IN THE HIGH COURT OF SOUTH AFRICA CAPE OF GOOD HOPE PROVINCIAL DIVISION

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In the matter between

TREATMENT ACTION CAMPAIGN Applicant

and

DR RATH HEALTH FOUNDATION First respondent

MATTHIAS RATH Second respondent

REPLYING AFFIDAVIT

I, the undersigned

ABDURRAZACK "ZACKIE" ACHMAT

hereby affirm and say:

I deposed to the founding affidavit in this matter as the national chairperson of the Treatment Action Campaign ("TAC"). I wish to reply to the answering affidavits filed on behalf of the respondents.

2	The contents of this replying affidavit are within my personal knowledge and
	belief unless the context indicates otherwise, and are true and correct.
3	I have read the affidavit of Anthony Brink filed for the respondents in this matter
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8	Unless otherwise indicated in the present affidavit, I deny the claims made
	by Mr Brink in his affidavit.
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57	In this affidavit I respond to the respondents' affidavits, including Mr Brink's.
	What follows first are general matters in response.
58	At the time of filing this affidavit, the Second Respondent, Matthias Rath
	had not deposed to an affidavit despite all the allegations against the
	Applicant being made in his name or that of the foundation bearing his
	name, and despite very serious allegations of professional misconduct
	against him in other countries.
59	I would like to state that I believe respondents' overall response to our

application to be misconceived in at least two respects:

- 59.1 TAC would not ever wish to limit the right to free expression and fair comment in our society:
 - 59.1.1 TAC promotes and deeply values, and has relied in all its own work, on respect for freedom of expression rights.
 - 59.1.2 TAC encourages debate and full discussion on the risks and benefits of antiretroviral therapy (ARVs). Our standard public fact sheet shows this ("ZA15").
 - 59.1.3 However, the right to free expression and fair comment does not include the right
 - 59.1.4 to defame other persons, and particularly not in an inflammatory and inciting manner.
- 59.2 Mr Anthony Brink asserts that the respondents are simply attempting to participate in open debate about aspects of the HIV problem. However, the respondents have not denied that:
 - 59.2.1 the Rath foundation is based on a corporation owned by Matthias Rath that markets multivitamin products, including as a purported treatment for HIV/AIDS;

- 59.2.2 the respondents' campaign against TAC is part of its campaign to sell Rath vitamin products;
- 59.2.3 respondents have now commenced, in certain parts of the Western Cape, examining, advising and "treating" people seeking HIV/AIDS treatment while distributing to them the products which it produces and markets; or that
- 59.2.4 respondents have previously been prevented from making unsubstantiated claims about their products.

- of If the respondents had simply been involved in vigorously and even robustly participating in furthering public debate, without attacking the integrity of the TAC, the TAC would not have brought this application.
- As will appear below, a good deal of the respondents' attack on the TAC is based on allegations about the TAC's sources of funding which are simply false. The respondents have been free to approach the TAC (or the other organisations involved) in order to establish the truth in this regard. The TAC would willingly have provided the relevant information.

Respondents have however never approached TAC for the facts in this regard. Instead, they have (pursuant to marketing their own products) embarked on a sustained, inflammatory, abusive and defamatory campaign of advertising that lacks any basis in fact.

THE AFFIDAVIT OF ANTHONY BRINK

63 Mr Brink's affidavit contains numerous statements of his opinion with regard to the science of HIV/AIDS. By his own admission, Mr Brink has no recognised training, qualifications and scientific expertise in this field. He is simply not qualified to make many of the statements that he makes, which I submit are inadmissible. At the hearing of this matter, application will be made for the striking out of much of his affidavit on the grounds that it is inadmissible as hearsay or an expression of opinion on scientific matters on which Mr Brink is unqualified to comment.

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65 Even if Mr. Brink's views on the ineffectiveness and toxicity of ARVs were

correct (against the overwhelming scientific consensus accepted by the Constitutional Court, the government of this country, the Medicines Control Council, the World Health Organisation and UNAIDS, as described in the attached affidavit of Prof Robin Wood [ZA16]), these do not justify the respondents' claims that the TAC is a dishonest and fraudulent organisation, is a front for pharmaceutical companies, is funded by the pharmaceutical industry, receives funding from members of this industry for promoting ARVs, organises rented crowds for the drug industry, pays people to participate in demonstrations, or targets and poisons poor communities on behalf of drug companies.

There are many parts of Mr Brink's affidavit (as well as that of the respondents' employee Mr Langner), where the assertions are so extravagant and speculative, often amounting more to the exposition of conspiracy theories than assertions of fact, that it is difficult for me to respond as one usually does in an affidavit, other than simply to deny the correctness of the contents of the paragraphs.

Mr Brink's response is therefore irrelevant to at least points 2.1 to 2.5, and 2.10, in the Notice of Motion.

Although the applicant will ask that much of Mr. Brink's affidavit be struck out, the court will be asked during argument to have regard to

- the selective use of quotations out of their context, often with extraordinary results.
- The simplest example of this is For example, in the course of his various statements on ARVs, BMr Brink's citation of quotes from Judgestice Edwin Cameron's book *Witness to AIDS* (para [65]) in support of the contention that several of the TAC's members "have been killed by ARV drugs". What Mr Brink omits is the central point of Judge Cameron's account of the death of Sarah Hlalele (not "Tahle"), which is that because of her personal circumstances, it was not possible for the side effects the drugs were having on her to be promptly monitored and dealt with, and that because of the doubts which had been cast on ARVs, Cameron writes, "she was reluctant to believe that she was experiencing side effects and left it too late before she tried to seek help". Mr Brink also suppresses the central theme of Judge Cameron's book, which is that his own life has been saved by the use of ARVs, and a plea for ARVs to be more widely made available.
- In this regard I attach as **ZA17** pages 201-3 of Judge Cameron's book dealing with the death of Sarah Hlalele, and pages 38-9 (dealing with the side-effects on Judge Cameron himself), and page 122 and pages 173-4 (to the effect that he has been on ARVs for years, and that this has saved his life).

- I attach these extracts not as proof of the effect of ARVs, as I appreciate that they are inadmissible hearsay for that purpose, but to demonstrate Mr Brink's bias and selective use of evidence, and deliberate and perverse misreading of the evidence. I submit that this demonstrates Mr Brink's patent bias and lack of objectivity, which itself disqualifies him as someone able to give expert evidence in this regard.
- A good deal of Mr Brink's affidavit consists of assertions for which he does not provide any evidential basis. To avoid burdening the papers, I do not repeat this in respect of each and every such assertion. By failing to do so, I do not admit the truth of such unsubstantiated assertions. I have been advised that each such assertion must be tested to establish whether any admissible evidence is provided to justify it.
- 74 I now respond to certain of the details in Mr Brink's affidavit.

Ad paragraphs 6 to 25, 111, 113, 114, 118, 121, 124

- These paragraphs are replete with unqualified expressions of opinion, hearsay, and double hearsay and even triple hearsay. The applicant will ask that they be struck out. They do not constitute evidence. I can not refrain from pointing out that it is remarkable that Mr Brink professes to be an expert on matters on which he is not qualified to comment, while apparently not understanding a matter on which he should, as an advocate, have some expertise, namely the law of evidence.
- With regard to **paragraph 20**, dealing with Dr Richard Beltz, this is not only pure hearsay, as no supporting documentation is produced in support of Mr Brink's claim, but is also inconsistent with Dr Beltz's own writing (**ZA18**), in which he states that he has been wrongly quoted on the Internet with regard to AZT, and expresses the view that "we must admit that it [AZT] has at least some limited value as an anti-AIDS drug, especially for preventing newborn children from AIDS-infected mothers from acquiring the disease."
- 77 With regard to **paragraph 25**, the whole point of my statement about TAC's and the broad community's lack of expert scientific knowledge is that we rely on the expert opinion of the scientific community, which is set out in the affidavit of Prof Robin Wood. Any reasonable reader would have interpreted my comments as a call for people to learn more about science. This is another example of Mr Brink's selective and misleading use of

quotations.

Ad paragraph 28

- 79 It is correct that TAC placed and paid for the advert in the *Mail & Guardian*.
- 80 However:
- We placed this advert pursuant to our constitutional objectives (as set out in para [12] of the founding affidavit).
 - 81.1 The suggestion that we placed this as "third party advertising" as "a front for the pharmaceutical industry' is untrue, totally unsupported by any evidence in the affidavit, and defames the TAC.
 - 81.2 In many of its public information materials, and for considered public health reasons, TAC calls for HIV-positive pregnant women and mothers to enquire about formula milk if they choose not to breast-feed (see annexure 'H' to Mr Brink's affidavit, a TAC advertisement). This hardly constitutes evidence that TAC is undertaking third-party advertising as a front for corporations (such as Nestle) that happen to produce formula milk. The recommendations made by TAC in the advert are based on the recommendations made by the World Health Organisation. They also reflect the practice of many clinics and

hospitals in South Africa that provide mother-to-child transmission of HIV prevention services.

- 81.3 I draw attention to the fact in its publications (for example annexure 'H' to Mr Brink's affidavit), TAC generally and in principle does not use the brand names of drugs such as Retrovir (AZT) and Viramune (nevirapine), which are associated with the companies that manufacture them. We only use proprietary names when it is the familiar name that patients know or that their health professionals use.
- 81.4 TAC endeavours to twhere he extent that this is possible and practicalconvenient to uses the generic and generic and scientific namesterms of for these drugs, such as 'AZT' or 'nNevirapine' in order not to benefit any specific companies.

Ad paragraph 29 and 30

- The first sentence of paragraph 29 is a gross misrepresentation of the TAC's central mission, which is to ensure that persons with HIV receive treatment that is appropriate, including for opportunistic infections, and this should include ARV treatment where clinically indicated.
- 83 It is simply not true that TAC campaigns only on 'pricing and supply' of

ARVs. We have also campaigned on quality and safety issues in relation to

ARVs and we have campaigned on the availability of all medicines.

84 The undisputed fact that the TAC has engaged in active and often

acrimonious litigation and public campaigns against the pharmaceutical

companies, which has been actively opposed by the pharmaceutical

companies, gives the lie to Mr Brink's speculative and unsupported

allegations in this regard.

85 In fact, this case against the respondents detracts from our current work

against several drug companies such as MSD, Abbott Laboratories and

Bristol Myers Squibb for patent abuse, excessive pricing and other anti-

competitive behaviour.

86 I deny the contents of the last sentence of paragraph 29, which is entirely

speculative. We encourage debate on HIV drugs, but not defamation.

87 I deal below with the false and defamatory allegation that And we would

ask that the Court note the tone of the deponent the TAC takes money from

pharmaceutical companies directly or indirectly.

Ad paragraph 31

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- 89 For the reasons set out in the founding affidavit and this affidavit, I deny the correctness of the contents of the first part of this paragraph.
- The allegations in paragraph 31.1 are made against Glaxo-Smith Kline ("GSK"). They are not the only manufacturers of AZT; there are at least four other companies that manufacture and sell AZT. TAC cannot and would not respond for GSK. However, the deponent himself acknowledges that this is a research bottle, not one intended for public use. The court has been given no evidence concerning the origins and purpose of this photograph and bottle.
- 91 TAC does not know why GSK or other AZT manufacturers did not respond to this false advertising. The TAC responded because it is false advertising on a public health matter that affects millions of people which is at the heart of the TAC's concerns. TAC would I believe respond similarly to similar false advertising by GSK or other pharmaceutical companies in relation to their products or those of their competitors.
- Our complaint was motivated by the TAC's own constitutional objectives and the constitutional right to health care access.
- 93 Mr Brink will ask that tis be str-Smith Kline ("GSK") to the respondent's campaign is n
- 94 offers no evidence for the assertion that the ASA is "a private company

funded by the Pharmaceutical Manufacturers Association".

To the best of my knowledge the ASA makes rulings on all types of false advertising including groceries and pool cleaning. It does not exist for any specific industry.

96 Mr Brink's assertion is however consistent with the respondents' general pattern of conduct. Whenever any person or institution takes a decision which is inconsistent with the interests and theories of the respondents, the respondents promptly label that institution or person a tool of or front for the pharmaceutical industry. Such institutions are promptly accused of fraud and dishonesty, and labelled as a "Trojan Horse" of the pharmaceutical industry.

97 First, the respondents have taken a similar attitude to the Medicines Control Council (MCC), the statutory body charged with the registration and monitoring of medicines in South Africa. Because the MCC has registered ARVs for treating and preventing transmission of HIV/AIDS, the respondents state that the members of the MCC are "directly or indirectly on the payroll of the pharmaceutical industry". In this regard I refer to the extract from the Rath Foundation's website at page 99 of the founding papers in this matter.

98 The website extract at page 99 invites readers to read a Press Release issued by the Rath Foundation. I attach as **ZA19** a copy of that press

release. I refer in particular to the assertion that the MCC's motivation for its ruling in relation to "natural health therapies and traditional medicines" is "the trillion-dollar pharmaceutical investment business's attempt to eliminate all competition posed to its market by safe, effective and affordable therapies", and that this is "a last desperate attempt to shore up the cartel's collapsing monopoly on world health based on patented synthetic drugs. The MCC is the pharmaceutical cartel's Trojan Horse within the South African health service".

- 99 Second, the respondents made similar allegations against the ASA after its 9 March adverse ruling against them. These allegations are set out in the advertisements and pamphlets described in paragraph 66 of the founding affidavit.
- 100 Lodging a complaint with the ASA in order to prevent false advertising is not an infringement of the respondent's freedom of speech. Nearly all South African media outlets abide by the self-regulating code of the ASA. The standards of advertising require that advertising claims are substantiated. The ASA, through the media's self-regulating process, can prevent false or unsubstantiated advertisements from being run. It has no power to stop the respondent from making false or unsubstantiated claims in other fora. The applicant is not attempting to stop the respondent from doing so, except where these claims are defamatory of it.

101 Third, the respondents' reaction to the joint statement of UNAIDS, UNICEF and the WHO of 30 March 2005 (attached as RW9 to the affidavit of Prof Robin Wood **ZA16**) declaring respondents' misrepresentations "dangerous and unhelpful" has been to attack the independence of these United Nations bodies by publicly asserting that "in an unprecedented step, representatives of these drug interests within the WHO and other UN bodies have directly attacked this groundbreaking work of our Foundation" (see ZA 24 to this affidavit).

Ad paragraphs 34 to 39: Treatment Action Group and SA Development Fund

- 102 I respectfully refer to the affidavit of Laura Morrison a Board member of the Treatment Action Group ("TAG") which I have read in draft (ZA20) and of Judith Blair of the South African Development Fund ("SADF") (ZA21), which I have also read in draft. These affidavits:
 - 102.1 show that the TAG and SADF have at all times been aware that the applicant has a policy of refusing to receive funds from pharmaceutical firms;
 - 102.2 show that the TAG and SADF have accordingly never given the applicant any funds derived from pharmaceutical companies;

- 102.3 disclose the sources of the funds which the TAG and SADF have given to the applicant;
- 102.4 show that because of the TAC's well-known policy, the SADF actually refused to accept funds intended for the TAC, because they came from pharmaceutical companies
- 102.5 establish that in truth, the TAG and SADF have never given the applicant any funds derived from pharmaceutical companies.
- 103 If the respondents had bothered to approach the TAC in order to establish the truth in this regard, the TAC would readily have made all of the relevant information available to them. The respondents have however not done so.
 I submit that this is because they are not in fact interested in establishing the truth.

Paragraph 40-41: European Coalition of Positive People

In paragraphs 102 to 108 of my founding affidavit, I set out in detail the facts with regard to the allegation that the TAC received pharmaceutical company money through the European Coalition of Positive People ("ECPP"). Those facts demonstrate that the TAC contract with the ECPP stipulated in terms

that no funds were to come either directly or indirectly from pharmaceutical companies, and that the TAC in fact refused to accept funds offered by them because of their policy on access to affordable medicines. This was confirmed by the affidavit of Nathan Geffen.

- 105 The respondents have not denied the correctness of any of the facts set out in those paragraphs. They have not produced any evidence to show that the ECPP breached the terms of its contract with the TAC.
- 106 Astonishingly, the respondents nevertheless appear to persist in this allegation, although they have not adduced any facts which contradict what is set out in the founding papers.
- 107 I respectfully submit that this is further evidence that the respondents are not interested in the truth. They continue to repeat their defamatory allegations even when confronted with incontrovertible facts which directly contradict their conspiracy theory.

Ad paragraphs 44 to 45 (AIDS Foundation of South Africa)

108 I respectfully refer to the affidavit of Debra Mathews (**ZA22**), which:

108.1 shows that the AIDS Foundation has at all times been aware that the applicant has a policy of refusing to receive funds from

pharmaceutical firms;

- 108.2 shows that the AIDS Foundation has accordingly never given the applicant any funds derived from pharmaceutical companies;
- 108.3 discloses the sources of the funds which the AIDS Foundation has given to the applicant;
- 108.4 establishes that in truth, the AIDS Foundation has never given the applicant any funds derived from pharmaceutical companies and
- 108.5 states that if the respondents had approached the AIDS Foundation in order to establish the truth in this regard, the AIDS Foundation would readily have made all of the relevant information available to them. The respondents have however not done so.
- 109 Similarly, if the respondents had approached the TAC to establish the facts in this regard, we would readily have made them available. The respondents have not done so. They are not interested in the facts.

Ad paragraphs 46 to 47: The Rockefeller Foundation

110 Again, this is a matter with which I have dealt in detail in my founding affidavit, in paragraphs 99 to 101. Again, the respondents have not denied

any of this. However, they persist in this allegation, on the basis of generalised allegations, hearsay, conspiracy and speculation.

- 111 The respondents do acknowledge at paragraph 117 that they were incorrect in stating that the TAC received "millions of rand" from the Rockefeller Foundation, whereas in fact it was less than half a million rand. They undertake not to repeat the allegation. That undertaking is repeated in paragraph 130.
- As appears from the affidavit of Mandla Majola (**ZA23**), on 16 April 2005, while these proceedings were pending, the respondents distributed a further pamphlet (**ZA24**) at a public meeting. That pamphlet repeats in precisely the same terms the allegation with regard to the Rockefeller Foundation, despite Mr Brink's undertaking, made under oath on 8 April 2005, that the respondents would not do so.

Ad paragraph 48

113 I have been advised that it is not necessary for me to deal with the statements in this paragraph, which are political rhetoric rather than an allegation of fact. However, it is correct that the TAC has received funds from the Kaiser Foundation. If it is true that the Kaiser Foundation is endowed by profits from the petrochemical industry, then on Mr Brink's logic the TAC is a front for the petrochemical industry.

Ad paragraph 49: Mark Heywood 119.1 119.2

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125 Yet again, this allegation consists of simple assertion unsupported by any evidence.

126 I refer to the affidavit of Mark Heywood (**ZA25**) which I have read in draft and which demonstrates that this assertion, too, is false.

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Ad paragraph 50-55

128 I deal below with the affidavit of Daphne Bryant. At this stage I would only:

- 128.1 point out that Ms Bryant's affidavit does not in fact support the allegation that the TAC pays people to participate in its demonstrations;
- 128.2 repeat what is set out in paragraph 125 of my founding affidavit and the affidavits of Nathan Geffen and Rukia Cornelius, which Mr Brink does not address at all.

- 129 The statements in
- Annexure V are the purest form of double hearsay. Mr Brink, an advocate, seeks to place before the court statements allegedly made by people who have not made affidavits, to another person, who not only does not make an affidavit, but is not even identified. However, they are significant in that to the extent that one can place any reliance on them, they show that in fact the TAC does not pay people to participate in its demonstrations. If the respondents were honest, and if they believed in the reliability of these statements, that should be enough reason for them to have doubt about the correctness of their allegation. However, they are not interested in the truth, and simply repeat the allegation.

- 132 I deny that the handing out of 'HIV-Positive' T-shirts is intended as an inducement to march or as part of a "drug marketing programme". TAC distributes these T-shirts to promote openness and reduce stigma about the epidemic, pursuant to our constitutional objectives.
- 133 In the same way, while we have never denied that marchers are sometimes offered T-shirts or refreshments or assistance with transport, this is not done as an inducement to march or reward for marching. The provision of refreshments is not unusual at all marches, demonstrations and

conferences.

134 The TAC does indeed promote the use of ARV drugs as a treatment for HIV, but I deny that this can in any honest way be characterised as "marketing".

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137 Mr Brink appears to concede that the marchers are, after all, not attending marches for the inducements he mentions, but because they are "at one" with TAC in its "moral and political" campaign to pressurise the government to comply with its constitutional obligations and to fulfil its own policy on national ARV treatment roll-out.

138 Conduct such as the TAC's litigation, advocacy, and protest is a manifestation of democracy, and hardly an undermining of it. To criticise one's government is not, in my view, to be undemocratic.

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140 Mr Brink's statements in paragraphs 54 and 55 are

141 irrelevant and unsupported by any admissible evidence. In my opinion they are also racist and paternalistic. In particular, I fully endorse the averments by Mr Mandla Majola at paragraphs 10 and 11 of his affidavit with regard to Langner's affidavit (ZA23). These comments apply to Brink as well.

Ad paragraphs 56 to 81

- I respectfully submit that Mr Brink is simply not qualified to express the opinions set out in these paragraphs (I refer again to the affidavit of Professor Robin Wood, which sets out the science of HIV/AIDS and antiretroviral therapy **ZA16**). These paragraphs also consist almost entirely of hearsay save where they express Mr Brink's opinions, which I have been advised are irrelevant to these proceedings. Application will be made at the hearing for the striking out of the allegations in question. I have been advised that it is not necessary for me to traverse them in detail. There are however certain aspects to which I do wish to respond.
- 143 I have already dealt with Mr Brink's selective and misleading quotation of Judge Cameron's book.
- 144 In these paragraphs Mr Brink goes beyond his assertion that he is an expert on the science of HIV/AIDS. He apparently asserts that he also able to:
 - 144.1 diagnose the cause of the heart attack which I suffered;

144.2 come to conclusions about my intellectual ability;

144.3 make findings as to my psychological condition; and

144.4 diagnose my neurological condition.

145 A professionally qualified person who (like Mr Brink) expressed such opinions under oath without ever examining the "subject" would be liable to the discipline of his or her profession. Mr Brink and the respondents appear to take the view that he is able to do so even though he is not professionally qualified in any of the professions concerned.

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149 For the sake of completeness, however:

149.1 I attach (**ZA26** and **ZA27**) affidavits by my medical practitioners, Dr Zaid Mahomed and Dr Steve Andrews, who deal with the effect which the ARV treatment has had on my health, and who express the professionally qualified opinion that my recent heart attack is

unrelated to my use of ARV's, and explain the reason why this is so.

149.2 I am psychologically well.

149.3 I have had no impairment of my intellectual capacity.

149.4 Following my heart attack, I am making a really good recovery.

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- 150 In relation to paragraphs [72] to [75], I attach the full text of the English and Afrikaans reports by journalists Willemien Brummer (**ZA28a ZA28b**) and Sue Valentine (**ZA29**) referred to by Brink. I believe these indicate yet again Mr Brink's willingness to quote selectively and out of context.
- 151 Brink's deliberate misrepresentation about my health infringes my constitutional rights to dignity.
- 152 In relation to **paragraph 87**, I wish to point out since vitamins (natural medicine) are offered free at public health outlets in South Africa, a policy we support, there is in any event not the element of competition Mr Brink suggests.

Ad paragraphs 87 to 97

- 153 Again, this section of Mr Brink's affidavit is replete with scientific, quasi- and pseudo- scientific opinions which he is not professionally qualified to express. He is of course welcome to his opinions, but I have been advised that they do not constitute evidence of any kind, other than evidence of the opinions which Mr Brink holds, which are irrelevant to these proceedings.
- The court case to which Mr Brink refers in paragraph 87.2 is described in paragraphs 35 and 36 of my founding affidavit. As I explained, the TAC had a major role in globalising the dispute, and its intervention had a very material impact on the outcome. Mr Brink does not dispute any of this. He does not explain how our role in this case, which he says "deeply embarrassed the pharmaceutical companies", is to be squared with his continued assertion that we are a front for those companies. I submit that it clearly gives the lie to that assertion.
- 155 I deny and reject the insinuation and statements that TAC is somehow involved in destabilising the State as an agent of international business interests or "in furtherance of a foreign business agenda".
- 156 The TAC has conducted a vigorous public campaign on the matters which are at the heart of its concerns. It is entitled to do so. That is part of our

democracy.

- 157 I deny that the TAC tried to break up a meeting held by the first respondent on 25 November 2004. As Mr Brink provides no detail in this regard, and does not even allege that he was present, I can not deal further with these allegations.
- 158 It is true that in the heat of the moment, I was inexcusably rude to the Minister of Health on 25 March 2004. I immediately made a public apology for my conduct in this regard.
- Much of the contents of these paragraphs consist of little more than bare allegations (without any evidential foundation), abuse and opinion. The allegation that we behave like Nazis in the Weimar democracy is extraordinary. I will not dignify it with a response save to say that the awards which the TAC and I have received for our contribution to human rights and democracy in South Africa speak for themselves (see founding affidavit paragraphs 41 to 46).

Ad paragraph 98

- 161 The reason why the TAC campaigns very actively in African and coloured townships is precisely because many members of those communities are most deeply affected by HIV/AIDS, and need access to proper medical care. Unlike middle class African, white, coloured and Indian people, poor people do not have access to private health care. The respondents produce no evidence that the motive behind our work is to "target poor communities as a market for the drug industry".
- 162 I point out that the Rath Foundation's own activities promoting its own products in Cape Town appear to be focused on Khayelitsha (**ZA23 and ZA24**).
- In addition, as chairperson of TAC, I have personally spoken at small and large meetings of every racial group in the country. My colleagues and I have done advocacy work at universities, among lawyers, doctors, pharmacists, business people and teachers of all races. A record of these

would be unnecessary and too voluminous to attach.

164 Again, this paragraph is filled with assertions with no evidential basis.

Ad paragraph 99

The respondents' assertions are false and deliberately misleading, so the contention that they are justified by being "true and in the public interest" can not succeed. To the extent that they are comment, they do not constitute fair comment. Argument will be addressed in this regard at the hearing of this matter.

Ad paragraphs 100 to 109

- 166 Much of the content of these paragraphs consists of argument. The arguments raised will, to the extent that they are relevant, be addressed in argument at the hearing of this matter.
- 167 I have already described the TAC's position with regard to freedom of expression. The TAC supports public debate, and robust public debate, over a matter of national importance such as HIV/AIDS. It certainly does not seek to gag public debate about this matter. I have been advised and

respectfully submit, however, that the constitutional right to freedom of

expression does not include the right to defame others. This is not a

necessary element of public debate.

168 I submit that Mr Brink's abusive attitude to senior South African scientists

such as Professors Makgoba, Karim and Coovadia discloses more about

Mr Brink than about the merits of the scientific issues, or the legal issues in

this matter.

169 I do not understand how Mr Brink can in paragraph 105.1 characterise its

piece in the Mail and Guardian as an "invited article". On the face of it, it is

a paid advertisement. It was referred by the TAC to the ASA on that basis.

To the best of my knowledge, the respondents did not dispute in the

proceedings before the ASA that it was an advertisement.

Ad paragraphs 115 and 121

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176 I submit that these paragraphs illustrate a pattern of behaviour of the respondents:

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- 177.1 The Medicines Control Council ("MCC") a statutory body, took action in October 2004 to prevent the respondents re-publishing claims that the MCC's members are 'directly or indirectly on the payroll' of the drug industry (**ZA19**).
- 177.2 The respondents' response was to attack the independence and integrity of the MCC (**ZA19**).
- 177.3 The respondents had an adverse ruling against them issued by the ASA on 9 March.
- 177.4 Their response was to attack the integrity of the ASA, describing it as a "Trojan Horse" of the pharmaceutical industry.

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- 177.7 The World Health Organisation, UNAIDS and UNICEF issued a statement in Geneva on 30 March 2005 calling the respondents' misrepresentations in advertising in South Africa "dangerous and unhelpful".
- 177.8 The respondents' response was to suggest the joint statement resulted from "representatives of drug interests within the World Health Organisation" (ZA24).

Ad paragraph 112

- 178 The TAC did not coerce the government into assuming the policy that it did.

 In relation to mother-to-child transmission of HIV, the government was coerced by the requirements of the Constitution, as explained by the Constitutional Court in the case brought by the TAC.
- 179 Brink does not appear to appreciate this distinction. The general treatment plan was adopted by the government after considering the report of the Health and Treasury Task Team in August 2003 (a copy could be made available should the court require but it is too voluminous to attach) and then by the development of its own operational plan in November 2003. By this stage the Cabinet had also had full regard to the Presidential AIDS

Advisory Panel's report on HIV/AIDS, its prevention and treatment. No doubt the advice of its own experts, presumably having had regard to its obligations under the Constitution, were paramount in its decisions to develop a treatment plan that included antiretroviral therapy.

Ad paragraphs 114 and 118

180 Again, Mr Brink appears to consider that he is able to express an opinion on my medical condition and its causes. He appears to be a lawyer not a doctor or scientist.

181 I have never concealed my medical condition from the public.

Ad paragraph 115

182 I respectfully point out that here Mr Brink makes clear that the respondents, having attempted to substantiate their claims before the ASA, have decided to ignore the ASA's findings because they were unfavourable to it. Instead, they have launched an attack on the integrity of the ASA.

Ad paragraph 116

183 I find it extraordinary that Mr Brink can deny, under oath, that the respondents' claims go to the TAC's honesty. Argument will be addressed

in this regard at the hearing of this matter.

184 I have previously referred to the pamphlet (**ZA24**) distributed by the respondents at Khayelitsha on 16 April 2005, while this application was pending. See also **ZA23**.

185 That pamphlet repeats the defamatory allegations on which this application is based, and then refers to what it describes as "Ultimate consequence of this fraud". I do not understand how this can be squared with Mr Brink's denial, under oath, that the respondents' claims go to the TAC's honesty.

Ad paragraph 120

186 I submit that the judgments of the Constitutional Court speak for themselves.

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Ad paragraph 123

190 This is yet another piece of hearsay evidence. There is no evidence as to who took the photograph, or when it was taken, or from where, or on what date.

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192 In any event, I deny the claim of the respondents as to turn-out at the march. I was at the march. There were many more than 600 people in attendance. There were thousands of people present.

Ad paragraphs 126 to 138

- 193 I have been advised that the contentions advanced by Mr Brink amount to legal argument, which will be addressed at the hearing of this matter.
- 194 I submit that it is clear from these paragraphs, and from the contents of Mr Brink's affidavit, that the respondents have every intention of continuing their campaign of defamation of the TAC.
- 195 Mr Brink has not disputed that the TAC's attorneys wrote to the Rath Foundation's attorneys requesting an undertaking that they will desist from such conduct, and that the Rath Foundation did not give the undertaking

requested.

196 If there were any room for doubt as to the respondents' intentions in this regard, it was removed by the pamphlet **ZA24** which the respondents distributed on 16 April 2005 while these proceedings were pending, and which repeated the defamatory statements about the TAC.

197 That pamphlet is revealing in another respect. It states the following in bold type:

Latest News from the High Court:

TAC panics and postpones!

The date chosen by the TAC for the hearing of its case in the High Court was 14 April. But the evidence we filed about how the pharmaceutical industry finances the TAC is so overwhelming that the TAC panicked and postponed the case. We will keep you updated as the TAC's case further collapses. To distract from the fact that their pharmaceutical funders have been revealed, the TAC is now reverting to its old tactics

198 This is an extraordinarily dishonest account of what actually happened, which is as follows:

- 198.1 The notice of motion stipulated 14 April 2005 as the date of hearing, and required the respondents to file their answering affidavits by 4 April 2005.
- 198.2 The respondents requested through their counsel an extension of time until Thursday 7 April 2005 for the filing of their affidavits. The applicant agreed to this.
- 198.3 In the event, the respondents filed one affidavit late on Friday 8 April 2005, and two further affidavits (one of them unsigned) on Monday 11 April 2005.
- 198.4 By then, it was patently not possible for the matter to be heard on Thursday 14 April 2005, as the applicant had first to file a reply to the voluminous and in the end largely irrelevant material in their answering affidavits.
- 198.5 The applicant therefore removed the matter from the roll for 14 April 2005, and re-enrolled it for 21 April 2005.
- 198.6 This evoked a complaint from the respondents that the matter should not be heard on 21 April 2005. The respondents took the position that the matter could not be heard before 10 May 2005. It was stated

that the respondents' advocate was not available before 10 May 2005.

- 198.7 The applicant persisted that the matter could not wait until 10 May 2005 because of the respondents' refusal to undertake, without prejudice to its rights, not to repeat the defamation until the hearing.
- 198.8 During a discussion with counsel for the applicant, counsel for the respondents then offered 26 April 2005 as a possible date. The applicant accepted this date, albeit with some reluctance.
- 199 I have read in draft the affidavit of William Kerfoot, the applicant's attorney.

 This affidavit confirms the correctness of this sequence of events, and attaches as an annexure, a letter from him to the respondents' attorney recording this sequence at the time when the date of hearing was still in dispute, and the applicant was pressing for an early hearing.
- 200 I submit that the respondents' dishonesty is patent from this sequence of events. The applicant has consistently sought the earliest possible hearing, and the respondents have sought to postpone the hearing. Despite this, the respondents have published a pamphlet attributing the delay to the applicant's "panic". I submit that this speaks volumes about the regard which the respondents have for facts and truth.

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AD THE AFFIDAVIT OF DAPHNE BRYANT

203 The applicant has never denied that

204 it makes funds available to cover the cost of demonstrations, including costs of taxis, buses and refreshments. In this regard I refer to paragraph 38 of the affidavit of Nathan Geffen in the founding papers.

205 These funds are dispensed to those organising such things as group taxi hire.

I am not able to deal with the detail of Ms Bryant's affidavit because it refers to an event which allegedly took place almost two years ago, and the people involved are not identified. However, there is nothing in Ms Bryant's affidavit which is inconsistent with what Mr Geffen stated in the founding papers. On the contrary, her statement that money was paid to a small group of people, whose names and details were recorded, is consistent with funds being paid to the people responsible for the costs which the TAC would cover.

207 That this is the case is confirmed by the explanation which was allegedly given to Ms Bryant by the marshals, namely that this was for transport and refreshments.

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210 I repeat that TAC has never paid people to participate in its demonstrations.

The respondents have produced no evidence at all to substantiate their claim, which they continue to repeat.

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AD THE AFFIDAVIT OF RALF LANGNER

212 I submit that this affidavit falls to be struck out in its entirety on the basis that it is entirely irrelevant and inadmissible in these proceeding, being a hearsay and speculative account of Mr Langer's opinions of the activities of Mr George Soros – which as it happens, is not supported by the documents which he attaches to his affidavit.

213 Those documents themselves are hearsay.

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AD THE AFFIDAVIT OF PROFESSOR SAM MHLONGO

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220 Professor Mhlongo is entitled to his opinions about AZT and nevirapine. However, those views fly in the face of the consensus of the South African and international scientific community, as is explained in some detail by Professor Wood.

- I have been advised that Professor Mhlongo's affidavit does not constitute admissible expert evidence, as it does not meet the requirements for the submission of such evidence to a court. He does not set out what his opinions are, and explain why he holds those opinions. If necessary, argument will be addressed in this regard at the hearing of this matter. It also appears from **ZA24** that Professor Mhlongo is now contracted by the Rath Foundation.
- 222 Professor Mhlongo's opinion that the use of AZT and nevirapine in medicine is "highly contentious, to say the least" is in any event a far cry from the categorical assertions made by the respondents in their publications.

CONCLUSION

- 223 The Treatment Action Campaign insists that full public discussion and debate of the benefits, risks, and side-effects of ARV therapy, as well as their management, is essential and ongoing.
- 224 This application is not about science or antiretrovirals. Nor does it seek to inhibit discussion about these medicines.
- 225 I respectfully submit that it is the intention of the Respondents, as part of its strategy to sell its own products, to cause irreparable harm to the applicant,

its members and its staff through a systematic campaign of defamation and incitement.

226 The sustained campaign of slander and incitement by the Respondents misuses the vulnerability of people living with HIV/AIDS and undermines our work and reputation.

227 I am advised that the constitutional protection of freedom of expression does not give the Respondents a right to defame our organisation, its members, staff or any other organisation particularly in an inciting and inflammatory manner.

228 I therefore submit that an order be granted as set out 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 APRIL 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