



## TERMS OF REFERENCE:

### INVESTIGATION INTO ALLEGATIONS OF RACIAL DISCRIMINATION OR DISCRIMINATION IN ADVERTISING

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#### INTRODUCTION

1. The South African Human Rights Commission (**'the Commission'**) has decided to initiate an investigation into continuing complaints or allegations of racial discrimination or discrimination in general in advertising within South Africa.
2. In accordance with the Commission's objectives of promoting: respect for human rights; a culture of human rights; and the protection, development and attainment of human rights, the Gauteng Provincial Office (**'GPO'**) will undertake an investigation, into, amongst other aspects, the creation and publication of adverts and the people involved.
3. In the recent past, there have been a few advertisements which have been indicative of racism and have evoked much criticism of the industry and their clients. Instead of having to react to each discriminatory advert as and when they occur, with the learnings and information gathered during the investigation, the SAHRC aims to craft medium to long term interventions that will instill, in the advertising sector, a culture of human rights and produce mechanisms that promote equality and prevent unfair discrimination. And, in doing so, prevent the publication of discriminatory (racist, sexist, tribalist, homophobic, anti-Semitic, Islamophobic or ableist) advertisements.
4. The Commission has deemed it appropriate and in the public interest to conduct its investigation through a formal inquiry, in accordance with sections 13 and 15 of the South African Human Rights Commission Act 40 of 2013 (**'the SAHRC Act'**) and Chapter 4 of the Commission's Complaints Handling Procedures (**'the Procedures Manual'**).

## **BACKGROUND**

5. On or around 4 September 2020, Clicks South Africa published an advert allegedly owned by TREsemme South Africa in which Black women's hair was depicted in picture and described as dull and damaged, alongside pictures of white women's hair being described as normal.
6. Towards the end of 2018, Chicken Licken published what was known as the Chicken Licken Big John burger ad. This advertisement made light of the colonization of the land and people of Africa by Europeans, the horrendous consequences of which left the majority of inhabitants of this country with the legacy of slavery, dispossession, poverty and under-development, to name a few.
7. In early 2018, H&M published an online advert which had reach and which featured a black boy wearing a hoodie with the words, "coolest monkey in the jungle".
8. In 2017 Dove published a body-wash advert, internationally, which also aired in South Africa, which was perceived to imply that lighter skin was better.
9. In July 2014, Feed a Child, in an attempt to raise awareness on starving children, published an extremely triggering television advert in which a seemingly rich white woman feeds a black child as if it were her dog. The tagline read: "The average domestic dog eats better than millions of children". While shock was the intended reaction, the advert also invoked racial stereotypes and involved likening the condition of the African child to pets.
10. Discriminatory media publication are not a recent thing.
  - 10.1. In 1999 the Commission undertook an investigation, with the support of the then Media Monitoring Project (Media Monitoring Africa) into racism in the media, particularly news media. The Commission's investigation was the subject much public debate and academic writing regarding racism and the limitation of freedom of expression and media freedom and the involvement of the state intervention in the media. In its report, issued in August 2000, the Commission found that racism existed in South African media, that the South African

Inquiry into discrimination in advertising media, as a whole, was a racist institution. The Commission “urge[d]” bodies such as the South African National Editors Forum (**SANEF**) and the Institute for Advanced Journalism (**IAJ**) to offer racism awareness training for journalists at all levels and recommended that journalists be exposed to the cultural diversity that forms the fabric of our society, that the IAJ conduct regular workshops on the Bill of Rights and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (**‘PEPUDA’**), that SANEF initiate a pilot project on effective monitoring and accountability of the media, within the context of the Constitution, and that both formal and non-formal training institutions, as well as the media management, vigorously address the issue of the training and recruitment of black staff, especially sub editors to ensure greater representivity in the newsrooms; and

10.2. In 2001, the Parliamentary Portfolio Committee on Communications held hearings into racism in the advertising industry. Submissions were made by the then Department of Communications, the Quadraplegics Association of South Africa and by a range of marketing and advertising associations, including the Advertising Standards Authority (**ASA**), the Association of Advertising Agencies (**AAA**), the National Association of Broadcasters, the Association of Marketeers and Media Directors Circle. The Portfolio Committee raised questions relating to the representivity and diversity of management structures of the advertising and marketing associations and asked about what measures were set in place to effect transformation, including to increase representivity within the industry. The Committee highlighted the ineffectiveness of the ASA and its model of post-publication review of advertisements and pushed the AAA for greater representation in its leadership roles as well as to increase awareness and scholarships for Black matriculants wanting to join the advertising industry.

11. The reason for the investigation and the intended outcome is to establish a genuine culture of human rights and prevent discriminatory adverts which unfairly depict, discriminate and impair the dignity of the diverse people living in South Africa.

### **THE MANDATE, POWERS AND FUNCTIONS OF THE COMMISSION**

12. The SAHRC is a state institution established in terms of section 181 of the Constitution to strengthen constitutional democracy in South Africa. Its mandate, as contained in section 184 of the Constitution, is to promote the respect for and protection of human rights. It is also empowered to monitor and assess the observance of human rights in South Africa.

13. Section 184(2)(a) and (b) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country and to take steps to secure appropriate redress where human rights have been violated.
14. In addition to the Commission's powers under section 184(1) and (2) of the Constitution, the SAHRC has powers and functions prescribed by national legislation including the SAHRC Act and PEPUDA.
15. Section 13(3) of the SAHRC Act states that the Commission is competent to investigate, on its own initiative or on receipt of a complaint, any alleged violation of human rights.
16. Section 15(1)(a) of the SAHRC Act states that pursuant to the provisions of section 13(3) the Commission may, in order to enable it to exercise its powers and perform its functions conduct or cause to be conducted any investigation that is necessary for that purpose.
17. On 1 January 2018, the Commission's Procedures Manual were promulgated in accordance with sections 15(6) and (7) of the SAHRC Act. Article 3(1) of the CHP states that the Commission is competent to investigate on its own initiative or on receipt of a complaint, any alleged violation of human rights.
18. Section 15(5) of the SAHRC Act states that if it appears to the Commission during the course of an investigation that any person is being implicated in the matter being investigated, the Commission must afford such person an opportunity to be heard in connection therewith by way of giving of evidence or the making of submissions and such person or his or her legal representative is entitled, through the Commission, to question other witnesses, determined by the Commission, who have appeared before the Commission in terms of this section.

## **LEGAL FRAMEWORK**

### **19. The Constitution**

- 19.1. Section 1 of the Constitution states that South Africa is one, sovereign democratic state founded on the values of "... (a) Human dignity, the achievement of equality and the

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advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c)  
Supremacy of the constitution and the rule of law”.

19.2. Section 8, states that provisions in the Bill of Rights bind a natural or juristic person to the extent that the provision is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

19.3. The applicable rights in the Bill of Rights include section 9, which prohibits any person from unfairly discriminating, directly or indirectly against anyone on one or more grounds including, race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; section 10 which states that everyone has the right to have their dignity respected and protected; and section 12 which states that everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from public or private sources.

19.4. Section 16 of the Constitution is also applicable in that it provides everyone with the right to freedom of expression, including freedom of the press and other media. The protection of this right does not cover expression that advocates hatred based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

## 20. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

20.1. PEPUDA was enacted in accordance with the Constitution for the purpose of promoting equality and eliminating unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith. The preamble to the Equality Act states that “[a]lthough significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy.

20.2. The objects of the Equality Act include:

*“(c) to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability;”*

- (d) *to provide for procedures for the determination of circumstances under which discrimination is unfair;*
- (e) *to provide for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment;*
- (f) *to provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed;*
- (g) *to set out measures to advance persons disadvantaged by unfair discrimination;*
- (h) *to facilitate further compliance with international law obligations including treaty obligations in terms of, amongst others, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.”*

## 21. The Code of Advertising Practice

21.1. The Code of Advertising Practice (**‘the Code’**), is administered by the Advertising Regulatory Board (**ARB**), with the participation of representatives of the marketing and communications industries, and is amended from time to time to meet the changing circumstances and needs of business and our society.

21.2. The ARB decisions are governed by the Code of Advertising Practice, which in turn is based upon the International Code of Advertising Practice, prepared by the International Chamber of Commerce.

21.3. “[A]dvertisement” is defined in the Code as:

*“... any visual or aural communication, representation, reference or notification of any kind–*

*21.3.1 which is intended to promote the sale, leasing or use of any goods or services; or*

*21.3.2 which appeals for or promotes the support of any cause.*

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*Promotional content of display material, menus, labels and packaging also fall within the definition. Editorial material is not an advertisement, unless it is editorial for which consideration has been given or received.*

*The word “advertisement” applies to published advertising wherever it may appear. It does not apply to editorial or programming publicity.”*

21.4. In terms of section II article 1 of the Code prohibits advertising that 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.

21.5. 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.

21.6. Section II, article 3 specifically states that “[n]o advertisements may contain content of any description that is discriminatory, unless, in the opinion of the ARB, such discrimination is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

## 22. The International Chamber of Commerce Advertising and Marketing Communications Code

22.1. The International Chamber of Commerce Advertising and Marketing Communications Code (**‘the ICC Code’**) (2018 Ed.) is generally considered as the ‘gold standard’ of Advertising Self-Regulation. It was introduced by the International Chamber of Commerce in 1937. Since then, it has been updated several times to reflect changes in legal and business practices, as well as the emergence of new technologies. The ICC Code serves as the cornerstone for many national and regional codes.

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22.2. Article 2 of the ICC Code advises that marketing communications should respect human dignity and should not incite or condone any form of discrimination, including that based upon ethnic or national origin, religion, gender, age, disability or sexual orientation.

22.3. Article 3 states that advertisements should not contain statements or audio or visual treatments which offend standards of decency currently prevailing in the country and culture concerned.

23. Accordingly, this investigation is conducted in terms of the abovementioned constitutional and legislative framework.

### **THE SCOPE AND OBJECTIVES OF THE INQUIRY**

24. The purpose of the Commission's existence is, as stated above, to "*(a) promote respect for human rights and a culture of human rights; (b) promote the protection, development and attainment of human rights; and (c) monitor and assess the observance of human rights in the Republic.*"

25. The Constitution, the SAHRC Act and the Procedural Manual empower the Commission to fulfill its obligations through monitoring, investigating, researching, educating, lobbying, advising and reporting, on matters where human rights may have been violated.

26. As set out in the background, there appears to be an ongoing trend of racist adverts being published in South Africa. The Commission is aware of five adverts that have caused offense on the basis of race. The Commission wishes to investigate the existing landscape within which the advertising industry operates to establish whether opportunities exist for pro-active mechanisms to be introduced to sensitise and align the productions of the industry to the standards of our Constitution and associated laws aimed at respect for all of South Africa's diverse peoples. .

27. The Commission believes that any inquiry undertaken must be approached from a non-adversarial position (an inquisitorial position). The investigation will not proceed from the basis of specific allegations. The intention of the Commission is to find the best means of promoting human rights.

**28. The purpose of the investigation is, generally, to understand the cause of discriminatory advertising.**

29. In order to gain understanding and answer the questions above, the Commission needs to obtain from the participants of the investigation information on:

29.1. The make-up of the advertising industry in South Africa including:-

29.1.1. The size of the industry;

29.1.2. The leaders in the industry;

29.1.3. The racial, gender and inclusivity (accommodation of persons with disability) make-up of leadership and employees in the industry;

29.2. The advertising process including-

29.2.1. How television, print/online, radio adverts are commissioned;

29.2.2. How television, print/online, radio adverts are created (the process); and

29.2.3. How adverts get approved.

29.3. The awareness of the persons who make up the advertising industry including:-

29.3.1. The appreciation of the relevant Constitutional provisions within the industry;

29.3.2. The appreciation of the legislative provisions aimed at promoting respect for the diversity and social cohesion;

29.3.3. The culture prevalent within the sector,

29.3.4. The extent to which lessons have been learnt from past mistakes,

29.3.5. Other relevant factors.

29.4. The regulatory environment

29.4.1. How is advertising regulated in South Africa;

29.4.2. What is the role of the Advertising Standards Authority in South Africa;

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29.4.3. Are there any learnings or challenges in respect of compliance with the South African Constitution, the voluntary codes and advertising standards;

29.4.4. What are the patterns of breaches and what remedial measures have been/can be

## **PROCEDURE**

30. As stated above, the Commission has deemed it appropriate and in the public interest to conduct its investigation through a formal inquiry. The proceedings will be inquisitorial in nature. The inquiry will be presided over by panellists who will ask questions to the witnesses and proceedings will be recorded.

31. The Commission will receive both written and oral submissions from stakeholders and other interested parties for the purposes of the inquiry.

32. In terms of article 10(5) of the Commission's Procedure Manual and section 15(5) of the SAHRC Act, the Commission has determined that all stakeholders and interested parties will be given an opportunity to make further written submissions after the conclusion of the final sitting of the Inquiry, for a period of **21 working days**, to address any issues raised in the Inquiry which they would like to respond to;

33. The Commission has determined that the proceedings should be open to the members of the public and the media having regard to:

33.1. The public interest nature of this matter; and

33.2. The constitutional obligations of the Commission to observe the principles of accountability, openness and transparency.

34. Parties may be legally represented, but oral submissions must be made by the parties themselves.

35. The Commission will accept written submissions from parties and interested individuals or groups until **31 January 2022.**

36. The hearings are expected to take place at the Commission's **GPO's offices from 21-28 February 2022** and the interim report and findings are likely to be completed and released by **June 2022**

### **THE HEARING PANEL**

37. In accordance with article 10.3.1 of the Procedures Manual, the panel will comprise the following persons:

- 37.1. The SAHRC Chairperson, Adv B Malatji ;
- 37.2. Commissioner JB Sibanyoni;
- 37.3. Senior Legal Officers of the SAHRC and
- 37.4. Advertising expert