2nd Floor 33 Hoofd Street Braampark, Forum 3 Braamfontein 2017

Private Bag X 2700 Houghton 2041

Tel.: 011 877 3750 Fax: 011 403 0668



28 July 2014

MEDICAL RESEARCH COUNCIL

ATTENTION: Naeemah Abrahams

Per email:

Africa Check - South Africa

Per email: ii

LISA VETTEN

Per email:

Nechama Brodie

Per email:

Our ref: GP/1415/0020/KC

Dear Sir / Madam,

RE: COMPLAINT - ALLEGED VIOLATION OF HUMAN RIGHTS

The complaint lodged by Steve Hofmeyr, Sunette Bridges, Amanda de Lange and Johan le Grange (the Complainants), with the South African Human Rights Commission (the Commission) during April 2014, refers. Please be advised that 23 (twenty three) other complaints relating to this complaint were received by the Commission and subsequently consolidated with the main complaint. The Commission kindly provides you with its findings in its investigation of the complaints for your reference.

The Commission is a state institution established in terms of Chapter 9 of the Constitution of the Republic of South Africa, 1996 (the Constitution) to support constitutional democracy. The Commission is mandated in terms of section 184 of the Constitution to promote the protection, development and attainment of Transforming society. Securing rights. Restoring dignity. Chairperson: M L Mushwana; Deputy Chairperson: P Govender; Commissioners (Full-Time): B Malatji, L Mokate; M S Ameermia Commissioners (Part-Time): J Love, D Titus;

Chief Executive Officer: A K Ahmed

human rights, and to monitor and assess the observance of such rights within the Republic of South Africa. The Commission is further mandated to investigate and issue findings of *prima facie* violations of human rights contained within the Chapter Two of the Constitution.

The complaint is based on the following allegations:

- Professor Naeema Abrahams, on behalf of the South African Medical Research Council (MRC), published a study of female homicide in South Africa which provided statistics indicating that the majority of white South African women killed in 2009 and 1999 were killed by their intimate partners.
- 2. Ms Nechama Brodie, a researcher at Africa Check, and on behalf of Africa Check, made the following statement, which was reported in the Rapport newspaper on 29 June 2013:
 - "A White woman has a better chance of being murdered by her lover or partner than by an unknown Black man. We should not overlook the real problem."
- 3. Ms Lisa Vetten made the following statement in an article published by her on 17 July 2013 in her capacity as a researcher for Africa Check (and in support of a statement made by her co-researcher, Nechama Brodie):
 - "Claims that white women are likely to be murdered by "unknown black males" amount to racial scaremongering. The vast majority of women who are murdered in South Africa die at the hands of their husbands, boyfriends and lovers."
- 4. An extract of the allegations by the Complainants have been provided below:
- 5.1. "That you are perpetuating a distorted view of Femicide in South Africa by blaming the majority of murders of white South African women on white South African men;
- 5.2. Advocacy of hate speech and racial discrimination against white South African men in contravention of Section 16 of the Constitution;
- 5.3. The concealment and/or creation of a distorted portrayal of a very real and unacceptable threat against the lives of white South African women by the publication of unfounded allegations as facts;
- 5.4. The abuse of unsubstantiated statistical research to support unfounded accusations against white South African men;

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- 5.5. Through such statements, creating a distorted view of and degrading the character of white South African men, not only in South Africa, but worldwide;
- 5.6. That th[is] unfounded statement[s] constitute a malicious violation of the human right to dignity pertaining to the rights of white South African men as contained in Section 10 of the Constitution."
- That the statements complained of are "inaccurate and devoid of any statistical or actual, factual 5.7. research, but an offensive insult to "white" South African men in general";
- 5.8. Complainant further do not dispute the fact that most women in South Africa are murdered by their husbands, boyfriends and lovers but do dispute the accuracy of this fact in relation to white South African women;
- 5.9. The Complainants submit that they are unable to find evidence to support the statistics cited by the MRC regarding white intimate femicide in South Africa;
- The Complainants further allege that they have conducted their own research on the subject matter, which does not accord with the findings of the MRC.
- Based on the abovementioned allegations, the Complainants sought the following relief:
- 6.1. That the Respondents publically retract their statements;
- 6.2. That Nachama Brodie and Lisa Vetten publicly apologize to white South African men;
- That Africa Check and MRC conduct proper studies on female homicide in South Africa; and 6.3.
- 6.4. That the Respondents refrain from making "further such... statements pertaining to white South African men."

RIGHTS ALLEGEDLY VIOLATED

- 1. Section 9 (the right to equality)
- 2. Section 10 (the right to human dignity)
- 3. Section 16 (Freedom of expression)

Commissioners (Part-Time): J Love, D Titus; Chief Executive Officer: A K Ahmed

STEPS TAKEN BY THE COMMISSION

- 1. The Commission consolidated complaints in this matter on the basis that they related to the same Respondents and arose from allegations of a common nature to the material substance of the complaint. The consolidation was undertaken on the basis of Chapter 8 of the Commission's Complaints Handling Procedures, which states the following:
 - "38. (1) The Provincial manager may, on his or her own accord or on written application by a party to the proceedings, consolidate two or more complaints and deal with these complaints in the same proceedings...
 - (2) The Provincial Manager may, in consultation with any relevant stakeholders, determine that a class of complaints be handled together."

PRELIMINARY ASSESSMENT

- In terms of its CHP, the Commission confirmed acceptance of the complaints and on that basis, instituted an investigation of the complaints.
- As part of the investigation, the Commission forwarded correspondence to the Respondents on 22
 May 2014 setting out the allegations made by the Complainants. Responses were duly received from
 all Respondents.
- 3. In its assessment of the matter, the Commission has carefully considered the following:
 - i. Applicable Constitutional and statutory prescripts;
 - ii. The particular facts of the complaint and the allegations made by the Complainants; and
 - The responses received from the Respondents.
- 4. An overview of the applicable legal frameworks and precedents which were considered in the assessment of the complaint is provided below. For purposes of the assessment, this consideration is contextualized within a freedom of expression analysis against the specific type of comments made.

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FREEDOM OF EXPRESSION

- 1. Freedom of expression is considered of paramount value and importance in South Africa. However, the Constitution recognizes that certain categories of expression are not protected. Expression not protected in the Constitution is often referred to as "hate speech". There is ample precedent regarding hate speech, both at the level of the courts and through the findings of the Commission. In general, the four broad reasons for prohibiting hate speech at a social level include:
- 1.1 To prevent disruption to public order and social peace stemming from retaliation by victims.
- 1.2 To prevent psychological harm to targeted groups that would effectively impair their ability to positively participate in the community and contribute to society.
- 1.3 To prevent visible exclusion of minority groups that would deny them equal opportunities and benefits of society and visibly exclude their acceptance as equals.
- 1.4 To prevent social conflagration and political disintegration.²
- Notwithstanding the above, given the broad protection afforded to freedom of expression, there remains an on-going and clear need to balance the right to expression and other rights to ensure that no one right is diluted more than is constitutionally permissible.

INTERNATIONAL AND REGIONAL FRAMEWORK

3. Article 19 of the Universal Declaration of Human Rights (UDHR) identifies the right to freedom of expression as an essential human right. It states the following:

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

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Commissioners (Part-Time): 1 love D Titus:

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Afri-Forum and another v Malema and another (Vereeniging van Regslui vir Afrikaans as amicus curiae) 2011 (6) SA 240 (EqC); SAHRC vs J. Qwelane case no: 44/2009 (EqC); SAHRC obo South African Jewish Board of Deputies case no: 01/2012 (EqC); ANC and others v Harmse & another: In re Harmse v Vawda 2011 4 ALL SA 80 (GSJ); Freedom Front v South African Human Rights Commission & Another 2003 11 BCLR 1283 (SAHRC); S v Mamabolo (e-TV, Business Day and the Freedom of Expression Institute intervening) 2001 (3) SA 409 (CC).

- 4. Article 19 of the International Covenant on Civil and Political Rights (ICCPR) provides as follows:
 - "1. Everyone shall have the right to hold opinions without interference.
 - 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
 - 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals."
- 5. With respect to academic freedom, individuals are protected under both the principles espoused in terms of freedom of expression as well as the right to education. In this respect, reference is made to Article 13 of the International Covenant on Economic, Social, and Cultural Rights of 1966 (ICESCR), which states the following:

"The States Parties to the present Covenant recognize the right of everyone to education...
education shall enable all persons to participate effectively in a free society, promote
understanding, tolerance and friendship among all nations and all racial, ethnic or religious
groups, and further the activities of the United Nations for the maintenance of peace."

6. In guiding states on the application of this right, the Committee on Economic, Social, and Cultural Rights (CESCR), has held that:

"the right to education can only be enjoyed if accompanied by the academic freedom of staff and students."

² Afri-Forum and another v Malema and another (Vereeniging van Regslui vir Afrikaans as *amicus curiae*) 2011 (6) SA 240 (EqC) ³ Committee on Economic, Social and Cultural Rights (CESCR), General Comment 13: The Right to Education, E/C.12/1999/10, 1999, para. 38.

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- 7. Regionally, Article 9 of the African Charter on Human and Peoples' Rights⁴ (African Charter) protects the right to freedom of expression:
 - "(1) Every individual shall have the right to receive information.
 - (2) Every individual shall have the right to express and disseminate his opinions within the law."
- 8. In addition to the broad protections outlined in Article 9 of the African Charter, the African Commission on Human and People's Rights adopted the Declaration of Principles on Freedom of Expression in Africa,⁵ which limits the conditions under which governments may limit the freedom of expression.

"II Interference with Freedom of Expression

- (1) No one shall be subject to arbitrary interference with his or her freedom of expression.
- (2) Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society."
- 9. International law also recognizes the need to limit freedom of expression where it can be harmful to society. For instance, hate speech related to race specifically is prohibited in terms of Article 5 of The Convention on the Elimination of all Forms of Racial Discrimination:

"(a) declare an offence punishable by law of all dissemination of ideas based on racial superiority or hatred incitement to racial discrimination..."

CONSTITUTION AND DOMESTIC FRAMEWORK

10. The Constitution explicitly protects freedom of expression but also notes limitations thereto. Section 16 of the Constitution states as follows:

⁴ African Charter on Human and Peoples' Rights (Banjul Charter). Adopted 27 June 1981, entered into force 21 October 1986. Available Online at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf.

"16. Freedom of expression -

- (1) Everyone has the right to freedom of expression which includes-
- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to-
- (a) propaganda for war;
- (b) incitement of imminent violence; or
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm"
- 11. As long as the expression in question does not fall within the three categories set out in Section 16(2) of the Constitution, such expression would be protected under Section 16(1). In other words, such expression is protected and allowed (unless a limitation is justified in terms of section 36 of the Constitution). Section 16(2) of the Constitution is therefore an internal modifier which provides that the constitutional protection afforded to freedom of expression does not extend to propaganda for war, incitement of imminent violence and the advocacy of hatred.
- 12. To accuse a person of communicating in a language that undermines dignity is a serious charge, tantamount to suggesting that the person is undermining and threatening the core values of the Constitution.

It is therefore necessary on those making such a charge to satisfy themselves as to the constitutional and legal accuracy of their contentions. In this respect, expression cannot be classified as *inter alia* hurtful speech on the basis of subjective distaste at what is being said. In Handyside v United Kingdom, the European Court of Human Rights affirmed the following:

(Section 36 of the Constitution provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —

⁵Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, adopted at the 32nd Ordinary Session, in Banjul the Gambia from 17-23 Oct 2002. Available online at: http://www.achpr.org/sessions/32nd/resolutions/62/

| Ihid. | Ihid. | Ihid. | Initial terms | Initia

⁽a) The nature of the right;

⁽b) The importance of the purpose of the limitation;

⁽c) The nature and extent of the limitation;

⁽d) The relation between the limitation and its purpose; and

⁽e) Less restrictive means to achieve the purpose.)

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"Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2)⁷, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"." 8

13. The limitations on freedom of expression are also outlined in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (PEPUDA):

"Section 10

- (1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, gagainst any person, that could reasonably be construed to demonstrate a clear intention to-
- a. Be hurtful;
- b. Be harmful or to incite harm;
- c. Promote or propagate hatred...

Section 12

No person may-

- a. Disseminate or broadcast any information;
- b. Publish or display any advertisement or notice,

"(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth..."

Convention for the Protection of Human Rights and Fundamental Freedoms

⁸ 7 December 1976, Series A, No 24, para 49

In terms of Section 1 of PEPUDA, 'prohibited grounds' are defined as:

that could be reasonably construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the constitution, is not precluded by this section." (own emphasis)

14. South African Courts have confirmed that outside the exceptions to freedom of expression outlined in Section 16(2) of the Constitution (and the relevant provisions of PEPUDA), freedom of expression must be preserved:

"Freedom of expression is generally deemed necessary to promote scientific, artistic and cultural progress. Even the expression of false ideas (false speech) provokes further debate and the search for truth... Even unpopular views are tolerated in the marketplace of ideas, and society needs to be able to hear, form and express opinions and views on a wide range of matters." ¹⁰

15. In *Islamic Unity Convention v Independent Broadcasting Authority*, the court struck down clause 2(a) of the Code of Conduct for Broadcasting Services which prohibited broadcasts which were "likely to prejudice relations between sections of the population." In so doing, the court insisted that all limitations of the right to freedom of expression must fit within section 16 of the Constitution:

"Where the state extends the scope of regulation beyond expression envisaged in section 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in section 36(1) of the Constitution...Not every expression or speech that is likely to prejudice relations between sections of the population would be "propaganda for war," or "incitement of imminent violence" or "advocacy of hatred" that is not only based on race, ethnicity, gender or religion, but that also "constitutes incitement to cause harm." 11

¹¹ Islamic v Broadcasting para. 34

¹⁰ S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening) 2001 (3) SA 409 (CC) para 37

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ANALYSIS AND FINDINGS

1. MRC and Professor Naeema Abrahams

- 1.1. In response to the allegation that the MRC is perpetuating a distorted view of femicide in South Africa, the Respondent asserts that the methodology used in the study was both approved by the Ethics Committee of the MRC¹² and peer reviewed for accuracy prior to publication in *PLOS Medicine*. *PLOS Medicine* is an open-access medical journal and is a publication of the Public Library of Science (PLOS).¹³ As per its website, the *PLOS Medicine* assessment process involves a two-step evaluation. First, manuscripts are evaluated by a PLOS Medicine professional editor who examines both the quality of the research and the subject matter to determine if the work in question meets the standards of the publication. The editorial staff of *PLOS Medicine* works at leading medical institutions from around the world, including Oxford University, Harvard University, the National Institute of Health for the United States, the Rwanda Ministry of Health and the MRC. Once manuscripts have been approved by the Editorial Board, they are sent out for external peer review.
- 1.2. The peer review system in scientific research involves a series of academics from related fields evaluating the submitted materials to ensure that their credibility, usage of methodology, and that presentation of concluding points adhere to international scientific research standards. PLOS specifically instructs expert reviewers to evaluate manuscripts to assess the statistical methods used with heightened scrutiny.¹⁴
- 1.3. The methodology used by MRC in this matter involved the random selection of 38 mortuaries which were proportionally allocated into three categories based on annual autopsy volume.¹⁵ From those mortuaries, data was drawn on female murder victims aged 14 and above who were killed in 2009. Female homicide victims of all racial backgrounds were included in the study. The selected cases were

13 http://www.plosmedicine.org/static/information

http://www.plosmedicine.org/static/guidelines;jsessionid=4D5B62CA7AFDEAC8A8E5587FA15B3601.

15 First report, pg. 2

Commissioners (Part-Time): J Love, D Titus; Chief Executive Officer: A K Ahmed

¹² First report, pg. 2

¹⁴ More details about the PLOS peer review process can be found at

then weighted to ascertain a national estimate. Although it is noted that the Complainants object to the use of estimates in the research conducted by the MRC due to the specific methodology of the research, the names drawn by Ms Bridges cannot be used to directly refute (or confirm) the evidence provided by the MRC and accepted by *PLOS Medicine*. In addition, Ms Bridges' statistics covers years not investigated by the MRC and were gathered using unknown and unverified methods. As such, the Commission cannot verify or deny the Complainant's assertion that the portrayal of femicide outlined in the research is "distorted" or "unsubstantiated" (especially taking into account the rigorous evaluation process described above). In any event, such assessment does not fall within the mandate of the Commission.

- 1.4. With respect to the alleged "blame" placed on white South African men by the MRC and allegations that the research outcomes constitute hate speech and racial discrimination, the Respondents assert that no specific focus was placed on white South African men, that no such statements were made to the media and that no such conclusions were contained in the actual reports. Statistics pertaining to white South Africans in the *PLOS Medicine* report are presented in a table alongside the statistical data for Black, Indian, and Coloured South Africans. The results were not highlighted or differentiated from statistics pertaining to other racial groups in any way. The Commission cannot therefore find that the information contained in the MRC study attempts to place blame, differentiate or discriminate against white South African men with regards to homicides perpetrated against white South African women. Based on the above, the Commission is unable to find any of the respondents responsible for "hate speech" as defined in Section 10 of PEPUDA in respect of any of the statements / articles forming the basis of the complaint currently before the Commission.
- 1.5. In response to the claim by the Complainants that the report constitutes a violation of white South African men's right to dignity, the Respondents refer to the ethical procedures undertaken to ensure the approval of the research methodology employed (as outlined on page 3 of the report published in PLOS Medicine). In this respect, the study was approved by the Ethics Committee of the MRC, the national and provincial Departments of Health, the Forensic Pathology Service and the South African Police Service (SAPS). Furthermore, the correspondence between Professor Abrahams and Ms Bridges indicates that Professor Abrahams was personally sensitive to the dignity concerns raised by her research demonstrated by her refusal to violate the protocols of medical research ethics by revealing confidential information.

¹⁶ See correspondence from Professor Naeemah Abrahams to Sunette Bridges.

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1.6. For the reasons set out above, the Commission is not in position to grant the relief sought by the Complainants against MRC.

2. Nechama Brodie, Lisa Vetten and Africa Check

2.1. Nechama Brodie is a freelance journalist working for Africa Check. Brodie was cited as a respondent herein for the following statement made in the Rapport Newspaper on 29 June 2013:

"A White woman has a better chance of being murdered by her lover or partner than by an unknown Black man. We cannot overlook the real problem."

- 2.2. The report was entitled "Are SA Whites really being killed "like flies"? Why Steve Hofmeyr is wrong". The report was written by Ms Brodie and edited by Julian Rademeyer, the editor of Africa Check. The article sought to interrogate a number of statements made by Mr Hofmeyr and it is noted that Ms Bridges also responded to the report.
- 2.3. Mr Rademeyer subsequently commissioned Ms Vetten to write an analytical article on an Africa Check blog, "a forum for debate around various topics relating to academic research, statistics, data verification, factual inaccuracies, statements of fact by public figures and urban myths."
- 2.4. Lisa Vetten is a researcher at the Wits Institute of Social and Economic Research specialising in gender-based violence. Her publication on Africa Check's website was entitled "Racial scare-mongering in South Africa makes light of women's murders". Julian Rademeyer was responsible for drafting the following introductory blurb to the abovementioned article (and not Ms Vetten as alleged by the Complainants). The respondents confirm that the blurb is an accurate summary of Ms Vetten's article:

"Claims that white women are likely to be murdered by "unknown black males" amount to racial scare-mongering. The vast majority of women who are murdered in South Africa die at the hands of their husbands, boyfriends and lovers."

- 2.5. Both Brodie and Ms Vetten based their articles / comments on peer reviewed research of the MRC (mentioned above) and is therefore a fair representation of the statistical data procured therein.
 - 2.5.1. While Ms Brodie communicates the results of the study, that white South African women are more frequently killed by intimate partners than by non-intimates, she makes no reference to white South African men. Her words do not demonstrate any intention to be hurtful, to harm or to propagate hatred, and cannot therefore be viewed as hate speech. Additionally, the Commission is of the opinion that, in terms of Section 12 of PEPUDA, Ms Brodie's comments were made as "fair and accurate reporting in the public interest."¹⁷
 - 2.5.2. Regarding the allegation that Ms Vetten engaged in hate speech against South African men, Ms Vetten's article makes reference to white South African men once:

"Hofmyer and Bridges' claims therefore cast no doubt on the research showing the majority of women to be murdered by their intimate partners and, by extension, that the majority of white women are murdered by their white male partners."

- 2.5.3. It would appear from the statement that Ms Vetten inferred that most white South African women have white South African male partners. At this time in South Africa, the potential for inaccuracy of this assumption is not sufficient to render Ms Vetten's statements impermissible under the Constitution.¹⁸ In addition, Ms Vetten's article does not demonstrate intent to harm, be hurtful or to incite hatred. Furthermore, her comments cannot be viewed as discriminatory as it does not comply with the definition of discrimination as defined in PEPUDA: "any act... which directly or indirectly (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds."
- 16. Applying relevant legislation, jurisprudence of the Courts and the Commission's own internal precedent to the specific statement complained of and the contextual background thereof, the Commission is unable to classify the type of speech complained of as speech / comment which warrants restraint or censure. Instead, it views same as protected comment falling within the ambit of Section 16 of the Constitution, and in particular, Section 16(1)(a), ¹⁹ (b)²⁰ and (d)²¹ of the Constitution.

¹⁷ Section 12, Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹⁸ See S v Mamabolo above.

[&]quot;...freedom of the press and other media..."

²⁰ "...freedom to receive or impart information or ideas..."

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Based on the above, the Commission is unable to provide the relief sought by the Complainants against Africa Check, Ms Brodie and / or Ms Vetten.

In view of the above, the Commission will close its file in this matter.

We thank you for your cooperation during the Commission's investigation.

Yours faithfully,

Chantal Kisoon (Ms)

Provincial Manager: Gauteng

²¹ "...academic freedom and freedom of scientific research..."