



# PRO BONO AND HUMAN RIGHTS ALERT

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### COURT DISMISSES DEFAMATION CLAIM AGAINST SAHIVCS AND AFFIRMS IMPORTANT WATCHDOG ROLE

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The doctor sought to interdict the Society from publishing any "future defamatory material" of him on its website and to remove published (allegedly) defamatory material from its website. In an important victory for the SAHIVCS, the Court found that there had been no defamation and dismissed the application with costs. In its judgment, the Court emphasised the importance of the watchdog role of the Society.

The SAHIVCS is a powerful and independent voice within Southern Africa (SA) that strives to support and strengthen the capacity of its members to deliver high quality, evidence-based HIV prevention, as well as care and treatment services through publications, conferences and guidelines. Advocacy is especially important as the Society promotes only the highest quality of HIV care for people living with HIV.

Given the Society's mandate and the nature and extent of HIV in SA, it was concerned that, based on the marketing and packaging of the gel, the public would view the gel as a potential substitute for condoms to be used to prevent the transmission of HIV and other sexually transmitted diseases. The SAHIVCS considered this to be irresponsible because not only was the gel not registered as a medicine in terms of the Medicines and

Related Substances Act, there was also no proof that the gel could be used safely, or had any clinical benefits.

In order to prevent further sales and marketing of the gel, the SAHIVCS wrote a letter to various authorities (including the Department of Health, the Medicines Control Council (MCC) and the Advertising Standards Authority), which was later referred to in a newsletter to its members, and posted on its website. The content of this letter and newsletter was seen to be defamatory by the doctor in question.

Relying on the expert evidence of the three experts tendered by the SAHIVCS (all of whom were in agreement that given the antibacterial, antifungal and antiviral claims made in the marketing, the gel was a medicine which by law had to have been registered with the MCC before being sold or marketed), the Court held that the gel should have been registered as a medicine prior to being brought to market. It also found that an effective microbicide to prevent HIV infection has yet to be developed anywhere in the world, and that the advertising claims made in respect of the gel were likely to result in it being used in the place of acceptable, already-proven HIV prevention methods by the unsuspecting public – in the mistaken belief that it would prevent HIV infection.

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*The application was dismissed with costs and the newsletter along with the other correspondence was allowed to remain on the Society's website.*



The Court held that the doctor's view that the SAHIVCS had intended to injure his reputation through its publications was misconceived. It found that the Society's intention was not to defame the doctor by means of the published correspondence, but rather to pursue its objects of ensuring that the public was not exposed to untested medicines. Also that the fight against HIV was a national one and that all interested parties, including the Society, had the right to voice its concerns whenever there were suspicions of irregularity. The Court, therefore, held that statements relied on by the doctor constituted an honest expression of fair comment, were made in public interest and were therefore not defamatory or unlawful.

The Court also found that the SAHIVCS had every right to raise its concerns about the product with the relevant regulatory and professional bodies. The Court compared the steps taken by the Society to the type of action that was taken by the Treatment Action Campaign in the matter of *Treatment Action Campaign & Another v Rath & Others* in which the Cape

High Court found that Rath was acting unlawfully by publishing advertisements that made certain medical claims that had yet to be evaluated by the MCC (and by conducting unauthorised clinical trials).

Counsel on behalf of the Society submitted that given the nature and extent of the Society's publications it should be considered – for purposes of defamation proceedings – as a media respondent and therefore it was acting reasonably when it published and republished the impugned correspondence.

The doctor submitted that such a principle was not recognised in our law. The Court held that this may very well be so, however when interpreting the wording of Hefer JA in the matter of *National Media Ltd v Bogoshi*, and taking into consideration the watchdog role that the Society plays, it was fair to extend the reasonable publication defence to the Society. In the end, the application was dismissed with costs and the newsletter along with the other correspondence was allowed to remain on the Society's website.

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**BBBEE STATUS: LEVEL THREE CONTRIBUTOR**

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