Before the Final Appeals Committee of the Advertising Regulatory Board

In the matter between:

GOLDEN FRIED CHICKEN (PTY) LTD APPELLANT

and

SANDILE CELE RESPONDENT

Matter Ref: 30-11-18

DECISION

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1. This is an appeal by Golden Fried Chicken Pty Ltd ("appellant") against a Ruling of the Advertising Appeals Committee ("AAC") dated 19 February 2019 handed down in favour of Mr Sandile Cele ("respondent"). The ACC dismissed the appellant's appeal to it against the Decision of the Directorate of the Advertising Regulatory Board ("Directorate") handed down on 14 December 2018. The complaint that was the subject of adjudication was lodged by the respondent against a television advertisement flighted by the appellant. It is sometimes too difficult to give an accurate description of a pictorial advertisement. For the present purpose, it would be convenient to keep to the description by the Directorate. The ACC accepted that description, which we also accept as there is no reason not to. We will therefore proceed to consider the advertisement on the basis of the description given as follows by the Directorate:

> *"Description of the advertising*
>
> *The commercial shows a young man, called John Mjohnana, leaving his village in a boat in 1650 aiming to satisfy his hunger for adventure. He encounters obstacles like being confronted by a jaguar (he instructs the jaguar to fetch and the jaguar obliges); a*

whale splashes his boat with water in an attempt to topple it over (he rebukes the whale by indicating 'Haai maan Hey'); a shark approaches his boat and he threatens it with his knife and it turns away; a giant squid appears behind him (he seems not worried about it); thunder and lightning obstructs his boat. He arrives in Holland in 1651 and finds two gentlemen looking at a map as they seem to be preparing for a voyage. He greets them in what is well known as 'Tsotsi Taal' in South Africa, saying 'Hola MaNgamla' (Hello white people), and tells them that he likes the place, and it should be called Europe.

The voice-over narrates the story as follows:

'A long time ago Big Mjohnana left home to satisfy his hunger for adventure. His spirit was unstoppable, and his hunger was too big. Ja, Big Mjohnana did many things, but he will always be remembered for discovering a foreing land'.

The commercial ends with an elderly man in a Chicken Licken outlet indicating to few customers that 'that is the legend Big John', and he leaves the outlet laughing. The next customer in the queue orders the advertised product."

2. The respondent's brief objection was presented as follows:

"This advert makes a mockery of the struggles of the African people against the colonization by the Europeans in general, and the persecutions suffered at the hands of the Dutch in particular." One point must be made clear at the outset: this matter is not just about one individual; it goes beyond the respondent as he himself says in his complaint. This point is reinforced in his furthur submissions.

3. The appellant's response was the following:

With regards to the complaint laid against The Big John TV commercial, it is unfortunate that this complaint has arisen and that the interpretation of the commercial by this consumer has been negative. However, in our view the content in no way shape or form seeks to make a mockery of the struggles of colonisation and its effects on Africa and her people. As a proudly South African brand, Chicken Licken, is acutely aware of the need to uplift the South African spirit. And that is the place from which this advertisement stems, to show South Africans that Chicken Licken believes this country has all the potential to conquer the world and rewrite history from an African perspective. Chicken Licken's tonque-in-cheek sense of humour is a tone that consumers have come to expect but its communication's underlying purpose is to create a sense of pride and patriotism amongst South Africans."

4. One of the arguments raised by the appellant was that the complaint comprised only one sentence and was not substantiated. In answer to this, the respondent, in his response (12 January 2019?) to the appellant's Notice of Appeal (21 January 2019?) against the Ruling of the Directorate to the AAC, says the following:

"7. In this response I will not dwell on the basis of the complaint, the Appellant's response to the complaint as was submitted to the Directorate for that has been dealt with in the Directorate's Decision. I, however, will only respond to the matters in the Notice of Appeal which warrant my response and/or clarifying.

8. The Appellant has on more than one occasion stuck on that the complaint was stated in a single sentence. This is true. That single sentence was used because a consumer's complaint has to be submitted using a 'Consumer Complaint form' in the website of an Advertising Regulatory Board (ARB). It would appear that that single sentence coupled with accompanying

> *description of a commercial enable the Directorate to commence an investigation of the matter. Further, the single paragraph response of the Advertiser assisted the Directorate to reach its decision. I trust this dispels the notion perpetuated by the Appellant that the Directorate took the decision on the basis of a 'single sentence complaint'. It is evident that the Directorate did due diligence and reached an appropriate Decision."* The respondent then went on to deal further with the merits of the case.

5. In its Ruling dated 19 February 2019, the AAC dismissed the appeal, and pronounced itself as follows:

> "*In the circumstances the AAC upholds the decision of the Directorate and accordingly the Appellant is required to:*
>
> - *withdraw the television commercial in its currect format;*
> - *the process of withdrawing the commercial must be actioned within* (sic) *immediate effect;*
> - *the commercial may not be used again in future*."

6. On 20 March 2019 the appellant lodged its Notice of Appeal to the Final Appeals Committee ("FAC") against the decision of the AAC. In reality, it was more than just a Notice of Appeal because it did not concisely state the grounds of appeal; it was a detailed and prolific document which amounted to written argument on the merits, including references to decided cases. It covers some 45 pages, and comprises 84 paragraphs, with almost every second one divided into sub-paragraphs. The respondent did not make any further new substantive submissions.
7. The significance of reference to the appellant's extensive Notice of Appeal, and the respondent's short response, will become apparent when the Chairperson of

this Committee deals with the issue of *amicus curiae*. This he does from paragraphs 19 to 26 below.

8. The appellant later also submitted its heads of argument. As it turned out, it was really more of written argument than heads of argument; it was an extensive document accompanied by a list of authorities for the convenience of the Committee. Any heads of argument by the respondent? None. He said he had nothing to add. Once more, the significance of the fact that the appellant submitted extensive argument supported by authorities, as it was entitled to do, weighed against the fact that no heads were submitted by the respondent, will become apparent when the Chairperson deals with the need to appoint an *amicus curiae* to objectively help the Committee to reach a fair, informed and just deision. Let it be added also that at the hearing of the appeal, counsel for the appellant, who had in tow a team of lawyers, argued the matter for nearly $2^{1}/_{2}$ hours. Appearance for the respondent? None! The Chair of the Committee, being the one who exercised the discretion to appoint an *amicus curiae*, will return to all of these when dealing with the appellant's objection to such an appointment.

9. Notwithstanding appellant's extensive Notice of Appeal and heads of argument, with the latter being naturally substantially a repeat of the former, by the time the appeal was heard, there were in reality two points.

    22.1 Whether or not the advertisement depicted colonization

    22.1 The validity of the point raised by the appellant that, assuming that the advertisement depicted colonization, it was harmless parody.

The two points were dismissed by the Directorate and the AAC, both holding that the advertisement depicted colonization, something one could not parody as many people suffered under it in this country. In the view of both bodies, there are certain issues that are so-called "*no-go*" areas on which one may not construct parody; colonization being one of them. The appeal therefore turned on these two main points.

<u>Whether the advertisement depicted colonization</u>

10. The appellant's own description of the advertisement, both before the Directorate and the AAC, seems to give the impression that it is formulated to support its argument that the advertisement does not depict colonization. What is striking about the appellant's description is that it makes no reference to the figure resembling Jan van Riebeeck, the colonizer or the front runner thereof; it also leaves out reference to the time frames (1650 and 1651) which would have re-inforced the idea of South Africa's colonization which started in 1652 with the arrival of Jan van Riebeeck in the Cape of Good Hope. These two points alone zoom onto South Africa. The following comparative table belies the appellant's argument that the advertisement does not depict colonization, in particular, of South Africa.

Parallels between Jan Van Riebeeck's and Big John's voyage

Jan Van Riebeeck's voyage	Big John's voyage
Jan Van Riebeeck is from Holland and he goes on a voyage to set up a refreshment station overseas	Big John is a South African who goes on a voyage to satisfy his hunger for adventure
The voyage culminated in him discovering South Africa (Cape of Good Hope). A discovery that led to the permanent settlement of Europeans, colonisation and slavery in South Africa	The voyage culminated in him discovering Holland and naming it Europe
Jan Van Riebeeck discovered South Africa in 1652	Big John leaves South Africa in 1650 and discovers Holland in 1651
Name of the adventure seeker = Jan	Name of the adventure seeker = John
Jan Van Riebeeck is the main protagonist	The Big John advert features a Jan Van Riebeeck lookalike reading a map
Mode of transport used by the adventure seeker = boat named Dromedaris	Mode of transport used by the adventure seeker = unnamed boat The Big John advert features a Jan Van Riebeeck standing on a boat called Dromedaris

11. In any event, during argument counsel for the appellant conceded that the advertisement depicted colonization. He had to, because the argument that the advertisement was parody attracted the question: what was it that was being parodied, if not colonization? Surprisingly, in its subsequent submissions dated 7 June 2019, the concession was denied. Yet during the hearing on 10 May 2019, counsel for the appellant was asked by a member of the panel: since appellant's case is that the advertisement is a parody, if you deny that colonialism was depicted, what are you parodying? It was in the face of this pertinent question that the concession was made. This was why Mr de Klerk was told that his contribution on that point was not needed. In any case, concession or not, it is clear that the advertisement depicted colonization of South Africa in particular.

Whether the advertisement offends against Section II Clause 1 of the Code or is harmless parody.

12. This is a very difficult and contentious issue. In its Ruling, the AAC says the following: "*The appellant conceded in the hearing that in the event that the panel finds that the advert depicts a scene of colonization then it would be offensive to flight an advert in that context*." In the appeal to this Committee, the concession was abandoned. We are therefore not going to hold the appellant to it as it is against the thrust of the appellant's defence; this is apparent from its Notice of Appeal and generally how the defence was mounted. As we have found that the advertisement depicts the colonization of South Africa, the only remaining point on which the appeal now turns is whether the advertisement is offensive or amounts to harmless parody. This brings us to the Code.

13. Section II Clause 1 of the Code reads:

> *"1.1 No advertising may offend against good taste or decency or be offensive to the 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.*

1.2 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, inter alia, to the context, medium, likely audience, the nature of the product or service, prevailing standards, degree of social concern, and public interest."

In its Ruling, the ACC deals with the clause as follows:

"*23. One of the requirements of Section II Clause I is that the advertising must be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This requisite is lifted directly from section 36 of the Constitution of the Republic of South Africa under its Bill of Rights which provides that the rights in the Bill of Rights, including the right to freedom of expression may be limited only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.*

24. Clause 1 further raises caution in advertising to the effect that advertisements should not contain anything 'that is likely to cause serious or widespread or sectoral offence'. Whilst the words 'widespread' or 'sectoral' offence are easy to interpret, 'serious' offence is more difficult to quantify. The first two mean a large number of people that are likely to be offended or a sector such as a religious or traditional community, respectively. Serious offence would apply more appropriately to both the gravity of the offence even if not to a widespread

number of people and to a group of people. The latter could apply to a minority or small group of people but against whom serious offence is perpetrated by publishing offending material about them. It could also mean that the repercussions of the offending material could be widespread. Therefore, the fact that only one complainant lodged a complaint could mean that the gravity of the offence caused by an advertisement is serious enough so as to fail the constitutional test of reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."

The above is a correct interpretation of the clause. The AAC also adopted a correct approach in "*balancing the right to freedom of expression and the offence that the AAC may find in the advertisement*" with reference to the judgment in *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another*[1]. Nobody denies that the appellant has the right of freedom of expression; but that right cannot be absolute and must therefore be weighed against other competing rights.

The AAC went on to say that there were certain subject matters which were "*no go*" areas for humour, such as the Holocaust; other examples were given, including colonization in South Africa with reference to the brutality and suffering under it. One should be slow to accept that there are "*no go*" areas; yet the point is not without merit. There are certain subject matters that would not easily lend themselves to parody, such as the well documented Holocaust or the Rwandan Genocide in which nearly a million people were brutally killed. Is anyone qualified to compare the sufferings of different peoples, and say for example that the suffering under South African colonialism is less grave than the Holocaust or Rwanda Genocide and can therefore be fair game for parody? How could one possibly come to such a conclusion when, for example, apartheid was declared to

[1] (CCT42/04) [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) (27 May 2005)

be a crime against humanity by the United Nations? For one thing, it cannot be denied that colonization in South Africa resulted in immeasurable suffering and oppression. The matter must therefore be decided on that basis; a contrary view would greatly offend native South Africans as it would Rwandans and the Jewish people where in some countries even a mere denial of the Holocaust is a criminal offence. The survey conducted by the appellant, a subjective view of some people, cannot assist the appellant because, as the AAC correctly indicates, it would be sufficient if the advert is seriously offensive or is offensive to a section of society. Such a finding is the result of a balancing exercise by the tribunal: weighing the appellant's right to freedom of expression against the dignity of the people who, it must be accepted, suffered as a result of colonization; it is a value judgment. What is the exact right that is being weighed against the admitted sufferings under colonization? It is not the right to freedom of expression for the purpose of for example promoting a public debate, but to promote the sale of a commodity; to be precise, a hamburger. The correctness of the outcome reached by the AAC after its balancing exercise cannot be doubted. The parody relates not just to colonization in general, but to this country's colonization specifically; this is apparent from the comparative table above. In terms of the Code, parody must be harmless. **T**he drafters of the Code did not intend an unfettered use of parody in advertising. All constitutional rights, save for the right to life, have limitations and corresponding obligations. The right to use parody in freedom of commercial speech cannot be separated from a duty of care to ensure that the exercise of that right does not offend or cause harm to others.

14. The modern day South African society is still vocal in its condemnation of the country's colonialism and symbols thereof, and still feels hurt by it. It therefore stands to reason that the issue evokes painful memories to those whose forebears suffered under colonialism. Soon after the new dispensation, a public holiday marking the arrival of Jan van Riebeeck was abolished, a date which native South Africans had always rallied against. Not long ago there were protests against statues of people perceived to be champions of colonialism, such as Cecil John

Rhodes. An article appeared recently in the City Press edition of 30 June 2019 by one Tholene Sodi, described as a professor and clinical psychologist. The article tackles the question why Africans in the country continue to display anger that sometimes translates into destruction of public property. The heading reads: *"WHY WE ARE ANGRY*". The subhead reads: "*If we are to free ourselves as a nation, we must understand the root of South Africans' rage—the violence of colonial oppression*." The article went on: "*As most of us know, South Africa was primarily colonised by Europeans whose arrival in the Southern part of the country is traced back to 1652, when Jan van Riebeeck arrived in the Cape…… Generation after generation, Africans have continued to live with the lingering hangovers of colonial brutality, and its resultant psychological wounds and scars.*" Mr de Klerk referred us to an earlier article by one Adv Modidima Mannya that had also appeared in the City Press, 28 May 2019, entitled "*Helen Zille and the shaming of black people*." The article claimed that it was a response to what it said were some "tweets" by Helen Zille, which we need not go into; suffice it to say that Adv Mannya's article also decried the legacy of colonialism. The colonization of the country, and memories associated with it, therefore continue to be a sensitive issue in the country.

15. A lot of submissions centred around whether or not colonialism should be a "no go" area for parody. We do not necessarily subscribe to the view that one cannot construct parody on colonialism; we leave this issue open because it is not necessary to make such a determination for the purpose of resolving the present case, to which we must limit ourselves. That being the case, there is no need for us to deal in detail with those submissions. But a point has to be made that the right to use parody must be accompanied by a duty of care to ensure that its use does not cause more harm than good; for example, by being seriously offensive to a section of the society.

16. Much as we do not make a ruling that colonization is a "no go" area for parody, there is one particular problem with the advertisement (which is not parody on colonization in general, but of South African in particular); it is a point on which this appeal must fail. It is simply this: one cannot, in constructing parody on an event or

subject matter, distort or misrepresent, particularly where such misrepresentation or distortion is offensive. What the appellant did in its advertisement, was to leave out the negative effects of colonization (eg the undeniable sufferings it brought) or any reference to them, thereby presenting it as something harmless. This is insensitive and offensive to those who suffered under colonization. It is not for us to prescribe to the appellant how it should construct its parody on colonization; but those who choose to parody sensitive issues with the potential to seriously offend others, attract a heavier duty of care to themselves, a duty up to which they must live. It was imperative that the parody also reflected the undeniable sufferings caused by the colonization of the country and/or at least condemn them; otherwise it amounted to a misrepresentation or distortion and lent credence to the argument that it trivialized the sufferings under colonization. When constructing parody on colonialism, nobody has the right to leave out of it the plight of those who endured some suffering under it. Why? Because such suffering was, and continues to remain, an integral part of colonization; this is well articulated in the article by Professor Sodi referred to above and also shown by a recent public demonstration of feelings towards certain statues. A parody must accurately reflect the subject matter, pain and all. It is unthinkable that anybody could dare parodying the Rwanda Genocide or the Holocaust (the mere denial of which is a crime in other countries such as in Germany) and leave out completely any reference to the sufferings and horrors that are an integral part thereof, or at least condemn them. Regarding South Africa, apartheid, which Adv Mannya describes as the successor of colonialism, was, as said above, actually declared to be a crime against humanity by the United Nations, thereby recognizing the magnitude of the horror suffered by its victims. Yet the appellant's advertisement so conspicuously fails to reflect those sufferings that anybody who has not read the South African history, would get the impression that all was well under colonialism and its aftermath. Construct parody out of colonialism if you wish, but you are duty bound to also reflect the ugly aspects of it. This point is put as follows: "*Parody also tends to comment on or criticise a particular work; such criticism has a valued role in our society. Thus, parodies are protected for their contribution to public discourse; …*

however, the parody must specifically refer to and 'conjure up' elements of the original work such that they will be recognizable to the public. Parody works must necessarily copy the 'heart' of the original work in order for the parody to be recognizable and protectable."[2] (Own emphasis). The emphasized part simply means this: if you choose to parody colonialism, you must capture its ugly side as well. One looks in vain in the parody in dispute for any condemnation or depiction of the sufferings caused by colonialism. The consequences of the appellant's omission are serious; they are foundational to the argument of trivialisation, insensitivity and therefore offensiveness. The Constitution, in which the clause is rooted, cannot, properly interpreted, countenance this. As said earlier, barring the right to life, there is no right without limit.

17. The appeal can therefore not succeed, albeit on an approach different to that adopted by the Directorate and the AAC because, as said earlier, the basis of our decision is not that colonization is a "no go" area. We leave that issue open; a case may arise in future the determination of which may turn on that particular point; the present is not such a case. For the reasons given above, it is our ruling that the advertisement as currently formulated contravenes Clause I of Section II of the Code in that it is offensive.

18. The following Order is therefore made:

    22.1 the appeal is dismissed;

    22.1 the Ruling of the Advertising Appeal Committee, is upheld;

    22.1 the appellant must withdraw the television commercial in its current format;

    22.1 the process of withdrawing the commercial must be implemented with immediate effect;

    22.1 the commercial may not be used again in its current format in the future.

Dated this 9th day of July 2019.

Judge B M Ngoepe, Chair: Final Appeals Committee
Mr Mike Gendel, Representative: Association for Communication and Advertising

[2] Parody and Sabire, Philadelphia Volunteer Lawyers for the Arts. A program of the Arts & Business Council for Greater Philadelphia, by Max Kimbrough

REASONS BY THE CHAIPERSON FOR HIS DECISION TO APPOINT *AMICUS CURIAE*

19. I find it necessary to contexualize the appointment of Mr de Klerk as *amicus curiae* and to furnish reasons for the decision, because the appellant had raised an objection to the proposed appointment.
20. As indicated in the Decision of the FAC, there was no appearance for the respondent in the matter, whereas the appellant was legally represented.
21. Soon after the appeal was heard and the decision reserved on 10 May, I sent an email on 13 May 2019 to all, including members of the panel who later concurred. I said that following an *improptu* discussion amongst members of the panel and upon further reflection, I was of the view that ***"****written representations, in the form of a full written argument* (*t*o obviate the need for oral representations), *be made*, *if possible, on behalf of the complainant's case. There is a need to level the playing fields. I firmly believe that this would enable the FAC to come to a just decision."* Some reasons were given. I said that I had approached attorney Willem de Dlerk to act on a *pro bono* basis. The reasons for this were foreshadowed in the email; I deal with them fully in paragraph 23 below. Mr de Klerk, while prepared to do so, correctly pointed out that acting on a *pro bono* basis would mean that he would be acting on behalf of the respondent, in which case he would have to consult with him and take instructions from him. I had overlooked this fact. I should add that Mr de Klerk practises in Johannesburg, while Mr Cele's address points to a small place in Kwa-Zulu Natal, Mandeni, some 662k from Johannesburg. They were also strangers to each other. When I realized this difficulty, in particular the fact that acting on a *pro bono* basis would mean that Mr de Klerk would have to carry out respondent's mandate as opposed to assisting the Commmittee on an objective basis to come to a fair and just decision, I decided that he rather be appointed as an *amicus curiae.* I therefore, on the same day (13 May) sent an email at 22:17 to inform the parties accordingly, and apologized for the confusion. As a result of the

argument by the appellant in its response to Mr de Klerk's submissions challenging Mr de Klerk's role as *amicus curiae* (more about this later), I quote the relevant part of the email I sent at 22:17 which speaks for itself:

> "*1. The request by me as the Chair is for Mr de Klerk to act as amicus curiae, to argue compainant's case and not to argue on behalf of Mr Cele ("the complainant"). He therefore neither represents nor takes instructions or brief from Mr Cele, but argues the matter as he deems fit to assist the tribunal. As I have said, this matter goes beyond the personal interests of Mr Cele, the original complainant. I suppose the confusion partly arose because I had asked Mr de Klerk to charge no fee, to which he agreed*." (Recent emphasis). The message is clear, especially from the emphasis, that Mr de Klerk's appointment and role was to be that of an *amicus,* as opposed to acting for the respondent.

22. Before dealing with the matter further, I must first deal with the appellant's written submissions, dated 7 June 2019, in response to those submitted by Mr de Klerk as *amicus curiae.* I do not intend to deal with all the points raised, particularly those relating to the merits of the case; the merits are dealt with in the decision of the FAC. I only deal with two points they raised.

22.1 In paragraph 1 of the submissions, it is said that the "*decision was conveyed to the appellant after it had already been taken and implemented*" (Own emphasis). This statement is incorrect. Of course I had to speak to Mr de Klerk first to find out if he was prepared to assist, be it on a *pro bono* basis or as *amicus curiae*. The idea was to approach the parties not in instalments, but with the name of a particular individual, against whose name somebody might object. In my 13 May email sent at 22:17 (re *amicus curiae*) a few hours after the earlier one (re "*pro bono"*, or as I had wrongly put it, "*pro amici*") I sought to explain that Mr de Klerk was sought to be *amicus curiae,* and not to act on a *pro bono* basis. I said the following:

"*2. In light of the above clarification* (that what is required is an *amicus curiae* and not somebody acting *pro bono*)*, it now also occurs to me that the appellant should be, and is hereby given, the opportunity to indicate as soon as possible but by not later than 17 May 2019, whether it has any objection against Mr de Klerk acting as amicus curiae*. *In this respect, the appellant is referred to the reasons set out in my email. In the event the appellant raises such an objection, full written argument setting out reasons therefor should be filed by not later than 22 May 2019*".

Clearly, if it is contended that Mr de Klerk had already been appointed by the time of this email, it would be incorrect; he had only been approached earlier on for his attitude. In fact, a letter by the appellant's attorneys dated 17 May 2019, emailed the same day, raised an objection against the contemplated appointment. Nowhere does the letter hint that the decision had already been taken and implemented. In that same email, the attorneys confirmed that no further submissions would be made in support of the objection raised in the letter. In their email of 27 May 2019 to Ms Gail Schimmel, the ARB's administrative official, the appellant's attorneys say the following: "*We refer to the above matter and merely wish to enquire when we can expect to receive the chair's final decision in respect of the appointment of Mr de Klerk, following the appellant's objection*." (Own emphasis). The underlined would be inconsistent with any suggestion that Mr de Klerk's appointment was made without the appellant being given the opportunity to object if so advised. It was only through my email of 27 May 2019, after explaining my delay, that I finally advised the parties: "*Mr de Klerk is appointed amicus*". Mr de Klerk's appointment was therefore made after the appellant was given the opportunity to object, and did so.

22.2 The argument that Mr de Klerk's role was not that of a true *amicus curiae*. The argument misconceives the role of an "*amicus curiae*". Correctly

understood, it is exactly the role Mr de Klerk played; this point is dealt with fully in paragraphs 25 *et seq* below.

Reasons for the appointment of Mr de Klerk as *amicus curiae*

23. I now deal in more detail with the reasons for the decision to appoint Mr de Klerk as *amicus curiae*.

23.1 I was aware that Mr de Klerk was an officer of the Court as a practising attorney. He has appeared many times before me in matters involving the same kind of jurisprudence as in this matter: I am the Chair of the Appeals Panel of the Press Council, which is the final body of appeal in the adjudication of complaints against articles in the media in the country; in the present matter, we are dealing with an objection against an advertisement. Yes, although Mr de Klerk lost some matters before me and will probably do so in future where his cases have no merits, he showed to be industrious and well prepared. Very importantly, he would make concessions if fairness so required, even if prejudical to his own client"s case; that, to me, is one of the hallmarks of commitment to serving the course of justice objectively. My decision to appoint him was therefore not a thumb suck, but reasonably based. Naturally, there were other legal practitioners I could have approached, but only one person was needed.

23.2 The matter went beyond the respondent as an individual; this was very clear in his letter of complaint, referred to in the Decision of the FAC. This is also the finding of the FAC. It was a matter of public interest. The issue of colonization, and its consequences, can hardly be a matter personal to an individual.

23.3 As stated in paragraph 6 of the Decision of the FAC, the appellant's Notices of Appeal to both the AAC and to the FAC were extensive and detailed, with a large number of equally extensive annexures. The supposed heads of argument also amounted to written argument, with references to authorities.

Such submissions as were made by the respondent, were very short and not as detailed, and were clearly by a non-lawyer.

23.4 At the hearing of the appeal, there was no appearance for the respondent; on the other hand, there was appearance for the appellant, led by counsel with a few other lawyers in tow to assist him. In fact, on a few occasions, counsel, Mr Ngcongo**,** was afforded the opportunity, as he was entitled to, to consult with members of his team in order to fortify his argument.

23.5 Mr Ngcongo argued the matter for nearly $2^{1}/_{2}$ hours, with no opponent to counter any of his submissions. In fact, at one time, I pointed out to him that he was repeating himself too many times; that was the kind of leeway he enjoyed. Towards the end he asked for, and was given, time to consult with his team to make sure that he had covered all the points they wanted to make. I mention all these to make the point that the Committee was really hearing argument from only one side, without the benefit of a single opposing voice to test the validity of the submissions which were the product of the collective wisdom of the appellant's formidable legal team. Frankly, I found the objection incomprehensible; particularly in the absence of any defined or identified prejudice.

23.6 A quick and *impromptu* discussion amongst members of the FAC showed that there were some areas on which we might agree or disagree depending on possible further elucidation; those were the circumstances under which we parted (one member lives in Pretoria, two in Johannesburg and one in Cape Town**).** For reasons beyond our control, we were four members; it would have been most unfortunate if we had ended up evenly divided mainly because issues had not been properly ventilated from both perspectives. It would have been remiss of me as the Chair to leave things that way in a matter that affects the public, most probably millions. It was upon reflection on some of the provisional and *impromptu* views exchanged, that I felt the need for a lawyer to have a look at the respondent's case in light of the appellant's defence and submissions (written and oral). It was to this end that Mr de Klerk was subsequently given all the documents. As already said, it

was up to him to decide whether he found the respondent's complaint meritorious or not; as it turned out, his view was that the complaint had merit. Just as in the end we found the submissions by the appellant's legal representatives helpful, but not necessarily agreeing with them on everything, we also found Mr de Klerk's submissions helpful although, in his case too, we did not agree with everything he said. In fact, the point made in paragraph 16 which the FAC says it is on its own fatal to the appeal is not rooted in Mr de Klerk's submissions; that is how complex the matter was.

23.7 The FAC is an instance of final resort; there is no further appeal beyond it. Secondly, it creates precedent for the Directorate and the AAC, and its decisions provide guidance to the industries. With this awesome burden on it, it behoves the AFC to ensure that its pronouncements are made on an informed basis; this it can only achieve by making sure that issues before it are fully ventilated.

Alleged prejudice as reason for objection to the appointment of Mr de Klerk

24 In their 17 May 2019 letter, appellant's attorneys raise an objection against Mr de Klerk's appointment as *amicus curiae* on the basis that that would cause prejudice to their client. The nature of the prejudice was, however, not identified or described; I am therefore unable to deal with it. But I need to point out that paragraph 8 of the letter says the following: "*In the event that the FAC proceeds to appoint Mr de Klerk and written submissions are furnished, it will be necessary, as a question of an administratively fair procedure – including the Appellant's right to meaningfully make representations – for the Appellant to be afforded an opportunity to file further written submissions once it has received Mr de Klerk's submissions as well as an opportunity to present further oral argument to the Appeal Committee*". One would have thought that these measures were proposed to address any possible "*prejudice"*. The appellant was indeed offered the opportunity to respond to Mr de Klerk's submissions; the opportunity was seized, and written submissions, dated 7 June 2019, were submitted. No request was made to present oral argument for the second time. This was not surprising,

because firstly, Mr de Klerk did not raise anything new of substance they had not dealt with already. Secondly, as said in paragraphs 6 and 8 above they had made extensive submissions both in their papers and during oral argument (in contrast, Mr de Klerk was not afforded the opportunity to make oral submissions). Thirdly, there is no entitlement in law to oral representation; a tribunal may insist on only written submissions. Fourthly, naturally, a rehearing would have had to be reconstituted, with one member coming from Cape Town; there would have been extra costs incurred. Fifthly, there was in reality only one narrow issue left, namely, whether one could parody South African colonization, an issue fully traversed in the papers as well as during oral argument on behalf of the appellant. Given all these, the request for a rehearing would have been unjustified and absurd.

In light of the aforegoing, and given the fact that the nature of the alleged prejudice was not identified or described and that, if there were to be any, it could not be addressed by the measures they themselves proposed, I overruled the objection which, truth be told, was at best tentative as apparent from the letter and the emails referred to. Opposition to the appointment seems to have gathered momentum only after it was already made.

Whether Mr de Klerk's appointment and role was that of a genuine *amicus curia*

25 It is singularly important to emphasize the role contemplated for Mr de Klerk as *amicus curiae:* he would be free, if he found it non-meritorius, to disagree with the respondent's complaint or any of his arguments. This was because Mr de Klerk's duty was to assist the course of justice in an objective manner; not to feel bound to support the views of either party.

26 In their 7 June 2019 submissions, appellant's attorneys argue that Mr de Klerk was not, and did not play the role of, an *amicus curiae.* In an attempt to bolster their case, they say I said he was *"to submit written argument in the Respondent's case, in response to the submissions made by the Appellant"* and, they continue: *"to level the playing fields".* It is not clear to me where some of these words come from; but the levelling of *"playing fields"* was mentioned at the time a *pro bono*

appointment was contemplated in the email I sent on 13 May 2019 at 13:01; that is, before the switch to *amicus curiae.* They also disregard what I said expressly in my email of the same day at 22:17 (switching to *amicus curiae)* which reads: "(*1) The request by me as the Chair is for Mr de Klerk to act as amicus curiae, to argue* ***complainant's case*** *and not to argue* ***on behalf of Mr Cele*** *(the complainant). He therefore neither represents nor takes instructions or brief from Mr Cele, but argues the matter as he deems fit to assist the tribunal*". (The underlining is recent, but the highlight in black is as was in the original email sent). As apparent from both the highlight and the underlining, that the request to Mr de Klerk was to act in his capacity as *amicus curiae* and not on behalf of Mr Cele, could not have been made clearer. To bolster their case, reference is made to the following judgment of the Constitutional Court. "*The role of an amicus is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court"*[3]*.* This is a correct broad description of the ***amicus's*** role, except that the appellant seems to understand it too narrowly and also fails to apply the above guidelines properly to the present case. The above email clearly and specifically asked Mr de Klerk to act as *amicus curiae;* there was no ambiguity about that. As an attorney, he was expected to have a proper understanding of the role of an *amicus curiae*. There is no basis to say that he lacked that understanding, or that he did not deal with the matter accordingly. At the end of the day, what matters is the nature of the role Mr de Klerk was asked to play, which, as already said, was this: to assist the FAC to come to a fair and just decision in an objective manner and not blindly support a non-meritorious complaint. That his submissions turned out to be supportive of respondent's complaint is not an indication of lack of objectivity as contended for by the appellant; it is just how he happened to see the matter.

[3] In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 713 (CC), para 5.

27 Both in its letter of 17 May 2019 and the 17 June 2019 submissions in response to Mr de Klerk's, the appellant threatens legal action, apparently to launch a court review, if not happy with the outcome of this case; it is the appellant's right to do so. But there was an obligation to ensure that justice was done to the matter**.** I was, and remain, convinced that appointing Mr de Klerk to assist in a matter that went far beyond one person and continues to invoke strong sentiments, as demonstrated in for example paragraphs 14 and 15 above, was justified under the circumstances. What he appellant wants is for the entire submissions by Mr de Klerk to be removed from the table, and for the FAC to consider only the extensive written and oral submissions by its team of lawyers (Mr Cele having not appeared and, being a lay person, having not made any substantive submissions on vital points). There is a complaint in this country that justice is only for the well resourced; well, only if that can't be helped. In my experience, there have been instances when the Constitutional Court called upon the government or a Minister to make submissions to assist the Court in matters of public importance. As mentioned already, the issue of colonization by definition affects millions of people. This matter cried out for full and proper ventilation, and, thanks to Mr de Klerk's appointment and the role he played as *amicus curiae*, that is exactly what the matter got; what is more, without any known or demonstrable prejudice to the appellant.

Dated this 10^{9h} day of July 2019.

Judge B M Ngoepe, Chair, Final Appeals Committee

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