I do not know whether the First Respondent is suggesting that to be opposed to the government means that one is destabilising democracy. If this is what he means, I reject it. As it happens, my contact with TAC

members has shown me that the majority of our members support the government. Many are, like me, members of the ANC.

125 We do not do our work “on behalf of the pharmaceutical industry”, but pursuant to our own aims and objectives as stated in the TAC’s constitution.

126 The TAC has not “forced the South African government to pay millions of rands to buy [ARV’s]” in the interests of the manufacturers of these drugs. *The Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa* is the result of a decision of the Cabinet pursuant to an order of the Constitutional Court of South Africa concerning the basic human right of access to health care. The TAC works with Provincial Health Departments and is willing to work together with the South African government in implementing and ensuring the success of the national treatment plan.

127 The 16 February 2005 march on parliament was widely reported in the media. I was present. The respondent’s statement that there were only 620 people at the march is an outrageous, almost comical lie. At that march Mr Murphy Morobe, Head of Communications in the Presidency said to the TAC “Keep marching: you are our conscience”.

128 The TAC has no knowledge of any of its members being “expelled from NAPWA”.

129 The TAC held a meeting in Khayelitsha some days after the 16 February march. This was at the *Medicins Sans Frontieres* offices. I was at the meeting. The only “anger” evident, as I observed it, was that of the TAC members, staff and volunteers against the First Respondent’s campaign of deceit.

130 The TAC has never paid any person to march for it, nor offered any free T-shirts or refreshments as an inducement to march or reward for marching. It is certainly true that the TAC has given some people who come to marches free “HIV-Positive” T-shirts. This is done in furtherance of the campaign of the TAC, to destigmatise HIV and create openness about the disease. It is not done in order to get people to march. People have never been promised T-shirts if they march.

A PATTERN OF CONDUCT

131 I verily believe that this is not the first occasion on which the First Respondent or its head, Dr Mathias Rath (Rath), has engaged in activities of this kind.

132 According to the website of the Royal Numico N.V. corporation, a pharmaceutical company, on 15 November 2000 Rath was ordered by the Court of Almelo in the Netherlands to end his campaign of allegations of involvement in organised crime, made against the Royal Numico N.V. pharmaceutical corporation and its subsidiary. Rath was ordered to publish the verdict of the court in a door-to-door distribution to householders in the Netherlands. Non-compliance would result in a penalty for Rath of 1 million Netherlands guilders per day. I attach (ZA14) a printout from that website.

133 I believe that this is not the only occasion on which the Second Respondent or a front organisation has been found by a court to have committed defamation or slander of institutions which produce or promote registered medicines for diseases which he claims his own products can treat or prevent. I invite the Respondents to take the court into its confidence and disclose under oath whether there are any other cases in which he has been found to have defamed or slandered any other persons or bodies, and if so, to disclose the details of such cases and his interest in providing “treatment” or “prevention” for the diseases which are treated or prevented by the products of the companies concerned.

134 I verily believe that Rath has also previously been ordered to stop making false claims about the medicines which he sells. In 2000, the British Advertising Standards Authority upheld a complaint against claims in a Matthias Rath Ltd. Newsletter "Good Health, do it yourself" which had

stated that the company's vitamins could prevent heart attacks, strokes, high blood pressure, and other conditions mentioned in the newsletter. I believe that in 2002, the agency upheld a complaint against a claim by the Health4Us Foundation of Emeryville, California, which had advertised in a British press that Rath's "remarkable natural approach is capable of controlling the spread of cancerous cells in the human body without damaging healthy cells."

135 The Respondents have recently commenced examining, advising and "treating" people seeking HIV/AIDS treatment in at least Khayelitsha, Nyanga and Mandela Park. This is referred to in the letter of 15 March 2005 from the Applicant's attorney to the First Respondent's attorney, and has not been disputed.

136 It is my belief that this campaign of defamation and disinformation is part of an attempt by the Respondents to persuade people to purchase their products. People who need ARV treatment are being advised not to commence treatment. This could endanger their lives. A complaint on this basis was laid by the TAC with the Health Professions Council of South Africa ("the HSPCA") on 17 March 2005. The HPCSA have laid a complaint with the South African Police, Khayelithsa.

THE BASIS AND NEED FOR AN INTERIM INTERDICT

137 I have been advised and respectfully submit that it can not be disputed that the First Respondent has embarked upon a sustained campaign of defamation of the TAC.

138 That defamation is, for the reasons which I have given, deeply injurious to the reputation of the TAC. It attacks the very existence and purpose of the TAC. It is a direct infringement of the TAC's right to its good name and reputation.

139 I am genuinely concerned that the inflammatory statements that the TAC assists in poisoning and killing people places our members, staff and volunteers at real risk of serious physical and mental abuse and attack from confused members of the community.

140 The publication and dissemination by the Respondents of these defamatory allegations is harmful to the TAC's local, provincial, national, regional and international reputation.

141 The publication and dissemination by the Respondents of these defamatory allegations undermines the TAC's ability to carry out its daily public health information work in vulnerable communities across the country.

142 As chairperson of the TAC, a board member of the TAC Treatment Project, and a person living with HIV, I have personal experience of the impact of

HIV/AIDS on vulnerable individuals and communities and the need for clear and accurate public health information.

143 I am, like the TAC itself, constantly approached by people living with and affected by HIV/AIDS who seek assistance and accurate information in order to access appropriate health care.

144 In the light of my experience in relation to the TAC and the nature of its work, I consider the good public standing and public trust of the TAC to be vital to the ability of its staff, volunteers and members to effectively inform and educate people in South African communities about HIV/AIDS and its proper treatment.

145 In many communities, the treatment literacy work of the TAC takes place in a context of considerable apprehensiveness about openly discussing subjects such as the virus itself, causes of death, sexual behaviour, and violence against women and children. For this reason, the respondent's claims about the TAC and the treatment it promotes are cynical and wilfully misleading and, in a very real sense, dangerous.

146 Despite these defamatory attacks on the TAC, we have been reluctant to institute legal proceedings against the Respondents because we have to use our resources to save lives.

- 147 We hoped that the ASA ruling, although it did not deal with the TAC, would indirectly lead to cessation of attacks on our organisation. Regrettably that has not happened.
- 148 We attempted to dissuade the First Respondent from its sustained campaign of defamation by having our attorneys write to them. That too has produced no result.
- 149 We now find ourselves in the position where our failure to take legal action is used by the Respondents as “evidence” of the validity of their outrageous claims, because they claim that (in the words of his pamphlet **ZA10**) we are “unable to challenge this fact in any court”.
- 150 We have therefore reluctantly decided to institute action in this Honourable Court for a permanent interdict, for an apology, and for damages. We have been advised that we ought to proceed by way of action both because of the nature of the relief which we seek, and also because we must anticipate that the First Respondent may seek to justify its conduct, thereby creating a dispute of fact.
- 151 Meanwhile, however, the First Respondent’s campaign of defamation continues unabated, and reaches ever greater heights.

- 152 The harm to the reputation of our organisation cannot be adequately remedied by damages or other relief at some later stage. The harm which is being and will be done by this campaign of defamation is irreparable. Damages at a later stage can not compensate for the harm caused to our reputation and our ability to further our goals.
- 153 There is a high risk that a great deal of the hard work which is being done to deal with the national crisis of HIV/AIDS, much of it by volunteers, will be undermined. Our capacity to sustain the trust of the communities where we work is undermined both immediately and in the future. The damage which is done is irreparable. A later award of damages can not compensate for this.
- 154 The information we provide in support of the government's treatment programme saves lives. Lives will be lost if the programme is not implemented effectively, and the active involvement of civil society organisations such as the TAC is critical for this purpose. We explain to community members, in clear and plain language, the benefits and risks of all medical interventions including ARVs.
- 155 I submit that we have a well-grounded apprehension of irreparable harm if interim relief is not granted, and the ultimate relief is eventually granted.

156 I respectfully submit that the balance of convenience clearly favours the granting of an interim interdict. The Respondents do not have a right to defame us. They do not have a right to promote the sale of their products through a campaign of defamation. I submit that any inconvenience that the Respondents may suffer through this very limited restriction on its speech is far outweighed by the prejudice which the TAC and people who need medicines will suffer if this sustained campaign of defamation is permitted to continue.

157 I respectfully submit that this matter is urgent because of the ongoing defamation of the respondents despite the ruling of the ASA with the severe consequences to the reputation of the applicant, the safety of its members, and the communities in which they operate.

158 I further submit that the TAC has no other satisfactory remedy. We have used such other remedies as are available to us, without any success.

159 I therefore ask that an order be granted as prayed in the Notice of Motion.

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ABDURRAZACK "ZACKIE" ACHMAT

SIGNED AND AFFIRMED BEFORE ME IN THE
PRESCRIBED MANNER AT CAPE TOWN ON THIS DAY
OF MARCH 2005, THE DEPONENT HAVING STATED THAT
HE HAS CONSCIENTIOUS OBJECTIONS TO TAKING THE
OATH AND THAT HE REGARDS THE AFFIRMATION AS
BINDING ON HIS CONSCIENCE.

COMMISSIONER OF OATHS