



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(Cape of Good Hope Provincial Division)**

Case No: 2807/05

In the matter between

TREATMENT ACTION CAMPAIGN

Applicant

and

MATTHIAS RATH

First Respondent

DR RATH HEALTH FOUNDATION

Second Respondent

TRADITIONAL HEALERS ORGANISATION

Third Respondent

JUDGMENT DELIVERED on 3 March 2006

DESAI J:

The relief sought herein essentially requires the balancing of freedom of expression and other competing constitutionally guaranteed interests. The application relates to the boisterous and, at times, unseemly debate with regard to the efficacy or otherwise of anti-retroviral treatment for those

suffering from HIV/AIDS. In the light of the scale of the pandemic and its frighteningly severe consequences, this discord is unsettling. Though the arguments for and against anti-retroviral treatment have been set out in some detail on the papers, it is unnecessary for the purposes of this application to make any decision in regard thereto. This Court is, in any event, hardly competent to do so. It is an issue best left for consensus amongst suitably qualified medical scientists.

The applicant in these proceedings is the TREATMENT ACTION CAMPAIGN ("TAC"). The TAC is a company incorporated in terms of section 21 of the Companies Act and its principal objectives include campaigning for access to affordable treatment for all people with HIV/AIDS and supporting campaigns for the prevention and elimination of all new HIV infections. It endeavours to advance its objectives by means of litigation, lobbying, advocacy and other forms of social mobilisation, especially against any perceived barriers that limit access to treatment for HIV/AIDS in the private and public sector. The organisation has several thousand individual members and it seems that a range of community organisations are associated with it. The TAC and its national chairperson, Mr **ABDURRAZAK "ZACKIE" ACHMAT ("ACHMAT")**, have won national and international acclaim for their work. This is apparent from the many diverse awards received by them.

The first and second respondents are **DR MATTHIAS BATH**, a physician, and his Foundation. The precise legal status of the Foundation is unclear. It appears that they support the use of natural and traditional medicine as the basis of primary health care. The attack upon the TAC by them, briefly

stated, is premised upon the view that anti-retroviral drugs are extremely toxic and that in promoting the use of such drugs the TAC is simply advancing the interests of the pharmaceutical industry. Furthermore, they contend that the TAC is indirectly funded by the said industry. Their sustained public criticism of the TAC results in this application.

The third respondent's interest in these proceedings is somewhat tenuous. It was not cited initially as a party by the TAC. The Traditional Healers Organisation ("THO") then brought an application to be joined as third respondent on the basis, *inter alla*, that it and the other respondents had been jointly responsible for one or more of the pamphlets upon which the TAC's application is based. It was argued that if the Court prevented the distribution of the pamphlets by the first and second respondents, they too would be prejudiced. The TAC did not oppose the application and the relief sought by the THO was granted. It appears that their principal complaint is about the TAC's exclusive reliance upon "Western pharmaceutical drugs" and their failure to properly take into account African traditional medicine in the treatment of HIV/AIDS.

The fact that first and second respondents have widely published the alleged defamatory statements is not in dispute. They deny that the statements are defamatory and argue that they have a right to freedom of expression and should not be precluded from participating in a debate on a matter of crucial public importance. Mr **G M Budlender**, who appeared on behalf of the TAC, properly conceded that the respondents are entitled to hold the view that anti-retrovirals are toxic, and to propagate that view

energetically. The issue is whether the respondents are entitled to publish pamphlets, newspaper advertisements, articles on an internet site, and posters in which they assert that the TAC is a front for pharmaceutical companies and is funded by them in return for promoting anti-retroviral drugs.

The respondents have indicated that they intend to continue publishing such statements and, in the circumstances, the TAC intends instituting an action for a final interdict, damages and related relief. At this stage an interim interdict is sought as the respondents have failed to furnish an undertaking to cease publishing these statements pending the determination of the action to be instituted. The TAC does not seek an order preventing the respondents from propagating their contentions as to the nature and consequences of anti-retroviral drugs. The relief which is sought is directed at the core allegation that the TAC is an unscrupulous organisation which covers up its real motive - to promote the interests of pharmaceutical companies. The TAC accordingly seeks in its Notice of Motion an order interdicting the respondents from publishing any statement which alleges that

- (i) the applicant is a front for pharmaceutical companies or the pharmaceutical industry;

- (ii) the applicant is funded by pharmaceutical companies or the pharmaceutical industry;

- (iii) the applicant receives funds from pharmaceutical front organisations in return for promoting antiretroviral drugs;
- (iv) the applicant organises rented crowds for the drug industry;
- (v) the applicant pays people to participate in demonstrations;
- (vi) the applicant encourages people to take medicine which is harmful to them and will kill them;
- (vii) the applicant forces the government to spend millions of rands on toxic drugs;
- (viii) the applicant forces the government to spread disease and death among the people of South Africa;
- (ix) the applicant destabilises democracy in South Africa; or
- (x) in order to promote the interests of pharmaceutical companies, the applicant targets poor communities as a market for the drug industry.

Counsel for first and second respondents, **Mr J Van der Berg**, submitted that it was not clear from the facts what irreparable harm the TAC would suffer if the relief claimed was not granted. It was a very public corporation, he stated, which courted the limelight and was not averse to seeking public confrontation. Accordingly, he argued, the TAC cannot claim

to fear irreparable harm when it in turn is criticised in robust terms. Besides suggesting that the TAC's prospects in the main case are open to considerable doubt, Mr Van der Berg also submitted that it has to overcome "the obstacle" of freedom of expression which is a competing right accruing to the respondents under the Constitution.

Though freedom of expression may be limited by the law of defamation, ***"the constitutional guarantee of free expression is available to all under the sway of our Constitution, even where others may deem the expression unsavoury, unwholesome or degrading"*** [See **LAUGH IT OFF PROMOTIONS CC v SAB INTERNATIONAL (FINANCE) BV t/a SABMARKINTERNATIONAL 2005 (8) BCLR 743 (CC) para 55**]. While admitting that freedom of expression is fundamental to a democratic society, Mr Budlender contended that the right of free expression must yield to an individual's equally important right not to be unlawfully defamed (See **ARGUS PRINTING AND PUBLISHING CO LTD v ESSELEN'S ESTATE 1994 (2) SA 1 (A) at 25D-E.**) Individuals have a legitimate interest in their reputation which the law of defamation seeks to protect. [See **KHUMALO AND OTHERS v HOLOMISA 2002 (5) SA 401 (CC) para 28**].

It appears that the two constitutional rights - dignity and freedom of expression - are in tension with each other. They have to be balanced against each other and that balancing has to be undertaken in a constitutional context. As Mr Budlender has correctly pointed out, the Constitutional Court has repeatedly emphasised the fundamental importance

of dignity as a value which must infuse all constitutional adjudication. Where a defamation is published, the question which arises is whether there are grounds of justification which negative unlawfulness or *animus injuriandi*. These grounds have to be considered and applied in a manner which is sensitive and responsive to constitutional principles which include both the right to dignity and freedom of expression.

Mr **D Ntsebeza**, counsel for the third respondent, argued extensively that a juristic person cannot be the bearer of human dignity. That proposition is undoubtedly correct. However, the issue herein is not whether the TAC has a right to human dignity, it is whether the defamation impacts upon human dignity. The evidence establishes that the defamation impacts upon the dignity of the members, volunteers and staff of the TAC. They say in terms that the defamation upsets them and is an attempt to destroy their reputation. That being so, the right to human dignity comes directly into play.

Mr **Ntsebeza** submitted that the right to dignity is "the plank on which the applicant's case is founded", and that it accordingly cannot succeed on the basis that its *fama* is affected. It appears that counsel mischaracterises the application. **Achmat** states, repeatedly and in terms, that the basis of this application is that the defamatory statements injure the TAC in its reputation and its work. Mr **Ntsebeza** does not state in express terms that a non-trading corporation such as the TAC does not have a right to reputation, and cannot sue for defamation. However, if that is the suggestion, there are several authorities to the contrary. The remarks of

Corbett CJ i n FINANCIAL MAIL (PTY) LTD v SAGE HOLDINGS LTD 1993

(2) SA 451 at 462A are apposite:

'Although a corporation has 'no feeling to outrage or offend' (see the Spoorbond case at 1011), it has a reputation (or lama in respect of the business or other activities in which it is engaged which can be damaged by defamatory statements and it is only proper that it should be afforded the usual legal processes for vindicating that reputation. "

Mr **Ntsebeza** also advanced the argument that the TAC should be denied a remedy despite being defamed as it has itself committed defamation. He stated that whatever the respondents have said has been neutralised or cancelled by the TAC's own conduct and that the absence of "clean hands" on their part should result in the court exercising its discretion and refusing the application. In exercising its discretion whether to grant an interdict the Court is entitled to take into account several "disparate and incommensurable features". [See KNOX DARCYLTDAND OTHERS v JAMIESONAND OTHERS 1996 (4) SA 348(A) 361H-I]. However, this defence was not raised by the first and second respondents either on their papers or in argument. They cannot, and do not, rely on this defence. Third respondent only raised this issue in argument, thereby depriving the applicant of an opportunity of dealing with it in its papers. In any event, the respondents have not produced any evidence whatsoever that the applicant has defamed them. The statement by **Achmat** that *'some traditional healers spread dangerous messages'* is not remotely defamatory of all or potential members of third respondent. The abusive remarks which some

members of the TAC made about the Minister of Health are neither factually nor logically connected to the alleged campaign of defamation by the respondents. Ultimately Mr **Ntsebeza** places reliance upon this extended version of the so-called "clean hands" doctrine, namely, that as a result of the abuse of the Minister, any other person can now with impunity make defamatory allegations concerning the TAC and do so repeatedly. This proposition is not supported by any authority and has no foundation in law.

The first and second respondents do not, for the purpose of this application, place in issue the TAC's right to *fama*. They, however, deny that the right has been infringed and argue that a *prima facie* right to the court's protection arises only when it is established that the statements complained of by the TAC are defamatory. A defamatory statement is one which injures the person to whom it refers by lowering him in the estimation of ordinary intelligent or right-thinking members of society generally. [See **MOHAMED AND ANOTHER v JASSIEM 1996 (1) SA 673 (A) 703G-704D**]. Counsel for the respondents submitted that not one of the statements relied upon by the TAC was capable of being accorded a defamatory meaning by ordinary, right-thinking members of society generally. Mr Ntsebeza submitted that the best that can be said in favour of the TAC is that the statements amount to verbal abuse which does not have the effect of injuring the TAC's good name.

With regard to the specific allegations, counsel for the respondents contended that it would be "outlandish" of any member of society to see anything scandalous in an organisation promoting certain medicines being

funded by pharmaceutical companies or their associates. Similarly, there is nothing untoward for an organisation "fulfilling something akin to a political role" rewarding people to demonstrate in its cause. With regard to the TAC encouraging people to take medicine which is harmful, they argue that it is common cause that the TAC encourages people to take anti-retroviral drugs which have harmful side effects.

These arguments are not entirely without merit. Activist groupings accusing each other of renting crowds has been part and parcel of political activity in this country for many decades and few take this suggestion seriously. On behalf of the TAC, Mr **Budlender** conceded that the respondents are entitled to propagate their views with regards to the toxic nature of antiretrovirals vigorously. As indicated previously, this court would be reluctant to intervene in that debate. The suggestion that the TAC destabilises democracy is incapable of fair-minded support. The tactics employed by the TAC may be somewhat boisterous and, at least in one instance, abusive towards the Minister of Health. Their conduct, however, does not threaten the security of the state and few, if any, right-thinking South Africans would see it in that light.

In the instances cited above I am not persuaded that the statements are defamatory or that the TAC has established, in respect of each statement, a *prima facie* right to the relief sought. Recognising the importance of free expression, I would leave it unfettered unless it is clear that any right has been infringed.

First and second respondents repeatedly state that the TAC is funded by pharmaceutical companies and fronts for them. These allegations fall in a different category and warrant closer scrutiny. Though the defamatory nature of the statements should be determined from the context of the statements themselves, it is noted that the respondents do not deny certain specific allegations made by **Achmat** in this regard. **Achmat** alleges that the statements are intended to damage the reputation of the TAC and to lower the TAC in the esteem of people who read them. He says that the statements have that effect and it damages the ability of the TAC to carry on its activities and further its aims. Furthermore, the TAC's ability to carry out its daily public health information work in vulnerable communities across the country is undermined. Similarly, broader public interest work done by it to ensure quality and affordable health for all people is compromised. There is also the possibility of respondents' statements being harmful to the reputations of members of TAC staff in relation to their future possible careers. None of this is denied by the respondents.

Mr **van der Berg**, somewhat surprisingly, submitted that the use of the word "front" should not give any offence as the word has several innocuous meanings. That may be so. However, in the context of the statements it could only mean that the TAC serves as a sinister cover for the activities of the pharmaceutical companies.

The respondents' allegations with regard to the pharmaceutical industry and the TAC are premised upon conjecture and inferences and, it seems, are underpinned by a conspiracy involving several players. It is an unlikely

scenario and no evidence has been disclosed which supports the respondents' position on the TAC's funding. The TAC, on the other hand, has made full disclosure of its income and their source. Moreover, several local and international deponents have confirmed the TAC's policy and practices in respect of its finances. The respondents' allegations are not supported on the available evidence and the contrary appears to be more likely.

I refer briefly to some of the responses to the allegations made by the respondents.

Achmat states that since its inception the TAC has insisted on political and financial independence from the pharmaceutical industry. This policy was formally declared and adopted at its national congress in March 2001 and forms part of TAC's constitution. The relevant clause of the constitution reads as follows:

"2,2 The TAC will remain independent of government and the pharmaceutical industry"

Achmat states further under oath that neither the TAC nor himself have ever knowingly accepted funding from a pharmaceutical corporation or its agents, nor would they do so in the future. It also appears from **Achmat's** affidavit that the TAC has strenuously campaigned and litigated against pharmaceutical companies with substantial success. It is difficult to understand why a front organisation would display such hostility towards its principal.

Mr **Nathan Geffen ("Geffen")** has been TAC's treasurer and, for about 3 years, its national manager. It appears that he holds a master's degree in Computer Science. Though his earning potential would be much higher in the private sector, he elects to work for the TAC for a modest salary because he believes in its campaigns. He was party to the refinement of TAC's principles of financial management. He is in a position to comment upon the respondents' claims and states categorically under oath that their statements and claims are false. He admits that the TAC received an amount of R482 683,52 from the Rockefeller Foundation which to his knowledge is a well respected philanthropic organisation without any attachment to the drug industry of the sort claimed by the respondents. He also explains the money received from the European Coalition of Positive People ('the ECPP'). Their funding contract stated categorically that "***no funding shall come from, directly or indirectly, any pharmaceutical company***": because of the ECPP's later public stance on affordable medicine and the closeness of its views to that of the pharmaceutical industry, the TAC, after accepting R120 000, refused to take the balance of the contract amount. They, however, have no evidence that the ECPP breached the terms of their contract by sourcing the money from drug companies.

Mr **Alan Velcich ("Velcich")** is a chartered accountant and he states under oath that he has examined the TAC's audited financial statements from incorporation. The audited statements provide schedules of funders and amounts granted over the financial periods concerned. **Velcich** concludes his affidavit by saying that from the financial statements reviewed by him

nothing has come to his attention that would indicate that the TAC has received any funding from pharmaceutical companies or any organizations representing it.

The TAC's members, staff and donors - including fraternal organizations overseas - are aware of the TAC's policy not to accept money from drug companies and comply with it.

The evidence shows that as a matter of deliberate policy the applicant has not received money from drug companies either directly or indirectly and it has implemented mechanisms to preclude any such eventuality.

Save for the speculation or conjecture to which I have already referred, the respondents have produced no factual material to advance a sustainable defence in respect of these defamatory allegations.

On the available evidence these statements are, in my view, defamatory and a *prima facie* right to the court's protection has been established.

There seems to be a well-grounded apprehension of irreparable harm. In this case the harm cannot be remedied by the payment of damages. The applicant is not a trading corporation. It is a mission-driven organisation and as **Achmat** puts it, the defamatory statements are intended to strike at the heart of the activities of the TAC.

The limited restraint on free speech, resulting from the order I make, is not

directed to stop the respondents from participating in a debate of immense public importance. The restraint is directed at the manner in which the respondents have chosen to participate in the debate and the methods they chose to employ. It is imposed to ensure that the TAC's continued participation in the debate is not hamstrung by defamatory and unfounded allegations of undue intimacy with the pharmaceutical industry.

I do not propose making any costs order at this stage as it is an issue best resolved by the court which hears the trial action.

In the result, the following order is made:

1. The respondents are interdicted, pending the final determination of an action which the applicant has instituted against the respondents for a final interdict, for an apology, and for damages, from publishing any statement which alleges that

1.1 The applicant is a front for pharmaceutical companies or the pharmaceutical industry, or the "Trojan horse" of that industry, or the 'running dog' of that industry;

1.2 The applicant is funded by pharmaceutical companies or the pharmaceutical industry;

1.3 The applicant receives funds from pharmaceutical front organisations in return for promoting antiretroviral drugs;

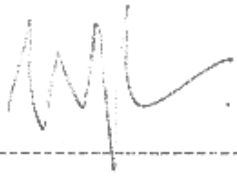
1.4 The applicant targets poor communities as a market for the drug industry in order to promote the interests of pharmaceutical companies.

2. The costs of this application are to stand over for determination by the court hearing the aforementioned action.



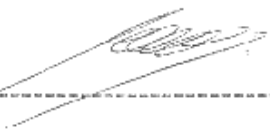
DESAI J

I agree.



LOUW J

I agree.



MOOSA J