IN THE HIGH COURT OF SOUTH AFRICA

SOUTH GAUTENG DIVISION, JOHANNESBURG)

CASE NO.: 11535/2014

DATE: 4 APRIL 2014

In the matter between:

AFRICAN NATIONAL CONGRESS Applicant

And

DEMOCRATIC ALLIANCE First Respondent

INDEPENDENT ELECTORAL COMMISSION OF SOUTH AFRICA Second Respondent

JUDGEMENT

INTRODUCTION:

1. On the 27th of March 2014, the African National Congress (hereinafter referred to as the "ANC" or the Applicant) brought an application against the Democratic Alliance (herein after referred to as the "DA" or the First Respondent) and the Independent Electoral Commission of South Africa (herein after referred to as the "IEC").

2. The ANC, through its Secretary General, deposed to an affidavit on behalf of the ANC in his capacity as Secretary General. The ANC describes itself as a

liberation movement, founded and operating in accordance with its constitution and having the power to sue and be sued in its own name. It is a registered political party in terms of Section 26 of the Electoral Act, Act no.73 of 1998 ("The Electoral Act"). The First Respondent is the Democratic Alliance which is a registered political party in terms of The Electoral Act.

3. The chairperson of the IEC is also cited although no relief is sought against the IEC. The IEC is cited in this matter solely by virtue of the interest that the IEC has, or may have, in the outcome of this matter. The IEC has not participated in the proceedings.

4. The ANC seeks an order against the DA;

4.1 declaring that the dissemination of a text message via bulk mobile phone short message service ("the SMS"), by or on behalf of the First Respondent which reads: "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", amounts to a publication of false information in contravention of Section 89(2)(c) of the Electoral Act and;

4.2 an order declaring the dissemination of the SMS, by or on behalf of the First Respondent which reads; "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" amounts to a publication of a false allegation in contravention of item 9(1)b(ii) of Schedule 2 to the Act, the Electoral Code "The Code" read with Section 94 of the Electoral Act and;

4.3 an order interdicting and restraining the DA from further disseminating or distributing the SMS and;

4.4 an order directing the DA to retract forthwith the SMS by despatching, at its own cost, a new text message via the mobile phone bulk short message service to all earlier recipients of the SMS stating that "The Democratic Alliance "DA" unreservedly retracts the SMS message despatched to you earlier which falsely stated that President Zuma stole R246m to build his home. The said SMS constitutes a violation of the Electoral Code and the Act. The DA apologies to the African National Congress "ANC" for any inconvenience caused and recommits itself to the letter and spirit of the Electoral Act and The Code" or containing such formulation as the Court may deem fit in the circumstances";

4.5 costs of two counsel is sought, as is an order effectively declaring this matter to be an urgent application.

JURISDICTION

5. The Applicant, the ANC, claims that this Court has jurisdiction in terms of Section 20(4)(b) of the Electoral Commission Act read with the Electoral Court's determination, published in the Government Gazette no.19572 under GN 2915 of 4 December 1998, proclaiming the Rules regulating electoral disputes and complaints about infringements of the Electoral Code of Conduct in Section 2 of the Electoral Act and determination of Courts having jurisdiction.

6. Section 20(4) of the Electoral Commission Act provides;

6.1 (4) the Electoral Court shall;

(a) make rules in terms of which electoral disputes and complaints about infringements of the Electoral Code of Conduct as defined in Section 1 of the Electoral Act 1993(Act no 202 of 1993), and appeals against decisions thereon may be brought before courts of law and;

(b) determine which courts of law shall have jurisdiction to hear particular disputes and complaints about infringement and appeals against decisions arising from such hearings.

7. Rules regulating electoral disputes and complaints about infringements of the Electoral Code of Conduct provided for in Schedule 2 of the Electoral Act and

the determination of Courts having jurisdiction were promulgated under Government Notice 2915 of 1998 in Government Gazette no. 19572.

8. Those rules provided under the heading "Determination of Courts and Jurisdiction" the following;

> 2(1) The Magistrate's Court and the High Court in whose area of jurisdiction;
>
> (a) any electoral dispute;
>
> (b) any complaint about an infringement of the Code has arisen, have subject to sub-rules (2) and (3), jurisdiction to hear such dispute or complaint.
>
> (2) The following courts have jurisdiction to impose the following sanctions as referred to in Section 96 of the Act;
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> (a) the Court, (ie The Electoral Court') all the sanctions in subsection 2;
>
> (b) the High Court, all the sanctions in subsection (2) except (2)(h) and (i).

9. Section 96(2)(h) and (i) relate to an order disqualifying the candidature of that person or of any candidate of that party [Section 2(h)] and an order cancelling the

registration of that party [Section 96(2)(i)].

10. Thus this Court has jurisdiction "in the interest of a free and fair election" to impose any appropriate penalty or sanction upon a person or registered party that has contravened a provision of part 1 of chapter 7 of the Electoral Act.

11. The application is brought by the ANC in terms of Rule 4 of The Electoral Court Rules, read together with the Rules of the High Court where appropriate. There is a prayer that the matter be heard as a matter of urgency as provided by Rule 4(10) of the Rules of the Electoral Court which provides very similar provisions to the provisions of Rule 6(12) of the Uniform Rules of the High Court. Reference is also made by the Applicants to the provisions of Rule 4(9) which allows for the extension or curtailment of the normal periods provided for in the Rules of the Electoral Court.

THE POWERS OF THIS COURT

12. During the argument of this matter I raised the question whether this Court in hearing this matter was functioning as: -

12.1 An Electoral Court, with those powers bestowed upon it in terms of Section 96(2)(a) to (g) of the Electoral Act 73 of 1998 ("the Electoral Act");

12.2 a High Court, with its ordinary inherent powers and those in terms of the Superior Courts Act 2013; or

12.3 both an Electoral Court and a High Court, with the powers of both those Courts.

13 This issue was addressed by both the Applicant and the First Respondent in Supplementary Heads of Argument. Having considered those arguments, I am of the view that that which I set out below is the correct analysis of the powers of this Court and of the function that it performs. The following appears from a reading of The Electoral Act, The Electoral Commissions Act 51 of 1996 ("The EC Act"), and the Rules under the EC Act[1]:

13.1 The Electoral Court is the final arbiter of disputes regarding alleged violations of Section 89 of the Electoral Act, and the Electoral Code of Conduct ("the Code") and the Electoral Code.[2]

13.2 However, in terms of the Rules, the Electoral Court may only be approached as a court of first instance when a violation of the Electoral Act and/or the Code might justify a sanction in terms of sections 96(2)(h) and (i) of the Electoral Act - being:

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[1] *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)

[2] A violation of the Code is also a violation of the Act - section 94 of the Electoral Act.

"(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. "

13.3 In other matters (i.e. which only justify a lesser sanction than those in sections 96(2)(h) and (i)), the High Court or Magistrates Court in the area of jurisdiction in which the alleged violation arose has jurisdiction to hear any resulting case.

13.4 When a matter of this kind comes before a High Court as a court of first instance, it has the power to impose all sanctions in terms of section 96(2) of the Electoral Act, save for those in sections 96(2)(h) and (i).

13.5 Furthermore, in such cases an appeal lies to the Electoral Court (with the leave of the High Court, or failing that, the leave of the chairperson of the Electoral Court).

14 Based on this scheme, a proper understanding of the powers of this Court is as follows:

14.1 This Court hears matters such as the one at hand as the High Court, and not as an Electoral Court. In other words, the jurisdiction of the High Court is extended (pursuant to section 96(2) of the Electoral Act, read

with section 20(4)(b) of the EC Act and the Rules) to allow it to hear such cases. The High Court does not, however, become an Electoral Court for these purposes.

14.2 An appeal lies from the High Court to the Electoral Court (subject to the leave of the High Court or the Electoral Court). In hearing such an appeal, the Electoral Court would be constrained to the powers it has been given by statute - which for current purposes would be those in terms of Section 96(2) of the Electoral Act. Although the Electoral Court has the same status as the High Court, it is different to the High Court and does not have the inherent and statutory powers of the High Court. (An Electoral Court is thus akin to the Labour Court, or the Equality Court.)

14.3 When hearing cases such as the current one, the High Court cannot have greater powers than the Electoral Court. The alternative would be absurd, in that a High Court would have wide powers to deal with a matter, and on appeal an Electoral Court's powers would be narrower.

14.4 Thus, even though the matter comes before this Court as a High Court, the only powers that it has are those in terms of Section 96(2)(a) to (g) of the Electoral Act. This Court cannot in such matters exercise its inherent powers as a High Court.

14.5 The sanctions in Section 96(2)(a) to (g) of the Act are not a closed list. The introduction to this section states that this Court may impose *"any*

appropriate penalty or sanction", before listing possible sanctions.

14.6 In considering what penalty or sanction is "*appropriate",* this Court has a duty to ensure that any violation of the Electoral Act and Code is cured with effective relief.[3]

14.7 Appropriate and effective relief may include a declaration of rights, or an interdictory power. While this kind of relief is not traditionally conceived of as a "*sanction*", it would serve the purpose of vindicating the rights of the party which has suffered a wrong, and entail serious consequences for the party accused of wrongdoing.

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[3]*Gory v Kolver No And Others (Starke and Others Intervening) 2007 (4) SA 97 (CC) at para 40, the Constitutional Court noted that it had -"consistently emphasised that, where a litigant establishes] that an infringement of an entrenched right has occurred, he or she should as far as possible be given effective relief so that the right in question is properly vindicated."*
in *Fose v Minister* of Safety and Security 1997 (3) SA 786 (CC) at para 69, the Court stated the following:
"In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced.
Particularly in a country where so few have the means to enforce 4 4 4 their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."
See also MEC, Dept of Welfare, Eastern Cape v Kate 2006 (4) SA 478 (SCA) at para 23ff.

15 I have already set out the nature of the relief sought by the ANC. The heart of the complaint is that the DA is said to have sent out SMS messages advising the recipients of those messages that the Nkandla report shows how 'Zuma' stole your money to build his R246m home. The ANC seeks an order declaring that the publication of that message to the recipients of that message amounts to a publication of false information in contravention of Section 89(2)(c) of the Act.

16 Section 89(2)(c) of the Act, as I have already indicated, provides that no person may publish any false information with the intention of influencing the conduct or outcome of an election.

17 The ANC also complains that the dissemination of the SMS to its recipients amounts to a publication of a false allegation in contravention of item 9(1)(b)(ii) of Schedule 2 to the Act being the Electoral Code, read with Section 94 of the Act.

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

19 Item 9(1)(b)(ii) of Schedule 2 to the Act, the Electoral Code, in very similar terms to Section 89(2)(c) of the Electoral Act provides that no registered party or candidate may publish false or defamatory allegations in connection with an election in respect of a candidate, or that candidate's representatives.

20 An order is sought interdicting and restraining the DA from further disseminating or distributing the SMS.

21 The ANC also seeks an order directing the DA to retract forthwith the SMS by despatching, at its own cost, a new text message via the mobile phone bulk short message service to all previous recipients of the SMS stating that "the Democratic Alliance (DA) unreservedly retracts the SMS message despatched to you earlier which falsely stated that President Zuma stole R246m to build his home. The said SMS constitutes a violation of the Electoral Code and the Act. The DA apologies to the African National Congress (ANC) for any inconvenience caused and recommits itself to the letter and spirit of the Electoral Act and the Code" or containing such formulation as the Court may deem fit in the circumstances.

THE HEART OF THE COMPLAINT

22 Clearly the heart or gravamen of the complaint is an allegation, said to be wrongful, that "the Nkandla Report shows how Zuma stole your money to build his R246m home".

23 I have no doubt that this Court has jurisdiction to hear this complaint about the infringement of the Code and the Electoral Act and, as I have said, to impose an appropriate sanction if I find that the relevant provision or provisions of the Electoral Act or Code have been infringed.

THE FACTS OF THE MATTER

24 It is alleged by the Secretary General of the ANC that the DA disseminated, or caused to be disseminated, the SMS to which I have referred fully above to "unknown multitudes of recipients". The averment is made that a bulk SMS was disseminated to recipients throughout the Republic and within the area of jurisdiction of this Court.

25 The Founding Affidavit goes on to deal in some detail with contact between persons representing the ANC and persons representing the DA with regard to the bulk SMS messages allegedly sent out. Ultimately a letter of demand was

sent to the leader of the DA, Ms Helen Zille in which her attention was drawn to the allegation of the contraventions of the Act and the Code. The claim was made that the DA and/or its members or supporters had committed an act which was a deliberate and mischievous distortion of the report of the Public Protector. The claim was made by the ANC that the assertions are false, vindictive and designed specifically to conduct a campaign to influence voters with false information. A deadline was set for a response. A response from the Chief Executive Officer of the DA was forthcoming in which the DA indicated that it would revert as soon as possible.

26 The averment is further made that on the 24th of March 2014, the Parliamentary Leader of the DA, one Ms Lindiwe Mazibuko had on the evening television news in South Africa challenged the ANC to approach any Court if it were aggrieved by the SMS as interpreted by her. In the view of the ANC, the SMS needed no interpretation as it stated that the President of the ANC and the President of the country, Mr Jacob Zuma, stole R246m to build his home. She is alleged to have justified the SMS and challenged the ANC to go to Court.

27 It was said that the origination, existence and contents of the SMS are common cause. It is claimed that the SMS contains false information.

28 The reference to "the Nkandla Report" is to "Secure in Comfort; a Report of the Public Protector, March 2014, Report no. 25 of 2013/2014". Strangely and apparently "in order to avoid burdening the Court" with annexing the 400 pages of the report to the application, the Applicant indicated that a copy of the report would be made available to the Court at the hearing of the matter. The Founding Affidavit goes on to tell this Court that the Public Protector did not find in her report that President Zuma stole R246m to build his home. It is alleged that nowhere does the "Nkandla Report" make the assertion contained in the SMS.

29 The claim is made that in the context of the SMS that President Zuma is alleged to have committed the crime of theft and that this is the basis for a call to the recipients of the SMS to vote for the DA. It is averred that the despatch of the SMS was made with the intention to influence the recipients thereof to vote for the First Respondent and obviously therefore not to vote for the ANC. The claim was made that in terms of Section 89(2)(c) of the Electoral Act, no person may publish any false information with the intention of influencing the conduct or outcome of an election.

30 Not only was the SMS a means of garnering votes by the First Respondent, it was also said that the SMS would have unintended consequences. These are;

30.1 that it is likely to open up an avenue for a free flow of campaign through slander, insults and deception based on false information and;

30.2 secondly, that such free flow of slander, insults or deception through falsehoods would be likely to inflame the atmosphere and heighten political intolerance which has the real likelihood of affecting the conduct and/or outcome of the current elections.

It was said that the Public interest, presumably in a free and fair election, demands that the mandate of the Electoral Commission is not undermined by conduct that is prohibited in terms of the Act, the Code and other instruments regulating the conduct of elections.

31. The Founding Affidavit of the ANC goes on to indicate that the election enjoys high levels of interest having due regard to the number of registered parties contesting it. There are apparently 29 registered parties. The claim is made that political engagement is entitled to be suitably robust, that the conduct of the DA, if undeterred, will result in the deterioration of political exchanges between the parties and thus contaminate the free and fair nature and character of the forthcoming elections.

32 I must point out that this application was set down to be heard on the 1st of April 2014 and that the elections are scheduled for the 7th of May 2014, some 5 weeks away. The Applicants went on to point out that on the 19th of March 2014 all registered parties, including the DA, signed a written pledge committing themselves to adhere to the Code of Conduct under the Electoral Act. The obvious point is made that the DA is bound by the Electoral Code.

33 Thereafter, the founding papers of the ANC go on to deal with the formal requirements of an interdict being a clear right, a right which is being continuously infringed, and there being no alternative remedy.

34 Conspicuous by its absence was the placing of the so called "Nkandla Report" before the Court by the Applicant.

35 It must be remembered that the complaint is that, when properly read, the Nkandla Report by the Public Protector does not say that President Zuma "stole" the R246m. As I have referred to earlier, the promise was made, presumably to hand up from the bar, the 400 page Nkandla Report from which the Court would then and at that stage presumably be asked to conclude whether that report did or did not say that President Zuma stole R246m. The bare assertion is made in the founding papers that no such finding was made in the Public Protector's report.

36 It is clearly insufficient and a failure by the Applicant, properly to plead its case for the Applicant to claim interdictory and other related relief based on a complaint which holds that the Public Protector's report did not find that the President stole R246m, but that it found something different without, in the Court papers, and by necessary reference to the key findings of the report, illustrating what it was that the Public Protector in fact found.

37 The relief sought by the Applicant in this matter could well not have been granted by me for this fatal omission. As a matter of completeness of pleading, the actual finding of the Public Protector needed to be either properly and suitably fully summarised so that this Court could understand what, in fact, the finding was of the Public Protector in the Nkandla Report or alternatively that report needed to have been provided to the Court by the Applicant in its founding papers. In the answering affidavit of the DA the full report was included and the affidavit summarised the key findings of the Public Protector's report.

THE OFFICE OF THE PUBLIC PROTECTOR

38. The Public Protector's office is established under Sections 181 to 182 of the Constitution of the Republic of South Africa, 1996 ("The Constitution") and Section 1A of the Public Protector Act 23 of 1999 ("PP Act"). It is one of several so-called "chapter 9 institutions" which are mandated to "strengthen

constitutional democracy in the Republic". As such, the office of the Public Protector is a bulwark of this country's constitutional democracy.

39. The multi-party system of democracy is also a founding principle provided for in Section 1(d) of the Constitution, to "ensure accountability, responsiveness and openness".

THE ELECTORAL ACT AND CODE - A PROPER INTERPRETATION

40. I propose when interpreting the relevant provisions of the Electoral Act and Code to apply Section 39(2) of the Constitution which provides:- "When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".

41. In addition, the Electoral Act itself provides in Section 2 thereof that "every person interpreting or applying this Act must;

(a) do so in a manner that gives effect to the constitutional declarations, guarantees and responsibilities contained in the Constitution;

(b) take into account any appropriate code.

42. The Applicant suggested that there was a significant difference between Section 89(1) of the Electoral Act and Section 89(2) of the Electoral Act. The difference is that in terms of Section 89(1), the scenario was catered for where someone who made a statement which was false but who believed, on reasonable grounds, that the statement was true such person would not act unlawfully. On the other hand, so argued the Applicant's section 89(2) of the Electoral Act provides for a 'strict liability' in that it rendered unlawful, the publication of false information with the intention of influencing the conduct or outcome of an election and did not cater for a situation where the publication of the false information could be made in circumstances where the maker thereof believed, on reasonable grounds, that the statement was true. In the context of the complained of SMS message by the DA, the Applicant contended that if the contents of the message was false or factually incorrect; in that the finding of the Public Protector did not use the words complained of, then section 89(2)(c) of the Electoral Act, and for that matter the Code, would be breached or infringed by the maker and disseminator of the statement.

43. I am not persuaded that a proper interpretation of the meaning of Section 89(2) of the Act or of the relevant provision of the Code provide for a 'strict liability' or 'strict interpretation'.

44. I am persuaded that a purposive interpretation of this section of the Electoral Act and of the Code is necessary to give expression to the values enshrined in the Bill of Rights and in the Constitution as a whole. Two of those values are the freedom of expression enshrined in section 16 of the Constitution as well as the right in a constitutional democracy to a multi-party system of democratic government which ensures accountability, responsiveness and openness. A necessary adjunct to a multi-party system which ensures accountability, responsiveness and openness is a liberal interpretation of freedom of expression in the context of political debate and political campaigning.

45. I am not attracted by the argument that Section 89(2)(c) of the Electoral Act falls to be strictly interpreted so that if a statement is false for being not completely accurate it is to be strictly interpreted as false and therefore falls to be censured as being in breach of that provision of the Act. I am similarly not persuaded that item 9(1)(b)(ii) of the Electoral Code falls to be strictly interpreted. Its meaning also falls to be interpreted through the prism of the Bill of Rights and the Constitution in a purposive manner.

46. To my mind the principles, well-developed in the law of defamation, allowing "fair comment" - to adopt the phrase for the time being - should be followed. As I will show shortly, even the epithet "fair comment" is not entirely an accurate

one.

47. In Pienaar and Another vs Argus Printing and Publishing Company Ltd 1956(4)SA 31OT Act 318 the court held that;

"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. I think, too, that the public and readers of newspapers that debate political matters, are aware of this. How soon the audiences of political speakers would dwindle if the speakers were to sue the tones, terms and expressions that one could expect from a lecturer at a meeting of the ladies' agricultural union on the subject of pruning roses! Some support for this view is to be found in a passage in Gatley on Libel and Slander, 3rd ed. P. 468. It reads:

> *'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. ' "*

48. The principles are common to cases of defamation or an attack on dignity. In

determining whether a publication is defamatory regard must be had to the person who was allegedly defamed. What may be defamatory of a private individual may not necessarily be defamatory of a politician or a judge. By virtue of their public office they are expected to endure robust comment albeit that this does not mean they cannot be defamed.

[4]

49. In Argus Printing and Publishing Co Ltd v Inkatha Freedom Party 1992 (3) SA 579 (A) at 588F, 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. The approach most appropriate in this case is that taken in *The Citizen 1978 (Pty) Ltd v McBride (Johnstone, Amici Curiae)* 2011 (4) SA 191 (CC), 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".

[4] Le Roux and Others V Dey 2010 (4) SA 210 (SCA) at para 11; Mthembi- Mahanyeli v Mail and Guardian Ltd and Another 2004 (6) SA 329 at para 63; Cele v Avusa Media Limited [2013) 2 All SA 412 (G)

51. Mr. Mc Bride 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 the court of law convicts."*

52. In my view there can be no violation of the relevant provisions of the Act and the Code in circumstances in which a comment which is not entirely accurate amounts to "fair comment" in the sense that that concept has been developed in cases of defamation.[5]

53. In the *McBride* case, the Court noted that the description that a comment had to

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[5] In Hardaker v Phillips 2005 (4) SA 515 (SCA) at para 26 the Court highlighted that the requirements for this found of defense 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."

be *"fair"* was misleading. The Court referred to the statements of *Innes CJ in Crawford V Albu* 1917 102 at 114, 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 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 express 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 to not justify the comment" (emphasis added)

54. In the Hardaker case at paragraph 32 the SCA (per Cameron J) held at "whether the jibe is 'fair' does not in law depend solely or even principally on reason or logic". I propose to adopt a similar approach. Guided by the principles that I have enunciated above the statement in the SMS of the First Respondent is fair comment in the sense elucidated above.

55. The right of any political party robustly to enter into political debate and disagreement with any other political party is of the essence of the conducting of a free and fair election. The comments made by the DA in the bulk SMS messages were comments made in interpreting the Nkandla Report. One has therefore to look at the totality of the Nkandla Report to see whether it can be

said that "the Nkandla Report shows how Zuma stole your money to build his R246m home" and whether a statement is attributed to the Public Protector which says that President Zuma stole the money in question.

THE FINDINGS OF THE PUBLIC PROTECTOR

56. That which must immediately be appreciated in understanding this judgement is that this Court does not sit in judgement on the conduct of President Zuma. The function of this Court is not to make a finding that the Public Protector was correct in making the findings that she did make in the Nkandla Report. This Court's function is to weigh and appreciate the contents of the Nkandla Report in order to form the view whether the contents of the complained of SMS message constitutes a violation of the relevant section of the Electoral Act and Code given that the method of interpretation of those provisions, that I have found is the correct one, is one which allows fair comment, in the sense that that which is expressed must be one that a fair person might honestly hold. The comment needs to be fair only in the sense that objectively speaking it qualifies 'as an honest, genuine (thought possibly exaggerated or prejudiced) expression of opinion relevant to the facts upon which it was based, and not disclosing malice'. It can be readily seen that I have accepted the dictum referred to above which would hold that 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.

THE FINDINGS IN THE NKANDLA REPORT

56. The findings in the Nkandla Report are substantial, coming to some 400 pages. It is impossible for the purpose of this judgement to adequately summarise the entire contents of the Nkandla Report. I intend to give a basic understanding of the background facts, a basic description of the process by which the expansion of the work at Nkandla took place, the involvement of the President in the process and the conclusions reached by the Public Protector. In doing so, I do not attempt an exhaustive analysis of the report. Thus my analysis will be as brief and to the point as possible for the purpose of explaining the view that I have come to in this judgement.

57. Before making an analysis of the contents of the report, however brief it might be, I have to make a trite but trenchant observation. The Republic of South Africa is a constitutional democracy in which all public officials, including the President of the country, are subject to constitutionally entrenched controls over public power and the spending of public money. When it comes to the spending of public money and the control of such spending, as the Public Protector has observed, the following statutes, at the very least, are of pivotal importance;

57.1 section 217 of the Constitution;

57.2 the Public Finance Management Act 1 of 1999, the ("PFMA");

57.3 the Treasury regulations under the PFMA;

57.4 the Supply Chain Management Policy of the Department of Public Works.

Whimsical and uncontrolled use of public funds by the Executive is not tolerated in a democracy such as ours.

58. In weighing whether the contents of the SMS sent out by the First Respondent claiming that "the Nkandla Report shows how Zuma stole your money to build his R246m home" offends against the provisions of Section 89 of the Electoral Act of Section 89(2)(c) of the Electoral Act and the relevant provision of the Code referred to, one must observe that the SMS did not allege that the report itself makes the finding that President Zuma "stole". It makes the assertion that the Nkandla Report "shows how" President Zuma "stole" taxpayers' money to build his home.

59. In assessing the findings made by the Public Protector it is necessary to assess whether the SMS expresses a conclusion which could be fairly reached by a person reading the report or not. I will make that assessment once I have, in

brief, summarised the major facts and findings of the Nkandla Report.

THE ESSENCE OF THE NKANDLA REPORT

60. The necessity for building operations at Nkandla commenced with an assessment that certain security upgrades were necessary to be brought about to the President's home at Nkandla. The necessity of some form of upgrade to improve the security of the President's home is not disputed by any party.

61. The initial security assessment by the South African Police Services ("SAPS"), conducted in May 2009, assessed required security upgrades with a value of R27 893 067.

62. In the same period President 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. President Zuma's private 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. This despite the fact that the architect had no experience in security matters.

63. The proposed security upgrades spiralled out of control, and covered items which were plainly not required for security purposes including: a double story 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, all because their dilapidated homes "bothered the designers".

64. 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 President Mandela. This despite the fact that Nkandla is an area radically underserved by health services. 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 "safe haven", which was initially to cost R500.000, eventually cost R19 million, including a series of elevators for access.

65. 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. They also reported back to President Zuma.

66. The Nkandla residence was declared a national key point in April 2010 in terms of the National Key Points Act of 1980. This declaration required that the President pay for security upgrades. This was never required of President Zuma. A suggestion by officials of the Department of Public Works, namely that President Zuma be required to pay for some nonsecurity upgrades, never appears to have been considered.

67 The findings of the Public Protector include the following:

67.1 The security upgrades were carried out contrary to a Cabinet Policy of 2003, and without any understanding of the relevant legal prescripts. This constituted "maladministration".[6]

67.2 The measures went far beyond those required for security purposes, and substantially increased the value of the President's private residence, at

[6] Paragraphs 9.1.1.13-9.1.1.14 of the Report.

the expense of the taxpayer.[7]

67.3 Procurement legislation was violated on a number of occasions by the appointment of consultants and contractors in the absence of competitive process - in violation of 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. The President's architect had a resulting conflict of interest. He now bore duties to the Department of Public Works to ensure cost-effectiveness, but also was the President's private advisor. In the circumstances his fees escalated as the project increased and ultimately amounted to R16 million.[8]

67.4 The manner in which the project was undertaken indicated "a lack of control and focused self-interest". 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 the state involved…."[9]

[7] Paragraph 9.2 17-9.2.19 of the Report, page 403
[8] **Executive Summary of the Report.**
[9] **Executive Summary at page 39.**

67.5 The President 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. [10] President Zuma "tacitly accepted" the implementation of these measures, for which he should have paid. [11] He failed to discharge his duties as President and as a beneficiary of public privileges. [12]

67.6 The acts and omissions hat allowed such value to be added to the President's private residence constitute "unlawful and improper conduct and maladministration". [13] President Zuma "improperly benefitted" from measures not required for his security.

67.7 The Public Protector's considered view was that the President, as the head of South Africa Incorporated, was wearing two hats, that of the ultimate guardian of the resources of the people of South Africa and that of being a beneficiary of public privileges of some of the guardians of public power and state resources, but failed to discharge his responsibilities in terms of the latter.[14]

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[10] Para 9.5.4-9.5.7 and 9.5.10-9.5.12 of the Report.
[11] Para 10.9.1.4 - 10.9.1.5 of the Report.
[12] Para 10.10.1.4 of the Report.
[13] Para 10.5.2-10.5.3 of the Report.
[14] Report para 10.10.1.4

68. These, in brief summary, are the findings of the Public Protector. As I have said, that which the First Respondent has done is made a comment flowing from the findings of the Public Protector. Clearly, the Public Protector has found that the entire project was not subject to adequate control of the spending of public funds. The upgrades were carried out contrary to a Cabinet Policy of 2003 and without any understanding of the relevant legal principles. This constituted maladministration. The value of the President's private residence was substantially increased at the expense of the taxpayer. Procurement legislation was violated on a number of occasions by the appointment of consultants and contractors. The project was undertaken in a manner which indicated a lack of control and a focused self-interest on the part of the President. Most importantly, the Public Protector found it 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.

69. The meaning of the word "loot" as given by the concise Oxford dictionary is "goods taken from enemy, spoil; booty, illicit gains made by official". The use of the word "loot" must be understood to have been meant intentionally by the Public Protector. The totality of the findings speak of an untrammelled and uncontrolled or substantially uncontrolled access to public funds to benefit, without adequate lawful authority, the State President. The Nkandla Report finds that the President was guilty of ethical violations in that being aware of the upgrade work, he never raised any concerns as to the scale and cost of this work at his private residence. He "tacitly" accepted the

implementation of the upgrade measures for which he should have paid and did not. He failed to discharge his duties as President and as a beneficiary of public privileges. The acts and omissions detailed in the Nkandla report allowed such value to be added to the President's private residence and constituted unlawful and improper conduct and maladministration leading to the President improperly benefiting from measures that were not required for his security.

70. When one takes the core findings of the Nkandla Report into account and considers whether, particularly in the context of the robust political debate which lies at the centre both of freedom of expression and which lies at the centre of not stifling proper political debate, I ask myself the question whether the message contained in the SMS "the Nkandla Report shows how Zuma stole your money to build his R246m home" is an opinion that a fair person, perhaps in extreme form might honestly hold. I ask myself whether the comment objectively speaking, could qualify as an honest, genuine expression of opinion relevant to facts upon which it was based and not disclosing malice. I ask myself the question whether, in particular in the political environment, the SMS of the DA is 'fair', in the sense that I have referred to above, in order to ensure that divergent views are aired in public and subjected to scrutiny and debate.

71. I find the answer to those questions to be in the affirmative.

72. It is certainly not so that the report of the Public Protector proves the commission

by President Zuma of the crime of theft. The Public Protector's report, as I have set out fully, shows an unchecked or inadequately checked dipping into public funds by those responsible for the significant upgrades to the President's residence which took place according to the Public Protector's report with the President's knowledge, tacit approval and to a significant degree active participation. The use of the phrase "licence to loot" comes very close to the wording "stole" used in the complained of SMS.

73. In these circumstances I do not find that the SMS, using the words that it does, constitutes a breach of Section 89(2)(c) of the Electoral Act or of item 9(1)(b)(ii) of the Electoral Code.

74. Accordingly whilst I find that this application ought to be dealt with as a matter as urgency by virtue of the importance to the nation and to the nation's voters of the issues raised in this application I do not find that a case has been made out by the Applicant for the declaratory order sought by it declearing that the dissemination of the text message in question amounts to the publication of false information in terms of section 89(2)(c) of the Electoral Act or that it amount to the publication of a false allegation as envisaged of the relevant item of the Code.

75. Having so concluded, none of the other relief falls to be considered as the Applicants have faltered at the first hurdle.

76. In the result I make the following order:-

The application is dismissed with costs, including the costs of two counsel.

Hellens AJ