IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no: CCT76/14

In the matter between:

DEMOCRATIC ALLIANCE Applicant

and

AFRICAN NATIONAL CONGRESS First Respondent

INDEPENDENT ELECTORAL COMMISSION OF SOUTH AFRICA Second Respondent

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APPLICANT'S HEADS OF ARGUMENT

INTRODUCTION

1. On 19 March 2014 the Public Protector, Adv. Thuli Madonsela, released a Report[1] following an investigation into extensive upgrades carried out, under the guise of security measures, at the private home of President Jacob

[1] The Report is entitled "*Secure in Comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province.*" Annexure "JS 1", commencing at record vol 2, p 103.

Gedleyihlekisa Zuma ("Pres. Zuma") in the otherwise impoverished town of Nkandla in rural KwaZulu-Natal.[2]

2. These upgrades have already cost taxpayers R215 444 415.68, which amount is expected to rise to R246 631 303.00.[3] This far exceeds amounts spent on the residences of previous Presidents.

3. On 20 March 2014 the Applicant ("the DA") released a campaign message which stated as follows:

> "*The Nkandla report shows how Zuma stole your money to build his R246m home. Vote DA on 7 May to beat corruption. Together for change.*"

4. The message was transmitted by means of a bulk short message service ("SMS") to the cellphones of 1 593 682 voters in Gauteng.[4]

5. The short-hand used is an incident of the fact that an SMS can only be 160 characters long. The reference to "*Zuma*" obviously relates to Pres. Zuma,

[2] The poverty of the area is described in para 6.1 of the Report (p127-128), record vol 3, p 229.
[3] Para 7.4.1 of the Report (p 292), record vol 4, p 394.
[4] Answer (Selfe), para 18, record vol 1, p 43.

who is also President of the First Respondent ("the ANC") and was the ANC's presidential candidate in the elections.[5]

6. The DA and the ANC were at the time engaged in a hard-fought electoral campaign in Gauteng.[6] The ANC did not take issue with similar, or more critical statements by other political parties. It, however, took apparent offence to the SMS. The gist of the ANC's complaint was that the SMS was untrue, in that the Nkandla Report "*did not find that President Zuma stole R246m to build his home*".[7] As such, the ANC alleged that the SMS:

6.1. Violated section 89(2)(c) of the Electoral Act 73 of 1998 ("the Act"), which provides that "*no person may publish any false information with the intention of … influencing the conduct or outcome of an election*"; and

6.2. Violated item 9(1)(b) of the Electoral Code of Conduct ("the Code"), which is included as schedule 2 to the Act, and which provides that "*no registered party or candidate may … publish false or defamatory*

[5] Answer (Selfe), para 4-5, record vol 1, p 38.
[6] Answer (Selfe), para 20, record vol 1, p 43.
[7] Founding (Mantashe), para 25, record vol 1, p 26.

allegations in connection with an election in respect of … a candidate …".

7. On this basis the ANC sought (a) declaratory relief that the SMS violated the Act and the Code;[8] (b) interdictory relief preventing the DA from "*further disseminating or distributing the SMS*";[9] and (c) mandatory relief compelling the DA to send an SMS with an apology in words dictated by the ANC.[10]

8. It is common cause that the DA only sent out the SMS on one occasion; and that it undertook that it would not send out the SMS again.[11] Accordingly the interdictory relief sought by the ANC was manifestly flawed.[12]

9. Curiously, in its founding and replying papers in the High Court, the ANC failed or refused to deal with the findings of the Nkandla Report, and did not

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[8] Notice of Motion, para 2-3, record vol 1, p 13.
[9] Notice of Motion, para 4, record vol 1, p 13.
[10] Notice of Motion, para 5, record vol 1, p 13.
[11] Statement of facts, para 24, record vol 1, p 7; Answer (Selfe), para 142, record vol 1, p 91. This undertaking was given not because the DA accepted the SMS was unlawful, but to ensure that these proceedings could be heard in an orderly fashion. The DA also indicated that the SMS will not be sent out again, because its campaign and the handling of the Nkandla scandal has moved on.
[12] It is a trite proposition that an interdict cannot be granted for a past invasion of rights. In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at para 50, the Constitutional Court held that "[a]*n interdict is meant to prevent future conduct and not decisions already made*." See further Van Loggerenberg and others Erasmus: Superior Court Practice, supplementary volumes at page E8-1 and footnote 2, and the cases cited therein.

attach the Report itself. We submit that the High Court correctly found that this was insufficient and amounted to a failure by the ANC to properly plead its case.[13]

10. It is also notable that Pres. Zuma, who is the subject of the Report and the SMS, failed to depose to an affidavit in the proceedings before the High Court, indicating any prejudice to him or to his dignity.

11. The failure by the ANC and Pres. Zuma to deal with the content of the Report is compounded by the very serious, and far-reaching, findings made against Pres. Zuma in the Report. The Report describes the upgrades to Pres. Zuma's residence as "*focused self-interest*". The President was centrally implicated in the wrongdoing. He "*improperly benefitted*" from extensive upgrades to his private residence, based on the spurious basis that they were required for security reasons.

[13] To sustain the argument that the Report did not make certain findings against Pres. Zuma, but in fact found something different, reference should have been made to the actual findings of the Public Protector. The Report and its findings were dealt with by the DA in answer. This cannot cure the defect in the ANC's case as pleaded. See *Administrator, Transvaal, and Others v Theletsane and Others* 1991 (2) SA 192 (A) at 197D stated the principle that "*the room for deciding matters of fact on the basis of what is contained in a respondent's affidavits, where such affidavits deal equivocally with facts which are not put forward directly in answer to the factual grounds for relief on which the applicant relies, if it exists at all, must be very narrow indeed.*" This principle was upheld in *SAA (Pty) Ltd v AUSA* 2011 (3) SA 148 (SCA) at para 40.

THE LEGISLATIVE BACKGROUND

12. The ANC and the DA are registered political parties which participated in the national and provincial general elections held on 7 May 2014 ("the elections").

13. The elections were proclaimed on 25 February 2014.[14] Since at least that date the provisions of the Act applied to parties.[15]

14. Subsequently, parties intending to contest the elections were required to submit lists of its candidates to the Second Respondent ("the IEC") by 12 March 2014.[16] Together with those lists, undertakings had to be submitted by the parties and their candidates that they would be bound by the Code.[17]

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[14] President's proclamation 12/2014, published in Government Gazette 37376 of 25 February 2014

[15] Section 3 of the Act deals with its application, and reads as follows:

"*(1) This Act applies to every election of the National Assembly and of a provincial legislature.*

(2) This Act applies to an election of a municipal council or a by-election for such council only to the extent stated in the Local Government: Municipal Electoral Act, 2000 (Act 27 of 2000)."

[16] In accordance with section 27(1) of the Act. Pursuant to schedule 1 to the Act, and election timetable was published by the IEC on 26 February 2014 under Notice 145 in Government Gazette 37387 of 28 February 2014. This set the date for the submission of lists.

[17] Section 27(2)(a) and (d) of the Act, which read as follows:

"*(2) The list or lists must be accompanied by a prescribed-*

(a) undertaking, signed by the duly authorised representative of the party, binding the party, persons holding political office in the party, and its representatives and members, to the Code;

...

Section 94 of the Act provides that "*no person or registered party bound by the Code may contravene or fail to comply with a provision of that Code.*"

15. The DA has at all times accepted that it is bound by the Act and the Code. The DA also accepts that the SMS was a statement made with the intention of influencing the outcome of the election. The DA however denies that the SMS violates the Act and the Code, or that the ANC has made out a case for any of the relief sought.

PROCEEDINGS IN THE HIGH COURT AND THE ELECTORAL COURT

16. The ANC brought proceedings in the South Gauteng High Court ("the High Court") in terms of the latter's jurisdiction under section 96(2) of the Act, read with section 20(4)(b) of the Electoral Commissions Act 51 of 1996 ("the EC Act") and regulations under the EC Act.[18]

(d) undertaking signed by each candidate, that that candidate will be bound by the Code".

Section 99 of the Act also provides that parties and candidates must "*subscribe*" to the Code.

[18] Being the "*Rules Regulating Electoral Disputes and Complaints about Infringements of the Electoral Code of Conduct in Schedule 2 of the Electoral Act, 1998 (Act 73 Of 1998) and Determination of Courts Having Jurisdiction*", published under General Notice 2915 in Government Gazette 19572 of 4 December 1998.

17. The matter was launched on Thursday, 27 May 2014, and heard on an urgent basis before Mr. Acting Justice Hellens on Tuesday, 1 April 2014. In a judgment and order of Friday, 4 April 2014, the High Court dismissed the application with costs.[19]

18. The High Court found that, based on a purposive interpretation, the provisions of the Act and the Code had to give expression to the constitutionally entrenched right to free speech (section 16) and the right in a constitutional democracy to a multi-party system of democratic government which ensures accountability, responsiveness and openness.[20] The essence of a free and fair election was the right of political parties to enter political debate and disagree with other parties.[21]

19. The provisions of the Act and the Code could thus not be strictly interpreted, but should be guided by the principles, developed in the law of defamation, allowing for "*fair comment*".[22]

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[19] The judgment of the High Court is reported sub nom *African National Congress v Democratic Alliance and Another* 2014 (3) SA 608 (GJ).
[20] High Court judgment, para 44.
[21] High Court judgment, para 55.
[22] High Court judgment, para 46.

20. After considering the serious findings of the Nkandla Report, the High Court concluded that the SMS qualified as an honest, genuine expression of opinion relevant to the facts upon which it is based and does not disclose malice – and as such was fair and did not violate the Act and Code.[23]

21. With the leave of the High Court, the ANC appealed to the Electoral Court. The parties accepted that the Electoral Court had jurisdiction to hear the appeal, in terms of the regulations under the EC Act. The matter came before the Electoral Court on 25 May 2014.

22. The Court's judgment (per Deputy President Mthiyane) was handed down after 20h00 on 6 May 2014 (i.e. the evening before the elections). The Electoral Court found that the High Court erred in that the SMS **"***does not project itself to be an expression of opinion*"; and overlooked that "the reader of the SMS had no access to the Public Protector's report and was not afforded an opportunity to compare the SMS message to the contents of the report".[24]

[23] High Court judgment, para 70-73, record vol 7, p 613.
[24] Electoral Court judgment, para 14-15, record vol 7, p 622.

23. The Electoral Court found that the SMS fell short of the test for a "*fair comment*" in that it did not constitute a comment but makes a factual assertion, and that "*the statement is clearly false*". Accordingly the Court found that the SMS violated the Act and the Code;[25] and ordered the DA to send out a further SMS to the same recipients reading "*The DA retracts the SMS dispatched to you which falsely stated that President Zuma stole R246m to build his home. The SMS violated the Code and the Act.*"

24. The DA maintains that the SMS did not violate the Act and the Code. Also, with respect, the Electoral Court erred in in its reading of the SMS, which does not suggest that "*President Zuma stole R246m*".

25. On 8 May 2014, the DA sought leave to appeal to this Court. The ANC's attorneys initially adopted the position that no appeal lay to this Court, pursuant to section 96(1) of the Act.[26] The DA pointed out in response that in the *ANC v IEC* case,[27] this Court found that section 96(1) should be interpreted to mean that "*no appeal or review lies against a decision of the*

[25] Electoral Court judgment, para 23 and 25, record vol 7, p 626.
[26] Section 96(1) states that "*the Electoral Court has final jurisdiction in respect of all electoral disputes and complaints about infringements of the Code, and no decision or order of the Electoral Court is subject to appeal or review.*"
[27] *African National Congress v Chief Electoral Officer of the Independent Electoral Commission* 2010 (5) SA 487 (CC) at para 7

Electoral Court concerning an electoral dispute or a complaint about an infringement of the Code, save where the dispute itself concerns a constitutional matter within the jurisdiction of this Court."

26. The ANC now appears to accept that this Court does have jurisdiction to hear this matter. To the extent that this issue remains in dispute, the DA seeks direct access to declare section 96(1) of the Act unconstitutional, in that it unlawfully ousts this Court's jurisdiction under section 167 of the Constitution.[28]

THE NKANDLA REPORT

27. We submit that any assessment of the SMS, and whether it is "*false*" for the purposes of the Act and the Code, must be based on a proper understanding of the Report. As noted by the High Court, this Court is <u>not</u> asked to confirm the findings made by the Public Protector in her Report. Instead, the Court is required to "*weigh and appreciate the contents of the Nkandla Report in order to form the view whether the contents of the complained of SMS*

[28] Application for leave to appeal (Selfe), para 44, vol 7, p 654.

message constitute a violation of the relevant section of the Act and the Code …".[29]

28. The Public Protector's office is established under sections 181-182 of the Constitution and section 1A of the Public Protector Act 23 of 1994 ("the PP Act"). It is one of several so-called "*chapter 9 institutions*", which are mandated to "*strengthen constitutional democracy in the Republic*".

29. The investigation into the upgrades of the President's private residence followed several complaints to the Public Protector. These included one by the DA's then parliamentary leader, Ms. Lindiwe Mazibuko, that it appeared that Pres. Zuma's family had improperly benefited from the upgrades, contrary to the Executive Members' Ethics Act 82 of 1998 ("the Ethics Act"). The Public Protector's investigation was conducted in accordance with her powers in section 7 of the PP Act and sections 3 to 4 of the Ethics Act.

30. In terms of sections 181(3) and (4) of the Constitution, other organs of state are required to assist the Public Protector, and not to interfere with the

[29] High Court judgment, para 56, record vol 7, p 603.

functioning of her office. The Report however shows that the President, several of his cabinet Minister, and high-ranking officials caused delays; failed to provide information; and sought to curtail the investigation through spurious legal arguments and litigation.[30] The ANC has sought to challenge the Public Protector regarding the timing of the release of her Report, even though delays were clearly attributable to other organs of state and the Presidency.[31]

31. The High Court largely approved the DA's synopsis of the Report and its findings,[32] which is as follows:

31.1. An initial security assessment conducted by the South African Police Services ("SAPS") in May 2009, identified required security upgrades with a value of R27 893 067.[33]

31.2. In the same period Pres. Zuma planned to build three new houses as part of his extended residence, which is situated on land owned by a Trust controlled by local traditional authorities. Pres. Zuma's private

[30] Answer (Selfe), para 39.1-39.6, record vol 1, p 48.
[31] Answer (Selfe), para 39.7,record vol 1, p 51.
[32] High Court judgment, para 60 to 67.
[33] Answer (Selfe), para 42, record vol 1, p 52.

architect was improperly appointed, in the absence of any competitive process, as the principal agent to also oversee the upgrades to security at the residence.[34] The architect had no experience in security matters.

31.3. The proposed security upgrades spiraled out of control, and covered items which were plainly not required for security purposes including: a double storey visitor's centre with a large lounge and balcony overlooking a pool area; an "*elaborate*" kraal with separate facilities for cattle, goats and chickens; a culvert leading from the kraal under a security fence; parking facilities and a swimming pool; an amphitheatre and marquee area; extensive roads, walkways and paving; and the relocation of neighbours and family graves, in the latter case because their dilapidated state "*bothered the designers*".[35]

31.4. In addition, measures were implemented without considerations of efficiency or use to the wider community. A private clinic was built, rather than the sort of mobile clinic which sufficed for Pres. Mandela. Despite the fact that Nkandla is an area underserved by health

[34] Answer (Selfe), para 42, record vol 1, p 52.
[35] Answer (Selfe), para 76, record vol 1, p 61.

services, the clinic was built in a manner which did not allow it to be used by the community.

31.5. Similarly, a helicopter pad was included, and extensive quarters for SAPS officers, without consideration if their placement elsewhere would have been useful to the community. A subterranean "*safe haven*", which was initially to cost R500 000, eventually cost R19 million, including a series of elevators for access.[36]

31.6. The President was constantly aware of the details of the upgrade work. He was updated by his architect on detailed proposals. Following complaints from the President about the slow progress, several Ministers, Deputy Ministers and officials were specially deployed to ensure that the work was carried out speedily. This resulted in the highly unusual situation in which site progress meetings were chaired or attended by Ministers, Deputy Ministers and senior officials in the Department of Public Works. They also reported back to Pres. Zuma.

[36] Answer (Selfe), para 77, record vol 1, p 64.

31.7. The Nkandla residence was declared a national key point in April 2010 in terms of the National Key Points Act 102 of 1980. This declaration required that the President pay for security upgrades. This was never required of Pres. Zuma.

32. The findings of the Public Protector include the following:

32.1. The security upgrades were carried out contrary to a Cabinet Policy of 2003 (which specifically regulated upgrades to the President's private residence), and without any understanding of the relevant legal prescripts. This constituted "*maladministration*".[37]

32.2. The measures went far beyond those required for security purposes, and substantially increased the value of the President's private residence, at the expense of the taxpayer.[38]

32.3. Procurement laws[39] were violated on a number of occasions by the appointment of consultants and contractors in the absence of a

[37] Paragraphs 9.1.1.13-9.1.1.14 of the Report (p390-391), record vol 5, p 492-493.
[38] Paragraph 9.2.17-9.2.19 of the Report (p406-407), record vol 6, p 508-509.
[39] Including section 217 of the Constitution; the Public Finance Management Act 1 of 1999; the Treasury Regulations; and the Supply Chain Management Policy of the Department of Public Works

competitive process. The President's architect had a conflict of interest, as he bore duties to the Department of Public Works to ensure cost-effectiveness, but also was the President's private advisor.[40] His fees escalated as the project increased, ultimately amounting to R16 million.

32.4. The manner in which the project was undertaken indicated "*a lack of control and focused self-interest*".[41] In the Executive Summary to the Report, the Public Protector states that "*it is difficult not to reach the conclusion that a licence to loot situation was created by government due to a lack of demand management by the organs of state involved …*".[42]

32.5. The President himself was guilty of ethical violations. He was aware of the upgrade work but never raised any concerns as to the scale and cost of this work at his private residence. The standards of ethical conduct required by section 96 of the Constitution and the Ethics Act required that he be concerned.[43] He "*tacitly accepted*" the

[40] Executive Summary of the Report (p31-33), record vol 2, p 133-135.
[41] Para 9.4.66 of the Report (p422), record vol 6, p 524.
[42] Executive Summary (p38), record vol XX, p XX.
[43] Para 9.5.4-.9.5.7 and 9.5.10-9.5.12 of the Report (p423-424), record vol 6, p 525-526.

implementation of these measures, for which he should have paid.[44] He failed to discharge his duties as President and as a beneficiary of public privileges.[45]

32.6. The acts and omissions allowing such value to be added to the President's private residence constitute "*unlawful and improper conduct and maladministration*".[46] Pres. Zuma "*improperly benefitted*" from measures not required for his security.

THE SMS IS TRUE, OR AT LEAST IT IS NOT "*FALSE*"

33. The DA highlights that the SMS did not allege that the Report made the positive finding that Pres. Zuma "*stole*"; but only that it "*shows how*" Pres. Zuma "*stole*" taxpayers' money for the purposes of building his own home.

34. In light of the findings in the Report, we submit that the sentiment in the SMS could be construed by a reasonable person to be substantially true. The fact that the Report does not use the word "*stole*", or suggest that Pres. Zuma is guilty of the crime of theft, is not dispositive of anything.

[44] Para 10.9.1.4 – 10.9.1.5 of the Report (p437), record vol 6, p 539.
[45] Para 10.10.1.4 of the Report (p439), record vol 6, p 541.
[46] Para 10.5.2-10.5.3 of the Report (p431), record vol 6, p 533.

35. A comparable situation arose in the *McBride* case,[47] which concerned a comment in a newspaper that Mr. McBride, who had been granted amnesty for his participation in a lethal bombing of civilian targets, was a "*murderer*". Mr. McBride sought to argue that calling him a murderer was untrue, as this could only refer to those found guilty of the crime of murder in a court. The Court however stated that –

> "*this is to redefine language. In ordinary language 'murder' incontestably means the wrongful, intentional killing of another. 'Murderer' has a corresponding sense. More technically, 'murder' is the unlawful premeditated killing of another human being, and 'murderer' means one who kills another unlawfully and premeditatedly. Neither in ordinary nor technical language does the term mean only a killing found by a court of law to be murder, nor is the use of the terms limited to where a court of law convicts.*"

36. In the current case, the Report shows that that through unlawful acts and omissions, and in violation of his public duties, Pres. Zuma's property was increased in value at the expense of the taxpayer. President Zuma knowingly received a benefit to which he was not otherwise entitled. This would quite fairly be construed by a right-minded person as a theft on the fiscus. The ordinary reader, who is not trained in law, would draw no

[47] *The Citizen 1978 (Pty) Ltd v McBride (Johnstone, Amici Curiae)* 2011 (4) SA 191 (CC)

distinction between Pres. Zuma's unlawful appropriation of a benefit to which he knew (or ought to have known) he was not entitled, and stealing. The ordinary reader would also not take the SMS as a legal opinion or statement that Pres. Zuma was guilty of a crime.

37. At the very least though, we submit that the SMS does not fall within the definitional ambit of "*false*" speech proscribed by the Act and the Code.

INTERPRETING THE ACT AND THE CODE CONSTITUTIONALLY

38. Section 39(2) of the Constitution requires that legislation must be interpreted to "*promote the spirit, purport and objects of the Bill of Rights.*" This principle is restated in section 2 of the Act.[48]

39. This Court has further established that "*where legislation is capable of more than one plausible construction, the one which brings the legislation within constitutional bounds must be preferred*."[49]

[48] Section 2 states that "[e]*very person interpreting or applying this Act must … do so in a manner that gives effect to the constitutional declarations, guarantees and responsibilities contained in the Constitution.*"

[49] *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC) at para 43. See also *Investigating Directorate: Serious Economic Offences And Others v Hyundai Motor Distributors (Pty) Ltd And Others; In Re Hyundai Motor Distributors (Pty) Ltd And Others v Smit NO and Others* 2001 (1) SA 545 (CC) at

40. The interpretation of the Act and the Code suggested by the ANC in the courts *a quo* is stark, and proposes essentially that once a statement is found to be premised on facts which a court subsequently finds to be objectively false, it violates the Act and is punishable as such.

41. We submit that this approach fails to appreciate the value of:

41.1. Free speech, which is protected in section 16 of the Constitution to include the "*freedom to receive or impart information or ideas*"; and

41.2. Political rights, which are protected by section 19 of the Constitution and include the rights:

> "*(b) to participate in the activities of, or recruit members for, a political party; and*
> *(c) to campaign for a political party or cause.*"

42. By failing to take cognisance of these rights, the approach suggested on behalf of the ANC invites this Court to adopt an interpretation of the Act and the Code which would be unconstitutional.

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para 23 and *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* 2009 (4) SA 222 (CC) at para 81(and the cases cited in footnote 80).

43. The importance of freedom of speech to the democratic values of the Constitution was highlighted by this Court in the Mambolo case:[50]

> "*Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression - the free and open exchange of ideas - is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed*."

44. With regard to the importance of political rights, in *Ramakatsa*[51] this Court noted the pernicious legacy of apartheid, and held that "[t]*he purpose of section 19 is to prevent this wholesale denial of political rights to citizens of the country from ever happening again.*"[52]

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[50] *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC) at para 37

[51] *Ramakatsa and Others v Magashule and Others* 2013 (2) BCLR 202 (CC) at para 64

[52] The Court continued to note the central role of political parties, and held as follows:

> "[71] *In relevant part section 19(1) proclaims that every citizen of our country is free to make political choices which include the right to participate in the activities of a political party. This right is conferred in unqualified terms. Consistent with the generous reading of provisions of this kind, the section means what it says and says what it means. It guarantees freedom to make political choices and once a choice on a political party is made, the section safeguards a member's participation in the activities of the party concerned.*"

45. Taking these rights together, we submit that the ability of political parties to express their views, free from interference or fear of retribution by the executive or other opposing parties, is central to the democratic vision of the Constitution. If the Act and the Code were to be interpreted in a manner which allowed any party to gag its opponents from making statements which are critical, they would be unconstitutional. The fact that the DA's views may cause the ANC discomfort, embarrassment or offence can play no role. The Constitution does not entrench a right to take offence.

46. To guide the proper interpretation of the Act and the Code, we submit that this Court should take guidance from:

46.1. The development in the law of defamation of the objective lawfulness of political speech and comment;

46.2. The elevated importance of unhindered free speech in election periods; and

46.3. Comparable foreign experience.

DEFAMATION, POLITICAL SPEECH AND COMMENT

47. In developing the concept of lawfulness in defamation cases, courts have dealt with the interplay between the rights of freedom of speech and dignity.[53] We submit that two relevant and inter-related principles are evident: first, that greater latitude must be allowed to speech critical of members of the government; and secondly, speech must be accommodated if it amounts to a fair comment.

48. In the *Bogoshi* case[54] the SCA stated that the determination of lawfulness is a policy-laden determination based on a consideration of reasonableness in light of the convictions of the community, and must be guided by the Constitution. In this regard, even under pre-constitutional cases, "*greater latitude is usually allowed in respect of political discussion*". In this regard, the Court referred with approval to the approach in *Pienaar,*[55] in which it was held as follows:

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[53] In *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) at para 28, the Court stated as follows:
"*The law of defamation seeks to protect the legitimate interest individuals have in their reputation. To this end, therefore, it is one of the aspects of our law which supports the protection of the value of human dignity. When considering the constitutionality of the law of defamation, therefore, we need to ask whether an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other.*"

[54] *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1212

[55] *Pienaar and Another v Argus Printing and Publishing Co Ltd* 1956 (4) SA 310 (W) at 318C-E

> *"Although conscious of the fact that I am venturing on what may be new ground I think that the Courts must not avoid the reality that in South Africa political matters are usually discussed in forthright terms. Strong epithets are used and accusations come readily to the tongue.*"

49. Similarly in the *Argus*[56] case**,** the court held that**:**

> *"the law's reluctance to regard political utterances as defamatory no doubt stems in part from the recognition that right-thinking people are not likely to be greatly influenced in their esteem of a politician by derogatory statements made about him .."*

50. In *Mthembi-Mahanyeli*[57] the question arose whether "*special principles*" could be invoked when dealing with statements about members of Government. After dealing with foreign law, the Court accepted that political information and speech raised different considerations, and that members of Government could be expected to be more resilient to robust criticism.[58]

51. The Court continued as follows:

> "[65] *Freedom of expression in political discourse is necessary to hold members of Government accountable to the public. And some latitude must be allowed in order to allow robust and frank comment in the interest of keeping members of society informed about what*

[56] *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 588F
[57] *Mthembi-Mahanyeli v Mail and Guardian Ltd and Another* 2004 (6) SA 329 (SCA) at para 53
[58] At para 62 to 64.

Government does. Errors of fact should be tolerated, provided that statements are published justifiably and reasonably: That is with the reasonable belief that the statements made are true. Accountability is of the essence of a democratic State: It is one of the founding values expressed in s 1(d) of our Constitution …
[66] … The State, and its representatives, by virtue of the duties imposed upon them by the Constitution, are accountable to the public. The public has the right to know what the officials of the State do in discharge of their duties. And the public is entitled to call on such officials, or members of Government, to explain their conduct. When they fail to do so, without justification, they must bear the criticism and comment that their conduct attracts, provided of course that it is warranted in the circumstances and not actuated by malice.
[67] That does not mean that there should be a licence to publish untrue statements about politicians. They too have the right to protect their dignity and their reputations …
[68] But where publication is justifiable in the circumstances the defendant will not be held liable. Justifiability is to be determined by having regard to all relevant circumstances ...".[59]

52. The protection of fair comment[60] was dealt with by this Court in the *McBride* case. The description that a comment had to be "*fair*" was misleading. This Court referred to the statements of Innes CJ in *Crawford*,[61] and explained that

> "*[81] … the criticism sought to be protected need not 'commend itself' to the court. Nor need it be 'impartial or well-balanced'. In fact, 'fair' in the defence means merely that the opinion must be one that a fair person, however extreme, might honestly hold, even*

[59] See also *Cele v Avusa Media Limited* [2013] 2 All SA 412 (G)
[60] In *Hardaker v Phillips* 2005 (4) SA 515 (SCA) at para 26 the Court highlighted that the requirements for this ground of defence were that "*(i) The statement must constitute comment or opinion; (ii) it must be 'fair'; (iii) the factual allegations being commented upon must be true; and (iv) the comment must relate to a matter of public interest.*"
[61] *Crawford v Albu* 1917 AD 102 at 114

if the views are 'extravagant, exaggerated, or even prejudiced'. The comment need be fair only in the sense that objectively speaking it qualifies 'as an honest, genuine (though possibly exaggerated or prejudiced) expression of opinion relevant to the facts upon which it was based, and not disclosing malice'.

[82] So to dub the defence 'fair comment' is misleading. If, to be protected, comment has to be 'fair', the law would require expressions of opinion on matters of fact to be just, equitable, reasonable, level-headed and balanced. That is not so. ***An important rationale for the defence of protected or 'fair' comment is to ensure that divergent views are aired in public and subjected to scrutiny and debate. Through open contest, these views may be challenged in argument.*** *By contrast, if views we consider wrong-headed and unacceptable are repressed, they may never be exposed as unpersuasive. Untrammelled debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values.*

[83] Protected comment need thus not be 'fair or just at all' in the sense in which these terms are commonly understood. Criticism is protected even if extreme, unjust, unbalanced, exaggerated and prejudiced, so long as it expresses an honestly-held opinion, without malice, on a matter of public interest on facts that are true. In the succinct words of Innes CJ, the defendant must 'justify the facts; but he need not justify the comment'" (our emphasis added).[62]

53. In the current case it is submitted that the comment made in the SMS – namely that the Public Protector's Report "*shows how*" Pres. Zuma "*stole*" – is fair. Based on the facts in the Report, the conclusion could be made that Pres. Zuma was guilty of deliberate and self-serving dishonesty in which

[62] So too in *Hardaker (supra)* at para 32, the SCAheld that "*whether the jibe is 'fair' does not in law depend solely or even principally on reason or logic*." The Court should instead allow a generous leeway to statements of opinion.

taxpayers money was utilised to personally enrich him, and to provide him with benefits to which he was not lawfully entitled.

54. The DA submits that it is simply not credible that Pres. Zuma never questioned this rampant expenditure – despite a growing public furore and the ever expanding scope of the works.[63] The findings against the President are thus serious.[64] The findings against the President are no less serious than a finding of theft.

THE IMPORTANCE OF SPEECH IN ELECTION PERIODS

55. The ANC suggested in the courts *a quo* that the cases above are inapposite, in that the Act and the Code limit speech in an election context.

56. The suggestion that speech plays a diminished role in the run-up to elections, or that political parties demand greater cosseting in this period, is patently flawed:

[63] Answer (Selfe), para 106, record vol 1, p 75.
[64] In this regard the High Court noted the "*trite but trenchant observation*" – namely that "*whimsical and uncontrolled use of public funds by the executive is not tolerated in a democracy such as ours*". High Court judgment, para 57.

56.1. In the first place, in the run-up to elections, the right to criticise opposing political parties has an increased value, not a diminished one. It is in this period that the record of those in power should be most open to scrutiny, and their views and policies subjected to rigorous interrogation.

56.2. In the second place, the ANC, as a juristic person, is not a bearer of the right to human dignity.[65] Pres. Zuma is also not before this Court and does not seek to vindicate his dignity. There is also no evidence of any prejudice to him. The value of speech is thus not moderated in these cases by the countervailing interests of human dignity.

57. It is submitted that the purpose of the provisions of the Act and the Code implicated in this case is to prevent statements which incite violence, which are based on complete fabrication or gratuitous insult, or which demonstrably pose a threat to the elections. The purpose is not to have a 'chilling effect' on speech which is critical, unpopular, or even iconoclastic.

[65] *Hyundai*, *supra*, at para 18.

58. The ANC attempts to suggest, by mere *ipse dixit*, that the SMS poses a threat to the elections and risks violence. This is not borne out by any evidence, or the experience of the election period.

COMPARABLE FOREGN JURISPRUDENCE

59. The common law jurisdictions of England, Australia, Canada and New Zealand have, with a surprising degree of uniformity, developed their laws of defamation in order to allow for a much greater scope for freedom of speech in matters of public interest and/or political speech. The mere fact that a statement is subsequently found to be false is not sufficient to proscribe such speech.

(a) English law

60. In English common law the substantial truth of a statement is an absolute defence. In the *Reynolds* case[66], the House of Lords further noted that the common law recognised the need for parties to be able to speak freely

[66] *Reynolds v Times Newspapers Ltd and others* [1999] UKHL 45; [1999] 4 All ER 609.

without exposure to damages actions, in the wider public interest, even though they were mistaken or misinformed.[67]

61. Consequently, additional common law defences to a claim of defamation were developed to include honest comment on a matter of public interest, and qualified or absolute privilege. Only the latter defence is applicable in relation to false statements of fact. Consequently, as indicated in the *Jameel*[68] case, "*qualified privilege as a live issue only arises where a statement is defamatory and untrue.*"[69]

62. The defence of qualified privilege is grounded in the public policy need for free speech to trump reputation i.e. "*when the person to whom a statement is made has a special interest in learning the honestly held views of another person, even if those views are defamatory of someone else and cannot be proved to be true*".[70]

[67] *Reynolds v Times Newspapers Ltd and others* [1999] 4 All ER 609, at p. 614.
[68] *Jameel and others v Wall Street Journal Europe Sprl* [2006] UKHL 44; [2006] 4 All ER 1279.
[69] *Jameel* (*supra*), at para 32.
[70] *Reynolds* (*supra*), at p.615.

63. Privileged occasions arise where the circumstances indicate a reciprocal duty or interest by the speaker in making the statement, and a duty or interest by the recipient to receive the statement.

64. The concept of duty or interest is a wide one encompassing a legal, social or moral duty/interest.[71] Of current relevance, even at common law, qualified privilege was applied in election cases, in which candidates and voters were found to have the necessary reciprocal interests and duties in exchanging information during election contests (albeit within the territorial constituency limits then applicable to political contests in the UK).[72]

65. The protection of qualified privilege applies even when information is published negligently, irrationally and in the absence of steps to verify the truth of the statement, unless the very high hurdle of malice could be established.[73]

66. In the *Reynolds* case the court acknowledged the need to give even greater protection to freedom of speech and, accordingly, recognised the possibility

[71] Reynolds, at p. 616 and 649.
[72] See *Braddock v Bevins* [1948] 1 KB 580 at 591 and discussion of various cases by Lord Hope in *Reynolds* (*supra*), at pages 650-654. See also *Perera v Peiris* [1949] A.C. 1, in which the proceedings of a commission on bribery could be reported to the general public.
[73] Para 103 of Roberts v Bass [2002] HCA 57; Cf Reynolds, at p.616 and 640. Halsbury's Laws of England, 4th ed, Vol 28, at para 153.

of privilege attaching to large scale communications to the general public on matters of public interest (not merely political matters). This new category of privilege, dubbed the Reynolds privilege, functions as an extension to the existing qualified privilege (which, as we have seen, already recognizes qualified privilege in certain electoral cases), but does not replace it.[74]

67. In essence, although sometimes expressed to be a single test for whether it is in the public interest to grant the privilege, the Reynolds test contains two elements:[75] (i) whether the communication is of public interest (which unlike the traditional privilege concentrates on the nature of the material rather than the occasion);[76] and (ii) whether it was responsibly or fairly reported (which effectively supplants/incorporates a requirement of the absence of malice).[77]

68. The *Reynolds* case, read with the subsequent cases of *Jameel*, *Flood* and *Seaga*[78], establish the following broad principles:

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[74] Cf. Clerk and Lindsell on Torts (20th ed), para 22-117. Jameel, at paras 137, 43-47, 50.
[75] *Flood v. Times Newspapers Limited* [2012] UKSC 11 at para 2 and 188; *Jameel* (*supra*), para 48-54 and 107.
[76] *Jameel* (*supra*), para 46 and 134.
[77] *Flood* (*supra*) at para 38. In the *Reynolds* case, at p. 626, Lord Nicholls set out an illustrative set of considerations guiding when qualified privilege may apply including: the seriousness of the allegation; the public concern in the information; the source of the information; the steps taken to verify the information; the status of the information (for instance the allegation may have been the subject of an investigation which commands respect); the urgency of the matter; whether comment was sought from the plaintiff in appropriate cases (*Jameel* (*supra*) at para 35 and 83-84); the balance and tone of the statement; and other circumstances of publication.
[78] *Seaga v Harper (Jamaica)* [2008] UKPC 9.

68.1. That the test is one which was designed to fit the European Convention for the Protection of Human Rights and Fundamental Freedom and the Human Rights Act, 1998.[79]

68.2. The *Reynolds* case must be applied with due regard to its liberalising intention.[80]

68.3. The privilege is not restricted to the press, broadcasting and print media, but applies to the publication by any person of material of public interest in any medium.[81]

68.4. Public interest (and what should be responsibly reported) should be determined by reference to the entire article/communication.[82] Due weight should be given to editorial judgment, in the absence of evidence of carelessness, and the perils of perfect hindsight should be avoided.[83]

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[79] *Flood* (*supra*) at para 46-47, 138.
[80] *Jameel* (*supra*) at para 35; *Seega* (*supra*) at para 10; *Flood* (*supra*) at para 176.
[81] *Seaga* (*supra*) at para 11; *Jameel* (*supra*) at para 54, 118 and 146; and *Flood* (*supra*) at para 44.
[82] *Seaga* (*supra*) at para 12; *Jameel* (*supra*) at para 48, 107-108.
[83] *Reynolds* (supra) at p.626; and *Jameel* (supra) at para 33.

69. In the *Woolas* case[84] the Court interpreted a provision which proscribed *"any false statement of fact in relation to the candidate's personal character or conduct"* before or during an election, for the purpose of affecting the return of any candidate at the election, unless reasonable grounds existed that the statement was true.

70. Significantly, the Court was concerned that the provision would infringe the Convention's free speech rights if it applied to honest false statements, which were carelessly made[85]. However the Court's ultimate finding would appear to be that, because the provision's focus on false speech relates only to the personal character (not political views) of the candidate, this placed the provision beyond Convention attack.[86]

(b) Canada

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[84] *R (on the application of Woolas) v The Speaker of the House of Commons [2010] EWHC 3169 (Admin)*

[85] Para 96 and 123-124, read with 65 and 91-96 of *Woolas*.

[86] Consequently, the Court finds, at para 124, that

> *"Freedom of political debate must allow for the fact that statements are made which attack the political character of a candidate which are false but which are made carelessly. Such statements may also suggest an attack on aspects of his character by implying he is a hypocrite. Again, imposing a criminal penalty on a person who fails to exercise care when making statements in respect of a candidate's political position or character that by implication suggest he is a hypocrite would very significantly curtail the freedom of political debate so essential to a democracy. It could not be justified as representing the intention of Parliament. However imposing such a penalty where care is not taken in making a statement that goes beyond this and is a statement in relation to the personal character of a candidate can only enhance the standard of political debate and thus strengthen the way in which a democratic legislature is elected*."

71. In the *WIC Radio* case,[87] the Canadian Supreme Court expanded the reach of the fair comment defence to defamation. The Court replaced the restrictive requirement that the comment be one that a fair minded person could hold, with the requirement that the comment merely be one that a person could honestly hold and is notable for affirming a generous approach to this defence[88]. It also indicated a generous approach to determining the fact/opinion divide in matters of political debate.[89]

72. A year later, in the *Torstar*[90] and *Quan*[91] cases, the Court introduced a new defence, in addition to traditional qualified privilege, covering responsible communication of matters of public interest.

73. In the *Torstar* case the Court isolated three rationales for the protection of free speech:[92] democratic discourse; truth-seeking; and self-fulfillment. The

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[87] *WIC Radio Ltd. v Simpson* 2008 SCC 40

[88] Cf.Vellacott case cited below, at para 100, where they confirm that the WIC radio case, confirms a wide and generous approach to this defence, at para 100.

[89] The court stated, at para 26: *"Brown's The Law of Defamation in Canada (2nd ed. (loose-leaf)) cites ample authority for the proposition that words that may appear to be statements of fact may, in pith and substance, be properly construed as comment. This is particularly so in an editorial context where loose, figurative or hyperbolic language is used (Brown, vol. 4, at p. 27-317) in the context of political debate, commentary, media campaigns and public discourse. "*

[90] *Grant v Torstar Corp* [2009] 3 SCR 640. This case dealt with a newspaper report detailing community concerns and controversy over the possible use by a wealthy and politically connected businessman of political influence to obtain permissions for land development in a sensitive area.

[91] *Quan v Cusson* 2009 SCC 62

Court continued that *"the first two rationales for free expression squarely apply to communications on matters of public interest, even those which contain false imputations*".[93] The Court pointed out that the fear of lawsuits, combined with the speaker's need to prove the truth of statements to a legal standard, often years after the event, chilled the communication of valuable material.[94]

74. The Court thus had no difficulty in rejecting the argument that false statements did not advance the free speech right.[95] The Court justified, as an appropriate balance between competing interests of speech and reputation, the imposition of a responsible reporting duty. At the same time, people in public life are not entitled to demand perfect protection against false accusations and innuendo, given the chilling of speech that would result.

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[92] *Torstar, supra,* at para 47-52.
[93] *Torstar, supra,* at para 52.
[94] Para 53 of Torstar.
[95] Paras 52, 55-57 and 65. Indeed, it pointed out, that this proposition was already contradicted by common law privilege, which provides that *" untrue statements should be granted immunity, because of the importance of robust debate on matters of public interest (e.g. Parliamentary privilege), or the importance of discussion and disclosure as a means of getting at the truth (e.g. police reports, employment recommendations)". Torstar, supra,* at para 55. The Court further limited and distinguished a narrower statement in *Hill v Church of Scientology of Toronto* [1995] 2 S.C.R. 1130 that *"defamatory statements are very tenuously related to the core values which underlie* [free speech]", based on the facts of that case.

75. The Court indicated that public interest should be determined along the following lines:

75.1. Public interest must be determined on the subject matter of the communication as a whole.[96]

75.2. Public interest is not merely what interests the public (as a matter of curiosity or prurience),[97] even though the prominence of the figure may be a factor influencing its public interest. It must conform to reasonable expectations of privacy.[98]

75.3. Public interest is not confined to government or political matters,[99] and does not mean that all or most of the populace is interested in the matter. It is sufficient that *"some segment of the public must have a genuine stake in knowing about the matter published*."[100]

[96] *Torstar*, *supra*, at para 101.
[97] *Torstar*, *supra*, at para 102 and 105.
[98] *Torstar*, *supra*, at para 102.
[99] *Torstar*, *supra*, at para 106.
[100] Torstar, para 105.

76. The Court set out various factors to be considered in determining what would constitute responsible communication.[101] It further highlighted that the defence of responsible communication was *"available to anyone who publishes material of public interest in any medium",* not merely mass media defendants.[102]

77. In the *Vellacott* case,[103] the Saskatchewan Queen's Bench dealt with a complaint by a politician regarding statements that her misuse of benefits was "*crooked*" and "*stealing*". The Court indicated that[104]:

> "*Public figures, such as politicians, bear many burdens. One is that they are subject to criticism, castigation and insults, some even made in bad taste or replete with vulgarity. Still, the law has long held that not all such statements are defamatory, particularly with respect to*

[101] These included (paras 111-126):
- The seriousness of the allegation- the need to verify increases in proportion to the seriousness of the charge and the impact on privacy.
- Public importance of the matter will effect due diligence.
- Urgency of the matter and the time for verification.
- Status and reliability of the source.
- Whether the Plaintiff's side of the story was reliably or accurately reported.
- Whether inclusion of the defamatory statement was justifiable (this may engage a variety of considerations and editorial choice, which should be granted generous scope).
- Whether the defamatory statement's public interest lay in the fact that it was made rather than its truth.
- Any other relevant factors.

[102] Torstar, at para 96.

[103] *Vellacott v Saskatoon Starphoenix Group Inc* 2012 SKQB 359. This case concerned a report relaying the views of people in relation to a controversy as to whether the Plaintiff had abused her parliamentary free posting privileges by using them to advocate for a particular candidate in his party's internal political leadership contest.

[104] Vellacott, at para 48.

> *those holding public office. A public official can expect that his or her public conduct will be subject to searching criticism.*"

78. The defendant in that case argued, *inter alia*, that the offended politician overstated the defamatory meaning that might be inferred from the statements, given that the words were normal rhetoric in a political leadership campaign, because they did not lower the estimation of the politician in the eyes of the ordinary reader, given that "*the public should be taken to be aware that one's political opponents may use harsh and accusatory language.*"[105] The court found that the offending statements were to be taken as comments and not statements of fact, and would have been recognized as such by a reasonable reader.[106]

(c) Australia

79. In the *Lange* case,[107] the High Court of Australia found that various constitutional provisions about an elected, representative and responsible government, necessarily implied a constitutional right of "*freedom of communication between the people concerning political or government*

[105] *Vellacott*, at para 54.
[106] *Vellacott, at para 104. Note, at para 102, its reference to a generous determination of the fact/opinion divide in the WIC Radio case, as noted in our footnote 89 above.*

matters which enables the people to exercise a free and informed choice as electors."[108]

80. Consequently, although Australia has no written bill of rights, this constitutionally implied freedom of speech invalidates any abridgement by common law or by statute (unless the object of the infringing law is compatible with representative government).

81. The Court found that the common law qualified privilege, which generally did not extend to communications to the general public via mass media, abridged the constitutional free speech right, especially in light of modern developments and the dependence of the public on powers exercised by representatives and officials. Accordingly the Court recognised an extended privilege for reasonable statements (by any Australian)[109] concerning government and political matters that affect the public[110] (while retaining protection of the narrower existing categories of common law privilege, including certain electoral cases, limited only by malice).[111]

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[107] *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520
[108] *Lange case* [1997] HCA 25; 189 CLR 520, at p. 560-561.
[109] Lange, at p.571-572.
[110] Lange, at p.573.
[111] Paras 64-74 of Roberts v Bass [2002] HCA 57.

(d) New Zealand

82. In two judgments in the *Lange* case,[112] the New Zealand Court of Appeal extended the common law of qualified privilege to statements which were generally published and in which, given the nature of New Zealand's democracy, the wider public may have a proper interest. In particular, a proper interest exists about the actions and qualities of those elected to Parliament or seeking election, insofar as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities.[113]

83. The Court clarified that the circumstances of the communication must still be considered, including such matters as the identity of the publisher, the context in which the publication occurs, and the likely audience, in addition to the actual content of the information.[114]

84. The privilege is only defeated by improper abuse of the qualifying occasion (i.e. essentially a malice test). The Court rejected the imposition of an

[112] *Lange v Atkinson* [1998] 3 NZLR 424 and *Lange v Atkinson* [2000] NZCA 95 (21 June 2000); [2000] 3 NZLR 385. The two judgments were handed down before and after the matter went to the Privy Council.
[113] Para 10 of Lange v Atkinson [2000] NZCA 95 (21 June 2000); [2000] 3 NZLR 385.
[114] Para 13 and 21-22 of Lange v Atkinson [2000] NZCA 95 (21 June 2000); [2000] 3 NZLR 385.

additional requirement of reasonable or responsible publication, as per the English and Australian approaches.

85. In the subsequent case of *Vickery*,[115] the Court decided that extension of the privilege in *Lange's* case did not cover allegations of serious criminality, which it indicated could only be appropriately made to the police. The reasoning appears to be based on fears of 'trial by media' and undermining of the criminal justice system. However, as the *Flood* case in England points out, there are other appropriate mechanisms to address subversion of the justice system.[116]

(e) United States of America

86. In the case of *New York Times v Sullivan*,[117] the Supreme Court barred defamation suits brought by public officials against critics of their official conduct, unless it was knowingly false or published with reckless

[115] *Vickery v McLean* [2000] NZCA 338
[116] *Flood*, *supra*, at para 197.
[117] 376 U.S. 254 (1964). Quoting James Madison, at p. 271, the Court pointed out in the *Sullivan* case that "*some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press*."

disregard.[118] Later cases extended "*official conduct*" to include *"anything which might touch on an official's fitness for office."*[119]

87. The Court in *Sullivan* noted as follows:[120]

> "*A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount— leads to a comparable 'self-censorship.' Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. .... Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.'... The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.*"

88. In *Brown v Hartlage*[121] the Supreme Court considered a proscription of false speech in the electoral process. The Court emphasised that while a State had an interest in protecting the integrity of its electoral process, it was required not merely to fully demonstrate a legitimate interest in such a bar, but a compelling one. The Court found that the mere proscription of false speech

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[118] Sullivan, at p. 280.
[119] *Garrison v Louisiana* 379 U.S. 64 (1964), at p. 77; *State v. 119 Vote No! Committee* 957 P. 2d 691 (Washington Supreme Court, 1998), at p. 699.
[120] Sullivan, at p. 279.
[121] 456 U.S. 45 (1982)

in that case fell far short of these requirements and it stressed the need to create a margin of appreciation in respect of false speech, in order not to chill speech.

89. The "*strict scrutiny*" standard is premised on the recognition that freedom of political choice lies at the heart of the protection of free speech, and in this sphere the protection of speech found its "*fullest and most urgent application*"[122]. This involves the government showing that the law is narrowly tailored and necessary to achieve a compelling governmental interest, which poses a heavy burden. [123]

90. Various courts have tested laws penalising false statements in the electoral process, and found them wanting.[124]

NO VIOLATION OF THE ACT AND THE CODE

[122] Brown v Hartlage, at p. 53.
[123] *US v Alvarez* 617 F. 3d 1198 (9th Circuit), at p. 1215-1216 (the court also rejecting anything other than highest scrutiny of a prohibition of false factual speech). State v. 119 Vote No! Committee, 957 P. 2d 691, at p. 694 (noting the "well-nigh insurmountable" burden to justify restriction on political speech).
[124] *281 Care Committee v Arneson* 638 F. 3d 621 (Court of Appeals, 8th Circuit); *Rickert v State, Public Disclosure Com'n* 168 P. 3d 826 (Washington Supreme Court); *State v 119 Vote No! Committee* (*supra*).

91. Based on the above we submit that the Act and the Code cannot be interpreted to proscribe:

91.1. Criticism – no matter how harsh – of politicians, especially senior figures such as Pres. Zuma, in the run-up to elections;

91.2. Comments which encapsulate a view which could be held by a reasonable person about a political figure; and

91.3. Statements of fact which are made without malice, even if it later transpires that a court finds that the statement is false.

92. On all of these bases it is submitted that the SMS does not fall into the category of speech affected by the Act and the Code. The SMS contains a legitimate criticism of Pres. Zuma, reflecting the serious findings against him in the Report. It represents an opinion which was genuinely held by many people. Even if it is conceived as a statement of fact, there is no suggestion that it was made in bad faith, or that it constitutes a gratuitous and baseless assault on Pres. Zuma.

93. Read purposively, the Act and the Code seek to deal with speech which by design, or foreseeably, poses a threat to the electoral process. It is not designed to protect participants in the process, and candidates, from their opponents. Rather it is the integrity of the democratic process which is paramount, and only when speech poses a threat to that process can it fall foul of the Act and the Code.

THE INAPPROPRIATENESS OF A FORCED APOLOGY

94. Section 96(2) of the Act states that this Court may impose "*any appropriate penalty or sanction*", and lists several possible sanctions.[125] The Act does

[125] The sanctions mentioned in section 96(2) of the Act include:

"*(a)* *a formal warning;*
(b) *a fine not exceeding R200 000;*
(c) *the forfeiture of any deposit paid by that person or party in terms of section 27 (2) (e);*
(d) *an order prohibiting that person or party from-*
  (i) *using any public media;*
  (ii) *holding any public meeting, demonstration, march or other political event;*
  (iii) *entering any voting district for the purpose of canvassing voters or for any other election purpose;*
  (iv) *erecting or publishing billboards, placards or posters at or in any place;*
  (v) *publishing or distributing any campaign literature;*
  (vi) *electoral advertising; or*
  (vii) *receiving any funds from the State or from any foreign sources;*
(e) *an order imposing limits on the right of that person or party to perform any of the activities mentioned in paragraph (d);*
(f) *an order excluding that person or any agents of that person or any candidates or agents of that party from entering a voting station;*
(g) *an order reducing the number of votes cast in favour of that person or party;*
(h) *an order disqualifying the candidature of that person or of any candidate of that party; or*
(i) *an order cancelling the registration of that party.*"

not mention an apology. We submit that this is based on a recognition by the legislature that, in the context of robust election campaigns, a court-ordained apology by one party to another is not appropriate.

95. Essentially this would risk involving the Court in the campaigns of political parties, and create the impression that the message of one political party carries the authority and *imprimatur* of a Court.

96. In the facts of the current case an apology is also unjustified. No prejudice is demonstrated by the ANC. Pres. Zuma has not complained of any affront to his dignity and status. The ANC's complaint against the DA is at best selective. Other political parties and commentators have made comments which go far beyond those made by the DA, with no apparent action by the ANC.

97. The ANC has failed to show that the SMS has impacted on, or in any manner affected, the public debate regarding the Nkandla scandal. Furthermore, the ANC has failed to show that the SMS was picked up by, or amplified in the press. On the contrary, it is submitted that if the ANC had

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The High Court's powers are further constrained by section 20(4)(b) of the EC Act, and Regulation 2(2)(b) of the *Rules Regulating Electoral Disputes (supra)*. In terms of the Regulations the High Court has the power to impose "*all the sanctions in subsection (2) except (2)(h) and (i)*".

not made an issue of the SMS and brought this case, the effects of the SMS would have been ephemeral. The ANC had a suitable alternative: namely to explain the Nkandla Report, to deal with the allegations in it, and to explain why Pres. Zuma is not guilty. In the context of an election, the ANC had an existing campaign, and would reasonably use "*political action and not litigation*"[126].

CONCLUSION

98. In the circumstances it is submitted that the appeal should be dismissed

99. In the Electoral Court the DA abandoned the costs award granted in its favour by the High Court, and the parties agreed that the Electoral Court should not grant any costs award. It is submitted that the same arrangement should apply in respect of these proceedings, and that this Court should make no award as to costs.

ISMAIL JAMIE SC

DAVID BORGSTRÖM

[126] *Die Spoorbond and Another v South African Railways; Van Heerden and Others v South African Railways* 1946 AD 999 at 1009 at 1012-1013.

Chambers
Cape Town
22 July 2014

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No.: 4/14 EC

In the matter between:

DEMOCRATIC ALLIANCE **Appellant**

and

AFRICAN NATIONAL CONGRESS **First Respondent**

INDEPENDENT ELECTROL COMMISSION

OF SOUTH AFRICA **Second Respondent**

FIRST RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1 This matter concerns an appeal from the judgment of the Electoral Court, per Mthiyane DP, delivered on 6 May 2014. The judgment related to a message, sent on 20 March 2014 via bulk short message service ("SMS"), by the Democratic Alliance ("DA") to 1 593 682 potential voters in the Gauteng area. The SMS stated that:

> "*the Nkandla report shows how Zuma stole your money to build his R246m home. VOTE DA on 7 MAY to beat corruption. Together for change*"

2 The Electoral Court held that the message constituted a statement of fact. Further, it held that the factual claim contained in the message was false, given that the Public Protector's report did not find that President Zuma was guilty of theft or of any other crime. Consequently, the message fell foul of the provisions of the Electoral Act and the Electoral Code, which prohibit the publication of false information about political candidates or parties during the election period. The Court ordered that the DA send a second SMS to the same recipients, retracting its earlier statement.

3 We submit that the Electoral Court was entirely correct in its findings and that its judgment and order should be upheld.

4 The DA, in its arguments before this Court, emphasizes the need for robust criticism of politicians and open political debate. The Electoral Court's decision, it contends, will have a chilling effect on such speech. The DA argues that other democratic countries have recognised this danger and have responded by developing broad defences to defamation in cases involving political parties and politicians.

5 The DA's framing, however, is a mischaracterisation of the issues before this Court.

5.1 The question before this Court is not whether there should be leniency and scope in South Africa's law of defamation to allow for

robust political debate or the criticism of politicians. Such scope already exists in our law of defamation.

5.2 This case deals with the specific institution of a legislative regime that applies during the limited campaigning period before the elections. This regime (set out in the Electoral Act and Code) creates protections for voters by proscribing the publication of false information about political parties or candidates in the run-up to elections. In essence, this regime aims to encourage robust political debate, while simultaneously preventing the spread of false claims couched as fact during the campaigning period.

6 The clear language of the Electoral Act and Code prohibits the publication of false information about political candidates or parties and does not afford the publisher of such false information the defences that are available to a defendant in a defamation claim. Such a reading, we submit, best gives effect to the Bill of Rights because neither the right to freedom of expression nor the right to political participation support the publication of false factual statements. Further, it would unduly strain the language of these provisions to read them as allowing the publication of such statements.

7 It is important to note that the DA has not challenged the constitutionality of this legislative regime (specifically section 89 of the Electoral Act and section 9 of the Electoral Code) which prohibits the publication of false information about candidates and political parties during the elections.

8 Thus, in what follows, the ANC will submit that:

8.1 The Electoral Act and Code contain a clear and unambiguous prohibition on the publication of false information or factual claims about political candidates or parties in the election period;

8.2 This reading of the Electoral Act and Code is consistent with the constitutional rights to freedom of expression and to political participation;

8.3 The Electoral Act and Code do not make provision for the defences available in the law of defamation to be used to justify the publication of false factual claims;

8.4 The statement in the DA's SMS is a factual claim;

8.5 The factual claim made by the DA is false;

8.6 Consequently, the DA's SMS breached the Electoral Act and Code. In the circumstances, the most appropriate relief for the breach is for the DA to send a second SMS to the same recipients, retracting its statement.

9 Before delving into the above-mentioned submissions, we will give a brief summary of the factual and litigation background of this matter.

FACTUAL AND LITIGATION BACKGROUND

10 On 20 March 2014, the Democratic Alliance sent an SMS to 1 593 682 potential voters in the Gauteng area,[1] stating that:

> *"the Nkandla report shows how Zuma stole your money to build his R246m home. VOTE DA on 7 MAY to beat corruption. Together for change"*

11 The mention of the "*Nkandla report*" [2] refers to the Public Protector's report on the upgrades to President Zuma's Nkandla residence. It is common cause that the Report did not make a finding that President Zuma stole the R246 million.[3] Further, it is common cause that the SMS was sent as part of the DA's election campaign and was designed to influence voters to vote for the DA.[4]

12 On 27 March 2014, the ANC approached the High Court and submitted that, by dispatching the SMS, the DA had disseminated false information regarding President Zuma and had thereby breached both the Electoral Act and the Electoral Code.

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[1] Answering Affidavit, p 7, para18.

[2] The full name of the report is *'Secure in Comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province*', A Report by the Public Protector, March 2014, Report no. 25 of 2013/2014.

[3] Answering Affidavit, p. 39, para 103.

[4] Answering Affidavit, p 7, para 18.

13 The High Court, per Hellens AJ, held that the message constituted fair comment and, as a consequence, was permitted.

14 The Electoral Court overturned the ruling of the High Court. It found that the message did not constitute comment or opinion, but was a statement of fact. Further, it held that the factual claim in the SMS was false – the Public Protector's report did not in fact find that President Zuma had stolen public money – and consequently violated the Electoral Act and Code.

15 The Electoral Court handed down its judgment on 6 May 2014, on the eve of the national and provincial elections, which were held on the following day. It ordered that the DA "forthwith" issue a retraction SMS to the recipients of the original message, in the following terms:

> "*The DA retracts the SMS dispatched to you which falsely stated that President Zuma stole R246 million to build his home. The SMS violated the Code and the Act.*"

16 The DA did not send the retraction message on either the 6th or 7th of May. It lodged its application for leave to appeal to this Court on 8 May 2014.

THE PUBLICATION OF FALSE STATEMENTS BY POLITICAL PARTIES IS PROHIBITED DURING THE ELECTION PERIOD

17 The publication of false statements during the election period is prohibited by the provisions of Electoral Act[5] and its accompanying Electoral Code[6].

18 Section 89(2) of the Electoral Act provides that:

No person may publish <u>any false information</u> with the intention of-

(a) disrupting or preventing an election;

(b) creating hostility or fear in order to influence the conduct or outcome of an election; or

(c) influencing the conduct or outcome of an election. (Underlining added)

19 It is common cause that the SMS was sent by the DA as part of its elections campaign and with the intention to influence recipients to vote DA.[7]

20 Section 9(1)(b) of the Electoral Code provides:

[5] Electoral Act 73 of 1998.

[6] Schedule 2 of the Electoral Act 73 of 1998.

[7] Answering Affidavit, p 7, para 18.

Prohibited Conduct –

(1) No registered party or candidate may-

(b) publish false or defamatory allegations in connection with an election in respect of-

(i) a party, its candidates, representatives or members; or

(ii) a candidate or that candidate's representatives. (Underlining added)

21 Section 94 of the Electoral Act provides that:

"*no person or registered party bound by the Code may contravene or fail to comply with a provision of that Code.*"

22 The provisions of the Electoral Act and Code apply to municipal, provincial and national elections in terms of Section 3 of the Electoral Act. Hence, the provisions are applicable for the limited period of the election - from the date upon which an election is proclaimed until the election is complete ('the elections").[8]

23 It is important to note that the prohibitions in these provisions apply only to the publication of false factual statements. They do not proscribe

[8] The 2014 National Election was proclaimed on 25 February 2014.

robust debate about the beliefs and values held by political parties or candidates. Further, the provisions do not prohibit candidates or parties from stating opinions that they have formed in relation to any given set of facts. This becomes clear when the above sections are read with Section 4 of the Code:

4. Public commitment

(1) Every registered party and every candidate must-

(a) publicly state that everyone has the right-

(i) to freely express their political beliefs and opinions;

(ii) to challenge and debate the political beliefs and opinions of others…

24 It will be argued below that the content of the DA message constitutes a false factual statement rather than the expression of a belief or opinion. Consequently, it is proscribed by both section 89 of the Electoral Act and section 9 of the Code.

FREEDOM OF EXPRESSION AND THE RIGHT TO POLITICAL PARTICIPATION

25 The prohibition on publishing false information (i.e. false factual claims) during the election period is entirely consistent with the Bill of Rights. By

encouraging the exchange of beliefs and opinions, but curtailing the spread of false information, these provisions promote the rights to freedom of expression and to political participation. Such measures promote campaigns that are characterised by meaningful and well-founded debate. This, in turn, is vital to the development of a healthy democracy.

(i) FREEDOM OF EXPRESSION DOES NOT SUPPORT THE PUBLICATION OF FALSE STATEMENTS

26 A plain and literal reading of sections 89 and 9 of the Electoral Act and Code, respectively, is constistent with the constitutional right to freedom of expression. In fact, such a reading best gives effect to the right by ensuring that debate is not muddied or derailed by false and misleading factual claims.

27 Section 16 of the Constitution guarantees everyone the right to freedom of expression. Freedom of expression is an essential value in an open and democratic society based on freedom and equality. The Constitutional Court has dealt extensively with the value, importance and meaning of freedom of expression.

27.1 The Constitutional Court has elaborated upon the principles underlying the right to freedom of expression in the following way:

"*Freedom of expression lies at the heart of democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters."*[9]

27.2 In *Khumalo and Others v Holomisa,*[10] the Constitutional Court stressed that the crucial role played by the freedom of expression in the development of a democratic culture. Its value was described as follows:

"In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture." **11**

27.3 The right to freedom of expression includes the freedom to receive information and ideas. In addition, the right also

[9] *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC) at para 7.

[10] 2002 (5) SA 401 (CC).

[11] Holomisa (supra) at paras 22 – 24.

encompasses *"the freedom to form one's own opinion about expression received, and in this way both promotes and protects the moral agency of individuals*."[12]

27.4 These aspects of the right lie at the heart of democracy. The Constitutional Court has held that "*access to information and the facilitation of learning and understanding are essential for meaningful involvement of ordinary citizens in public life*."[13]

28 Implicit in these statements is the assumption that the information is accurate and correct. The publication of inaccurate or false information -

28.1 does not "*facilitate the search for truth by individuals and society generally*";

28.2 cannot lead to greater understanding and involvement;

28.3 does not provide a proper basis for an individual to form a meaningful opinion and, as a consequence, does not respect the moral agency of individuals.

29 The Constitutional Court has explicitly adopted the position that there is no value to be gained from, or constitutional interest in, protecting the

[12] *Print Media South Africa and Another v Minister of Home Affairs and Another 2012 (6) SA 443 (CC*) at para 53.

[13] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) at para 28.

publication of a false statement. In *Khumalo v Holomisa,* the court held that:

> "*False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society*."[14]

30 The Court went on to hold that there is no powerful constitutional freedom of expression interest in a falsehood:

> "*To the extent, therefore, that the common law of defamation permits a plaintiff to recover damages for a defamatory statement without establishing the falsity of the defamatory statement, it does not directly protect a powerful constitutional freedom of expression interest, for there is no powerful interest in falsehood." (para 36)*

31 Similarly, the English courts, when considering section 10 (the right to freedom of expression) of the European Convention on Human Rights in the *Woolas*[15] case held that:

[14] *Khumalo v Holomisa* at para 35, quoting *Hill v Church of Scientology of Toronto* (1995) 126 DLR (4th) 129 (SCC) at para 106.

[15] Regina on the Application of *Phillip James Woolas and the Parliamentary Election Court and Robert Elwyn James Watkins and the Speaker of the House of Commons* [2010] EWHC 3169 (Admin) (Case No. CO/11578/2010).

"The right of freedom of expression does not extend to the publishing, before or during an election for the purpose of affecting the return of any candidate at an election, of a statement that is made dishonestly, that is to say when the publisher knows that statement to be false or does not believe it to be true. It matters not whether such a statement relates to the political position of a candidate or to the personal character or conduct of a candidate when the publisher or maker makes that statement dishonestly. The right to freedom of expression under Article 10 does not extend to a right to be dishonest and tell lies, but s. 106 is more limited in its scope as it refers to false statements made in relation to a candidate's personal character or conduct."

32 Falsehoods do not enrich debate. They muddy it. They impede rather than advance the development of a healthy democratic society. Hence, the publication of false information in the DA message cannot be justified by relying on the right to freedom of expression.

(ii) THE RIGHT TO MEANINGFUL POLITICAL PARTICIPATION AND FALSE STATEMENTS

33 We submit that the arguments against publishing false statements apply with even greater force in the period before elections. This is a time when voters are required to assess a number of candidates and political parties in a limited time, and to select those that will best represent their interests. Hence, the receipt of information about candidates is crucial to

the ability of voters to exercise an informed choice when they cast their vote. A well-informed electorate is an electorate that is capable of meaningful political participation, in fulfilment of their right under section 19 of the Constitution.

34 Given the importance of information to voters, it is critical that the information provided by political parties and candidates in the run-up to elections is accurate and true. This is particularly so, given that:

34.1 Voters rely in large part on the information that they receive from political parties during the election period.

34.2 Many voters do not have the resources or time to investigate and verify the information conveyed to them by candidates or parties. This is exacerbated by the fast pace of election campaigns, the limited time period over which campaigning takes place and by the fact that a vast amount of information is conveyed during elections.

35 The provisions of the Electoral Act and Code are necessary to prevent a situation where political parties campaign on the basis of blatant untruths. A party's constituency will trust it above its opposition, even if the opposition argues that the claims made about it are false. In many circumstances, the campaign messages of a party will be the primary or sole source of information that a voter will receive or trust. Hence, it is

necessary to regulate the conduct of campaigns to ensure that this dynamic is not abused.

36 The necessity of regulating the conduct of campaigns is most pertinent in relation to the more powerful political parties. Bigger parties have more sway than small parties during the campaign period because of their greater resources, larger constituencies (who already trust the party), and more established party infrastructure. Hence, the regulatory measures in the Electoral Act and Code are not a tool of the powerful, but a tool to avoid the abuse of power.

37 The importance of accurate reporting and truth in the election period has been emphasized by this Court, as well as foreign courts. In *Brümmer v Minister for Social Development and Others*[16] this Court stressed the importance of accurate reporting and its bearing on elections. The Court highlighted the fact that inaccurate or false reporting may have "*devastating*" consequences. It stated the following injunction, which we submit applies with equal force to a publisher or maker of a false statement during elections:

> *"The role of the media in a democratic society cannot be gainsaid. Its role includes informing the public about how our government is run, and this information may very well have a bearing on elections. The media therefore has a significant influence in a democratic state. This carries with it the*

[16] 2009 (6) SA 323 (CC).

responsibility to report accurately. The consequences of inaccurate reporting may be devastating. Access to information is crucial to accurate reporting and thus to imparting accurate information to the public. [17]"

38 A similar sentiment was been expressed in the English Courts in the case of *Regina on the Application of Phillip James Woolas and the Parliamentary Election Court and Robert Elwyn James Watkins and the Speaker of the House of Commons*.[18] The Court considered a provision similar to section 89 of the Act, which prohibited any person from making or publishing *"any false statement of fact in relation to the candidate's personal character or conduct"* in order to influence the outcome of the election. It held that:

"The primary object of this statute was the protection of the constituency against acts which would be fatal to the freedom of election. <u>There would be no true freedom of election, no freedom of opinion of the constituency if votes were given in consequence of the dissemination of a false statement</u> as to the personal character or conduct of a candidate.[19]" (emphasis added)

39 In addition, in *Robert James Watkins v Phillip James Woolas,* the court highlighted that the legislation in question aimed to ensure that the

[17] 2009 (6) SA 323 (CC) at para 63.

[18] [2010] EWHC 3169 (Admin) (Case No. CO/11578/2010).

[19] Ibid, at p 166. See also *Robert James Watkins v Phillip James Woolas* [2010] EWHC 2702 (QB) at para [44], (in the court of first instance in the *Woolas case above*)

electorate was able to express its opinion on the basis of facts and competing policy arguments rather than on false assertions about a candidate. It noted that false statements distort, or may distort, the electorate's choice and, hence, the democratic process:

> "*Thus section 106 is directed at protecting the right of the electorate to express its choice at an election, which right is protected by article 3 of the first protocol. Section 106 ensures that the electorate expresses its opinion in the choice of the legislature on the basis of facts and competing policy arguments rather than on false assertions as to the personal character or conduct of a candidate. That can properly be described as a pressing social need. Section 106 is also directed at protecting the reputation of candidates at an election which is protected by article 8 of the ECHR. In truth the two interests, that of the electorate and of other candidates, overlap or converge. False statements which relate to a candidate's personal character or conduct distort, or may distort, the electorate's choice and hence the democratic process*."

40 Given the danger and the prejudicial effect posed by inaccurate or false allegations on the electorate, the Legislature has decided to disallow political parties and candidates from publishing false information during elections.

THE BAR ON PUBLISHING FALSE STATEMENTS IS CLEAR AND UNAMBIGUOUS

41 On the plain language of the provisions of the Electoral Act and Code, the restrictions placed on the publication of false facts is clear and unambiguous. It does not provide for the defences available in the law of defamation:

41.1 Section 89(2)(c) of the Electoral Act states that no person may publish "*any false information*" with the intention of influencing the outcome of an election.

41.2 Section 9(1)(b)(ii) of the Electoral Code provides that no registered party or candidate "*may publish false or defamatory allegations*" with regard to another party or candidate.

41.3 Section 89(2) of the Electoral Act contains an outright prohibition of the publication of false information. It makes no mention of defences or exceptions to this rule. This is significant given that section 89(1) makes provision for a defence for the publication of false statements when the person believes on reasonable grounds that the statement is true.[20] The omission of such a

[20] Section 89(1) provides:

1) No person, when required in terms of this Act to make a statement, may make the statement-

(a) knowing that it is false; or

(b) without believing on reasonable grounds that the statement is true.

defence from section 89(2) indicates that the legislature intended that such defences would not apply to the publication of false factual statements.

41.4 Section 9(1)(b) of the Code prohibits the publication of either false allegations or defamatory allegations. False allegations are not treated as a subset of defamatory allegations. Rather, there are two separate categories of prohibited statements – defamatory statements and false statements. The defences of 'fair comment', 'qualified privilege' and 'reasonable publication' (publication of statements that were not true but were reasonably believed to be true at the time of publishing) remove liability for defamation. However, they are not defences to the publication of false information.

42 Hence, both the Electoral Act and Code envisage a clear and unambiguous bar on the publication of false factual statements about political parties or candidates during elections.

43 The DA contends that such an interpretation of the provision is not consistent with the Constitution. It argues that the provisions should be read to allow for the publication of false factual statements in certain circumstances, in order to bring it within constitutional bounds. However, we submit that the clear and literal interpretation of the provisions, as

they stand, promotes the spirit, purport and objects of the Bill of Rights and should not be departed from.[21] The reasons for this are as follows:

44 First, as has been argued above, the plain language of section 89 of the Electoral Act and section 9 of the Code are wholly consistent with the right to freedom of expression and the right to political participation. In fact, the sections ensure that political debate is not derailed and that voters are able to make informed decisions when voting.

44.1 The DA maintains that this interpretation would stifle political debate and consequently violates section 16 of the Bill of Rights. It argues that "*greater latitude is usually allowed in respect of political discussion*"; that political matters are "*usually discussed in forthright terms";* and that "*right-thinking people are not likely to be greatly influenced in their esteem of a politician by derogatory statements made about him"*. The DA also relies on the following dictum quoted in *Pienaar and Another v Argus Printing and*

[21] In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*, 2001 (1) SA 545 (CC)[21] the Constitutional Court maintained that when interpreting legislation a court must promote the spirit, purport and objects of the Bill of Rights and that all statutes must be interpreted through the prism of the Bill of Rights. Thus, it held that:

> *"Judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section."* (at para 23)

In *Minister of Safety and Security v Sekhoto and Another*, 2011 (5) SA 367 (SCA) the SCA elaborated upon the rule in *Hyundai*. It noted that the process described above is an interpretive one. Where a legislative provision is reasonably capable of a meaning within constitutional bounds, it should be preserved. Only if this is not possible should one resort to a challenge of constitutional invalidity.

Publishing Co Ltd [22] to found the claim that there should be few limits placed on statements made in the context of campaigning:

> *'In cases of comment on a matter of public interest the limits of comment are very wide indeed. This is especially so in the case of public men. Those who fill public positions must not be too thin-skinned in reference to comments made upon them.'*

44.2 The DA's argument in this respect is critically flawed:

44.2.1 It conflates the notion of a statement of fact with a statement of opinion or comment.

44.2.2 There is great value to be gained from robust political debate involving different opinions, beliefs and ideas. Freedom of expression protects and facilitates the exchange of ideas with the aim of achieving greater understanding and uncovering truth. Debate allows for missteps in reasoning to be highlighted and corrected. In the words of Cameron J in *The Citizen v McBride*[23], it is important that "*divergent views are aired in public and subjected to scrutiny and debate. Through open contest, these views may be challenged in argument."*[24]

[22] 1956 (4) SA 310 (T) at 318.

[23] *The Citizen 1978 (Pty) Ltd and Others v McBride 2011 (4) SA 191 (CC)*.

[24] *The Citizen v McBride,* at para 82.

44.2.3 By contrast, the publication of false statements of fact muddies and hampers debate. It provides a false foundation from which ideas are built and, as a consequence, acts as an impediment to the achievement of truth and understanding.

44.2.4 By allowing for the free exchange of opinions and beliefs, but restricting the spread of false factual statements, the Electoral Act and Code promote the rights to freedom of expression and political participation during the period of elections.

44.2.5 Politicians and political parties have immense scope and freedom to express their opinions, to debate and to criticise. The only restriction that the Electoral Act places upon them is the requirement that, during the elections, they make it clear when they are expressing an opinion rather than making a factual statement. Doing so empowers the voters to critically assess the arguments that they hear, which in turn enriches the debate and the democratic process.

44.2.6 Outside of the election period (when there is not the same combination of time constraints, fast-paced campaigning, distrust of opposing parties and an immense volume of information being conveyed), the usual regime of defamation law, and its broad defences,

applies. This includes the *Bogoshi* [25] defence of reasonable publication and, in general, greater leniency in the context of political discussion and criticisms.

45 Second, the language of the Electoral Act and Code is unambiguous and there is no basis to depart from it. As this Court held in *Botha v Rich N.O.*, "*the general rule of statutory construction is that courts will give unambiguous provisions of a statute their plain meaning unless that meaning creates a result that is contrary to the purpose of the statute itself or when it leads to an absurd result.*"[26]

45.1 The Electoral Act proscribes the publication of "*any false information"* and does not provide for the defences available in the law of defamation. It is evident from the sections themselves that the purpose of the provisions is to create a separate regime that applies during elections. Its rules are clear and simple. Further, the context of elections makes it necessary that such rules are put in place:

45.1.1 Elections take place over a limited time period and in pressured circumstances. Thus, there is the need for

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[25] *National Media Ltd. and Others v Bogoshi* 1998 (4) SA 1196 (SCA).

[26] *Botha and Another v Rich N.O. and Others* 2014 (4) SA 124 (CC) at para 29. Similarly, in *Venter v R* 1907 TS 910, the Court stated that only in exceptional circumstances can a court use the purposive approach to depart from the clear language of a statutory provision. A court may only depart from the clear language of a statute where that would otherwise lead:

> "*to absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account*".

See also *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at para 232.

clear and unambiguous rules to guide the conduct of parties and candidates.

45.1.2 The language of sections 89 and 9 as they stand is simple and straightforward. It limits the potential for confusion or misreading of the rules.

45.2 Hence, far from resulting in a meaning that is absurd or contrary to the Legislature's intention, the provisions give effect to the right to meaningful political participation. It introduces measures to ensure that voters are able to make informed, well-founded decisions and to vote on the basis of competing policies rather than misinformation. This regime applies above and beyond the existing regime of the law of defamation. It seeks to ensure that the harm that is caused during an election period is cured immediately rather than through a defamation action that will inevitably be concluded long after the elections have taken place.

46 Third, the Electoral Act makes provision for cases where a false factual statement has been made due to a genuine and reasonable mistake. It does so by giving the court a wide discretion in relation to remedy.

46.1 Section 96(2) of the Electoral Act gives courts the power to impose an "*appropriate penalty*" on any person or party for a contravention of the Act. This may amount to a mere warning or any other remedy that the court deems appropriate. This gives the regime the flexibility that is required to account for reasonable

errors or mistakes, whilst maintaining the general prohibition on the publication of false statements.

47 Hence, we submit that a reading of the Electoral Act and Code based on its clear and unambiguous language is entirely consistent with the Constitution, particularly the rights to freedom of expression and political participation. The prohibition on the publication of false information during elections is imposed in order to promote meaningful debate and to strengthen the democratic system. Given this, there is no basis to depart from the plain language of the Electoral Act and Code.

48 The DA argues that countries such as England, Australia, New Zealand, Canada and the United States of America provide broad defences in their law of defamation in the context of political debate and discussion. In certain circumstances, it argues, various countries allow for the publication of false factual claims in the context of political debates and even during election time. However, this does not provide a basis for departing from the plain and unambiguous meaning of the Electoral Act and Code. The Act and Code are consistent with the Constitution. Further, the regime embodies a choice about how best to incorporate the felxibility required to fairly balance competing concerns. The fact that other systems have found this balance in a different way is not a ground to justify departure from the scheme devised in the Act.[27]

[27] Here, Chaskalson P's reminder regarding the use of foreign law in *S v Makwanyane* 1995 (6) BCLR 665 (CC) at para 39 is apt:

> *"[W]e must bear in mind that we are required to construe the South African Constitution, and not . . . the constitution of some foreign country, and that this has to*

49 Having analysed the broader legal issues, we now turn to facts of this case.

THE DA MESSAGE CONTAINS A FACTUAL CLAIM

50 The High Court held in favour of the DA on the basis that the text of the message constitutes 'fair comment' and is consequently permitted under the Electoral Act and is protected by the right to freedom of expression. The Electoral Court overturned this decision, holding that the DA's statement constituted a statement of fact and that the information therein was false. Consequently, it violated the Electoral Act and Code.

51 We submit that the Electoral Court was correct in its finding. The statement in the DA message constitutes a false factual claim, rather than a comment or opinion. As a result, the statement falls foul of the Electoral Act, Electoral Code and is not protected by the provisions of the Constitution.

52 The courts have dealt with the distinction between a fact and a comment in the context of the law of defamation. These insights are useful and relevant in the present case. In the law of defamation, the test to determine whether a statement is a comment or a fact is whether the

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be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from ... foreign case law, but we are in no way bound to follow it."

statement is recognisable to the ordinary reasonable person as comment and not as a statement of fact. This is an objective test.[28]

53 In addition, the general rule for the fair comment defence in defamation law is that the facts upon which a comment is based must be clearly stated or indicated in the article or statement.[29] This allows the reader to distinguish between that which is fact and that which is comment. As the Court put it in *Crawford v Albu,*

> "*those to whom the criticism is addressed must be able to see where fact ends and comment begins, so that they may be in a position to estimate for themselves the value of the criticism. If the two are so entangled that inference is not clearly distinguishable from fact, then those to whom the statement is published will regard it as founded upon unrevealed information in the possession of the publisher; and it will stand in the same position as any ordinary allegation of fact*"[30]

54 This is not required where the facts "*are so notorious that they may be incorporated by reference.*"[31] Hence, the facts need not be expressly

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[28] *Crawford v Albu* 1917 AD 102 114.

[29] *The Citizen v McBride* at para 88 (Cameron J).

[30] *Crawford v Albu* at 114-115, cited in *Citizen v Mcbride* at paras 80 and 155. See also *Roos v Stent and Pretoria Printing Works, Ltd.* 1909 TS 998:

> *"If a writer chooses to publish an expression of opinion which has no relation, by way of criticism, to any fact before the reader, then such an expression of opinion depends upon nothing but the writer's own authority, and stands in the same position as an allegation of fact. It cannot be covered by a plea of fair comment."*

[31] *Citizen v McBride*, at para 89 (Cameron J).

stated where the facts are "*in the common knowledge of the person speaking, and those to whom the words are addressed*".[32]

55 In this case, the test is whether the DA message would be construed by the ordinary reasonable person as (i) a factual statement that the Public Protector's report found that President Zuma is guilty of theft or corruption because he stole public money to pay for the upgrades to his home, or (ii) a comment that, based on the findings of the report, we can conclude that President Zuma stole public money for the upgrades to his home.

56 We submit that the statement is clearly a factual claim, for the following reasons:

56.1 The message is worded as fact – "*the Nkandla report shows how Zuma stole your money to build his R246m home"*. It implies that the Public Protector's report concluded that President Zuma was guilty of theft or some other corruption-related crime. The DA contends that the use of the phrase "*shows how"* indicates that the statement is an opinion rather than a fact. This is plainly incorrect. If an individual were to read the message without any knowledge of the report, he or she would understand it to be a factual statement about the findings of the report.

[32] *Citizen v McBride,* at para 89 (Cameron J), quoting *Crawford v Albu* 1917 AD 102 at 126, per Solomon JA, and at 137, per De Villiers AJA.

56.2 A reasonable person would not construe the DA message as an opinion. The message does not give any explanation or elaboration for the statement. If it was a comment or opinion, one would expect the facts upon which it was based to be included or clearly referenced. The absence of a clear reference to the facts upon which it is based suggests that the message is itself a statement of fact.

56.3 It cannot be said that the findings of the Nkandla report are so notorious and well-known to the relevant audience that they are incorporated by reference and that the DA message would be understood self-evidently to be an opinion:

56.3.1 The vast majority of South Africans will not have read the 74 page Executive Summary of the Public Protector's report, let alone the full 447 page report. Most people would have relied on summaries and statements from the media and other sources to inform them of the report's findings. The DA message, worded as fact, would have constituted one such source.

56.3.2 It cannot be assumed that the recipients of the SMS were aware of the full findings of the Public Protector's report simply because the issue had been covered in the media. In the *McBride* case, the Constitutional Court considered whether the fact that Mr McBride had been convicted of

murder and subsequently received amnesty from the Truth and Reconciliation Commission was so notorious that it could be assumed to be incorporated by reference. The Court reached the conclusion that these facts were generally known to the readers of the impugned articles. In doing so, Cameron J (for the majority) took the following into account:

(a) "*Newspaper readers tend to show interest in current affairs, so it is reasonable to assume that the readership of the Citizen was likely to have known that Mr McBride received amnesty for his conviction for murder.*"[33]

(b) The Citizen newspaper had reminded readers of the relevant facts in the first of the series of articles in which the impugned articles appeared, and again in a report on the front page the next day. Hence, newspaper readers interested in the newspaper's comment and opinion section (in which the impugned articles were situated) would likely be familiar with the facts already.[34]

[33] *Citizen v McBride*, at para 92 (Cameron J).

[34] *Citizen v McBride*, at para 93 (Cameron J).

(c) Finally, it would be wrong to assume that newspaper readers read articles in isolation. When assessing the comments in an editorial piece or column, the reader will likely bring to mind the recent news coverage of the events in issue.[35]

56.3.3 When applied to the case at hand, the factors considered in the *McBride* case lead to the conclusion that the factual findings of the Public Protector's report cannot be assumed to be so well-known to the target audience that it was unnecessary for the DA to explicitly include or reference them. This is so because:

(a) The recipients of the SMS are not newspaper readers who can be presumed to follow current affairs. They are simply individuals who have been placed on the DA's SMS lists.

(b) The DA makes no claim that the recipients of the SMS subscribed to the list. It simply states that it sent the message to "*1 593 682 cellphone numbers of potential voters*".[36] Hence, there is no indication that the recipients sought out the information or are interested in political issues or current affairs.

[35] *Citizen v McBride*, at para 94 (Cameron J).

[36] Answering Affidavit, p 7, para 18.

(c) The SMS was sent in isolation and was not part of a series of messages that explained the findings of the report.

57 Consequently, it cannot be assumed that the SMS recipients were aware of the findings of the Public Protector's report and would have understood the DA's message to be an opinion that flowed from those findings. Rather, the reasonable reader would have read the DA's message as a statement of fact.

58 The DA relies on the point that the SMS format is limited to 160 characters. As a result, the DA argues, it was not able to refer to the facts upon which its opinion was based. This point cannot succeed. The limited format does not affect the status of the message as fact rather than opinion. Further, it does not excuse the publication of a false factual claim by the DA. The DA could have worded the message more carefully. Alternatively, it could have sent out a series of SMS messages giving detail about the Nkandla report's findings. Either route could have been used to clearly indicate that the message contained an opinion.

59 Finally, if the DA wishes to rely on the argument that the statement was an opinion rather than a factual statement, and constitutes fair comment, it bears the burden of proving this.[37]

[37] *Le Roux and Others v Dey* 2011 (3) SA 274 (CC) at para 85.

THE STATEMENT IN THE DA MESSAGE IS FALSE

60 The DA message states:

"the Nkandla report shows how Zuma stole your money to build his R246m home. VOTE DA on 7 MAY to beat corruption. Together for change"

61 As argued above, this statement is a factual claim. The plain meaning of the word 'stole' is that President Zuma is guilty of theft, corruption or some other crime (whether convicted by a court or not).

62 The DA contests this. In its submissions to ths Court, it refers to the Constitutional Court's approach to the term 'murderer' in the *McBride* case. In *McBride*, the Court held that the term 'murderer' should not be narrowly construed to apply only to those convicted of murder *in a court of law*. Rather, according to its ordinary meaning, the word applies to those who are guilty of the wrongful and intentional killing of another. Notably, the ordinary meaning enunciated by the court is still relatively narrow. The term does not extend to people who refuse to give money to charity, or to people who eat meat, or to people who buy imported goods from warring countries.

63 Similarly, the ordinary meaning of the word 'stole' is that the perpetrator committed an act of theft or 'taking without the consent of another', regardless of whether they have been convicted in a court of law. The

term does not, in its ordinary meaning, extend as far as the DA claims. The DA claims that “President Zuma’s property was increased in value at the expense of the taxpayer” and that this constituted “theft on the fiscus”. This intepretation strains the meaning of the word “stole” beyond its primary meaning to the ordinary man.

64 Nowhere in the Public Protector’s report is there any suggestion that the President stole public money, or was guilty of theft, ‘taking without the consent of another’ or any other corruption-related crime. The Public Protector’s report went no further than to say that President Zuma had breached his ethical obligations in terms of the Executive Ethics Code.

64.1 In this regard, the report found that the President should have taken more steps to interrogate the use of public funds in the Nkandla Project. The steps listed by the report include: asking questions regarding the scale, cost and affordability of the Nkandla Project; the President benchmarking with some of his colleagues; asking whose idea some of the measures were, particularly given Mr Makhanya’s non-security background and the potential of misguided belief that his main role was to please the President; instituting an inquiry into the expenditure on Nkandla after the issue was raised in the media in 2009.[38]

[38] Paragraph 4, p 65 of the Executive Summary.

64.2 Hence, the report concluded that the President tacitly accepted the implementation of the measures at his residence and improperly benefitted as a result.[39]

65 On no reasonable interpretation do these findings mean that the President *stole* public money, is guilty of theft or is guilty of any other corruption-related crime. It is common cause between the parties that the President was not found to be guilty of the crime of theft.[40]

66 The High Court explicitly agreed on this point, holding that: "*It is certainly not so that the report of the Public Protector proves the commission by President Zuma of the crime of theft*."[41]

67 In its arguments before this Court, the DA relies on the statement in the report that the Nkandla upgrades involved a "*license to loot situation*" as a basis for the comment that President Zuma "stole" public money. However, this statement is made in the context of a criticism regarding poor systems of oversight for public spending. The full "licence to loot" comment reads as follows:

> *It is difficult not to reach the conclusion that a license to loot situation was created by government due to a lack of demand management by the organs of state involved as provided for in*

[39] p 63 of the Executive Summary.

[40] Answering Affidavit, p 39, para 103.

[41] At para 72.

the Cabinet Memorandum, the National Key Points Act, relevant health care and transport regulations as well as National Treasury Guides and directives on procurement. Treasury prescripts clearly require government not to go to the market with a blank cheque licensing service providers to simply fill the blanks relating to scope of work and amount to be paid. In the words of the Project Manager, Mr Rindel: "It was like building a puzzle without a picture" and the Project Team "wrote the rules as they went along". [42]

68 It is clear that the "*license to loot*" comment relates to the inadequacies of the current arrangements and the risk of service providers driving up costs as a result. It does not refer to the actions of the President or impute criminal or other corrupt conduct upon him.

69 In fact, rather than attributing the excessive costs of the Nkandla project to President Zuma, the report focuses on systemic failures and the "*need for a proper policy regime regulating security measures at the Private residences of the President, Deputy President, Minister, and Deputy of Defence*." [43] The report states that "*the anomalies in the Nkandla Project point to the existence of systemic policy gaps and*

[42] p 39-40 of the Report.

[43] p 67 of the Report.

administrative deficiencies in the regulatory framework used as authority for implementing security measures at the private residences..."[44]

70 There is a significant difference between a finding of maladministration and a finding of corruption. The Public Protector's report, which is carefully worded and precise, found the former but not the latter. The failures complained of by the DA – the flawed appointment of the project architect, the spiralling costs of the project, poor decisions as to the placement of the police quarters and clinic – are all accounted for by systemic failures, maladministration and flaws in the regulatory framework for such projects. The report did not find that President Zuma stole public money or was guilty of corruption. In light of the above, we submit that the factual claim made in the DA SMS is clearly false and inaccurate.

FAIR COMMENT

71 It has been argued above that the text of the DA message constitutes a statement of fact rather than an opinion or a comment. However, even if the statement in the message is a comment (which it is not), it does not meet the requirements for the defence of fair comment, and is consequentially defamatory.

72 The elements of the defence of fair comment are as follows:

[44] p 66 of the Report.

(a) the defamatory statement must amount to comment or opinion as opposed to a statement of fact;

(b) the comment must be fair;

(c) the facts on which the comment is based must be true and must be expressly stated or clearly indicated in the document or speech containing the defamatory statement;

(d) the comment must relate to a matter of public interest.[45]

73 As has been argued above, the DA message fails to meet requirement (c) because the facts upon which the statement is based are not expressly stated or indicated in the message. Nor are they so notorious as to be incorporated by reference – there is no evidence that the SMS recipients sought out the information and subscribed to the SMS list; the recipients cannot be assumed to follow current affairs or have read widely; and the SMS was not sent as one of a series of messages that contained the relevant information.

74 Hence, the SMS does not constitute fair comment. The DA bears the full onus of proving otherwise.[46] It has failed to do so.

[45] *The Citizen v McBride,* at para 49.

[46] *Le Roux v Dey* (supra) at para 85.

75 As a result, even if this Court finds that the statement in the SMS constitutes an opinion rather than a factual claim, it still falls foul of Section 9 of the Code, which prohibits the publication of defamatory statements during an election.

REMEDY – RETRACTION OF THE SMS

76 The Electoral Court ordered that the DA retract its message by sending a second SMS, stating that:

> "*The DA retracts the SMS dispatched to you which falsely stated that President Zuma stole R246 million to build his home. The SMS violated the Code and the Act."*

77 Section 96(2) of the Electoral Act empowers the Electoral Court, High Court and Magistrate's Court to impose penalties for a breach of the Act. It provides that the Court may "*in the interest of a free and fair election impose any appropriate penalty or sanction".*

78 The relief sought by the ANC and granted by the Electoral Court falls within the bounds of this provision. The order that the DA must send a retraction SMS is appropriate for the following reasons:

78.1 It effectively and conclusively corrects the publication of the false information;

78.2 It ensures that the recipients of the original SMS receive the correction. The publication of a correction by the ANC in

newspapers and other media sources is by no means guaranteed to reach the original recipients, who may not follow the news;

78.3 A correction issued by the DA will be more credible to the recipients than one issued by the ANC, particularly given that the original SMS would have stoked suspicion towards the ANC.

79 Although section 96 does not explicitly provide for a retraction or apology, the sanctions set out in the section do not form a closed list. Hence, it is both appropriate and competent for the Court to order the relief sought.

80 The DA opposes this relief by contending that the ANC suffered no prejudice as a result of the SMS. However, this is clearly not the case. In the run-up to the elections, Gauteng was a hotly contested province. The SMS was sent to over 1.5 million potential voters and stated that the Public Protector – a well-respected and trusted figure – had found that the ANC president was guilty of the crime of theft or corruption. It gave no further explanation. It cannot be contended that the ANC suffered no prejudice as a result of the message.

81 The DA also argues that the relief granted by the Electoral Court is inappropriate because a court-ordered apology by one party to another would create the impression that "*the message of one political party carries the authority and imprimatur of a Court*." This misconstrues the nature of the relief. The relief sought is better thought of as a "retraction" than an "apology". Its aim is not to restore the injured dignity of an individual, but to correct the publication of false information. An order

calling for a retraction does not indicate that the Court favours a particular party or its message over another. It simply indicates that the court found the factual statement in the message to be inaccurate, and requires that it be corrected.

82 The DA's argument, if taken to its logical conclusion, would mean that court would never be permitted to penalise a political party for any contravention of the Electoral Act or Code, as this would be an indication that the court disapproves of the party or of its message.

83 Even if this Court finds that the relief granted by the Electoral Court is no longer apt, in view of the fact that elections have passed, this Court is empowered to impose any appropriate remedy in terms of section 96 of the Electoral Act or any order that is just and equitable in terms of section 172 of the Constitution.

CONCLUSION

84 We submit that the DA's SMS contained a false factual claim about President Zuma and was dispatched with the intention of influencing the conduct of voters. Consequently, it was distributed in breach of both the section 89 of the Electoral Act and section 9 of the Code. It is manifestly unlawful and is not protected by the rights to freedom of expression or political participation in the Constitution. Rather, such conduct is inimical to the development of a healthy democracy based on informed debate.

85 In the circumstances, we submit that the appeal against the Electoral Court's judgment should be dismissed. The Court should make the following order:

85.1 *"(a) It is declared that the DA SMS amounts to a publication of false information in contravention of s 89(2)(c) of the Electoral Act and Item 9(1)(b)(ii) of Schedule 2 of the Act, the Code read with s 94 of the Act;*

(b) The DA is directed to forthwith retract the SMS by dispatching at its own cost, a text message via the mobile phone bulk short message service to all earlier recipients of the SMS stating that:

'The DA retracts the SMS dispatched to you which falsely stated that President Zuma stole R246m to build his home. The SMS violated the Code and the Act.'"

85.2 Alternatively, this Court fashion an appropriate remedy in terms of section 96(2) of the Electoral Act.

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