CERTIFICATE OF ATTESTATION

I, the undersigned, **PAULINE PIETERSEN**, Consul at the Consulate General of the Republic of South Africa, New York, hereby certify that, **IAN BASSIN,** of whose identity I have satisfied myself, has this day signed the attached **REPLYING AFFIDAVIT** in my presence.

These documents have been united and sealed with the official seal of this Consulate General.

PAULINE PIETERSEN
Consul

New York
14 November 2012

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 34974/12

In the matter between:

AVAAZ FOUNDATION Applicant

and

PRIMEDIA (PTY) LIMITED First Respondent

AIRPORTS COMPANY OF SOUTH AFRICA LIMITED Second Respondent

REPLYING AFFIDAVIT

I, the undersigned

IAN BASSIN

do hereby make oath and state as follows:

1 I am the General Counsel and Campaign Director of the Avaaz Foundation, employed at its New York office situated at 857 Broadway, New York, N.Y. I am duly authorised to depose to this affidavit on behalf of the Avaaz Foundation.

2 The facts contained herein are true and correct and, unless the context indicates otherwise, within my personal knowledge. Where I make legal submissions, I do so on the advice of the Avaaz Foundation's legal representatives.

3 I have read the answering affidavit deposed to by Mr Haroon Jeena on behalf of the second respondent ("ACSA"). Many of the allegations advanced therein are a matter for legal argument, which will be addressed at the hearing of this application. To the extent that the allegations in the answering affidavit address matters of fact, I respond thereto as set out below.

4 To the extent that I fail to respond to any averment or contention in the answering affidavit which is inconsistent with what I have set out in my founding and supplementary affidavits in this application, it must be taken to be denied rather than admitted.

INTRODUCTION

5 ACSA, a state entity, makes a bold and extreme claim in this litigation: that it can censor a political message it views as critical of the President and be free from any constitutional oversight by the courts, so long as it has entered into a private contract with a third party purportedly giving it the power to do so.

6 To illustrate why this claim is dangerous and erroneous, I begin by restating several relevant facts underlying this action that were first stated in the founding

papers. Some of these facts have taken on new import in light of ACSA's admission in paragraph 20 of its answering affidavit that the original reason it cited as the basis for its decision to remove Avaaz's political advertisement was, in fact, not true.

7 ACSA has prevented Avaaz, a public interest organization representing thousands of people, from expressing a political position to the President of the Republic in a public way because ACSA does not approve of the message.

8 ACSA took this action after concluding, as documented in annexure "**AF8**" of the founding papers, that there was "*an implicit message in the content of the advert that says the President (personally) is currently standing by while our lions are being killed and is thus complicit in the killings*" and that this "*could potentially be a public relations nightmare.*" Regardless of whether this interpretation of the advertisement was correct, it reveals that ACSA's motivation in removing the advertisements was in part informed by its desire to avoid bad public relations stemming from an advertisement it saw as critical of the President.

9 Notwithstanding this contemporaneous record of the basis for ACSA's decision, ACSA initially stated in its letter to Avaaz of August 27, annexure "**AF11**" of the founding papers, that its decision was based on "*verbal comments from members of the public*" that "*raised the possibility of the advertisement being objectionable.*" ACSA now admits in paragraph 20 of its answering affidavit that this was not true.

10 It will be contended at the hearing that ACSA's shifting justifications for its action are indicative of:

10.1 The fact that its decision was taken as a result of incorrect and irrelevant considerations;

10.2 Its attempts to hide the fact that its true motivation was to prevent criticism of the President. Section 16(1) of the Constitution prevents such censorship, particularly of political speech. The danger of allowing government entities to take such action absent constitutional oversight is obvious.

11 In light of these facts and those averred in the founding papers, Avaaz has contended that ACSA violated the right to freedom of expression under section 16 of the Constitution, and violated its right to administrative justice under section 33 of the South African Constitution and the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). Avaaz has also contended that Primedia breached its contract with Avaaz.

12 ACSA has now responded by erroneously claiming that:

12.1 It did not violate Avaaz's right to freedom of expression because it was effectively exempt from the Constitution when it removed Avaaz's advertisement; and

12.2 It could not have violated Avaaz's right to fair administrative action because when it removed Avaaz's advertisement it was not exercising a public power

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– even though it was a government entity taking actions that negatively impacted members of the public.

13 I address each erroneous claim and the subpoints ACSA makes in support of each in this reply affidavit.

THE CAUSE OF ACTION BASED ON FREEDOM OF EXPRESSION

14 ACSA addresses this cause of action at paragraphs 44 to 56 of the answering affidavit, in which it erroneously claims that its concessionaire agreement with Primedia takes precedence over the constitution, that its action was justified because Avaaz's political advertisement was actually commercial speech, and that the private ASA Code is also superior to the constitution. Each of these points is wrong for the following reasons.

The Concession Contract is Subject to the Constitution

15 ACSA summarizes its position regarding Avaaz's constitutional rights in paragraph 49 of the answering affidavit, in which it states that "*Avaaz's ... right to freedom of expression under Section 16 of the Constitution of the Republic of South Africa, 1996, is ... dependant on and circumscribed by the concession contract between ACSA and Primedia.*" (Emphasis added). Essentially, ACSA claims it can privately contract away the constitutional rights of Avaaz and the public. Moreover, it appears to contend that it can do so without Avaaz even being made aware of this.

As will be discussed further below and argued during legal briefing, this is simply incorrect as a matter of law.

16 By ACSA's reasoning, it could have entered into a contract with Primedia that explicitly stated that all advertising was permissible at the airport except for advertising from one political party, or that all advertising was permissible at the airport except for advertisements critical of the government, and the Constitution could have no say over it. That logic is fundamentally at odds with the purpose of section 16 and, if sustained, would undermine the constitutional commitment to open and unfettered democratic debate.

17 Avaaz accepts that the constitutional right to freedom of expression does not *oblige* ACSA to permit advertising at the airport. However, when ACSA does elect to permit advertising and public messaging at the airport, it must do so in accordance with section 16 of the Constitution and may not bar political messages with which it does not agree. Again, this is a matter for legal argument. However, I make the following observations at this point:

17.1 Clauses 8.1.4 and 8.1.5 of the Concession Agreement between ACSA and Primedia do not entitle ACSA to act in breach of section 16 of the Constitution. To be enforceable, clauses 8.1.4 and 8.1.5 must be applied reasonably and fairly and in accordance with public policy as expressed in the Constitution.

17.2 Similarly, clauses 8.1.4 and 8.1.5 of the Concession Agreement do not entitle Primedia to act in breach of Avaaz's constitutional right to freedom of expression on instruction from ACSA.

17.3 ACSA's reliance on clause 8.1.4 or 8.1.5 was unreasonable, unfair, contrary to public policy and unconstitutional in light of the following circumstances:

17.3.1 ACSA's decision to remove the advertisement was based, in part, on its concern that the advertisement could be interpreted to be critical of the President and cause a public relations problem;

17.3.2 Primedia pre-approved the advertisement, which pre-approval was material to its contract with Avaaz;

17.3.3 No provision in the contract between Avaaz and Primedia expressly or impliedly permits Primedia to terminate its advertising service on instructions from ACSA;

17.3.4 Removal of the advertisement breached the constitutional rights of Avaaz to freedom of expression and political speech.

17.4 For inter alia the above reasons, ACSA's reliance on clauses 8.1.4 and 8.1.5 of the concession agreement is unsustainable.

ACSA's Complete Removal of the Advertisement does not Constitute a Justifiable Limitation on Avaaz's Right to Freedom of Expression

18 In paragraphs 54 to 56 of the answering affidavit, ACSA erroneously claims that its removal of the advertisement constituted a justifiable limitation on Avaaz's right to freedom of expression because:

18.1 Avaaz's advertisement constituted commercial and not political speech and was therefore not within the "inner sanctum" of the protected right;

18.2 ACSA's full removal of the Avaaz advertisement had an only limited impact on Avaaz's rights;

18.3 ACSA was justified in removing the advertisement because airports are not public fora; and

18.4 ACSA was justified in removing the advertisement because it was in breach of the ASA Code.

19 I address each of these points in turn. Contrary to ACSA's suggestion at paragraphs 54 to 56 of the answering affidavit, the effect of removal of the advertisement on Avaaz's right to freedom of expression was significant and ACSA's action was unjustified.

Avaaz's Advertisement was Core Political Speech

19.1 The expression in the campaign advertisement is plainly not commercial speech, but was in fact political speech.

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19.1.1 The advertisement is not designed to solicit contributions and does not do so. It is designed to solicit public support for a political goal and makes no solicitation for funds anywhere on the advertisement nor does it seek to sell any products or services.

19.1.2 The advertisement is directed at raising public awareness of a matter of grave public concern: organised activities that are fast depleting South Africa's wildlife heritage and resources.

19.1.3 It is also directed at encouraging an exercise of greater political will among members of the Executive, including President Jacob Zuma, and the taking of preventative measures.

ACSA's Complete Removal of the Advertisement Had More Than a Limited Impact on Avaaz's Ability to Communicate Its Message

19.2 ACSA's decision to remove the advertisement had a serious impact on Avaaz's right to advertise its campaign notwithstanding the other aspects of the campaign. The other aspects are not adequate substitutes for the advertisement because:

19.2.1 Only the advertisement at issue could reach and did reach the thousands of members of the public who travelled through OR Tambo's International Arrivals Hall;

19.2.2 Only the advertisement generated attention from other media outlets who then reported on the advertisement, thus generating

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earned media for Avaaz's campaign and reaching further members of the public;

19.2.3 It alone was specifically designed and targeted to reach the travellers to South Africa who crossed through the International Arrivals Hall to show the government that its policy on the lion trade could have detrimental impacts on SA's tourism industry; and

19.2.4 Avaaz's campaign was designed on the basis that the advertisement would form an integral part of the campaign.

ACSA Created a Public Forum by Allowing Political Advertisements

19.3 The international arrivals hall at an airport is not a private forum. To the contrary, it is a public forum in that:

19.3.1 During airport operating hours, it is used almost continuously by members of the public who arrive in South Africa from abroad. As ACSA suggests at paragraphs 60 to 61 of the answering affidavit, the OR Tambo International Airport is the busiest international airport in South Africa, and the international arrivals hall is the place where visitors to the country are obliged to pass through to enter South Africa.

19.3.2 Airports are in fact used for expressive activity directed at the public. This is admitted by ACSA at paragraphs 61 to 63 of the answering affidavit, where it explains the importance of positive and

'good taste' imaging of South Africa in the International Arrivals Hall. Indeed, transportation hubs such as trams, bus stops, railway stations and the docks of Durban and Cape Town have historically been places where political ideas and protest have been expressed. By way of example, I attach as Annexure **"RA1"** an historical account titled "Popular Struggles in the Early Years of Apartheid", sourced from the website, South African History Online at http://www.sahistory.org.za/topic/popular-struggles-early-years-apartheid-1948-1960.

19.4 Even if the airport itself is not a public forum, by deciding to open advertising spaces on the walls of the airport, ACSA created a public forum on those walls in those advertising spaces.

19.4.1 ACSA chose to open the International Arrivals Hall to advertising and did not place any restrictions in respect of political advertisements in its concessionaire agreement with Primedia.

19.4.2 Having opened its space to non-commercial advertisements, ACSA created a public forum and is not thereupon permitted to pick and choose which political messages to allow based on its own concerns or position in respect of the viewpoints expressed in those political messages.

The ASA Code is Subject to the Constitution

19.5 In paragraph 56.3, ACSA erroneously claims that if an advertisement is found to have breached the ASA code, that decision takes precedence over the constitutional right to freedom of expression. This is a matter for legal argument, which will be addressed at the hearing of this application. For now, I reiterate that a provision of the ASA Code cannot justify an infringement of section 16 of the Constitution, but that the court need not even reach that question as there has yet to be a finding by the ASA in this case that Avaaz's advertisment breached the code, which it did not.

19.5.1 First, ACSA admits in paragraphs 56.3 and 56.5 that the ASA Code is a "self-regulation." It is inconceivable that a self-regulation without the force of law can somehow take precedence over a provision of the constitution.

19.5.2 Second, even were one to entertain that notion, I emphasise that Primedia did <u>not</u> act in accordance with a ruling of the ASA, but on the basis of an opinion by ACAAS, which is an advisory body having no official status. Indeed there was never a complaint to the ASA. The respondent's contention at paragraph 56.3 that Primedia was bound by a ruling of the ASA to remove the advertisement pending review is based on a factually erroneous assumption that there has been a ruling by the ASA in this case. There has not

been such a ruling, not that it would matter for the reasons previously stated.

19.5.3 In essence, ACSA is arguing that a private advisory body interpreting a private and voluntary code of self-regulation can issue a decision interpreting that code that binds a private actor to give that decision greater weight than the constitution of the Republic.

The Advertisement Does Not Breach the ASA Code

19.6 Even if one were to accept ACSA's radical proposition, the Avaaz advertisement was not in breach of the ASA Code. I have addressed each of alleged breaches of the ASA Code at paragraph 49 of the founding affidavit. I note the following however in respect of ACSA's contentions regarding the ASA Code at paragraph 56 of the answering affidavit:

19.6.1 In respect of clause 1 of Section 2 of the ASA Code, no evidence is tendered to support ACSA's allegation that the image in the advertisement is offensive. I emphasise again that the applicable standard is that of a reasonable viewer who is neither hypercritical or oversensitive.

19.6.2 With regard to clause 11 of Section 2 of the ASA Code, on a proper application of clause 11.2.4 of the ASA Code, the consent of President Zuma was not required before the display of the advertisement. It is a generally accepted principle in developed

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democracies that a public figure such as a head of state may not prevent members of the public from using his image in non-commercial, political messages that are taken in the public interest, and this principle is reflected in clause 11.2.4. It is reinforced by the fact that President Zuma has yet to object to the use of his image notwithstanding the fact that he has been notified about this campaign and advertisement as evidenced by the letter contained in annexure **"AF3"** of the founding affidavit and accompanying text.

19.6.3 With regard to clause 4.1 of section 2 of the Code, Avaaz held in its possession documentary evidence to support all the claims in the advertisement capable of objective substantiation and made this evidence public.

(a) On 28 June 2012, when Avaaz first launched its campaign to stop the lion bone trade, it sent an email to millions of people worldwide laying out its claims and substantiating them with reference to the sources for its factual assertions. That public communication and the sources contained in it are attached to this affidavit as appendix **"RA2"**.

(b) The above information was collated and encapsulated in the press release published on its website on 9 August 2012.

(c) It is therefore quite plain that Avaaz had the requisite substantiation for the advertisement prior to the advertisement

being displayed. Indeed, had ACSA requested such substantiation as part of a fair hearing process, it would have been provided. As indicated, ACSA chose not to and instead took a decision without hearing Avaaz at all.

19.6.4 I point out that on the basis of each of these considerations alone:

(a) ACSA's decision was unlawful and unconstitutional; and

(b) ACSA's decision was taken because of irrelevant considerations and falls to be reviewed and set aside on administrative law grounds.

THE CAUSE OF ACTION BASED ON ADMINISTRATIVE ACTION

20 Even if ACSA was entitled to remove the advertisement notwithstanding the constitutional guarantee of freedom of expression found in Section 16 of the South Africa Constitution, an entitlement Avaaz disputes, I reiterate that ACSA was obliged by section 33 of the Constitution and section 3 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") to give Avaaz an adequate opportunity to respond to its contentions *before* removing the advertisement, and ACSA's decision to remove the advertisement had to be both rational and reasonable. Indeed, even if the decision did not constitute administrative action, this was still required by the principle of legality.

21 ACSA deals with this cause of action in paragraphs 23 to 43 of the answering affidavit, in which it erroneously claims that in removing the advertisement it was not exercising a public power, that its action was rational and reasonable, and that even if it exercised a public power in an irrational or unreasonable way, the only remedy available to Avaaz is for ACSA to now reconsider its decision rather than restore Avaaz to the position it would have been in before ACSA took its unlawful action. I respond to each of these erroneous claims in turn.

ACSA Exercised a Public Power

22 Avaaz disputes the contention, made at paragraph 24 of ACSA's answering affidavit, that its decision to remove the advertisement did not amount to administrative action. ACSA's decision to remove the advertisement involved not only the exercise of a contractual right *vis-à-vis* Primedia, but also the exercise of a public power or performance of a public function.

22.1 Avaaz accepts that no provision of law *obliges* ACSA to make the airport available for advertising and public messages.

22.2 However, the mere fact that no law obliges ACSA to permit advertising and public messages does not mean that when it does so it is not exercising a public power.

22.3 Avaaz avers, to the contrary, that when ACSA permits advertising and public messaging at the airport it exercises a public power under section

5(3) of the Airports Company Act 44 of 1993. This provides that ACSA "*shall have the power to raise or receive income from sources other than airport charges, including, but not limited to, the power to enforce any contract providing for such raising or receipt of income*".

22.4 The decision by a government body to allow advertising, including political advertisements, in a space frequented by the public has a strong public component in at least three respects:

22.4.1 First, it entails raising revenue to sustain or support a facility of vital public importance – it is accordingly a decision taken in the public interest;

22.4.2 Second, the very nature and purpose of advertising entails that it impacts on the public; and

22.4.3 Third, by choosing to open its space to both commercial and non-commercial (including political) advertisements, ACSA's actions regarding this space constitute public acts.

22.5 Even if ACSA is found to not have been exercising a public power, ACSA is still obligated to respect the right to freedom of expression for the reasons stated in paragraphs 33 and 34 of the founding papers, namely that even actors acting in a private capacity are bound horizontally under Section 8(2) of the Constitution to respect the right to freedom of expression.

ACSA's Decision was Irrational and/or Unreasonable

23 ACSA explains at paragraph 39 of the answering affidavit that the decision to remove the Avaaz advertisement was not based upon comments of the public, but rather on ACSA's determination that the advertisement "*was inappropriate for an international arrivals hall and thus of an objectionable nature*". At paragraphs 57 to 65, ACSA sets out the grounds upon which this determination was allegedly made. These amount to the following:

23.1 The depictions of a firearm in the advertisement reinforced the negative image of South Africa as a violent country;

23.2 Many foreign visitors would not be able to read or understand the writing on the advertisement, and so would not understand its message;

23.3 The advertisement was accordingly not conducive to tourism.

24 If these were indeed the reasons for ACSA's decision to remove the advertisement, and Avaaz does not admit that they were as stated above at paragraph 10, Avaaz avers that the decision was nevertheless irrational or unreasonable in that:

24.1 The reasons themselves are unsustainable and incorrect for at least the following reasons:

24.1.1 Many visitors come to South Africa to hunt and it is well known and advertised that hunting takes place in South Africa and thus ACSA's decision to attempt hide this fact is unreasonable.

24.1.2 Foreign visitors unlikely to understand the text of Avaaz's ad are unlikely to understand the text of other ads, rendering ACSA's decision to single out this ad for censorship irrational.

24.1.3 There is nothing in the Constitution, the ASA Code or ACSA's own concessionaire agreement on which it bases its entire case to suggest that only advertisements conducive to tourism may be displayed at the airport.

24.2 ACSA failed to take into consideration the right to freedom of expression of both the advertiser and the public, as protected under section 16 of the Constitution. The decision is accordingly reviewable under section 6(2)(e)(iii) of the PAJA because relevant considerations were not considered. That these considerations were not considered appears from the contemporaneous email chain attached to the founding papers as annexure "**AF8.**" In that e-mail chain, Mr. Mekgoe writes to Mr. Makgale at 12:09 pm on August 15, after it appears the decision to remove the advertisement has already been made, seeking to research potential ways to justify the decision post hoc. This indicates that ACSA not only failed to consider Avaaz's section 16 rights in the process of making its decision but also failed to fully consider the advertising and contractual standards it now

claims justify its decision – it indeed appears ACSA made a decision and only thereafter sought to weigh the relevant law. That is the very nature of an irrational and unreasonable decision and the PAJA is designed precisely to prevent such irrational and unreasonable decision-making.

24.3 The decision was not rationally related to the purpose of the empowering provisions – that is, clause 8.1.4 or 8.1.5 of ACSA's concession agreement with Primedia, read with section 5(3) of the Airports Company Act. Clause 8.1.4 permits ACSA to require removal of an advertisement "*which does not meet the code of conduct stipulated by the Advertising Standards Authority*", while clause 8.1.5 of the Code permits it to do so where the advertisement is *"unsightly or of an objectionable nature"*. However, this provision could never be directed at permitting ACSA to exercise administrative censorship of advertisements in violation of the right to freedom of expression under section 16 of the Constitution. For the reasons given at paragraphs 15 through 19 of this affidavit, ACSA's decision was indeed an unconstitutional act of administrative censorship.

The relief sought

25 ACSA's contention that Avaaz is not entitled to an order directing ACSA and Primedia to reinstate the advertisement is denied. This is a matter for legal argument and will be addressed at the hearing of this application.

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26 I point out, however, that the facts alleged at paragraphs 9 and 10 of the founding affidavit, which describe the nature of the advertisement as part of a concerted and pressing global campaign to stop an on-going illegal trade, make it clear that Avaaz will suffer unjustifiable prejudice by any further delay in correcting the decision to remove the advertisement. On this basis alone, the order sought by Avaaz constitutes an appropriate order, whether as an order of substitution or otherwise.

AD SERIATIM RESPONSE

27 In this final section of this affidavit, I address the pertinent allegations in the answering affidavit which have not been dealt with above. To the extent that I have not dealt with any of ACSA's allegations, they are denied.

28 **Ad paragraphs 14 – 21**

28.1 I have dealt above with the shifting explanations given by ACSA for its decision and the post-hoc nature of the justifications offered. I pray that what is stated above be read as incorporated herein.

28.2 I note that while ACSA states that Mr Machobane was not a participant in the decision to remove the advertisement, it is clear that on ACSA's own version Mr Mfusi (who communicated the "mistaken" message) was indeed party to that decision. There is no explanation for why Mr Mfusi

communicated this "mistaken" message, nor when he realised that he was mistaken.

29 **Ad paragraph 34**

29.1 ACSA contends that Avaaz is not entitled to exert its right to advertise under its contract with Primedia in that the advertising contract was terminated by effluxion of time after 11 September 2012.

29.2 I deny that the applicant is not entitled to an order of specific performance in these circumstances. In amplification of this denial, I aver that:

29.2.1 By virtue of its payment of the monthly rental under the advertising service agreement entered into with Primedia, Avaaz has an accrued right to Primedia's performance under the contract – *viz.* to the display of Avaaz's advertisement for the full contract period of one month.

29.2.2 Avaaz is accordingly entitled to an order of specific performance, notwithstanding the effluxion of time, save *inter alia* where compliance with such an order is impossible or unduly prejudicial.

29.2.3 Primedia has chosen to abide the order of this court. Neither it nor ACSA have shown that the due performance of Primedia's obligation under the advertising service agreement with Avaaz is impossible.

29.2.4 To the contrary, Primedia's previous extension of the advertising period, as described at paragraph 15 of the founding affidavit, suggests that it is entirely possible for it to extend the advertising period again in order to meet its obligations under the contract.

30 **Ad paragraph 47**

30.1 I deny the allegation that Primedia would be acting in breach of clauses 8.1.4 and 8.1.5 of its concession agreement with ACSA were the court to order it to reinstate the advertisement (in terms of prayer 3 of the notice of motion).

30.2 As I have already stated, clauses 8.1.4 and 8.1.5 of the concession agreement did not entitle ACSA to direct Primedia to remove the Avaaz advertisement. Accordingly, were Primedia to reinstate the advertisement, it would not be acting in breach of its obligations to ACSA.

30.3 Whereas were ACSA permitted to order Primedia to remove the advertisement, it would result in Primedia acting in breach of its contract with Avaaz.

31 **Ad paragraph 67**

31.1 I note that ACSA takes issue with Avaaz's standing to bring its claims. There is no basis for it to do so.

31.2 Avaaz is incorporated in the US State of Delaware as a non-profit, social welfare organisation under section 501(c)4 of the United States Internal Revenue Code (26 U.S.C). Under the law of its State of incorporation, Avaaz is granted the power to "*sue and be sued in all courts and participate, as a party or otherwise, in any judicial, administrative, arbitrative or other proceeding, in its corporate name.*" 8 Del. Laws ch. 1 § 122(2). I attach as Annexure **"RA3"** proof of such incorporation.

31.3 Given that foreign corporations are entitled to sue in South African courts, that is the end of this matter.

32 Ad paragraph 73

32.1 The allegations in this paragraph repeat in more elaborate terms those in paragraph 34 of the answering affidavit. I deny the allegations for the reasons set out in paragraph 26 of this affidavit.

33 Ad paragraph 76.5

33.1 I deny that Avaaz was required to adduce the ASA Rulings cited at paragraphs 49.5 and 49.6 of the founding affidavit. The Rulings are freely available from the ASA.

33.2 If ACSA was nevertheless unable to access the Rulings cited in the founding affidavit, it could have elected to call for the documents in terms of Rule 35(12), read with Rule 35(13), of the Uniform Rules of Court. It failed

to do so, and cannot now be heard to complain. Nevertheless, for the sake of convenience, I attach the Rulings to this affidavit marked **"RA4"** and **"RA5"**.

33.3 I do not understand the basis on which it is contended that "*the approach of the Applicant is not sanctioned by the rules of evidence*", but such allegation is in any event denied and will be addressed in argument if need be.

34 For all the above reasons, I persist in the relief sought in the notice of motion.

IAN BASSIN

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at NEW YORK on this the 14 day of NOVEMBER 2012, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

SOUTH AFRICAN CONSULATE GENERAL NEW YORK

COMMISSIONER OF OATHS

Full names: PAULINE PIETERSEN

Address: CONSUL

Capacity: SOUTH AFRICAN CONSULATE GENERAL
333 EAST 38TH STREET, 9TH FLR.
NEW YORK, NY 10016

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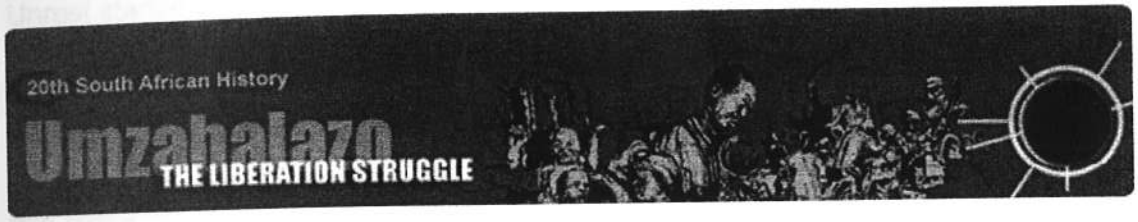
"RA1"

Published on *South African History Online* (http://www.sahistory.org.za)

Popular struggles in the early years of Apartheid, 1948-1960



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Popular struggles in the early years of Apartheid, 1948-1960

The 1957 bus boycott, 7 January 1957. Source: The Star

Historians recognise the significance of popular struggles over the past 100 years. But debates among historians about their relationship to formal political formations continue to rage.

In light of the upcoming centenary celebrations of the ANC, it is an opportune time to reflect on the extent of formal political formations' involvement with popular struggles. To what extent were they the outcomes of deliberate, organisational efforts on the part of the ANC and other political formations? And to what extent were they inspired by local and grassroots political formations unrelated to national movements?

This feature examines the causes of popular protests that erupted across South Africa

between 1948 and 1960, showing that they were largely responses to new measures passed by the apartheid government in the 1950s.

One of the factors that loomed large in the general elections of 1948 in the minds of white voters was that the United Party (UP) government under J. C. Smuts was incapable of dealing with growing unrest in the townships as well as the increasing number of strikes. The squatter movements that spread around the Witwatersrand in 1944 and 1945 and the African Mineworkers strike of 1946 were still fresh in the minds of voters at the time of the elections in 1948. The Nationalist Party (NP) of D. F. Malan promised not only to institutionalize racism to achieve the stated objective of "the reallocation of labour between mining, manufacturing and agriculture", but also to take tough action against any unrest that could come from Black communities.

Unrest started during the term of the UP and continued to flare up sporadically in certain areas soon after the NP government assumed power in 1948. Black townships particularly on the Pretoria-Witwatersrand-Vaal (PWV) area, (present day Gauteng) were involved in unrest that often turned violent. For instance, the Vaal township of Evaton experienced unrest that often turned violent as residents clashed with the police. In the Eastern Cape towns of East London and Port Elizabeth unrest broke out sporadically and acted as prelude to the Defiance Campaign of 1952. This was the case in Durban and Bloemfontein.

Unrest was sparked by a range of causes related to the increasing cost of living that was unmatched by average family incomes. These causes included increased bus, train and tram fares, intensified enforcement of pass laws, rigorous enforcement of liquor laws and increased rentals following the provision of mass housing schemes soon after World War II. In some cases one or two of these causes combined to ignite unrest that lasted for several months.

Tramway Clashes

In 1949 residents of the Western Areas of Johannesburg, including Newclare, Western Native Township and Sophiatown staged a boycott of trams following the Johannesburg City Council's (JCC) decision to increase fares. The JCC insisted on the fare increase even against the advice of the Native Affairs Department. This led to an organized boycott of trams and a march into the city centre led by the Anti-Tram Fare Action Committee. Heavy police presence prevented the march from taking place, but the tram boycott lasted nearly two months. On 1 November 1949 clashes between police and residents broke out when a tram returning from the city carrying one passenger was stoned.

On 29 January 1950 yet another clash between police and residents broke out. The catalyst this time was the attempted arrest of a man carrying a container of 'illegal' liquor. The man resisted and the crowd came to his rescue. A crowd gathered and started stoning the police patrol and freeing the offender. On this occasion the crowd, numbering about two hundred started stoning motorists and attacking government buildings such as the Newclare Railway Station. Another incident followed the arrest of a pass offender. Yet again the crowd gathered and started stoning passing vehicles and setting Asian-owned shops on fire.

These events preceded the banning of prominent members of the ANC and SACP J. B. Marks and Moses Kotane and Yusuf Dadoo of the South African Indian Congress (SAIC). Marks, a resident of Newclare, was particularly popular in the Western Areas of

Johannesburg. So when he along with Kotane and Dadoo were banned, and the ANC and CPSA called for a stay at home campaign for 1 May 1950, the response was overwhelming. Maylam states that "large numbers of Africans in the Johannesburg area observed the stoppage, which ended tragically in clashes between police and crowds in Alexandra, Sophiatown, Orlando East and Benoni, leaving 18 dead". (*Maylam, P, 1986, pp.184-5)*. Africanists within the ANC condemned this campaign as a diversion from the Programme of Action adopted a year earlier.

The May Day protest set the tone for the 1950s. Tensions and clashes between crowds of Africans gathered for one reason or the other and the police escalated during the decade. In some of the incidents, these were responses to campaigns organized at a national level by the ANC. The Defiance Campaign of 1952 falls into this category. In many of the cases though, spontaneous outbreaks of protests happened frequently. At the centre of many of the protests of the 1950s was the boycott of public transport facilities and services.

Each of these protest actions had underlying causes related to living conditions and the struggle to survive in the cities. The first, the Anti tram boycott was sparked by the rising cost of living. The second, the arrest of the man carrying liquor had wider ramifications on one of the key sources of income for many families in the Western Areas-beer brewing. The third was related to harsher enforcement of pass laws and location regulations. The fourth was linked to calls for increases in wages.

Provision of mass housing started after World War II intensified in the 1950s. Old Locations, situated on the fringes of towns were destroyed and residents moved to townships situated too far from city centres for workers to walk to the workplace. Transport costs were either added to family expenses or had to increase with increased distances travelled. This led to a series of transport boycotts in the 1950s. These boycotts were particularly evident in the PWV area, the Eastern Cape towns of East London and Port Elizabeth, Bloemfontein in the Free State and Durban in Kwa-Zulu Natal.

The Evaton Bus Boycotts

The Evaton Bus boycott is widely documented and has become a significant indicator of commuters' responses to poor services, fare increases and unfair labour and employment practices by transport operators. In January 1950 commuters boycotted the bus service following the operator's decision to use only tarmac roads. This meant that busses would not enter the township but would only get to the edge of the townships. Commuters would have to walk longer distances to the rank.

Another bus boycott in Evaton was called in November 1954. On this occasion commuters were disgruntled with overloading and overcrowding in busses. A one day demonstration was held and commuters continued to use the service. The biggest and most effective bus boycott in Evaton lasted several months. It began at the end of 1955 and ended early in 1956. It is this round of the Evaton bus boycott that inspired others in other parts of the country during 1956 and 1957. The cause of this boycott was fare increases. In this case the bus operator was forced to reduce fares.

In Kliptown south of Johannesburg Public Utility Transport Corporation (PUTCO) bus service was hit by a boycott. Here commuters had several grievances with the bus operator, including a 6d a week fare increase. After a four-week boycott, the Manager of PUTCO, a Mr. d'Agnese agreed to a fare reduction, other improvements of the service

and consultation with commuters when drawing bus timetables.

The Western Areas and Alexandra bus boycotts of January to April 1957 are also well documented. In both cases the cause was a fare increase by the same operator PUTCO. And in both cases the boycott ended when PUTCO agreed to reduce fares by introducing the coupon system. In the case of Sophiatown this happened in the middle of forced removals of the community to Soweto. At the time of the boycott the process of resettling the community was yet to be completed. But by 1957 resistance had all but collapsed.

A few landlords were still trying to hold out for higher compensation than the Native Resettlement Board (NRB) was prepared to give. By the end of 1957 however, all Sophiatown residents had been relocated to different parts of Soweto. Yet again, it should have been expected that as fares would be higher for commuters travelling between Soweto and Johannesburg, affected communities would continue with the boycott of services. But because of the more rigorous application of pass laws and location regulations, Western Areas communities relocated to different parts of Soweto had to wait nearly twenty years before becoming involved in another mass protest, the outbreak of the Soweto uprising in 1976.

Elsewhere on the Witwatersrand bus boycotts broke out during the 1950s. In the East Rand Brakpan, Germiston and Katlehong were also affected by bus boycotts. Two bus boycotts broke out in Brakpan within a space of two years. The first happened in October 1954 and lasted for a month, ending in November. The issue here was employment of Black drivers. The boycott ended a month later when the city council, the bus operator conceded to the employment of Black drivers. The second, which started in April 1956 and lasted for a month was a response to the Council imposition of 1d increase in fares. This too ended when council scrapped the proposed increase. In both instances the ANC and the local Vigilance Association were involved in organizing the event. This is explained by the presence of top ANC officials on the East Rand, notably David Bopape.

The last two boycotts on the East Rand broke out in Katlehong and Germiston. The cause of the boycott in Katlehong in 1955 was the Transportation Board's refusal to grant permission to taxi operators to provide a service and compete with the Council-run busses. The boycott ended after two weeks when the Council agreed to register taxis. The boycott was led by Vuka Afrika Party. In February 1957 a boycott was called in Germiston, Eastwood and Edenvale. The boycott was done in solidarity with the Alexandra boycotters.

Pretoria had one boycott during this time that was to overshadow the rest because of its duration. It lasted nearly two years, beginning early in 1957 and ending in 1958. The cause of the boycott was fare increases which were maintained at the end of the boycott. This boycott too was led by the ANC. In February 1957 a boycott in sympathy with Alexandra residents and against a 2d increase in fares broke out in Randfontein on the West Rand. The boycott lasted two months and ended when the Council withdrew its service permanently.

Bloemfontein had one bus boycott during this period. In February 1957 commuters boycotted busses, disgruntled that profits from bus operations were used to subsidise segregated white facilities and that Black drivers were not employed on services running between the city and the townships. The boycott was postponed after inadequate response to ANC local leadership.

Bus Boycotts in the Western Cape

The Western Cape also experienced bus boycotts. For instance, the South African Coloured People's Organization (SACPO) ANC, Congress of Democrats (COD) and South African Congress of Trade Unions (SACTU), Labour Party and the Liberal Party organized and coordinated the Cape Town bus between April- May 1956 in Cape Town. People picketed at terminuses in places such as Mowbray, Claremont and Wynberg and bus routes encouraging others not to ride buses. Just on the outside Cape Town, between March and April of 1957 Worcester also faced a bus boycott after the bus company failed to heed the local ANC's call to reduce fares. This was followed by a three-week boycott of busses that enjoyed 90% support from commuters.

Bus Boycotts in the Eastern Cape

The last group of bus boycotts in the early years of Apartheid broke out in the Eastern Cape. Port Elizabeth had four boycotts, two in February and November 1957, one in 1960 and another in 1961. This was an indication that the town had become a hotbed of popular struggles in the 1950s. In February a two-week boycott led by the ANC and the South African Coloured People's Organisation was held in solidarity with commuters in Alexandra. The next boycott happened in November following a 1d fare increase. Led by the ANC, the boycott failed after two days due to commuter indifference.

The boycott in January 1960 incorporated some distinctly political grievances. This was a protest against the Coloured Affairs Department and the Union's 50th anniversary celebrations in addition to rejection of the fare increase. The boycott was led by the South African Congress of Trade Unions. The last one was in 1961 and was a response to the dismissal of workers by the Bay Passenger Company.

East London and Grahamstown each had one boycott. In East London commuters boycotted for 11 days in solidarity with the Alexandra bus boycott. Grahamstown too faced a strike that was caused by fare increases in May 1961.

Conclusion

Popular struggles in the early period of Apartheid were a continuation of growing resistance to segregation and apartheid intensified during World War II. The African miners' strike of 1946 was a factor during the election campaign leading to NP victory in the polls in 1948. Sections of the white electorate were concerned about the UP government's capacity to deal effectively with the resistance movement. The NP with its policies and draconian measures presented itself as an alternative to the seemingly benign rule of the UP. Yet, the outbreak of popular unrest happened only a few months after the NP was swept to power.

The outbreak of popular revolts in the 1950s was inspired mainly by rising costs of transport for commuters. This was occasioned by the destruction of old locations and the resettlement of residents in townships far removed from city centres. In many instances these outbreaks were often spontaneous. However, in some cases the local ANC personalities were involved. This was the case in Western Areas of Johannesburg where J. B. Marks was a popular local leader as well as Brakpan on the East Rand where David Bopape was well known.

The Eastern Cape particularly Port Elizabeth showed a marked level of radicalism as well as well organized responses. This is explained by the presence of a peculiarly large industrial workforce and unprecedented levels of poverty in the immediate rural

hinterland of Ciskei coupled with a strong presence of trade union formations.

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"RA2"

On Thu, Jun 28, 2012 at 8:06 PM, Jamie Choi - Avaaz.org <avaaz@avaaz.org> wrote:

1 million to ban the lion trade

Dear friends,

Hundreds of South African lions are being slaughtered to make bogus sex potions for men. But we can stop this cruel trade by hitting the government where it hurts -- the tourism industry.

A global ban on tiger bone sales has traders hunting a new prize -- the majestic lions. Lions are farmed under appalling conditions in South Africa for "canned hunting", where rich tourists pay thousands to shoot them through fences. Now experts say lion bones from these killing farms are being exported to phony 'medicine' makers in Asia for record profits. **Trade is exploding and experts fear that as prices rise, even wild lions -- with only 20,000 left in Africa -- will come under poaching attack.**

If we can **show President Zuma that this brutal trade is hurting South Africa's image as a tourist destination,** he could ban and punish the trade in lion bones. Avaaz is taking out strong ads in airports, tourism websites and magazines, but we urgently need **1 million petition signers to give the ads their force. Sign below** to build our numbers fast:

http://www.avaaz.org/en/1_million_to_ban_the_lion_trade_fbb/?blOEpcb&v=15583

South African lions are being slaughtered for their bones, just to make bogus sex potions for men. **But if we show President Zuma that this hurts South Africa's image as a tourist destination,** he could stop this cruelty by banning the trade in lion bones and organs. **Sign the petition below** -- we'll take out ads in major tourism magazines and websites:

SIGN THE PETITION ▸

'Tiger bone wine' and other tiger-part medicines were banned after massive international outrage -- now traders have shifted their attention to lions' bones to make all kinds of bogus remedies. **Experts say unless governments act now, lions could be the next in line -- after tigers and rhinos -- to face extinction.**

There is a solution: banning and punishing the trade of lion bones and organs. South Africa is currently the largest exporter of lion trophies, bones and organs -- it is also the only African country actively breeding lions in large numbers to supply trophy hunting. **But if we can show that allowing this senseless trade can hurt South Africa's booming tourism industry and make visitors flee, President Zuma could be forced to act.**

Let's build a thunderous global roar for the lions. **Avaaz will show the cruelty of the lion bone trade with stinging ads -- sign now:**

http://www.avaaz.org/en/1_million_to_ban_the_lion_trade_fbb/?blOEpcb&v=15583

Avaaz members across the world have come together to demand strong protection for elephants and rhinos, save the world's bees from poisonous pesticides and achieve huge marine reserves in Chagos and Australia to safeguard vulnerable marine species. Lets come together once again and

NC
15

stand up for Africa's lions.

With hope, and determination,

Jamie, Alex, Antonia, Mia, Alice, Ricken, Luca, Emily and the entire Avaaz team

More information:

Lion Bone Trade Fuels Breeding Business in Africa (Al Jazeera)
http://allafrica.com/view/resource/main/main/id/00040108.html

South Africa continues to support the lion bone trade (LionAid)
http://www.lionaid.org/blog/2012/06/south-africa-continues-to-support-the-lion-bone-trade.htm

Quenching a thirst for lion bones (Mail & Guardian)
http://mg.co.za/article/2012-04-20-quenching-a-thirst-for-lion-bones/

Born to be killed (Carte Blanche)
http://beta.mnet.co.za/carteblanche/Article.aspx?ID=4226

The Lion Bone's Connected to the ... Rhino Horn? (Rhinoconservation.org)
http://www.rhinoconservation.org/2012/05/12/the-lion-bones-connected-to-the-rhino-horn/

Wildlife trafficking trail leads to SA safari man (News 24)
http://www.news24.com/SouthAfrica/News/Bloody-rhino-poaching-trail-leads-to-SA-safari-operator-20110721

Support the Avaaz Community!

We're entirely funded by donations and receive no money from governments or corporations. Our dedicated team ensures even the smallest contributions go a long way.

DONATE NOW ▸

--

Jamie Choi
Campaign Director, Avaaz
www.avaaz.org
Office: 1-917-388-3988
Cell: 1-347-986-7153
Skype: Jamie_Choi_Beijing

"RA3"

Delaware

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY "GLOBAL ENGAGEMENT AND ORGANIZING FUND" IS DULY INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL CORPORATE EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS OF THE TWENTY-FIRST DAY OF JUNE, A.D. 2006.

AND I DO HEREBY FURTHER CERTIFY THAT THE SAID "GLOBAL ENGAGEMENT AND ORGANIZING FUND" WAS INCORPORATED ON THE FIFTEENTH DAY OF JUNE, A.D. 2006.

AND I DO HEREBY FURTHER CERTIFY THAT THE FRANCHISE TAXES HAVE NOT BEEN ASSESSED TO DATE.

Harriet Smith Windsor

Harriet Smith Windsor, Secretary of State

4176072 8300

060596607

AUTHENTICATION: 4843531

DATE: 06-21-06

Delaware

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE RESTATED CERTIFICATE OF "GLOBAL ENGAGEMENT AND ORGANIZING FUND", CHANGING ITS NAME FROM "GLOBAL ENGAGEMENT AND ORGANIZING FUND" TO "AVAAZ FOUNDATION", FILED IN THIS OFFICE ON THE TWENTY-THIRD DAY OF JANUARY, A.D. 2007, AT 4:44 O'CLOCK P.M.

A FILED COPY OF THIS CERTIFICATE HAS BEEN FORWARDED TO THE KENT COUNTY RECORDER OF DEEDS.

4176072 8100

070076236

Harriet Smith Windsor

Harriet Smith Windsor, Secretary of State

AUTHENTICATION: 5377798

DATE: 01-23-07

AMENDED AND RESTATED
CERTIFICATE *of* INCORPORATION
***of* AVAAZ FOUNDATION**
***a* NON-STOCK CORPORATION**

First: The name of this Corporation is Avaaz Foundation.

Second: Its registered office in the State of Delaware is to be located at 3500 South DuPont Highway, City of Dover, County of Kent, Delaware, 19901. The name of this Corporation's registered agent at such address is Incorporating Services, Ltd.

Third: This Corporation is organized under the General Corporation Law of the State of Delaware. This Corporation shall be a nonprofit corporation. The specific purpose for which this Corporation is organized is to promote social welfare within the meaning of section 501(c)(4) of the Internal Revenue Code of 1986 or the corresponding provision of any future United States Internal Revenue Law. No part of the net earnings of this Corporation shall inure to the benefit of, or be distributable to, its members, directors, officers, or other private persons, except that this Corporation shall be empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in this Article Third.

Fourth: Notwithstanding any other provision of this Amended and Restated Certificate of Incorporation, this organization shall not carry on any activities not permitted to be carried on by an organization exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code of 1986 or the corresponding provision of any future federal tax code.

Fifth: This Corporation shall not have any capital stock, and the conditions of membership shall be stated in the Bylaws.

Sixth: Upon the dissolution of this Corporation, assets shall be distributed for one or more exempt purposes within the meaning of section 501(c)(4) of the Internal Revenue Code or corresponding section of any future federal tax code (or, at the option of the Board of Directors of this Corporation, for charitable or educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code or corresponding section of any future federal tax code), or shall be distributed to the federal government, or to a state or local government, for a public purpose. Any such assets not so disposed of shall be disposed of by the Court of Common Pleas of the county in which the principal office of the corporation is then located exclusively for such purposes or to such organization or organizations, as said Court shall determine which are organized and operated exclusively for such purposes.

Seventh: Directors of this Corporation shall be elected or appointed as set forth in this Corporation's Bylaws.

Eighth: The personal liability of the directors of this Corporation is hereby eliminated or limited to the fullest extent permitted by paragraph (7) of subsection (b) of Section 102 of the General Corporation Law of the State of Delaware, as the same may be amended and supplemented.

Ninth: Any amendment to this Amended and Restated Certificate of Incorporation requires approval by all of the members of this Corporation.

Tenth: Only the members may adopt, amend or repeal the Bylaws of this Corporation.

"RAL"

Advertising Standards Authority of South Africa

(Non-profit company registration 2001/021)

Telephone 011 781 2006 Fax 011 781 1616 Email info@asaso.org.za Website www.asaso.org.za
Willowview Burnside Island Office Park (entrance off Athole) 410 Jan Smuts Avenue Craighall Park PO Box 41555 Craighall 2024
Company Registration Number 1995/00784/08 Non-profit Registration Number 043-694-NPO

MRS DENISE WINKS — **FIRST COMPLAINANT**

GIDEON APOR — **SECOND COMPLAINANT**

and

CHICKENLAND (PTY) LTD
t/a NANDOS — **RESPONDENT**

15 June 2012

NANDOS / D WINKS & ANOTHER / 20502

Consumer complaints were lodged against Nandos' television commercial promoting two new items on its menu. The commercial was seen on e.tv during June 2012.

The commercial opens with a scene showing what appears to be a border fence with a large hole cut in it. A sign reading "ARRIVALS" is shown in the background, and the voice-over asks "You know what's wrong with South Africa?", at which point a man is shown peeking from the long grass.

The voice-over then answers the question by stating "... All you foreigners", at which point a much larger group of people are shown emerging from the long grass, carrying luggage and heading towards the hole in the fence. As the first man steps through the hole, the voice-over states "You must all go back to where you came from", at which point the man disappears in a puff of smoke.

The scene then cuts to a city setting with a long queue of people (all apparently of different nationalities) waiting outside a gazebo with the word "IMMIGRATIONS" stuck on the side. The voice-over then starts; "You Cameroonians, Congolese, Pakistanis, Somalis, Ghanaians and Kenyans, and of course, you Nigerians ..." With each mention

of a specific nationality, the people representing such nations disappear in a puff of smoke.

The voice-over makes his way through the rest of his examples; "... and you, Europeans. Let's not forget all you Indians and Chinese, even you, Afrikaners. Back to Swaziland for you Swatis, Lesotho for you Sothos, Tshwanas, Vendas, Zulus, everybody". At the end, only one man resembling the Khoisan remains, watching a car filled with smoke from all the vanishing people. He speaks in his native tongue, with subtitles on-screen reading "I'm not going anywhere. You *$&!@#* found us here".

As he runs off, another voice-over states "Real South Africans love diversity. That's why we have introduced two more items ..." and he promotes the relevant meals displayed on-screen.

COMPLAINT

In essence, the complainants argued that the commercial was offensive and that it incites xenophobia and xenophobic attacks on foreigners. Given South Africa's history in this regard, the commercial should not be flighted and goes against the South African Constitution and United Nations' position on human rights.

RELEVANT CLAUSE OF THE CODE OF ADVERTISING PRACTICE

The complaint was considered in terms of the following clauses of the Code:

- Clause 1 of Section II – Offensive advertising
- Clause 3.4 of Section II – Discrimination

RESPONSE

Bouwers Inc, acting on behalf of the respondent, filed a response to the complaints, arguing that when viewed from an objective and reasonable perspective, the

a real South African

- South Africans pride themselves on diversity
- Nandos in particular loves diversity
- Nandos does not support or endorse xenophobia.

Citing from various previous ASA rulings and Court rulings, it argued that it was trite that advertising had to be considered from a reasonable and objective perspective. In addition, it made the point that the concept of what is regarded as "offensive" turns on more than simply something that displeases. To be regarded as offensive advertising would have to be repugnant to the extent that it mortifies or pains all who see it. Judged from the appropriate perspective, it cannot be said that this commercial reaches such proportions, specifically given that the overall message clearly ridicules xenophobic thoughts as opposed to celebrating them.

The end voice-over clarifies that "Real South Africans love diversity ..." This is very similar to the renowned example of Charlize Theron's "Real men don't rape" commercial, which was also considered by the ASA. In the ultimate ruling by the Final Appeal Committee (the FAC), it was held that this commercial was deliberately hyperbolic to draw attention and condemn a pressing social issue, thus justifying the statement and commercial.

The respondent is well-known for its tendencies to satirise and parody current issues, and this commercial is doing just that by demonstrating that xenophobic tendencies have no place in our society, because they are illogical, irrational, absurd, and ought not to be adopted by any "real" South African. The overall execution demonstrates this absurdity inherent in xenophobia and expressly states that "Real South Africans" do not behave or think in this manner. As such, it falls well within the parameters of what is "justifiable in an open and democratic society based on human dignity, equality and freedom" as permitted by the Code.

In support of its arguments, it attached a letter from Lawyers for Human Rights, which voices its support and appreciation for this commercial and its underlying message. It also submitted correspondence from Saffron TV and its attorneys, arguing that the commercial is not in contravention of certain portions of the ASA Code and could be flighted. In addition, it provided information on how many times this commercial was

viewed online. This report shows that between 1 June 2012 and 4 June 2012, the commercial was viewed 297 524 times, and only 66 viewers opted to "Dislike" it.

ASA DIRECTORATE RULING

The ASA Directorate considered all the relevant documentation submitted by both parties.

At the outset, it should be noted that xenophobia is in itself a discriminatory mindset and practice, and any advertising that encourages such behaviour would be regarded as irresponsible and concerning. Having said this, however, it must be noted that the issue at hand turns on whether or not the commercial is, in fact, encouraging such behaviour (as alleged by the complainants), or rather belittling or condemning it (as argued by the respondent).

To make this determination, the Directorate has to adopt a reasonable and objective approach, viewing the commercial from the perspective of the hypothetical reasonable person who is neither over-critical nor overly sensitive. Doing so allows the Directorate to attach a reasonable and balanced meaning to the commercial.

Clause 1 of Section II reads as follows:

> "No advertising may offend against good taste or decency or be offensive to public or sectoral values and sensitivities, unless the advertising is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
>
> Advertisements should contain nothing that is likely to cause serious or wide-spread or sectoral offence. The fact that a particular product, service or advertisement may be offensive to some is not in itself sufficient grounds for upholding an objection to an advertisement for that product or service. In considering whether an advertisement is offensive, consideration will be given,

Similarly, Clause 3.4 of Section II reads:

> "No advertisements shall contain content of any description that is discriminatory, unless, in the opinion of the ASA, such discrimination is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".

It deserves mention that the clause also appears to allow for "justifiable" discrimination (refer Nedbank Eyethu / AE Ball / 2979 (14 October 2005) for example, where the practice of selling BEE shares was held as "justifiable" discrimination based on government policy and legal requirements). The clause also specifically refers to Section I, Clause 4.17, which contains the definition of discrimination. This clause defines discrimination as:

> "... any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantage on; or withholds benefits, opportunities or advantages from any person on one or more of the following grounds:
>
> > race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth, or any other analogous ground".

It also clarifies that "discriminate" and "discriminatory" shall have corresponding meanings.

Accepting that, in some instances offence and discrimination may be regarded as "justifiable", the Directorate considered the overall message of the commercial.

The humour and exaggeration is evident from the very start. This is best illustrated by the following examples:

1) The border fence which has been cut has an "ARRIVALS" sign next to it reminiscent of legitimate border destinations or airports which would ordinarily receive legitimate "foreign" visitors,

2) The examples of "all you foreigners" disappear in a puff of smoke when mentioned by nationality,

3) The long line at the "IMMIGRATIONS" office is actually in front of a tent / gazebo, intended to poke fun at the fact that many people are able to obtain fake ID documents by bypassing official processes,

4) The exaggerated stereotypical depictions of different nationalities such as, for example, the Kenyans who are shown running on the spot in a stationary line while wearing typical athletic attire (given Kenya's reputation for producing exceptional distance runners); the "Nigerian" shown standing suspiciously close to a Mercedes Benz occupied by two "Europeans" (given the strongly held belief that Nigerians are often involved in drug-related matters in the country); the clouds of smoke and sitar music emanating from the Plaza when "... all you Indians" are mentioned (given that the Plaza is often associated with Indian shops) and the "Afrikaners" depicted as a farmer driving his bakkie on a farm with the dog on the passenger seat (given the jokes about "boere" behaving in such a manner),

5) The Khoisan representative stating "I'm not going anywhere, you *$&!@#* found us here", complete with bleeped-out expletive and subtitles, and

6) The two meals that are swapped by means of a puff of smoke similar to that shown when the "foreigners" disappear.

The Directorate is satisfied that this falls within the parameters of hyperbole and/or harmless parody as allowed for by Clause 4.2.3 of Section II. This clause states that "Obvious untruths, harmless parody or exaggerations, intended to catch the eye or amuse, are permissible provided that they are clearly to be seen as humorous ..." This is also in line with the respondent's reputation for poking fun at topical issues and current affairs.

What's more, the commercial is clearly contrasting the "voice" of xenophobia (who starts the commercial off with mention that "... all you foreigners" should just "... go back to where you came from"), with the voice of "reason", who explains that "REAL South Africans" (our emphasis) love diversity. This carries the implied message that the initial "voice" of xenophobia does not speak for "Real" South Africans.

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In addition to this, if one views the entire commercial, it becomes apparent that the xenophobic voice and opinion is ridiculed and made to be irrational, because the point is made that all nationalities found here (save for the Khoisan) were once "foreigners".

Put simply, the respondent juxtaposes the xenophobic view that "what's wrong with South Africa" is "all you foreigners" with the rational and reasonable view that "what's wrong with South Africa" is actually "all you xenophobes". This is done in a tongue-in-cheek manner, and the ending voice-over explains that "REAL" South Africans "love diversity".

For the above reasons, the Directorate is satisfied that the commercial does not contravene the provisions of Clauses 1 and 3.4 of Section II of the Code.

The complaints are accordingly dismissed.

ON BEHALF OF THE ASA DIRECTORATE

"RA5"

Hi-Fi Corporation / Various Complainants

Ruling of the ASA Appeal Committee

In the matter between:

Various Complainants	Complainant(s)/Appellant(s)
Hi-Fi Corporation	Respondent

12 July 2001

The Appellants, being members of the Chinese community in South Africa, complained that the advertisement was hurtful and/or offensive as it portrayed the Chinese community as being stupid, stingy, petty or "foreign idiots" and that it was racist.

On the day before the appeal the Chinese Association of South Africa lodged a complaint in which it accepted that the advertisement was not specifically aimed at the Chinese community. The Association further said that the advertisement was geared "towards amusing" but at the point of the discounts being asked for on an item such as a banana the advertisement transgresses the line between amusement and stupidity on the part of the Chinese Community.

In terms of Section II clause 3.4 of the Code " advertisements should not contain anything which offends the susceptibilities of consumers. In particular claims or statements which directly or by implication, discriminate or exploit on the basis of race, ethnicity, gender or religion will not be permitted unless in the opinion of the ASA, the advertising is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." In terms of clause 3.5 advertisements cannot discriminate between people. Clause 4.2.4 of Section II of the Code provides that "obvious untruths, harmless parody or exaggerations, intended to catch the eye or to amuse, are permissible provided that they are clearly to be seen as humorous or hyperbolic and are not likely to be understood as making literal claims for the advertised product".

The Advertising Standards Committee found that bargaining is a normal and accepted practice in the orient and that this bargaining culture is not alien to the Chinese people. The Committee held that in looking at the advertisement as a whole the bargaining strategy was used to amuse consumers and to highlight that the Respondent sells goods at relatively low prices. The Committee ruled that the advertisement was not offensive or discriminatory within the meaning of either clauses 3.4 or 3.5 of Section II of the Code. A minority ruled that the advertisement used a negative stereotype to portray Chinese people and, therefore, was in breach of Section II clauses 3.4 and 3.5 of the Code.

Mr Marcus, who appeared for the Respondent, submitted that the ASA was a juristic person exercising a public function in terms of the contractual relationship between the ASA and its members and consequently the ASA was subject to the provisions of the Promotion of Administrative Justice Act 3 of 2000. That act was promulgated to

ensure that administrative action is lawful, reasonable and procedurally fair and that written reasons are to be given for such administrative action. This Act follows from the provisions of Section 33 (1) and (2) of the Constitution that everyone subject to administrative action has these rights and Section 33 (3) which required national legislation to be enacted to give effect to these rights. In terms of the Act administrative action includes any decision taken or any failure to take a decision by, inter alia, a juristic person which exercises a public function in terms of an empowering provision. An empowering provision is defined, inter alia, as including an agreement. It is clear that the relationship between the ASA and its members and the power vested in this Appeals Committee arises out of contract. See Turner vs The Jockey Club of South Africa 1974 (3) SA 633 (AD). In short, in terms of the Act the ASA, as a juristic person, is empowered by agreement.

An advertisement must be considered from the viewpoint of the hypothetical reasonable viewer who is neither hypercritical nor over sensitive. The surrounding circumstances of this advertisement are that it is notoriously well known that the Far East is the biggest supplier of hi-fi related electronic goods and that the best prices are to be obtained from the Far East. In that context it seems reasonable to have used the person, who is by appearance from the Far East, to lend credence to the message that the Respondent sells goods at the best prices because of the great deals they obtain.
The reasonable person has been postulated as a person " who gives a reasonable meaning to the words used within the context of the document as a whole and excludes a person who is prepared to give a meaning to those words which cannot reasonably be attributed thereto". See Demmers vs Wylie and others 1980 (1) SA 385 (AD) at 842 (H). Consequently, the reasonable person must exclude an assessment of an advertisement which embraces matters of personal predilection, taste and the like.

Further, the ASA and its various committees cannot lose sight of the fact that the Constitution is the supreme law of the Republic. Consequently, law or conduct inconsistent with its provisions is invalid and it imposes duties to be performed. The Constitution lays down that when interpreting any legislation and when developing the common law or customary law every court, tribunal or forum must promote the spirit and purport of the bill of rights. The Constitutional Court has held that any judicial officer, and in our view any tribunal such as the ASA, where possible should read legislation or self-regulatory provisions in ways which give effect to the fundamental values of the Constitution. While none of the rights in the Bill of Rights is absolute and the rights are subject to limitation, this limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In order to do this different interests must be balanced and weighed up. On the one hand there is the right infringed and on the other hand there is the importance of the purpose of the limitation. "In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose". See National Coalition for Gay and Lesbian Equality and Another vs The Minister of Justice and others 1998 (12) BCLR 1517 (CC) at paragraph 34. Further, the onus of proving that the limit on the fundamental right is permissible in terms of the limitations clause rests upon the party seeking to uphold the limitation See S vs Zuma and others 1995 (2) SA 642 (CC) at paragraphs 35 to

The ASA must interpret and apply the provisions of the Code in accordance with the requirements of the Constitution. Of particular significance, in casu, is the guarantee of freedom of expression. Freedom of expression is of essence to an open and democratic society based on freedom and equality and lies at the heart of democracy. See South African National Defence Union vs The Minister of Defence and Another 1999 (4) SA 469 (CC). It has been held in several courts in the United Kingdom and other jurisdictions including South Africa that the guarantee of freedom of expression extends to commercial speech. Davis J in City of Cape Town vs Ad Outpost (Pty) Ltd and others 2000 (2) SA 733 (C) said: "Whatever the role of such speech within a deliberative democracy envisaged by our constitution, it is clear that advertising falls within the nature of expression and hence stands to be protected in terms of Section 16 (1) of the Constitution".

The Appellants pointed to the fact that there are several of them who complained that the advertisement is offensive, but the issues in this matter cannot be decided by an opinion poll. Courts have repeatedly said that public opinion may have relevance to an enquiry but cannot be a substitute for the duty vested in a court or tribunal.

In determining whether there has been a breach of Clauses 3 (4) or 3 (5) the approach must be an objective one. It cannot depend upon the subjective views of individuals or of particular sections of our community in South Africa. It must be looked at objectively by the hypothetical reasonable person who is not hypercritical or hypersensitive.

The question of racism is now regulated by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. It provides that no person may unfairly discriminate against any person on the ground of race including the dissemination of any propaganda or idea which propounds the racial superiority or inferiority of any person including, incitement to or participation in any form of racial violence.

Clearly in the instant case there is no attempt to record racial superiority or to incite or participate in any kind of racial violence nor can it be said to be hate speech within the meaning of Sections 10 and 12 of the Act, because it is clearly not intended to incite harm or to promote or propagate hatred. The only question is whether the advertisement could be hurtful in terms of Section 10.

This Committee has repeatedly said that it must be accepted that advertisers use a certain amount of hyperbole in the description of their goods or services. An advertisement should therefore be looked at with a large pinch of salt.

Advertising by its nature contains innuendos and ambiguity and as such one cannot apply a literal and realistic claims test absolutely without becoming open to ridicule. It is in this context that one should see whether the advertisement amounts to harmless parody. Parody is defined in the shorter Oxford English dictionary as "a composition in which the characteristic terms of thought and phrase of an author are mimicked and made to appear ridiculous, especially by applying them to ludicrously inappropriate subjects". In the instant case the asking for a discount on a banana, an

ice cream or a sweet makes the asking of the discount ridiculous "especially by applying them to ludicrously inappropriate subjects". In our view this advertisement is clearly a parody and will certainly be seen by the hypothetical reasonable man as such. It cannot be said, therefore, that it offends the susceptibilities of consumers generally or that it discriminates between races. To give the advertisement a literal meaning of being hurtful would open one to ridicule in our judgment.

Further, it is not clear that the hypothetical reasonable man would necessarily see the person in the advertisement, who is apparently from the Far East, as a member of the Chinese community. This is effectively conceded by the Chinese Association. In any event, to bargain per se cannot be offensive, discriminatory or hurtful.

We believe that judicial cognisance can be taken of the fact that most people, at one time or another, ask for a discount on goods they wish to purchase.

In consequence, the Appeals Committee has come to the conclusion that in the context of the Code, embraced as it is by the Constitution and the various Acts referred to above, the advertisement is not offensive, does not offend the susceptibilities of consumers and is not discriminatory. By requesting a discount on items such as a banana, an ice cream and a sweet amounts to a parody.

The Appeal is consequently dismissed and no order for costs is made.