

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

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CASE NO. 2807/05

In the application of:

TRADITIONAL HEALERS ORGANIZATION

In the matter of an intervening application to be joined as Third Respondent in:

TREATMENT ACTION CAMPAIGN

Applicant

and

DR RATH HEALTH FOUNDATION

First Respondent

MATTHIAS RATH

Second Respondent

AFFIDAVIT IN ANSWER TO APPLICATION TO INTERVENE

I, the undersigned

ABDURRAZACK “ZACKIE” ACHMAT

hereby affirm and say:

1 I am the national chairperson of the Treatment Action Campaign (“TAC”). I deposed the founding and replying affidavits in this matter.

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3 I have read the affidavit of Phephsile Maseko (Maseko) on behalf of the
Traditional Healers' Organisation ("THO") in that organisation's
application to intervene in this matter.

4 The TAC disputes the claim of the THO that it is an interested party in
this matter. However, the TAC has no objection to the THO's
intervening in these proceedings on condition that it does not seek to file
further affidavits, which will lead to a delay in the hearing of what is an
urgent application.

5 As the THO's legal representatives have indicated that their client will
not seek to file further affidavits, the TAC will therefore not object to the
THO being given leave to intervene, even though it is our contention
that they are not entitled to do so.

6 I have been advised that under the circumstances, it is not necessary
for the TAC to file any affidavit in this interlocutory application.

7 I submit that most of the allegations made by Maseko are in any event
irrelevant to the matter before the Court.

8 However, the TAC wishes for the record to deal briefly with certain of the
allegations made by Maseko.

9 The facts stated herein are, unless the context indicates otherwise, within my personal knowledge, and to the best of my knowledge and belief are true and correct.

10 I respectfully submit that the efficacy and appropriate regulation of traditional healers and medicines is not relevant to these proceedings. The TAC believes that these questions are important and complex, and deserve further public debate in an appropriate forum.

11 The THO appears to assert, in effect, that a justification for publishing defamatory statements about the TAC is that TAC does not recognise traditional healers and their medicines. This claim about TAC is incorrect. Even if it were true, it would not justify the publication of false and defamatory statements.

12 For the record, however, I restate TAC's position on traditional healers and their medicines, which is as follows:

12.1 Traditional healers and their medicines play an important place in the lives of millions of people.

12.2 Under colonialism, apartheid and in the post-colonial period, traditional healers and their medicines were suppressed and denied registration, recognition and development.

- 12.3 This has resulted in the under-development of traditional healers, their knowledge and medicines.
- 12.4 The lack of an intellectual property framework that protects communities against *biopiracy* means that secrecy rather than the public sharing of knowledge characterises the uses of traditional medicines.
- 12.5 The legal framework that the government has established to register practising traditional healers in the Traditional Health Practitioners Bill will go some way to protect the public and the profession.
- 12.6 The centuries of under-development require major public investment in training of healers, and research into the safety, efficacy and quality of traditional medicines.
- 12.7 In general, the TAC will only promote medicines that are registered with the Medicines Control Council (“MCC”), or allowed under the MCC’s section 21 authorisation. This is because the MCC is the public authority tasked with ensuring the safety, efficacy and quality of medicines. It is conceivable that TAC could promote medicines not registered by the MCC, but this would be unusual and require exceptional and compelling evidence. We understand that the THO

might differ with TAC on this point, but this is a basis for engaging in public debate, not for a campaign of defamation.

12.8 There is not yet a list of traditional medicines equivalent to the Essential Drug List of the National Department of Health or or for instance, the Guidelines for the management and Treatment of HIV/AIDS related opportunistic infections.

12.9 The TAC therefore supports measures to develop, modernise, regulate and invest in traditional healers and traditional medicines, in the public interest.

12.10 This position has been made known to the THO and all interested parties at numerous TAC events.

13 I attach as ZAR1 a copy of the most recent issue of our publication “Equal Treatment”, which shows the respect we accord traditional healers and the need for the modernisation of the training and research of traditional health practitioners.

14 It is disappointing, to say the least, that the THO affidavit does not contain any acknowledgment that this has been the position of TAC on some of the matters THO raises as to the place of traditional medicines and healers in public health provision in South Africa.

15 I now respond to certain of the allegations made by Maseko. Having regard to the fact that the TAC does not oppose the intervention of the THO, on condition that this does not lead to any further delay in the hearing of the matter, and having further regard to the irrelevance of much of this affidavit to the issues in dispute in this matter, I do not reply to each and every allegation made by Maseko.

Ad paragraph 9

16 I respectfully draw the Court's attention to what is actually stated in the annexed World Health Organisation material, in particular as to questions of safety and efficacy.

Ad paragraph 10

17 The TAC disputes the utility or soundness of the deponent's characterisation of medicines as 'Western' or 'non-western'. What is relevant is whether the medicine (whatever its geographic origin) is tested and found by the relevant authorities to be safe and effective for its intended application.

Ad paragraphs 15, 16 and 17

- 18 The THO misstates and misrepresents the intellectual property regime in South Africa and internationally in relation to traditional medicines.
- 19 Divining and other forms of spiritual and psychological healing cannot be patented, but traditional remedies and compounds derived from them can be and often are patented.
- 20 The San communities of the Kalahari were nearly dispossessed of the active ingredient of the Hoodia patented by the Council for Scientific and Industrial Research as compound "P57", and sold to multinational pharmaceutical companies including Pfizer Inc. Only an international public outcry and the threat of litigation won a settlement for the San communities of South Africa.
- 21 Traditional compounds can be patented by individuals or companies. The law fails adequately to protect community-based knowledge. Individual traditional healers can also patent traditional remedies.
- 22 The first respondent (Mathias Rath) himself and the organisations he controls, hold at least 5 patents in the United States on their 'medicines'. These are patent numbers: 6693129, 6686340, 5650418, 5278189, 5230996. The US Patent and Trademark Office Internet documents (last accessed 5 May 2005) demonstrating this are attached as ZAR2.

23 I dispute Maseko's characterisation of the intention or effect of the proposed medicines registration regulations. The proposed regulations would not have banned traditional medicines, but only prohibited the making of unsubstantiated claims to an unsuspecting public.

24 TAC supports proper research by the State to test the safety and efficacy of these substances, and to develop an appropriate intellectual property regime that might benefit the communities having knowledge about these substances should they prove safe and effective.

Ad paragraphs 19 and 23

25 This is a mischaracterisation of the TAC's mission. The TAC's consistent concern is with the safety, efficacy and quality of *all* medicines, and with the accessibility and affordability of healthcare services generally, including in relation to the need for proper informed patient consent to treatment.

26 The assertion in paragraph 19 of the TAC's allegiance to pharmaceutical companies is false. It is defamatory of the TAC.

Ad paragraph 20

27 This paragraph is deeply ironic, since the Rath respondents can be characterised as foreign-based manufacturers and/or suppliers of synthetic 'Western' pharmaceutical products at great prices.

Ad paragraphs 21 to 33

28 Individuals from the THO have been active in the TAC. Like many other organisations, the THO has endorsed the work of the TAC. We regret their withdrawal and dissatisfaction with our approach to informed consent, explaining the benefits and risks of all medicines based on scientific evidence. However, this will not stop TAC from working with individual traditional healers and other organisations.

29 The nature of the THO's past relationship with the TAC is not relevant to the defamatory statements made by the Rath respondents, which are the subject of these proceedings. I dispute the correctness of Maseko's account of the history and nature of that relationship. In order to avoid further burdening the record with irrelevant and lengthy factual disputes, I do not go into this history in any detail.

30 Three TAC national executive committee members attended the workshop referred to in paragraph 26. The TAC delegation included Mark Heywood (TAC treasurer), Mr Luyanda Ngonyama (then

representative of the religious sector) and Isaac Skosana (representative of people living with HIV/AIDS on the TAC executive).

31 The TAC contributed R5000 to the workshop, which was addressed by the country representative of the WHO and a representative of the Medical Research Council.

32 Paragraph 28 is a mischaracterisation of what actually happened. The TAC was one of four organisations co-hosting the event, which was widely advertised. Most non-TAC delegates and delegations were not specifically invited. Most of them asked to attend as a result of the public announcement of the event by TAC. Any organisation that notified TAC or others of its attendance was accepted. I am not aware that the THO sought to attend the meeting. They would have not have been denied the opportunity to participate.

33 The THO are entitled to picket and to hold the views that they do about antiretrovirals. However, they do not have a right to defame anyone. I deny the correctness of the contents of their memorandum. To respond to the memorandum would require an extensive affidavit, with annexures, dealing with matters which are not relevant to these proceedings.

34 Paragraph 32 is a repetition of the defamation which is the subject matter of these proceedings. I have already dealt with this in detail in the papers in the main application.

Ad paragraph 35 and 36

35 I deny that the THO has any legal interest in these proceedings. However, as I have stated above the TAC has no objection to the intervention of the THO provided that it does not lead to a further delay in the hearing of the matter.

Ad paragraph 37

36 The TAC has a history of disagreement over strategy, tactics, accountability and corruption with the national leaders of NAPWA. We are not surprised that they should support the Respondents.

37 In the light of the issues in dispute in this matter, the fact that the THO makes common cause with NAPWA is deeply ironic. According to a press release issued by drug company, Bristol-Myers Squibb (BMS),

NAPWA received US\$1.1 million from BMS. I attach as annexure ZAR3 a press statement by BMS of 7 May 2004, stating that “A separate grant of \$1.1 million was disbursed to the National Association of People Living with HIV/AIDS (NAPWA) to build institutional capacity, mobilize communities and provide treatment literacy among its membership.”

38 NAPWA’s website states “NAPWA alongside Secure the Future are in preparations to launch a pilot Community Based Treatment Support Programme in Gauteng.” “Secure the Future” is a programme of Bristol-Myers Squibb.

39 The TAC does not allege that NAPWA’s receipt of funds from drug companies makes it a drug company front. NAPWA no doubt has its own reasons for accepting such funds. The TAC debated its stand on refusing drug company funding with NAPWA leaders at our first national congress in Soweto in March 2001. I was present during these discussions. I stated the TAC’s position that it would not accept money sourced from drug companies.

ABDURRAZACK “ZACKIE” ACHMAT

SIGNED AND AFFIRMED BEFORE ME IN THE PRESCRIBED MANNER AT CAPE TOWN ON THIS DAY OF MAY 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

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That issue is what we consider the unlawful, false, inciting and defamatory statements made about TAC by the Rath respondents

