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**

ANSWERING AFFIDAVIT

I, **ANTHONY ROBIN BRINK**, affirm and say:

1. I am an adult male, 46, an advocate of the High Court of South Africa, employed by the First Respondent as a spokesman at its offices at 15th Floor, The Terraces, 34 Bree Street, Cape Town. I respectfully point out the discrepancy in Applicant's papers as to the identities of First and Second Respondents, and state that the Dr Rath Health Foundation is hereinafter referred to as First Respondent; and Matthias Rath as Second Respondent.)

2. I have been duly authorized by Respondents to depose to this affidavit on their behalf.

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

4. 4.1 I propose to address Applicant's case by substantiating or otherwise justifying the statements sought to be interdicted and set out in paragraph 2 of the Notice of Motion, and will thereafter answer some of the specific allegations made by Abdurrack Achmat (hereinafter referred to as 'Achmat') in his founding affidavit, where they are strictly relevant to the cause of action.

4.2 I wish to preface my treatment of paragraph 2 of the Notice of Motion, by making it clear that, in confining their defence in this Application to justification (truth and public interest / benefit) and the right to freedom of expression, Respondents should not be seen to be waiving their right to raise any other defences in Applicant's proposed action proceedings.

5. Before addressing the issues of justification and freedom of expression, I will sketch my particular interest and special knowledge in

the subject of antiretroviral drug (ARV) pharmacology. The reason for doing so at this juncture will soon become apparent.

6. I have been closely tracking and reviewing the published research literature on ARV drugs for nearly ten years, paying particular attention to serious toxicity reports. In 1996, while in practice at the Pietermaritzburg Bar, I chanced to become aware of the fact that there was a substantial corpus of research literature reporting that the AIDS drug AZT was extremely toxic, and that as early as 1991 research scientists such as Hayakawa et al. had accordingly warned in the specialist scientific journal *Biochemical and Biophysical Research Communications* (176, 87-93) that 'it is urgently necessary to develop a remedy substituting this toxic substance, AZT'. In a review of the 'Clinical manifestations of ANA [*antiviral nucleoside analogue drugs, such as AZT*] toxicity'; published in the leading medical journal *Nature Medicine* ((5): 417-22) in May 1995, Lewis and Dalakas pointed out: 'It is self-evident that ANAs, like all drugs, have side-effects. However, the prevalent and at times serious ANA mitochondrial toxic side-effects are particularly broad ranging with respect to their tissue target and mechanisms of toxicity: Haematological [*destruction of blood cells, including immune cells*]; Myopathy [*destruction of muscle tissue*]; Cardiotoxicity [*destruction of heart muscle tissue*]; Hepatic toxicity [*liver*

damage]; Peripheral neuropathy [*destruction of nerve cells, particularly in the hands, lower legs, feet and brain*].'

7. The extraordinary toxicity of AZT is graphically indicated by the labelling of the drug when it is packaged by the chemical supply company Sigma-Aldrich for use by laboratory researchers. An enlarged photograph of a bottle of AZT is annexed hereto marked '[A]'. The manufacturer warns that the chemical is deadly poisonous with a skull and crossbones icon set against a broad vertical orange stripe (industry colour-code for dangerous substance), 'Toxic' in six different languages, and the warning: 'TOXIC Toxic to inhalation, in contact with skin and if swallowed. Target organ(s): Blood Bone Marrow. In case of accident or if you feel unwell, seek medical advice immediately (show the label where possible). Wear suitable protective clothing.'

8. The latest version of Sigma-Aldrich's label includes a warning that the chemical is a potential carcinogen (cause of cancer) – indeed, AZT is an established carcinogen in animal models at human equivalent doses.

9. The 25 mg of AZT supplied by Sigma-Aldrich in its bottle with the deadly chemical hazard warning is one quarter the amount contained

in a single capsule of AZT (100 mg) supplied by the pharmaceutical manufacturer GlaxoSmithKline.

10. In the package insert that accompanies the drug supplied in capsules, GlaxoSmithKline recommends that people, pregnant women included, swallow between 500 and 1500 mg of the chemical on purpose every day as a medicine. This is between 20 and 60 times the amount that Sigma-Aldrich cautions laboratory workers to be a potentially deadly chemical hazard by way of accidental inhalation, ingestion or even skin contact.

11. In marketing AZT as a medicine, GlaxoSmithKline does not warn that like all other chemotherapeutic drugs, even common antibiotics, the drug should be taken for a limited, short period only.

12. At the time that I became aware of the grave toxicity of AZT, the South African government was under heavy pressure to purchase it for administration to HIV-positive pregnant women. In the controversy over the government's disinclination to buy the drug on cost grounds, nothing whatsoever was being said about the toxicity of the drug – about which Lenderking et al. had reported in the *New England Journal of Medicine* (1994 Mar 17; 330(11):738-43) that just 500 mg of AZT given daily to 'asymptomatic patients' causes 'severe side effects' that

are ‘life threatening in some cases’. Instead, the public and professional debate proceeded from the premise that AZT had been show to be both safe and effective.

13. I went on to perform a thorough review of the published research literature on AZT, wrote it up for lay readers under the title *Debating AZT: Questions of safety and utility* and sent it up to the Minister of Health, who in turn passed it on to President Mbeki. After reading it, President Mbeki ordered an inquiry into the safety of the drug in Parliament on 28 October 1999, stating correctly: ‘There ... exists a large volume of scientific literature alleging that, among other things, the toxicity of this drug [AZT] is such that it is in fact a danger to health. These are matters of great concern to the Government as it would be irresponsible for us not to heed the dire warnings which medical researchers have been making. I have therefore asked the Minister of Health ... to go into all these matters so that ... we ourselves, including our country’s medical authorities, are certain of where the truth lies.’

14. GlaxoSmithKline (then GlaxoWellcome) deceptively responded by claiming that President Mbeki had ‘been gravely misinformed’. (This was reported by the media without comment.)

15. President Mbeki's announcement followed shortly after the publication of three critically important papers on the toxicity of AZT, none of which featured in the public discourse about the drug:

15.1 Brinkman noted in *Lancet* (1999 Sep 25; 354(9184):1112-5) that AZT and similar drugs 'are much more toxic than we considered previously. … The layer of fat-storing cells directly beneath the skin, which wastes away ... is loaded with mitochondria [*intracellular organelles crucial to energy metabolism*] … [O]ther common side effects of [AZT and related drugs are] nerve and muscle damage, pancreatitis and decreased production of blood cells … [A]ll resemble conditions caused by inherited mitochondrial diseases.'

15.2 Blanche et al. reported in the same issue: 'Our findings support the hypothesis of a link between mitochondrial dysfunction [in young children] and the perinatal administration of prophylactic nucleoside analogues' – having found eight children born with mitochondrial dysfunction, that is, seriously impaired energy metabolism and corresponding muscle and other cell damage, resulting in heart muscle damage and muscle weakness. Five children, of whom two died, presented with delayed neurological symptoms (severe brain damage in the form of massive cortical

necrosis, cortical blindness, epilepsy and spastic tetraplegia) and three were symptom-free but had severe biological or neurological abnormalities. Four of the children had been exposed *in utero* to AZT and 3TC (a similar drug) combined, and four to AZT alone. None was HIV-positive.

15.3 In a seminal review of the research literature pertaining to the pharmacokinetics of AZT, **A critical analysis of the pharmacology of AZT and its use in AIDS**, published as a special supplement in the prestigious academic medical journal *Current Medical Research and Opinion* in May 1999, Papadopulos-Eleopulos et al. recorded that: 'AZT underwent clinical trials and was introduced as a specific anti-HIV drug many years before there were any data proving that the cells of patients are able to triphosphorylate the parent compound to a level considered sufficient for its putative pharmacological action. Notwithstanding, from the evidence published since 1991 it has become apparent that no such phosphorylation takes place and thus AZT cannot possess an anti-HIV effect. However, the scientific literature does elucidate … a number of biochemical mechanisms which predicate the likelihood of widespread, serious toxicity from use of this drug. … Based on all these data it is difficult if not impossible to explain why AZT

> was introduced and still remains the most widely recommended and used anti-HIV drug. [The continued administration of AZT] either alone or in combination … to HIV sero-positive or AIDS patients warrants urgent revision.' In simple terms, the scientists found that not only is AZT exceptionally poisonous, it is also entirely useless as an antiretroviral drug inasmuch as it has no virustatic activity by all conventional measures of such ('viral load', 'viral burden', etc). This is to say, AZT is pure poison with no redeeming medicinal value whatsoever.

16. After amplifying *Debating AZT* to include discussion of these and a spate of further research papers on the serious toxicity of AZT published after this, as well as a brief account of the political and medical furore that followed the President's intervention, I published it as a book in December 2000 under the title *Debating AZT: Mbeki and the AIDS drug controversy*.

17. Dr Etienne de Harven MD, Pathology Professor Emeritus at the University of Toronto, described my literature review as 'excellent … the best, most comprehensive review on AZT available'.

18. Dr Peter Duesburg PhD, Professor of Cell and Molecular Biology at the University of California, Berkeley praised it as 'superb, extremely

well researched, analyzed, written … I could not have done a better job. … Are you a scientist or do you collaborate with one? How could you survey so many scientific publications as an attorney? … Could you publish your article or a variant of it in a medical/scientific journal? It would strengthen our case no end, if scientific papers of that quality would come from several sources, not only from Berkeley and Perth.' To an Indian journalist Duesberg remarked in my presence: 'I still can't believe he wrote that. He's really a molecular biologist pretending to be a lawyer.'

19. Professors de Harven and Duesberg's curricula vitae establishing their qualifications as scientists of the highest rank are annexed marked 'B' and 'C'.

20. Most tellingly, however, the inventor of AZT, Dr Richard Beltz PhD, Professor of Biochemistry at Loma Linda University School of Medicine, California, remarked to me: '… you are justified in sounding a warning against the long-term therapeutic use of AZT, or its use in pregnant women, because of its demonstrated toxicity and side effects. Unfortunately, the devastating effects of AZT emerged only after the final level of experiments was well underway … Your effort is a worthy one. … I hope you succeed in convincing your government not to make AZT available.'

21. In recognition of my expertise as an autodidact in the subject of ARV pharmacology I was granted an honorary co-authorship credit by Papadopulos-Eleopulos et al. in respect of *Mother to Child Transmission of HIV and its Prevention with AZT and Nevirapine.* At 170 000 words, the paper was much too large for publication in a medical or scientific journal and so was published privately as a monograph in October 2001 and submitted to the South African government as a contribution to the debate opened by President Mbeki in February 2000 with his convention of his International AIDS Advisory Panel. I annex the author list marked 'D'.

22. I am also the author of a substantially complete article, *Is AZT a DNA Chain Terminator?* It entails an extensive literature review and an investigation of the generally accepted model for AZT's putative pharmacological action as an ARV drug, as well as for its serious cellular toxicity (that AZT terminates DNA chain synthesis) and refutes it. (In fact the profound cellular toxicity of AZT arises through its activity as a potent oxidising agent.) My work in progress on this paper has been reviewed and approved by Papadopulos-Eleopulos et al. of the Royal Perth Hospital, Western Australia (the Perth Group). The Perth Group's credentials and publishing record is annexed hereto marked 'E'.

23. Together with Professor Sam Mhlongo, head of department, Primary Health and Family Medicine, Medical University of South Africa, I submitted a 100-point memorandum to the Medicines Control Council summarizing the toxicity and inefficacy of nevirapine in perinatal applications on 6 August 2002 (Annexure 'F'). On receiving it, Dr Rajen Misra, head of the sub-committee reviewing the drug, telephoned Professor Mhlongo two days later to thank him for the document, remarking that he (we) clearly knew more about the drug than anybody on Council and said he intended proposing to his colleagues that he be invited to join it.

24. I have written two further books on AZT and nevirapine, both currently in press for imminent hard-copy publication (but already published online at http://www.tig.org.za/):

    24.1 *Poisoning our Children: AZT and nevirapine in pregnancy*, is a compendium of unanswered letters sent to the Medicines Control Council, focusing principally on the foetal and neonatal toxicity of AZT reported in the research literature, much of it very recent. Reviewing it, Papadopulos-Eleopulos and Turner of the Perth Group remarked: 'Clearly your knowledge-base in this subject extends far beyond ours.'

24.2 *The trouble with nevirapine* is an extensive history and analysis of the toxic pharmacology and clinical inefficacy of nevirapine as a therapeutic and prophylactic agent, described by Dr Jonathan Fishbein MD, former Director of the Office for Policy in Clinical Research Operations, Division of AIDS, US National Institutes of Health, as 'an expertly written piece about this very dangerous drug.' Dr Fishbein's credential's are annexed marked 'G'.

25. It bears mentioning, in contradistinction, that Achmat, Applicant's founder and leader, and the deponent to its main founding affidavit, informed *Rapport* journalist Hanlie Retief on 10 February 2002 (I translate), 'We (the TAC) are scientifically illiterate.'

26. I now proceed to deal with the specific issues raised by Respondents with regard to the statements sought to be interdicted by Applicant in paragraph 2 of the Notice of Motion, to wit truth and public interest / benefit (justification) and the right to freedom of expression.

TRUTH AND PUBLIC INTEREST / BENEFIT

27. In paragraphs 2.1 to 2.10 of the Notice of Motion, Applicant foreshadows a number of statements which it claims to apprehend that Respondents

may make in future, and which it accordingly seeks to interdict. I shall deal *seriatim* with those paragraphs, below.

Para 2.1 of the Notice of Motion: 'The Applicant is a front for the pharmaceutical companies or the pharmaceutical industry'

28. Applicant functions as a front for the pharmaceutical industry in the sense, inter alia, that it carries on third party advertising for it. For the most recent example of this, I annex, marked 'H', a reduced copy of a full-page colour advertisement for two proprietary pharmaceutical drugs that Applicant placed, and presumably paid for (around twenty thousand Rand in our experience), in the *Mail&Guardian* on 1 April 2005, just after the launch of this Application. This is direct advertising of named pharmaceutical products, as the Annexure clearly shows.

29. Applicant's central mission is to ensure that as many HIV-positive people as possible in South Africa are given access to and take ARV drugs. By campaigning only over the pricing and supply issues, and by attacking and attempting to silence and discredit anyone raising the issue of the drugs' exceptionally dangerous toxicity, Applicant functions as an inestimably valuable asset of the pharmaceutical industry; and Applicant's political activities and propagandizing must have a value of hundreds of millions of dollars to it.

30. By largely restricting its quarrels with the pharmaceutical industry to drug pricing and availability, Applicant accordingly serves as loyal, controlled opposition to it. It is not surprising therefore that pharmaceutical industry money should fund Applicant after being washed through other ARV drug-promoting groups, which take money directly from the pharmaceutical industry for this service.

31. Apart from transmitting the pharmaceutical industry's marketing propaganda about the alleged benefits of consuming its merchandise, Applicant actively moves to protect both the commercial reputation of the seller and its goods when under threat:

31.1 First Respondent's article in the *Mail&Guardian* on 26 November 2004 under the headline 'Why should South Africans continue to be poisoned with AZT?' featured a photograph of Sigma-Aldrich's AZT bottle above the caption: 'This is a 25 mg bottle of AZT supplied by Sigma-Aldrich for use in research laboratories. The label speaks for itself. GlaxoSmithKline recommends between 500 and 1500 mg of AZT daily – twenty and sixty times the quantity that Sigma-Aldrich warns research workers could kill or severely injure them – alleging that "AZT has extended and improved the quality of life of millions of people living with

HIV/AIDS around the globe". Also that "GlaxoWellcome [now GSK] are a reputable company. We do not lie to people."'

31.2 GlaxoSmithKline did not respond to this direct attack on both the commercial reputation of the company and the safety of its product. Instead, it was Applicant that went complaining about it to the so-called Advertising Standards Authority of South Africa, a private company funded by the Pharmaceutical Manufacturers Association of South Africa. In this further sense Applicant acts as a pharmaceutical industry interest group, a front for the industry.

Para 2.2 of the Notice of Motion: 'The Applicant is funded by pharmaceutical companies or the pharmaceutical industry'

Para 3.3 of the Notice of Motion: 'The Applicant receives funds from pharmaceutical front organizations in return for promoting antiretroviral drugs'

32. Applicant states on its Internet website ('Support TAC' tab): 'The Treatment Action Campaign does not accept donations from the South African Government or from Pharmaceutical Companies.'

33. In an email newsletter of 23 November 2004, Applicant stated: 'We challenge Rath and the THO [Traditional Healers Organization] to produce any evidence that improperly links TAC to any drug company.

Our sources of funding and our audited statements are on our website for all to see.'

34. The Treatment Action Group (TAG) based in New York, US, is a classic pharmaceutical industry-serving patient-activist group, whose third party marketing activities for the industry, like Applicant's, serve the commercial 'drugs into bodies' agenda of the industry perfectly. Predictably therefore, the TAG's largest funding donors are pharmaceutical companies.

35. According to its 2001 financial statements (Annexure 'I') the TAG received unspecified grants of between $50,000 and $99,999 from Roche Laboratories Inc.; of between $25,000 and $49,999 from Agouron Pharmaceuticals, Inc., GlaxoSmithKline Inc. and Merck & Co. Inc.; and between $10,000 and $24,999 from Boehringer Ingelheim Pharmaceuticals Inc., DuPont Pharmaceuticals Co., and Gilead Sciences.

36. In the same year, according to Applicant's financial statements (Annexure 'J'), the group passed R242 939 of these funds on to Applicant, via the South African Development Fund (hereinafter the 'SADF').

37. According to its 2002 financial statement (Annexure ‘K’), the TAG took between $50,000 and $99,000 from Roche Pharmaceuticals; $25,000 and $49,999 from Bristol-Myers Squibb Virology, GlaxoSmithKline Inc. and Merck & Co., Inc.; between $10,000 and $24,999 from Agouron Pharmaceuticals, Inc., Boehringer-Ingelheim Pharmaceuticals, Inc., Bristol-Myers Squibb, Inc., Pfizer,Inc.; and between $5,000 and $9,999 from Abbott Laboratories and Gilead Sciences, Inc.

38. In the same year, according to Applicant’s financial statement (Annexure ‘L’), the TAG forwarded R201 000 of these funds to Applicant, again via the SADF.

39. The pharmaceutical industry money flow into Applicant, washed through the TAG, is graphically illustrated on Annexure ‘W’. (For the sake of convenience, I also annex – as ‘W2’ to ‘W5’ – graphic flow diagrams relating to some other sources of finance referred to herein.)

40. In the financial year ending February 2001, Applicant took R120 000 from another ARV drug-promoting group, the European Coalition of Positive People. The source of its £157,684 income in that year is not declared, nor the £207,650 it got in 2002. But the organisation is clearly financially maintained by the pharmaceutical industry. For instance, according to its annual report in 2003 (Annexure ‘N’), it was

funded by the industry in the following amounts: from F Hoffman La Roche £59,430; Pfizer Europe £16,312; Pfizer Foundation £18,488; and Merck Sharpe & Dohme £18,602. In 2002 it received £3,534 from Bristol Myers Squibb and £5,900 from GlaxoSmithKline Positive Action.

41. GlaxoSmithKline Positive Action is effectively a special marketing arm of AZT manufacturer GlaxoSmithKline, which the company specifically created to counter rising public alarm about the deadly toxicity of the drug experienced by people taking it. GlaxoSmithKline is frank about this, as appears from Annexure 'O'.

42. Applicant took R30 000, R56 000, R226 200, R177 000 and R195 000 from the AIDS Foundation of South Africa, according to its statements for the financial years ending February 2000, 2001, 2002, 2003 and 2004 respectively (see Annexures 'P', 'J', 'L', 'Q' and 'R').

43. According to its list of funders listed on its website (Annexure 'M'), the AIDS Foundation of South Africa is funded (in unspecified amounts) by the 13th International AIDS Conference 2000 and by the International AIDS Society (IAS).

44. The International AIDS Conferences held bi-annually are all funded by the pharmaceutical industry (indeed they are essentially drug company

trade shows). Annexed hereto marked Annexure ‘S’ is a page from the website of the most recent conference, demonstrating this.

45. The IAS is richly supported by the pharmaceutical industry and accordingly espouses a tight virus-chemotherapy line. Every issue of the IAS’s official journal *AIDS* is stuffed full of glossy full-page ARV advertisements for several pages before the reader reaches the journal’s hard content; and the IAS’s homepage on the Internet features a prominent in-your-face advertising banner promoting ARV drugs at the top of the page (Annexure ‘T’).

46 Applicant took R482 683.50 from the Rockefeller Foundation in 2002. The pivotal involvement of Rockefeller philanthropies in the erection of patented synthetic pharmaceutical drug-based medicine in the early 20th century, at the expense of rival natural health-based medical schools has been closely documented by Richard E Brown in a scholarly history and analysis, *Rockefeller Medicine Men* (University of California Press, 1979). (The Rockefeller Foundation and other ostensible philanthropies in the Rockefeller group have been endowed with billions of dollars generated by the Rockefeller family’s Standard Oil monopoly in the US in the late 19th and early 20th centuries – among the most rapacious capitalist enterprises in history. Its appalling

role in the destruction of native South American cultures has been detailed by in *Thy Will Be Done* (HarperCollins Publishers, 1976).)

47. It is First Respondent's view that the Rockefeller Foundation supports Applicant's promotion of the highly profitable, essentially capitalist proprietary-drug approach to immune deficiency among the poor in South Africa, because the Rockefeller financial group is heavily invested in the pharmaceutical drug industry:

47.1 It is common knowledge that the JP Morgan Chase banking group is controlled by the Rockefeller family. David Rockefeller served as an officer of the Chase Manhattan Bank from 1946 to 1981. He was chairman and chief executive officer from 1969 to 1980, and since then to the present he has been chairman of the bank's international advisory committee. According to its website, the JP Morgan Chase bank 'works with leading pharmaceutical companies all over the world'.

47.2 Three of JP Morgan Chase's directors are also directors of three of the world's largest pharmaceutical companies: C. Weldon is Chairman and Chief Executive Officer of Johnson & Johnson; William H. Gray III is a director at Pfizer Inc.; and Lawrence A. Bossidy is director at Merck&Co Inc.

48. Unlike Applicant, First Respondent is unimpressed by big capital amassed by past and present robber barons flinging crumbs to finance ostensible good works around the world, especially in developing countries they have looted. (The Kaiser Foundation which also finances Applicant's operations is a similar corporate philanthropy endowed by enormous profits from the petrochemical industry.)

49. The inestimable value that the pharmaceutical industry places on the third party marketing that it gets from AIDS drug activists in South Africa (and their counterparts abroad, whom it finances openly) is borne out as follows: One of Applicant's senior office bearers is Mark Heywood, who is also director of the AIDS Law Project, with an ARV drug-promoting agenda identical to Applicant's, and with which it co-operates closely. When Heywood and his staff travel to AIDS conferences locally and abroad, AZT manufacturer GlaxoSmithKline pays their travel and accommodation expenses.

Para 2.4 of the Notice of the Motion: 'The Applicant organises rented crowds for the drug industry'

Para 2.5 of the Notice of Motion: 'The Applicant pays people to participate in its demonstrations'

50. On 26 May 2003 Applicant paid R100 each to apparently impoverished black African women following a demonstration it organized on the Cape Town Parade. I refer to the affidavit of Daphne Bryant, who witnessed this.

51. First Respondent engaged a freelance journalist and cameraman to interview demonstrators attending Applicant's most recent march on Parliament on 16 February 2005. Annexed hereto marked Annexure 'V' is a transcript of the interviews showing that in many cases the marchers had little idea of what they were marching for. The entire unedited videotape is available for verification at the Honourable Court's or Applicant's instance.

52. The distribution of free T-shirts as in inducement to the poor to join Applicant's demonstrations against the government is a major part of its drug marketing programme. According to Applicant's financial statement for the year ending February 2003, Annexure 'X', Applicant spent R495 439 on having them made.

53. Demonstrating in uniform for the television cameras, the marchers appear to be at one with Applicant in its moral and political coercion of the government to spend billions of Rand on the purchase of ARV

drugs (the tender just awarded to various drug companies is worth R3.4 billion).

54. It goes without saying that nobody from the townships drawn into Applicant's demonstrations in this way has the remotest idea about the chemical composition and activity of the chemicals sold as ARV drugs, and any knowledge of the reams of professional literature on their life-threatening toxicity.

55. It is Respondents' view that Applicant's *modus operandi* in paying poor people from impoverished townships to demonstrate, or by offering them free food to attract them onto busses, a ride into Cape Town for a day's outing, commencing with a free music concert, free clothing and a square meal afterwards, all as inducements to march against the South African government to demand that it trade with the pharmaceutical industry for the purchase of ARV drugs (sometimes offered free for a while as a marketing hook), is utterly unconscionable.

Para 2.6 of the Notice of Motion: 'The Applicant encourages people to take medicine which is harmful to them and will kill them'

56. Since First Respondent's campaigning has concerned AZT and nevirapine only, this affidavit will address to these drugs only.

57. That Applicant encourages HIV-positive people to take AZT and nevirapine is not in question; the real issue is whether these drugs are harmful and potentially fatally so. Applicant disputes this, as indicated by Achmat's statement reported in the *Saturday Star* on 12 January 2002: 'It can only be Thabo Mbeki's belief that antiretrovirals like AZT are toxic and destroy the immune system. There is no other explanation for the paranoia that's going on.' Applicant's national treasurer is on record stating equally ignorantly: 'There is no evidence that has been tabled showing that AZT is toxic to either mother or child.'

58. AZT is a synthetic chemical compound in the nucleoside analogue group. Its pharmacological action is closely akin to 3TC, d4T and ddI, all in the same chemical class. The principal use of nucleoside analogues is to poison human cells in cancer chemotherapy. AZT was first synthesized for this purpose in 1961 and has been used to this end with reported success in several published studies.

59. Nevirapine is likewise exceptionally toxic. It is also a chemotherapeutic drug, described by its manufacturer Boehringer Ingelheim as such in

the information insert with which the drug comes packaged. A brief account of the toxicity of the drug is set out in my 100-point submission to the MCC, Annexure 'F'.

60. As appears from this latter document, the toxicity of nevirapine is so acute and so severe that it is not permitted in the US for even short-term use by medical professionals accidentally pricked by hypodermic needles.

61. Nevirapine is not licensed for use on its own as a treatment in first world countries, and may only be used in combination with nucleoside analogue drugs as a treatment option of last resort.

62. No industrialized first world country permits the administration of nevirapine to women in labour and their new-born babies. It is only in developing world countries that the drug is dumped for this purpose.

63. As mentioned earlier, there is a huge body of published research literature establishing that AZT and nevirapine are extremely toxic drugs with a range of seriously harmful and potentially lethal ill-effects. Both GlaxoSmithKline and Boehringer Ingelheim acknowledge in their package inserts for AZT and nevirapine respectively that the toxic ill-effects of their drugs may be fatal.

64. Annexed marked ‘Y’ are some excerpts from *Debating AZT*, which, in light prose for non-expert readers, reviews some of the literature concerning the toxicity of AZT published as at 15 November 2000.

65. Several of Applicant’s members have been killed by ARV drugs. Supreme Court of Appeal Judge Edwin Cameron relates in his new book *Witness to AIDS* (Cape Town: Tafelberg, 2005, pp 202-3) that TAC member Sarah Tahle was killed by ARV drugs in April 2002. Her doctor, Francois Venter, spoke at her funeral. ‘He explained that toxic reactions to the drugs can occur, particularly when the patients’ immune systems are severely weakened.’

66. It defies comprehension then that people with low CD4 cell counts should be encouraged to take ARV drugs such as AZT.

67. In fact AZT and similar nucleoside analogue drugs themselves destroy immune cells. Cheeson, Keating and Plunkett make the point on the first page of the preface to their standard text, *Nucleoside Analogs in Cancer Therapy* (Marcel Dekker, 1997), mentioning the ‘profound immunosuppression that often accompanies therapy with nucleoside analog drugs’, and their ‘potent immunosuppressive properties’.

68. A few months after commencing treatment with ARV drugs in the AZT class (d4T and ddI) in October 2002 TAC campaigner Charlene Wilson was killed by lactic acidosis, 'a side effect of stavudine [d4T] and didanosine [ddI]' (per Cameron, *Witness to AIDS*).

69. An article in the Canadian *Globe and Mail* on 13 September 2003 quoted Judge Cameron: '"On the 28th of October, 1999, the President gave a speech in which he said AZT was toxic," said Edwin Cameron, the shock of it still fresh. "This signalled the start of an apparent courting of the AIDS denialists. … Of course the drugs are toxic," said Mr. Cameron, almost trembling with exasperation. TAC recently lost three prominent activists whose bodies could not withstand the drugs.'

70. Achmat has himself suffered crippling side-effects from the toxicity of ARV drugs, and within minutes or hours of signing his affidavit on the day that this Application was launched, he suffered a major heart attack, for which he was hospitalized for several days and invalided for a month on doctor's orders.

71. It emerged in the media after South Africa's third democratic election in April 2004 that Achmat had been concealing from the people of South Africa and from our government the fact that he had been unable to continue taking his triple-combination antiretroviral drug regimen

because its severe toxic effects had crippled and incapacitated him, both physically and mentally.

72. A press report in the *Daily Dispatch* on 28 May 2004 highlighted the extent: 'Things have changed in Zackie Achmat's life. Once readily accessible and always quick with a sound bite, a personal assistant now monitors the cellphone and diary of the chairperson of the Treatment Action Campaign (TAC) and screens visitors before ushering them into Achmat's study. ... As much as these changes signify a new level of structure in Achmat's life and the need to manage multiple requests for interviews, the more profound changes emerge from his first six months of anti-retroviral therapy and how this has forced the charismatic activist to review his life. … [A] frightening setback ... occurred in February and March ... which shook Achmat's self-confidence. ... "Going into my fifth month I started feeling a sensation in my feet. At first I dismissed it, thinking I'd done something at the gym. The second week it was clear to me and I thought, 'I can't let Manto win and I can't let Mbeki win', and I kept quiet for three more weeks." When Achmat finally told his doctor about his symptoms, the nerves in his feet were so sensitive that he could barely walk. A change of drugs (from d4T to AZT) has arrested the situation and his left foot feels better, but he still can't put any weight on his right foot for any length of time, nor can he walk long distances. ... Achmat, who has a

clinical history of depression, says that the fact that he was immobile for a week while his doctor tried to bring the side effects under control brought on a terrible depression, the worst he's had in two years.'

73. In point of fact, AZT is no less neurotoxic than d4T; as nucleoside analogues the drugs are in precisely the same chemical class and have substantially the same toxic pharmacology. On the neurotoxicity of AZT, I canvass some research reports in paragraphs 56-7 of Annexure 'Y'.

74. The mitochondrial toxicity of the ARV drugs that were crippling Achmat's legs and feet – damaging both muscle tissue and nerve cells – is amply established in the clinical and research literature, a sample of which is cited in Annexure 'Y', paragraphs 3 – 8.

75. The neurotoxicity of the ARV drugs that incapacitated Achmat and prevented him from performing his work as an ARV drug promoter has also caused him brain damage, resulting in mental deterioration that had become conspicuous to observers by late 2004:

75.1 The early indications of this in the above-mentioned report were confirmed by journalist Willemien Brummer, who saw Achmat shortly for an article published about him by News24.com on 1

December 2004. During the interview, she noticed how 'His words were bats that flew into each other in the dark. His sentences ended in mid-air. It was as if he looked at you through a dense layer of fog. It was during these times that I wondered what was happening to him. Especially when he cancelled press conferences and public appearances at the eleventh hour. … Between gulps ['of soup and a glass of orange juice'] he talks about his past and the complex interaction between the chemicals in his brain, his genes and the virus with which he was diagnosed in 1990.The HI virus already penetrates the brain during cero-conversion [sic]. In other words, shortly after infection, when antibodies change from negative to positive [sic]. Every patient's reaction to this penetration is different. Chances are good this can lead to depression and cognitive reduction and, during the final stages, even to dementia – a condition that usually only afflicts the elderly.'

75.2 Achmat's own subjective appreciation of his deteriorating mental condition was conveyed by his expression of concern to Brummer that 'Losing control of his mind [was] his biggest fear' – worrying: 'As long as I hold onto my dignity.'

75.3 Achmat's psychological inability to reconcile himself with the reality that he is being poisoned by the drugs he pushes ('denialism' in the strict sense) is apparent from Brummer's report: 'And then came the physical side effects of the antiretrovirals. Especially peripheral neuropathy – a condition that takes place when the nerve endings are impaired; burning pains are felt in the feet and legs. It was so bad for Achmat, that by the fifth month of antiretroviral treatment he could no longer walk. "I was totally melancholic and dysfunctional at the beginning of the year. I fought with my nearest and dearest, and I did not want to accept that I was experiencing side-effects."'

76. It follows that Achmat's credibility in deposing about how the drugs AZT and nevirapine, at the centre of this case, have harmed him or otherwise, is unsafe.

77. Like AZT and d4T, nevirapine, which Achmat also takes, is neurotoxic too, and has been reported to cause severe mental deterioration by Wise et al. in the *British Medical Journal* on 13 April 2002, under the title **Neuropsychiatric Complications Of Nevirapine Treatment**.

78. The heart attack that Achmat suffered at the age of 42 is consistent with the destruction of cardiac muscle cells by the AZT and other ARV drugs he is taking. That AZT rapidly destroys heart muscle tissue is

well established in the medical and scientific research literature. In this regard I respectfully refer this Honourable Court to numbered paragraph 158 of Annexure ‘Y’.

79. Heart failure caused by ARV drug toxicity is in fact the leading cause of death among ARV-treated people:

79.1 An investigation of the incidence of life-threatening ill-effects caused by ARV drugs (‘Highly Active Anti-Retroviral Therapy’ or HAART) entitled **Grade 4 events are as important as AIDS events in the era of HAART** was reported by Reisler et al. in the *Journal of Acquired Immune Deficiency Syndromes* (2003 Dec 1; 34(4):379-86). The researchers noted that ‘All 4 classes of antiretrovirals (ARVs) and all 19 FDA approved ARVs have been directly or indirectly associated with life-threatening events [‘Grade 4’ events] and death.’ They reviewed the clinical case files of 2947 patients treated with ARV drugs between 1996 and 2001 with the stated objective: ‘To estimate incidence and predictors of serious or lifethreatening events that are not AIDS defining, and death among patients treated with highly active antiretroviral therapy (HAART) in the setting of 5 large multicenter randomized treatment trials conducted in the United States.’

79.2 More than twice as many people (675) had suffered a drug-related (Grade 4) life-threatening event as against an AIDS event (332.) The most common causes of grade 4 events from drug toxicities were ‘liver related’. The greatest risk of death was not an AIDS event but from drug-induced heart attack (‘Cardiovacular events’). ‘Our finding is that the rate of grade 4 events is greater than the rate of AIDS events, and that the risk of death associated with these grade 4 events was very high for many events.’ In plain speech, they found the cure is deadlier than the disease.

80. In the biggest, best conducted clinical trial of AZT yet, the use of the drug was found to accelerate death among people taking it: see paragraphs 16 to 19 of Annexure ‘Y’.

81. Annexed marked ‘Z’ is a recent news report confirming that AZT is making a child in Cape Town very ill. This is predictable: see paragraph 37 of Annexure ‘Y’.

Para 2.8 of the Notice of Motion: ‘The Applicant forces the government to spread disease and death among the people of South Africa’

82. On its own showing, Applicant has forced the South African government to make AZT and other ARV drugs available in the public heath system against the informed, better judgement of its democratically elected leadership in President Mbeki and Dr Tshabalala-Msimang.

83. *The Physician's Desk Reference* revealingly notes, 'It was often difficult [in AZT clinical trials] to distinguish adverse events possibly associated with administration of Retrovir from underlying signs of HIV disease or intercurrent illnesses.' In other words, the administration of toxic AZT may cause disease indistinguishable from and as severe as AIDS diseases.

84. There is a growing body of research literature reporting what physicians call the 'paradoxical' onset of opportunistic infections, something they've taken to calling 'immune reconstitution syndrome'. This is to say, doctors are seeing their patients on ARVs 'paradoxically' getting very sick notwithstanding their 'improvement' according to 'immunological' and 'virological' laboratory test markers.

85. The latest study reporting this, by Shelburne et al., was published last month in *AIDS* (19:399–406, 2005): **Incidence and risk factors for immune reconstitution inflammatory syndrome during highly**

active antiretroviral therapy. The drug industry-funded ARV-promoting English organization NAM summed up on its website aidsmap.com: 'Almost one third of patients with HIV and certain OIs [opportunistic infections] experienced a flare-up or worsening of their OI within months of starting their first antiretroviral regimen. Paradoxically, these episodes were seen in many of the patients with the best viral load and CD4 cell responses to ART [antiretroviral therapy].'

86. Applicant promotes the use of AZT in pregnancy despite the fact that numerous studies have found that exposure to AZT in the womb and after birth leads to a higher death and serious disease rate among drug-exposed babies than untreated ones. I have synopsized these studies in Annexure 'AA'. (Informed about them last year, the MCC has not responded.)

Para 2.9 of the Notice of Motion: 'The Applicant destabilizes democracy in South Africa '

87. First Respondent's political judgment and assessment in this regard is as follows:

87.1 The South African government is the most progressive country in the world for its promoting natural and traditional medicine as the

basis of primary health care. This is reflected by the passage of the Traditional Health Practitioners Bill (THP) – unique in the world, inasmuch as it gives traditional natural medicine equal legal recognition and status vis-a-vis Western pharmaceutical medicine, for the first time in any country in the world to the best of our knowledge. This directly threatens the market for patented drugs. According to the WHO about 85% of South African people trust and use traditional African medicine as the first line of treatment for their ills.

87.2 The role of the South African democratic government in resisting the lawsuit of thirty-nine international pharmaceutical companies can not be overestimated. The lawsuit over patent rights and profit was seen by human rights groups and AIDS activists as landmark in the effort to secure affordable medication by allowing South Africa to import or make cheap generic versions of patented drugs. The decision ended a global battle that deeply embarrassed the pharmaceutical companies. The international pharmaceutical industry has indeed an interest in destabilizing a country that actively attacks its multibillion dollar monopoly income source: patent-protected pharmaceutical drugs.

87.3 The South African government is also actively fighting for the free access to natural nutritional therapies and vitamin supplements that are not patentable and can therefore not be exploited by the pharmaceutical industry. Vitamin products compete with pharmaceutical drugs for their preventive action against chronic diseases, especially heart disease and cancer. The market with patented drugs for chronic diseases represents the biggest part of the pharmaceutical industry's global business. Over the past ten years the pharmaceutical industry has lobbied against the free availability of vitamin supplementation in the international Codex Alimentarius Commission. The courageous – and within the Commission unique – standpoint of the South African Codex Alimentarius delegate Antoinette Booysen has been to ensure that people should be encouraged to supplement their diet with vitamin supplements to prevents chronic diseases: 'Because foods contain many substances that promote health and prevent chronic diseases, people should therefore be encouraged to select a healthy diet and supplement this diet with those nutrients for which the intake from the diet is insufficient to meet the requirements necessary for the prevention of chronic diseases and/or for the promotion of health beyond the demands of preventing micronutrient deficiencies.'

87.4 The Codex Alimentarius standards for food supplements are binding worldwide as they are part of the Word Trade Organization, WTO. Countries that do not comply with these standards can be pressured by economic sanctions imposed by the WTO. Due to South African pressure within the Codex Alimentarius Commission, it abandoned its attempt to impose low limits to micronutrient concentrations at its meeting in Bonn, Germany, last year. This ensures that in future food supplements may contain doses with a preventive effect on chronic diseases. This is a massive setback for the pharmaceutical industry.

88. It is First Respondent's view that Applicant has been unwittingly instrumentalized by foreign pharmaceutical corporations to disparage natural medicine and demean President Mbeki and Dr Tshabalala-Msimang in a grossly insulting manner in furtherance of a foreign business agenda.

89. In our perception, Applicant is not a naturally 'home-grown', democratically-generated organization. It would be nothing without millions of Rand every year from foreign funders with alien agendas with which to make propaganda vaunting ARV drugs as life-saving (eg 'Stand Up for Our lives') and achieving market penetration among poor African communities by paying 'AIDS counsellors' and other field

operatives to transmit the pharmaceutical industry's marketing message about its allegedly beneficent merchandise.

90. By posing as the voice of 'civil society', rather than the political leadership of the African National Congress, elected to govern on an overwhelming majority of electorate support, and by coercing the government to provide ARV drugs against the informed, better judgment of the country's leadership, Applicant undermines our democracy.

91. In addition, Applicant has conducted itself in a crypto-fascist manner, disrupting public and private meetings, tearing down a banner hung by First Respondent and twice trying to silence the national Minister of Health.

92. Anticipating disruption by Applicant, First Respondent was constrained to hire a security company to keep the peace at its first public meeting in Cape Town on 25 November last year. As predicted, Applicant tried to break up the meeting with shouting and chanting.

93. First Respondent's 5X5 metre banner draped from a wall opposite Parliament on 14 February 2005, the day of Applicant's march, warning of the toxicity of AZT, was torn down by two of Applicant's supporters.

First Respondent's posters have been taken down, in the townships, presumably by Applicant.

94. On 25 March 2003 Applicant, in the form of Achmat leading a gang of about thirty supporters, tried to prevent Dr Tshabalala-Msimang speaking at a public health conference convened in Cape Town by the Health Systems Trust and the Public Health Association of South Africa, having unsuccessfully demanded that she be disinvited.

94.1 The Minister was forced to enter the conference from the parking basement because Applicant blockaded the hotel foyer. 'When she comes we will disrupt her speech,' Achmat promised, and duly did so, with him and other members of Applicant blowing whistles, waving large 'Wanted for Murder' posters with Dr Tshabalala-Msimang and Minister Alec Irwin's heads on them, and chanting 'murderer', 'criminal', 'resign', 'Manto go to jail', and 'Manto go home'.

94.2 When she entered the room, Achmat assailed her, jabbing his finger in her face and berating her with insulting comments about her appearance and lunch plans. When she attempted to interject, he or someone nearby, shouted, 'Shut up, Manto.' Achmat then, as an uninvited intruder, addressed the delegates, denouncing Dr

Tshabalala-Msimang for her reticence over ARVs, accusing her of dishonesty and incompetence.

94.3 When Achmat was done, the Minister addressed the conference protected by a policeman standing at either side of her on stage. Achmat commented afterwards: 'The organisers of the conference have only themselves to blame for inviting this criminal.'

95. Anticipating further such riotous conduct on the part of Applicant's members, on 8 April 2003 the Minister was forced to enter a cocktail party held for Richard Feachem, executive director of the Global Fund for HIV/AIDS, TB and Malaria, from a rear entrance to avoid another confrontation because Applicant's members were standing in front at the gates of the venue, chanting and waving 'Wanted for murder' posters.

96. When the Minister complained about this, and how Applicant was bussing in demonstrators to disrupt her public appearances, Applicant's national treasurer Mark Heywood shouted from the floor: 'You are lying, Minister. … You are a liar.' He continued remonstrating disruptively until silenced by a security official.

97. In view of the manner in which Applicant typically conducts itself, it is our view that it is abusing the democratic freedoms it has in South Africa in a manner not unlike the Nazi SA in the Weimar Democracy in the early thirties (attracting the poor to its marches with the promise of a beer and a place to sleep).

Para 2.10 of the Notice of Motion: 'In order to promote the interests of pharmaceutical companies, the Applicant targets poor communities as a market for the drug industry'

98. This is indeed the case. Applicant actively campaigns in Khayelitsha and other African townships to draw in supporters for its ARV drug-promoting mission. It would indeed be surprising to find an equivalent for such proselytizing by Applicant taking place in the traditionally rich white suburbs. Applicant's marches are generally populated by Africans, often with young whites working as marshals. The principal markets for ARV drugs in South Africa are undoubtedly black Africans. I further refer to paragraph 15 of Achmat's founding affidavit, which speaks for itself.

Conclusion

99. I respectfully submit, on behalf of Respondents, that it must be abundantly clear from the aforegoing that the statements which

Applicant seeks to interdict, are substantially true. It is further submitted that, by the very nature of such statements, and the context which they occupy in the controversial debate concerning the advisability or otherwise of ARV drugs, publication of such statements would be in the public interest and /or for the public benefit.

THE RIGHT TO FREEDOM OF EXPRESSION

100. Section 16(1) of the Constitution guarantees the right to freedom of expression. The statements which Applicant seeks to interdict are, it is submitted, examples of comment on matters of public interest and form a legitimate part of a lawful, if vigorous, debate on the aforementioned topics.

101. It is further submitted on behalf of Respondents that the debate in question, concerning highly contentious and controversial questions on perhaps the most burning issue of our time, namely AIDS, has long since been elevated from a matter of public health to one of national politics. As such, it is clear that the debate has entered the public domain and that all points of view, however unpopular or controversial they may be, should be permitted to be aired. That, I submit, is what the Constitution envisages.

102. Considering the nature of the debate and the importance which it occupies in national affairs, it is further submitted that Applicant – which has not shied away from the public gaze or, indeed, the limelight – should in any event accept that the role it plays in the debate exposes it to sometime robust criticism.

103. Respondents' freedom of expression, exercised and sought to be further exercised in the course of a raging debate on an issue of great moment, should accordingly be afforded appropriate recognition, and should not be stifled. That there are elements in the media and elsewhere, including Applicant, which desire that Respondents' voices be silenced and arguments be stifled, will become clear from the following paragraphs.

104. The reason why the extensive literature on the dangerous toxicity of AZT, nevirapine and other ARV drugs is largely unknown to the general public is largely on account of the partisan role that the media have played in the controversy – lionizing Achmat and Applicant, actively supporting their ARV drug-promoting agenda, blacking out information about the hazards of the drugs and disparaging their critics in the most insulting terms in editorials, reports and cartoons.

105. As a leading example, the *Mail&Guardian*, which established a local and international reputation for courageous, progressive reporting during the apartheid era, has led this trend in establishing an almost universal ‘progressive consensus’ in favour of ARV drugs, and has an avowed, express editorial policy of promoting them.

105.1 On 26 November 2004, the First Respondent published an invited article in the World AIDS Day supplement of that newspaper, in which it stated, inter alia, that ‘Hundreds of studies have found that AZT is profoundly toxic to all cells of the human body, and particularly to the blood cells of the immune system’ and that ‘Numerous studies have found that children exposed to AZT in the womb and after birth suffer brain damage, neurological disorders, paralysis, spasticity, mental retardation, epilepsy, other serious diseases and early death.’ (The article appears at page 94 of the founding papers.)

105.2 These shocking but amply substantiated statements drew a barrage of hostile letters to the newspaper, three of which claimed that such information could actually ‘kill people’. Editor Ferial Haffejee’s reaction was to apologize for publishing the article, stating that it ‘should not have been carried’ and that such writing ‘will not be carried in the *Mail&Guardian* in future’.

105.3 After telephonically agreeing with me to publish First Respondent's reply, Haffejee spiked it just before going to press. *Mail&Guardian* Chief Operations Officer Hoosain Karjeiker explained to me that what was objectionable about it was our reference to 'the side effects of extremely toxic pharmaceutical drugs like AZT and nevirapine'. 'We are proponents of AZT,' he said. 'Once again the ad casts aspersions on AZT and nevirapine.' I enquired whether it was objectionable to state that AZT is toxic. 'Yes,' he responded; 'It's dissident'.

105.4 Haffejee told me shortly afterwards that the 'position of the M&G is that everyone is entitled to treatment' with ARV drugs, and said the merits weren't open to debate. 'Our newspaper has been at the forefront of the push for antiretrovirals in this country. Our brand has suffered because of your ad two weeks ago. The new ad contains the same message, albeit not as strong. Publishing it will continue to damage our brand.'

105.5 Reacting to news that Applicant had gone on to complain to the Advertising Standards Authority about our article, the *Mail&Guardian* quoted Haffejee repeating: 'This newspaper has always supported the need for an effective anti-retroviral

programme and will not in future carry any advertising which dilutes this message or creates confusion in the minds of readers.'

106. Apart from the media's fealty to the pharmaceutical industry and its agents such as Applicant, a further major reason why the public is generally unaware of the dire research findings that have been published about the dangerous toxicity of AZT and other ARV drugs is the professional indolence of the salaried experts to whom the South African public looks for guidance. For example, three senior South African scientists (Professors Makgoba, Karim and Coovadia) responded to President Mbeki's announcement in Parliament about AZT by ignorantly repudiating it.

107. By attempting to gag Respondents from catalysing informed public debate about the ARV drugs that Applicant promotes as the principal plank of its political campaign, and by seeking to quell discussion of the pharmaceutical and foreign geo-political interests that Applicant's operations serve, Applicant appears determined to choke off all challenge, uncompromising criticism, novel ideological analysis and vigorous political engagement.

108. As the hitherto suppressed information and ideas that First Respondent has been publishing gain currency, Applicant is likely to wither as a political organization, hence its attempt to crush First Respondent's challenges and its unmasking of Applicant's essential agenda and its foreign corporate and political beneficiaries.

109. Applicant's endeavours to stifle critical voices in a matter of inordinate national importance are manifestly contrary to the values enshrined and protected by our Constitution. On a practical level, they are also very dangerous to public policy, especially in an intellectual climate in which journalists in South Africa typically conduct themselves in the 'embedded' manner exemplified by the *Mail&Guardian*'s editor and COO, and where South Africa's medical experts have revealed themselves to be disgracefully incompetent.

THE AFFIDAVIT OF ZACKIE ACHMAT

110. I now wish to respond to some specific, material allegations in the founding affidavit of Achmat. In doing so, I respectfully wish to draw attention to the following:

110.1 Since the Application is one for an interim interdict, I do not intend elaborating on or addressing allegations of past conduct, save to deny that any of Respondents' alleged past

conduct referred to by Achmat was unlawful, defamatory or false.

110.2 In addition, without necessarily dealing specifically with each averment made by Achmat, all factual allegations are denied, and all legal submissions refuted, save insofar as they may be consistent with Respondents' answering papers.

111. **Ad paragraph 19 thereof:**

111.1 It may be that AZT and nevirapine are registered with the MCC. The use of nevirapine as a perinatal prophylactic appears to still be under review, having regard to the MCC's announcement in this regard on the eve of the argument of the state's appeal in the case brought by Applicant. It is in any event First Respondent's view that the MCC has been grossly derelict in failing to act according to its responsibilities in the light of the adverse information about ARV drugs made available to it.

111.2 Registration of a drug is always provisional, as demonstrated by the withdrawal of dozens of registered drugs over the last decade by the US FDA, after they proved lethal.

112. **Ad paragraph 24 thereof**:

It is our perception and understanding, given Dr Tshabalala-Msimang's many public statements warning how toxic AZT is, that the South African government was coerced into assuming the policy that it did by Applicant in concert with powerful and influential foreign organizations with the same ARV drug-promoting mission.

113. **Ad paragraph 26 thereof**:

I dispute that anybody is ever 'in urgent need' of ARV drugs, any more than anyone was ever 'in urgent need' of arsenic, mercury, bismuth or antimony, once standard but lethal treatment in Western medicine.

114. **Ad paragraph 32 thereof:**

114.1 It is difficult to conceive of a better illustration of the clinical irrelevance of surrogate markers such as CD4 cell counts (which do not correlate with clinical health) and 'viral load' (which is not a measure of viraemia, and is also uncorrelated with clinical health) than Achmat's own clinical case history.

114.2 On the day he dubiously claims that he never felt better, he suffered a near-fatal heart attack. His claim to be enjoying excellent, restored health is to be doubted on account of his deceitfulness in concealing, for political reasons, the fact that he'd been incapacitated by a few months' treatment with ARV drugs by early 2004, and because for most people the toxicity of these drugs is unendurable:

(a) In a novel investigation to quantify the **Prevalence of adverse events associated with potent antiretroviral treatment** in single, double, and triple regimens of ARV drugs, published in *Lancet* on 20 October 2001 (358(9290):1322-7), Fellay et al. reported 'a high prevalence of toxic effects' in a cohort of 1160 patients. More than two thirds of patients on these drugs suffered side effects severe enough to affect treatment adherence – in other words prevent them taking the drugs as prescribed. Forty-seven per cent reported clinical problems like vomiting, diarrhoea, nausea, fat growth, mood swings, insomnia and fatigue. Blood tests revealed 'potentially serious' abnormalities among twenty-seven per cent. The researchers classed a 'significant proportion' of these adverse events as 'serious or

severe'. Kidney dysfunction and severe fatigue that were 'probably or definitely' due to their HIV treatment led to some patients being hospitalized.

(b) Numerous other studies have found AIDS drugs intolerably poisonous for a high percentage of people prescribed them.

115. **Ad paragraphs 55 and 57 thereof:**

115.1 There was no viva voce appearance before the ASA. The First Respondent filed a written answer to the complaint.

115.2 The merits of the case were not determined by the ASA because, as appears from the ASA's ruling annexed to Achmat's affidavit, the ASA did not consider and evaluate whether the substantial supporting documents submitted actually substantiated the claims contested by Applicant. The reason advanced by the ASA for this was that the substantiating documentation was not blessed by a single 'credible, independent expert'. In fact, in regard to AZT, many hundreds of independent, credible experts were cited.

115.3 The ASA demanded that the claims be withdrawn on the grounds that they were not substantiated. However, because the statements made are all perfectly true, and amply scientifically established, withdrawing them, and thereby misleading the South African public with false information, was out of the question, whatever the consequences.

116. **Ad paragraph 86 thereof:**

We dispute that our claims go to Applicant's honesty, but admit that they show Applicant to be a discreditable organization marketing dangerously poisonous chemicals as medicinal drugs on behalf of the pharmaceutical industry.

117. **Ad paragraph 99 thereof:**

First Respondent made an inadvertent mistake here, which it undertakes not to repeat now that it has been pointed out: it was not millions of rands that Applicant received from the Rockefeller Foundation, but nearly half a million.

118. **Ad paragraph 113 thereof:**

118.1 In our contrary view, in the light of the published medical literature on the clinical manifestations of the toxicity of ARV drugs, and particularly their cardio-toxicity, Achmat was 'probably' nearly killed by them on the day he signed his affidavit.

118.2 To the best of my knowledge there is no credible, independent study in existence (not funded by GlaxoSmithKline or its predecessors before several corporate amalgamations) that has shown that ingesting ARV drugs saves or extends lives. I have written a detailed critique of the small drug company-financed study that preceded FDA approval and giving rise to this belief under the title, *Licensing AZT*, which I have published online. The study conducted over several weeks was a complete sham (a quarter of those on the trial only survived the haematological toxicity of the drug with one or more repeated blood transfusions), and its findings could not be repeated; see paragraphs 19 to 20 of Annexure 'Y'.

119. **Ad paragraph 114 thereof:**

119.1 As mentioned above, Reissler et al. have found that the leading cause of death among people treated with ARV drugs is not AIDS but the side effects of ARV drugs.

119.2 ACT-UP is an ARV-promoting group similar to Applicant, with chapters across the US, and elsewhere in the world. In the 'long experience' of its members, however, ARVs, and particularly AZT, have killed so many of them that the San Francisco chapter switched to campaigning against the drugs. (Annexure 'BB'.)

119.3 In Parliament on 20 April 2000 Deputy President Zuma read from a letter addressed to President Mbeki by this group after it was barred from the 13th International AIDS Conference in Durban in July that year: 'For the past decade in San Francisco we have witnessed the destruction of human life caused by AIDS drugs. We hoped that by exhibiting at the conference, we could warn participants to prevent a similar catastrophe occurring in their countries.'

119.4 Another group in Los Angeles, 'Alive and Well', led by a healthy, drug-free, HIV-positive woman, Christine Maggiore, has also turned to campaigning against ARVs for the same reason.

120. **Ad paragraph 115 thereof:**

It is untrue that there was any substantial debate in the Constitutional Court concerning the safety and efficacy of ARV drugs. These were not the issues on trial. In the first mentioned case, some conventional wisdom was recited; in the second, the case against the perinatal use of nevirapine made in Professor Mhlongo's urgent application was dismissed without being adjudicated.

121. **Ad paragraph 116 thereof:**

As I mentioned, based upon all the scientific information available, and brought to its attention by me, I contend that the MCC has been guilty of gross dereliction of its responsibilities to protect the South African people against the marketing of useless toxic drugs.

122. **Ad paragraph 121 thereof:**

First Respondent considers that Applicant can justifiably take most of the credit for the government's decision to 'roll out' ARVs in South Africa.

123. **Ad paragraph 122 thereof:**

123.1 Annexed hereto marked ‘CC’ is an aerial photograph of the demonstration in full swing, with Applicant’s leaders cajoling the crowd through loudspeakers mounted on a flat-bed truck. There are about 620 people present, including passers-by and reporters. I respectfully ask the Court to determine who is telling ‘an almost comical lie’ about the size of Applicant’s demonstration. The demonstration was ignored by all major media abroad.

123.2 Mr Morobe’s opinion is a personal one; it certainly does not reflect President Mbeki’s opinion of Applicant and its ARV-promoting agenda, and Achmat well knows it.

124. **Ad paragraphs 141 and 149 thereof:**

Based on an exhaustive study of the published research literature on ARV drugs, and supported by the endorsement of my information campaign by Professor Richard Beltz, the inventor of AZT, I dispute that Applicant saves lives by promoting the ingestion of ARV drugs by mostly black, mostly poor Africans. Instead, it is my considered opinion that by so doing Applicant endangers their lives.

THE SUPPORTING (FOUNDING) AFFIDAVITS

125. As with the founding affidavit of Achmat, the contents of the remaining supporting (founding) affidavits are denied insofar as they may be inconsistent with Respondents' answering papers. In particular, however, I wish to deny, on behalf of Respondents, all averments contained therein which amount to allegations of unlawful, defamatory or false conduct on the part of Respondents (or their 'agents').

REQUIREMENTS FOR THE INTERDICT

126. In the premises of the aforegoing, I respectfully submit that Applicant has failed to make out a case for an interim interdict. I deal briefly with the requirements for such interdict, being mindful of the fact that legal argument will be advanced to the Honourable Court at the appropriate time.

A *prima facie* right

127. It is denied that the statements sought to be interdicted are defamatory of Applicant. At the very least, I respectfully submit that there is serious doubt as to whether such statements are defamatory.

128. In the absence of proof by Applicant of this aspect, it is submitted that the Application should be dismissed.

A well-grounded apprehension of irreparable harm

129. Again, it is submitted that, in the absence of proof of the defamatory nature of the statements sought to be interdicted, the Application cannot succeed.

130. As regards the past statements attributed to Respondents regarding Rockefeller Funds made available to Applicant, and in respect of which Respondents have acknowledged an inadvertent overstatement, it is respectfully pointed out that Respondents have undertaken not to repeat such statement. It follows, in my submission, that in that regard Applicant cannot harbour a well-grounded apprehension of harm.

Balance of convenience

131. Inasmuch as this matter is now in the public domain, it is respectfully submitted that an interdict by its very nature would not be an effective remedy and would, indeed, amount in effect to a form of censorship.

132. In addition, although Applicant seeks only temporary relief at this stage, the effect of granting the remedy will be that Respondents are precluded from participating in a legitimate debate on a matter of crucial public importance – and moreover, a debate to which Respondents have made a substantial contribution. As Applicant itself has stated in these proceedings, it could take up to two years for its defamation action to be heard. I therefore respectfully submit that, granting temporary relief at this stage is tantamount to granting final relief.

133. Should Respondents be precluded from (or be hamstrung in) participating in the aforesaid debate, they would be deprived of their constitutional right to influence events of a public and/or political nature in a democratic country. This, it is submitted, would be prejudice which Respondents will be suffering to a serious degree.

134. It is accordingly submitted that the balance of convenience favours Respondents.

No other satisfactory remedy

135. Applicant's averment that it has no other satisfactory remedy as it has 'used such other remedies as are available to us, without any success', does not advance its cause in seeking an interdict. Clearly, it is submitted, Applicant has itself identified its true remedy, which is to institute action for damages and ancillary relief.

136. I respectfully point out that this is not a case where Applicant has come to Court complaining that it would be impossible or even difficult to determine damages allegedly suffered by it, in a proposed action. In fact, I respectfully point out that the tenor of Applicant's complaint is simply that the alleged harm to its reputation 'cannot be adequately remedied by damages or other relief at some later stage'. No reason is advanced as to why that should be the case.

137. It is accordingly submitted that the Application must also fail on this leg.

A sustainable defence

138. In addition to the aforegoing, it is respectfully submitted that Respondents have demonstrated that they have a sustainable defence to the allegations of defamation levelled at them by Applicant. Given

that fact, it is respectfully submitted that publication of the statements sought to be interdicted should not be restrained.

COSTS

139. As to the question of costs, I respectfully submit that the Application should be dismissed, with costs.

140. However, it is further submitted that Applicant, at all material times, must have been aware that the factual allegations and legal contentions advanced by it would be disputed by Respondents – and particularly, on the question of whether or not the statements sought to be interdicted were actionable. As such, Applicant ought not to have brought the matter to the Honourable Court on motion. It is respectfully submitted that such remissness on the part of Applicant justifies a cost order in favour of Respondents, on a punitive scale.

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ANTHONY ROBIN BRINK

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.

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COMMISSIONER OF OATHS