Autonomy, Fairness, Pragmatism, and False Electoral Speech: An Analysis of *Democratic Alliance v African National Congress*

*Gautam Bhatia**

On 19 January 2015, the Constitutional Court handed down its judgment in *Democratic Alliance v African National Congress and Another* ('*DA v ANC*'),[1] bringing to an end a long-running legal battle between the two political parties. The origins of this battle lay in the 400-page Nkandla Report, authored by the Public Protector, which had been released on 19 March 2014 (a month and a half before the South African national and provincial elections, scheduled for 7 May). The Nkandla Report returned certain findings on the improper utilisation of public finances for security upgrades to President Jacob Zuma's private residence. The day after the release of the report, as part of its ongoing election campaign, the Democratic Alliance (DA) sent an SMS to 1,593,682 potential voters in the province of Gauteng, stating: '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.'

President Zuma's party, the African National Congress (ANC), brought an application against the DA before the South Gauteng Division of the High Court. It asked for a declaration that the DA's SMS violated s 89(2)(c) of the Electoral Act[2] and item 9(1)(b)(ii) of the Electoral Code,[3] an interdict restraining the DA from further disseminating the message, and an order directing the DA to dispatch a fresh SMS retracting its earlier one. The ANC claimed that the DA's SMS had alleged that according to the Nkandla Report, President Zuma had committed theft. The Report, however, had made no such finding. Consequently, the SMS constituted 'false information ... with the intent of influencing an election', which was proscribed by s 89(2)(c) of the Electoral Act, and a 'false … allegation …

* Advocate, New Delhi, India; BCL, MPhil (Oxon), LLM (Yale Law School). I would like to express my gratitude to the participants and organisers of the Constitutional Court Review Conference, held at Johannesburg in December 2016, where a draft of this article was discussed. I also thank Christopher McConnachie, Jawahar Raja, Chinmay Kanojia, Sanya Samtani, Mihir Naniwadekar, Krishnaprasad KV and Niranjan V for their comments on previous drafts of this article.

1 [2015] ZACC 1, 2015 (2) SA 232 (CC), 2015 (3) BCLR 298 (CC).

2 Act 73 of 1998. Section 89(2)(c) reads: 'No person may publish any false information with the intention of – influencing the conduct or outcome of an election.'

3 Schedule 2 of the Electoral Act. Item 9(1)(b) reads: 'No registered party or candidate may – publish false or defamatory allegations in connection with an election'.

in connection with an election', which contravened item 9(1)(b) of the Electoral Code.

The High Court disagreed. Hellens AJ held that the constitutional guarantees of the freedom of expression and a multi-party democracy necessitated a 'liberal interpretation'[4] towards political and electioneering speech. Applying this approach, he noted that the DA's SMS did not say that President Zuma 'stole', but made 'the assertion that the Nkandla Report "shows how" President Zuma "stole" taxpayers' money to build his home'.[5] Drawing an analogy with the defence of fair comment in defamation law, Hellens AJ held that in light of the Report's finding that there had been an 'untrammelled and uncontrolled or substantially uncontrolled access to public funds ... without adequate lawful authority',[6] the DA's SMS constituted 'an opinion that a fair person, perhaps in extreme form might honestly hold'.[7]

The ANC appealed to the Electoral Court, which reversed the High Court's order. The Electoral Court held that the DA's SMS constituted a statement of fact – ie, that the Report showed how President Zuma had stolen taxpayers' money to build his home – and was not a comment or an interpretation of the Report. What was of particular importance to the Electoral Court was 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'.[8] Furthermore, not only was the DA's SMS a statement of fact, but it was also a false one, since the Report did not find that President Zuma had stolen money. The provisions of the Act and Code had therefore been violated, and Mthiyane DP ordered the DA to send a retraction.

The DA pursued an appeal to the Constitutional Court. A majority of the Constitutional Court agreed, and set aside the Electoral Court's judgment. The joint opinion authored by Cameron, Froneman and Khampepe JJ (and joined by Moseneke DCJ and Nkabinde J) found that the constitutional principle of the freedom of speech – and especially, of political speech – mandated a 'restrictive interpretation'[9] of s 89(2)(c). The SMS itself, the Majority held, was clearly an 'opinion' or a 'comment'. This was because its 'source was the Report, to which it directly referred for its authority'.[10] On a plain reading, s 89 covered only 'false information', and not opinions or comments. Consequently, it had not been violated.

Zondo J (who was joined by Jafta J and Leeuw AJ) disagreed (the Dissent). On his reading, the DA's SMS alleged that the Report had made a finding that President Zuma had stolen taxpayers' money to build his home. This was a statement of fact, and not a comment, because it was made 'without reference … to other antecedent or surrounding circumstances *notorious to the speaker, and*

[4] *African National Congress v Democratic Alliance and Another* 2014 (3) SA 608 (GJ) at para 44.
[5] Ibid at para 58.
[6] Ibid at para 69.
[7] Ibid at para 70.
[8] *African National Congress v Democratic Alliance* 2014 (5) SA 44 (EC)('*ANC v DA*') at para 15.
[9] *DA v ANC* (note 1 above) at para 130.
[10] Ibid at para 146.

to those to whom the words are addressed'.[11] Since the 400-page Report had just been released the previous day, its contents, which the SMS purported to rely upon, could not be described as 'notorious' just yet. Therefore, the SMS relied upon its own authority, and was a statement of fact. Furthermore, it was a false factual statement because the Report did not accuse President Zuma of theft.

Van der Westhuizen J (joined by Madlanga J) concurred in the result, but took a slightly different path (the Concurrence). Eschewing the fact/comment binary that had structured the Majority and the Dissent, he held that in light of the constitutional guarantee of freedom of speech, and especially of political discourse, the word 'false' in s 89 had to be interpreted narrowly.[12] The word 'steal' had a range of possible meanings in ordinary life. 'In the context of an election campaign',[13] characterised by 'political slogans [that are] highly exaggerated interpretations of facts',[14] something which people were entirely aware of, the Concurrence held that the Report's finding that President Zuma received illegal benefits with his tacit approval, meant that his conduct could fall within a 'broadly conceived but reasonably possible meaning of the word "stole"'.[15] Consequently, the SMS was not 'false'.

DA v ANC presented three questions: *first*, what was the scope of the term 'false information' under s 89(2)(c) of the Electoral Act? *Second*, what was the meaning of the statement 'The Nkandla Report shows how Zuma stole your money to build his R246m home?'[16] And *third*, did the statement contravene the requirements of the Act? In engaging with these questions, the three judgments of the Constitutional Court raise a host of interesting – and relatively novel – issues. In light of the constitutional guarantee of freedom of expression, how must a court interpret regulations upon election speech that are ostensibly in the interests of preserving the fairness of elections (another constitutional guarantee)? Are there any specific principles that ought to govern the imputation of meaning *to* election speech? And how might principles developed in other areas of free speech law (defamation and fair comment) be imported into the context of election speech?

In this essay, I will argue that the Majority correctly answered the first question, and the Concurrence correctly answered the second. For a complete picture, therefore, they must be read alongside each other. However, I will also argue that both opinions need further conceptual justification in order to be entirely persuasive. I will contend that the Majority's analysis of the fact/comment distinction would have benefited from applying the principle of 'audience autonomy' (well known to South African free speech jurisprudence), especially in the context of an election campaign, and the Concurrence's examination of the word 'stole' ought to have been founded in the distinction between the semantic and pragmatic meanings of linguistic utterances. Understanding the

[11] Ibid at para 91 (emphasis added).
[12] Ibid at para 193.
[13] Ibid at para 204.
[14] Ibid at para 194.
[15] Ibid at para 204.
[16] These questions overlap; and, indeed, they are not always clearly distinguished, especially in the dissenting opinion. However, for the purposes of clarity in exposition, in this essay, I shall deal with them as distinct issues.

two judgments in this way, I will attempt to show, will also have some interesting consequences for South African constitutional free speech jurisprudence in general.

My argument will proceed as follows. In Section I, I will address the interpretation of s 89(2)(c), arguing in favour of the Majority and against the Dissent. Both parties, in their submissions before the courts, as well as the courts themselves, attempted to make sense of the phrase 'false information' through the lens of defamation law and fair comment. Consequently, I will begin by excavating the fact/comment distinction in the context of defamation, both in common law and in South African jurisprudence. South African defamation law, I will argue, has always been clear that the foundation of the fair comment defence is the requirement that recipients of defamatory speech should be able to 'make up their own minds' about its validity. In the post-constitutional era, this justification is better understood as one of the founding principles of the freedom of expression, that is, the right of audience autonomy.

In Section II, I will then argue that the principle of audience autonomy depends upon the nature of the relationship between the speaker and the audience, an argument that both the DA and the ANC (impliedly) made in their written submissions before the Constitutional Court. While the Majority was correct (and the Dissent incorrect) in extending a speech-protective reading of the fair comment defence into its interpretation of s 89(2)(c), its opinion would have been strengthened had it grounded its arguments in the principle of audience autonomy in the context of an election campaign.

In Section III, I will move to the construction of the DA's SMS itself. I will argue that the Dissent's interpretation of the SMS from the point of view of the 'ordinary, reasonable reader', and the precedent that it relied upon, incorrectly privileged a semantic reading over a pragmatic one. By contrast, the Concurrence's acknowledgment that the word 'stole' could carry multiple meanings, and that the choice of meaning should depend upon the complete context in which the statement was made, was the correct approach to take. This approach could have been further strengthened by a fuller exposition of the distinction between semantic and pragmatic meanings.

Finally, in Section IV, I will conclude by highlighting the consequences that this approach might have for South African free speech jurisprudence going forward.

I The Defence of Fair Comment

Before the Constitutional Court, it was accepted that the purpose of s 89(2)(c) was to balance the right to freedom of expression with the right to fair elections. The dissenting opinion (with which the Concurrence agreed on this point)[17] noted that 'an election that any political party or candidate wins as a result of false statements would be an unfair election'.[18] There was no disagreement, therefore,

[17] *DA v ANC* (note 1 above) at para 173.
[18] Ibid at para 42.

over the proposition that in striking a balance between the freedom of expression and a fair election, the government was entitled to regulate 'false information'.

To further explicate the meaning of 'false information', both parties, the courts below, and the Constitutional Court, turned to the law of defamation. The incorporation of defamation principles into the analysis of election speech was not fully fleshed out; in fact, both the Dissent[19] and the Majority[20] expressed uneasiness with it. However, intuitively, there is an obvious overlap: defamation law is one area of free speech where the *truth* of an allegedly defamatory statement is normally a complete defence. And the defence of fair comment in defamation law frontally addresses the question of the kinds of statements that can qualify as 'true' or 'false', and those that cannot.

How, then, does defamation law deal with this issue? Let us start at the beginning. As the Constitutional Court held in *Khumalo*, the purpose of defamation law is to strike a balance between 'the protection of freedom of expression on the one hand, and the value of human dignity on the other'.[21] The Constitutional Court endorsed the well-known dictum of Corbett JA, to the effect that the defences to defamation are concrete manifestations of this balance.[22]

One way that this balance is struck is by asking whether the defamatory statement is true or false. This is because South African free speech jurisprudence holds that within the constitutional guarantee of the freedom of expression, certain forms of speech occupy the 'core' of the right, and others the 'periphery'.[23] False statements occupy the far end of the latter side of the spectrum and are deemed to have little or no constitutional value.[24] Consequently, insofar as false defamatory statements are concerned, the balance seems to be struck cleanly on the side of dignity/reputation.[25]

However, an outright subjection of false statements to heavy liability runs the risk of causing a 'chilling effect'. This was memorably described by Justice Brennan of the United States Supreme Court as a situation where, 'because of doubt whether [the truth of a statement] can be proved in court or fear of the expense of having to do so … [people] tend to make only statements which "steer far wider of the unlawful zone". … The rule [of strict liability] thus dampens

[19] Ibid at para 69.

[20] Ibid at para 119.

[21] *Khumalo & Others v Holomisa* [2002] ZACC 12, 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at para 28.

[22] Ibid at para 26, referring to Corbett JA in *Argus Printing and Publishing Co Ltd & Others v Esselen's Estate* 1994 (2) SA 1, 25B–E (A).

[23] *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) & Others* [2003] ZACC 19, 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) at para 59. D Spitz 'Eschewing Silence Coerced by Law: The Political Core and Protected Periphery of the Freedom of Expression' (1994) 10 *South African Journal on Human Rights* 301.

[24] *National Media Ltd v Bogoshi* [1998] ZASCA 94, 1998 (4) SA 1196 (SCA), 1999 (1) BCLR 1 (SCA). See also *Gertz v Robert Welch* 418 US 323 (1974); but see, contra, *United States v Alvarez* 576 US 709 (2012) (concurring opinion of Breyer J listing out some of the expressive purposes served by lying).

[25] See, eg, *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2000 (4) SA 621 (C)(holding that while (intentional) false statements did not fall beyond the pale of s 16, their constitutional value was so minimal that they would easily be outweighed by the interest in reputation).

the vigor and limits the variety of public debate.'[26] For this reason, across the world, various apex courts have held that prohibiting false defamatory statements *simpliciter* tips the pendulum far too much towards reputation. To swing it back, not only must a defamatory statement be false, but it must also be made with 'actual malice' (United States),[27] or 'unreasonably' (South Africa[28] and the United Kingdom).[29] Errors of fact that occur in the course of 'reasonable publication' (all things taken into account) are therefore excused for instrumental reasons, *notwithstanding* the low constitutional standing of false speech.

The second important defence to defamation is that of fair comment. The justification for the defence of fair comment is stated to be society's interest in a 'free and general discussion of matters of public interest',[30] even at the cost of individual reputation. To this end, the defence of fair comment may itself be defeated if the defamatory statement was actuated by malice or was not in the public interest.

The truth and fair comment defences, however, operate in separate spheres. Before either of those defences can be applied, there is a more basic question to be answered: is the statement factual (in which case, the defence of truth would apply) or is it a comment (in which case, the requirements of fair comment would kick in)? The European Court of Human Rights has drawn this distinction through the principle of falsifiability: 'value judgments', as opposed to facts, are 'not susceptible of proof … so that a requirement to prove the truth of a value judgment is impossible'.[31] In a similar manner, Justice Breyer of the United States Supreme Court has drawn a distinction between 'laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like... [and] regulations concern[ing] false statements about *easily verifiable facts* that do not concern such subject matter'.[32]

While this seems plausible at first blush, an attempt to apply it to even slightly hard cases reveals its limitations.[33] The history of the fair comment defence itself

[26] *New York Times v Sullivan* 376 US 254 (1964).

[27] Ibid.

[28] *Khumalo* (note 21 above); *S v Hoho* [2009] 1 All SA 103 (SCA)(in the context of criminal defamation).

[29] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

[30] *Telnikoff v Matusevich* [1992] 2 AC 343, 356 (concurring opinion of Templeman J). See also *Citizen 1978 (Pty) Ltd & Others v McBride* [2011] ZACC 11, 2011 (4) SA 191 (CC), 2011 (8) BCLR 816 (CC) at para 158; *WIC Radio v Kari Simpson* [2008] 2 SCR 420.

[31] *Sorguc v Turkey* [2009] ECHR 979, cf *Spiller v Joseph* [2010] UKSC 53 at para 76; *Lingens v Austria* (1986) 8 EHRR 103 (holding that the words 'basest opportunism', 'immoral' and 'undignified' were not susceptible of proof and, therefore, opinions). See also *WIC Radio* (note 30 above) at para 26 ('a deduction, inference, conclusion, criticism, judgment, remark or observation *which is generally incapable of proof*.')

[32] *Alvarez* (note 24 above)(emphasis added)(concurring opinion of Breyer J). The English courts have also toyed with the test of the allegation being 'verifiable' (*British Chiropactic Association v Dr Singh* [2009] EWHC 1101 QB, overruled by *British Chiropactic Association v Dr Singh* [2010] EWCA Civ 350) or 'objectively verifiable' (*Hamilton v Clifford* [2004] EWHC 1542 (QB)).

[33] Interestingly, the Supreme Court of Washington, while striking down a statute that prohibited false speech in the context of elections, did so partially on the basis that 'in the religious and political realms', truth and falsity were almost entirely subjective. See *State of Washington v 119 Vote No! Committee* 135 Wash. 2d 618.

bears witness to this. Judges have regularly disagreed about whether the same set of words constitutes a fact or a comment. In *Lefroy*, an early fair comment case from the Court of the Queen's Bench in Ireland, it was held that the words 'dishonestly' and 'corruptly' were words of comment.[34] Thirty years later, the King's Bench in England repudiated this view entirely. Lord Justice Fletcher-Moulton held that 'it would have startled a pleader of the old school if he had been told that, in alleging that the defendant "fraudulently represented," he was indulging in comment.'[35] In *Spiller*, the United Kingdom Supreme Court referred to the following example from *Winfield & Jolowicz on Tort*: 'To say that "A is a disgrace to human nature" is an allegation of fact, but if the words were "A murdered his father and is therefore a disgrace to human nature", the latter words are plainly a comment on the former.'[36] The Court was driven to accept that this was not a 'happy expression'[37] of the distinction. In South Africa itself, in *Moolman*, trial and appellate judges disagreed over the nature of the word 'vituperative', the former holding that it constituted comment and the latter finding that it was a fact.[38]

In fact, it was an awareness of the difficulties of satisfactorily pinning down the fact/comment distinction that prompted the Concurrence in *DA v ANC* to abandon that mode of analysis altogether. Citing the European Court of Human Rights for the proposition that 'the distinction between facts and opinions cannot be determinative',[39] it made the enquiry simply about whether, properly interpreted, the DA's SMS could be called 'false'.

Perhaps, however, the Concurrence was a little too quick. Both English common law and the South African law of defamation (which, in its history, has often drawn from the English common law) have developed a test for the fact/comment distinction that is not entirely reducible to the circular falsifiability test. After struggling in a few early cases to develop a principled basis for the fair comment defence,[40] in *Hunt*, Lord Justice Fletcher-Moulton wrote:

> [I]f the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent negatived by the reader seeing the grounds upon which the unfavourable inference is based. But if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, *he will naturally suppose that the injurious statements are based on adequate grounds known to the writer* though not necessarily set out by him.[41]

One year later, the Supreme Court of the Transvaal adopted and deepened this reasoning. In *Roos*, Innes CJ observed that 'if a writer chooses to publish an expression of opinion which has no relation, by way of criticism, to any fact

[34] *Lefroy v Burnside* (1879) 4 LR (Ir) 565.
[35] *Hunt v Star Newspapers* [1908] 2 KB 309, 320.
[36] Ibid.
[37] *Spiller* (note 31 above) at para 88.
[38] *Moolman v Cull* 1939 AD 213.
[39] *DA v ANC* (note 1 above) at para 191 (concurring opinion of Van der Westhuizen J).
[40] See, eg, *McQuire v Western Morning News Co. Ltd* [1903] 2 KB 100 ('honesty and relevance') and *Dakhyl v Labouchere* [1908] 2 KB 325 ('an inference capable of being reasonably drawn').
[41] *Hunt v Star Newspapers* (note 35 above) at 319 (emphasis added).

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'.[42] The Chief Justice clarified that fair comment did not require speakers or writers to set out the facts 'verbatim and in full … but … there must be some reference … which indicates clearly what facts are being commented upon. If there is no such reference *then the comment rests merely upon the writer's own authority*.'[43] A few years later, in *Crawford*, Innes CJ added a further gloss to the defence:

> [T]hose 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*.[44]

Three overlapping ideals are at the heart of Innes CJ's formulation: a comment should not rest upon the speaker's own 'authority', it should incorporate the facts (authority) upon which it is based through some manner of reference, and the hearers must be able to 'estimate for themselves' what its value is.[45]

These principles, of course, are open-ended.[46] One set of cases – that culminated in the Dissent in *DA v ANC* – has extended them in a direction that I will label 'the notoriety thesis'. In *Moolman*, for instance, the standard adopted was that the facts must be 'notorious', that is, already known to the audiences.[47] In *McBride*, a case about whether calling an amnestied person a 'murderer' amounted to defamation, the Constitutional Court referred back to *Roos* to hold that there

[42] *Roos v Stent* 1909 TS 988, 998.

[43] Ibid at 999–1000.

[44] *Crawford v Albu* 1917 AD 102 (emphasis added)(relying once more upon Fletcher Moulton LJ's observations in *Hunt* (note 35 above)).

[45] But see, contra, *South African Associated Newspapers Ltd v Yutar* 1969 (2) SA 442 (A) 454E–H, [1969] 3 All SA 1 (A), which was relied upon extensively by the dissent:

> The repeated statement that the respondent misled the court is, I think, a statement of fact tendered to the reader as a conclusion – which he is invited to verify for himself – from the facts stated. To that extent it may be said to satisfy the requirement for comment. It is, however, not presented as a subjective disparaging view or belief or critical opinion, advanced by the author by reason of the stated facts, with which the reader may agree or disagree, *but rather as an objective finding of fact*, clearly established and beyond reasonable doubt. It is put forward as a fact proved with a measure of irrefutability which places it to all intents and purposes beyond dispute, and the reader is told, in effect, that that is what he will himself find if he applies his mind to the statement and the facts. To the ordinary reasonable reader these *positive, emphatic statements of allegedly established fact*, would not, I consider, appear and be recognisable as comment. He would take them to be factual statements which he is invited to accept as self-evident on the information placed before him; and that would apply also to the reader who has seen the poster and has opened the paper expecting to find an exposition of how the respondent misled the court. It follows that the appellants cannot rely on a defence of fair comment.
>
> No case, to my knowledge, has held that the authoritative tone of a statement would defeat the defence of fair comment which was otherwise applicable. The logic here – that the presentation of a statement is enough to make the reader accept the normative authority of the speaker – seems to undermine Innes J's original formulation to an unacceptable degree. On this issue, therefore, *Yutar* is incorrectly decided.

[46] See, eg, *Brent Walker Group plc v Time Out Ltd* [1991] 2 QB 33 (required that the facts be 'sufficiently indicated' – a sufficiently ambiguous phrase).

[47] *Moolman* (note 38 above).

may be 'cases where the facts are so notorious that they may be incorporated by reference'.[48]

It is important to note, however, that Innes CJ's formulation – that a comment must not be reliant only upon the speaker's authority – does not lay down the degree to which the underlying facts must be notorious. The phrases that Innes CJ used in *Roos* – that the comment must be based on facts '*before* the reader' and that the public must have '*an opportunity* of judging the value of the comments'[49] – are agnostic on this point. And indeed, even though the Constitutional Court in *McBride* claimed to be drawing the notoriety doctrine from Innes CJ, in actual fact, the notoriety standard cited by the Court was laid down in Smith J's *concurring* opinion in *Roos*.[50] As I shall shortly explain, the distinction is important.

In *McBride*, the fact that Robert McBride was a well-known public figure, and that *The Citizen* had published a number of earlier articles calling him a 'murderer' that had reminded readers of his amnesty, weighed with the Court in holding that the defamatory statement was a comment based upon facts incorporated by reference. And, in turn, the Dissent in *DA v ANC* relied upon *McBride* to hold that the Nkandla Report, having been published just the day before, had *not* achieved the requisite levels of notoriety. Consequently, the DA's SMS, simply by referring to the Nkandla Report, had not met the threshold for the fair comment defence.[51]

However, the Dissent's logic of notoriety – traced through *McBride*, *Moolman*, and ultimately, back to Smith J's concurrence in *Roos* – is by no means the only way of understanding the propositions laid down by Innes CJ in *Roos* and *Crawford*, and which have been subsequently accepted in South African defamation jurisprudence. The notoriety argument has had a chequered career in the common law, where the defence of fair comment originated (and was then taken up by Innes CJ in *Roos*). For instance, in *Kemsley*, the House of Lords considered the question of whether the defence of fair comment was available to a criticism of the conduct of a newspaper and its proprietor, couched in the phrase 'lower than Kemsley'. Lord Porter held that it was, observing that since a newspaper was in the public domain, 'the public have at least *the opportunity* of ascertaining for themselves the subject-matter upon which the comment is founded'.[52] Subsequently, in examining Fletcher-Moulton LJ's opinion in *Hunt*,

[48] *McBride* (note 30 above) at para 89. *Yutar* (note 45 above) at 7 (The Court went even further. In assessing a newspaper poster that – in similar language to the present controversy – stated 'How Dr Yutar misled the court', the Court held that even though it was an invitation to the readers to read the article in the newspaper, 'a great many people would not accept the invitation').

[49] *Roos* (note 42 above) at 998 (emphasis added).

[50] Ibid at 1010 (concurring opinion of Smith J).

[51] The notoriety thesis – or some form of it – was also accepted by the Supreme Court of Canada. *WIC Radio* (note 30 above) at para 31 (The Majority holding that 'the facts be sufficiently *stated or otherwise be known* to the listeners that *listeners are able to make up their own minds on the merits of Mair's editorial comment*. If the factual foundation is unstated or *unknown*, or turns out to be false, the fair comment defence is not available.')

[52] *Kemsley v Foot* [1952] AC 345, 357. See also *Reynolds* (note 29 above)('the comment must explicitly *or implicitly* indicate, *at least in general terms*, what are the facts on which the comment is made.')

he also noted that 'a reference to well known or *easily ascertainable facts*'[53] would be sufficient to found a plea of fair comment. In other words, even if the underlying facts are not *notorious* (well-known), but can be *ascertained* without unreasonable effort by the reader, fair comment was applicable. The example that Porter LJ gave was of court proceedings: not everyone might *actually* attend a trial, but 'in so far as there is room for them in the court all are entitled to do so, and the subject-matter upon which comment can be made is indicated to the world at large.'[54]

While cases after *Kemsley* doubted this proposition, the notoriety thesis was finally and decisively rejected by the United Kingdom Supreme Court in its most recent restatement of the fair comment defence. In *Spiller*[55] (which, curiously, was not cited by any of the opinions in *DA v ANC*) the Supreme Court repudiated its earlier position in *Telnikoff* (which *was* cited in both *DA v ANC*[56] and in *McBride*),[57] adopted the reasoning of Porter LJ in *Kemsley*, and held that:

> There is no case in which a defence of fair comment has failed on the ground that the comment did not identify the subject matter on which it was based with sufficient particularity ... for these reasons, where adverse comment is made generally or generically on matters that are in *the public domain* I do not consider that it is a prerequisite of the defence of fair comment that the readers should be in a position to evaluate the comment for themselves ... the comment must, however, identify at least in general terms what it is that has led the commentator to make the comment, *so that the reader can understand what the comment is about* and the commentator can, if challenged, explain by giving particulars of the subject matter of his comment why he expressed the views that he did.[58]

Spiller, therefore, marks a shift from the position in *Telnikoff* and in *McBride*. The shift is from a requirement that the reader be *given* the facts upon which the comment is based, in order to make up her own mind about the validity of the comment, to the significantly less onerous requirement that the comment *refer* to facts that are in the public domain, so that the facts are accessible *if* someone might wish to check.[59] The difference – it will immediately be observed – was at the heart of the issue between the Majority and the Dissent in *DA v ANC*. The Dissent believed that since the Nkandla Report was not notorious enough,

[53] *Kemsley* (note 52 above)(emphasis added). Interestingly, *Roos* (note 41 above) was cited before Porter LJ in order to support the notoriety thesis. Porter LJ found, however, that *Roos* adopted no novel proposition of law, but simply followed *Hunt*.

[54] *Kemsley* (note 52 above) at 355.

[55] *Spiller* (note 31 above).

[56] *DA v ANC* (note 1 above) at paras 79 and 100 (dissenting judgment of Zondo J) and note 102 (concurring opinion of Van der Westhuizen J).

[57] *McBride* (note 30 above) at fn 32.

[58] *Spiller* (note 31 above) at 98 (emphasis added)(The Court adopted the position set out in Lord Ackner's dissenting opinion in *Telnikoff* (note 30 above) which set the threshold at simply 'identifying the publication' upon which the comment was being made. Lord Ackner's concern was that a higher threshold would have the effect of stifling speech).

[59] *Spiller* itself repudiated the 'make-up-one's-own-mind' approach entirely. Its reasons for requiring a reference to facts in the public domain was, *first*, that without this, the defamatory comment would be 'wholly unfocused'; *secondly*, that the requirement that fair comment must be founded on true facts could be 'better enforced' if the facts were referred to, at least in a general way. *Spiller* (note 31 above) at paras 101–102. However, it is unclear why these reasons would require the facts to be referred to *in* the defamatory text itself when they could just as well be pleaded at trial.

a simple reference to it would not serve to put readers in a position where they could judge the content of the SMS for themselves. The Majority, on the other hand, believed that since the SMS's 'source was the Report, to which it directly referred for its authority',[60] it was a comment – and therefore did not constitute 'false information' under the Electoral Act. As we have seen, Innes CJ's original formulations of the principles in *Roos* and *Crawford* leave both interpretations open. It is at this point, therefore, in order to choose between them, we must look to the Constitution of the Republic of South Africa, 1996, and to constitutional principles. And for that, in turn, we must begin by clarifying the meaning of two important concepts: authority and autonomy.

II Authority, Autonomy, Elections and Freedom of Speech

Let us go back to the seminal statement of Innes CJ in *Roos*:

> 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.[61]

The upshot seems to be this: if I make a statement that is related to a set of facts that the reader has access to (let us bracket, for a moment, the question of the extent and manner to which the facts ought to be incorporated into my statement) then, in effect, I am placing before the reader the material that she needs to make an independent judgement about the validity and merits of the statement. My statement then falls within the realm of comment. If I do not, however, then I am asking the reader to believe my statement not because of the reasons that I am providing for it, but because *I* am making the statement. In the words of HLA Hart, the reason for belief is 'content independent'.[62] This is what it means to say that the 'expression … depends upon … the writer's own authority'. In such a case, my only defence is that of truth.

The use of the word 'authority' by Innes CJ is interesting and prescient. Joseph Raz, one of the most prominent theoreticians of authority in recent years, has defined 'authoritative directives' as those that provide us second-order reasons for action that pre-empt us from acting upon our own assessment of the balance of reasons.[63] Authority is justified in any given situation ('the normal justification thesis') when subjects are more likely to comply with right reasons by following the authority's directives, rather than their own judgement about what the balance of reasons requires.[64] Or – to put it colloquially, as Raz does – following authority entails a 'surrender of judgment'.[65] This is because – for reasons of

[60] *DA v ANC* (note 1 above) at para 146.
[61] *Roos* (note 42 above) at 998 (emphasis added).
[62] HLA Hart 'Commands and Authoritative Legal Reasons' in *Essays on Bentham* (1982).
[63] See J Raz 'The Problem of Authority: Revisiting the Service Conception' (2005–2006) 90 *Minnesota Law Review* 1003.
[64] Ibid.
[65] See J Raz *The Morality of Freedom* (1988) Chapters 2–4.

greater expertise, or greater wisdom, or something else – the authority is better placed to weigh up the balance of reasons than we are.

Readers will immediately note that the evolution of the fair comment defence closely follows the structure of the Razian definition of, and justification for, authority. In *Roos*, Innes CJ appears to hold that in the absence of supporting facts, the speaker of a defamatory statement claims authority over the issue of its validity. The justification for this then comes in *Crawford*, where he argues that if facts and comment '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*'.[66] And if it is reasonable to believe that a statement is founded upon 'unrevealed information in the possession of the publisher', then it also seems reasonable to believe the *statement* (or so the argument would go) until contrary information is made available.

It is clear that similar concerns animate judgments after *Roos* and *Crawford*, especially with respect to the courts' solicitude towards ensuring that, for fair comment to apply, the background facts must be *known* to the audience.[67] This is because if the facts were known, then the audience could weigh up the merits of the defamatory statement on their own (in the Razian framework, assess the first-order reasons). However, if the facts were *not* known, then the audience would be in no position to do so.

There is, however, one gap in the argument. Authority is not constituted *simply* by the fact that the recipients of a purportedly authoritative direction do not have the information they need to assess first-order reasons. *Additionally*, there must be something about the purported authority (in terms of its expertise, wisdom etc) that would ensure that following its directives independent of their content would make it more likely that the subject would end up acting in accordance with the correct balance of first-order reasons. Transposing the logic into defamation law, in the absence of the background facts, there ought to be good reasons for us for taking the defamatory statement at face value. Innes CJ's assertion that recipients would believe that the defamatory statement was 'founded upon unrevealed information in the possession of the publisher' remains just that – an assertion about psychological behaviour. Similarly, in *Horrocks v Lowe*, Lord Diplock noted:

> In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to

[66] *Crawford* (note 44 above) at 114–115 (emphasis added). Interestingly, in *Spiller* (note 31 above) (emphasis added) the trial judge – Eady J – approached the issue from the other side, noting that 'for example, where a conclusion is expressed by the commentator in circumstances *where it is obvious to the reader that he cannot know the answer* (eg in relation to someone's secret motives), it would be taken as comment rather than fact'. Readers will note that this reasoning fits squarely within the autonomy paradigm. See also *WIC Radio* (note 30 above) at para 71 (concurring opinion of LeBel J)('the public is *much more likely* to be influenced by a statement of fact than a comment' (emphasis added)).

[67] *Moolman* (note 38 above).

> recognise the cogency of material which might cast doubt on the validity of the conclusions they reach.[68]

However, true as this might be about how people *generally* behave, our enquiry, in deciding upon the correct balance between the freedom of speech and the right to reputation, must at least in part be normative. That is, it must be dependent upon the *purpose* of having a free speech guarantee in the first place. And the argument from authority negates one of the most important normative bases for a constitutional right to free speech: audience autonomy.[69]

In providing a philosophical basis for the existence of a right to freedom of speech, constitutional courts the world over (including in South Africa) have cited the 'search for truth' (or, as it is sometimes reformulated, a faith in the 'marketplace of ideas'),[70] 'individual self-fulfillment'[71] and 'democracy'.[72] Courts have also recognised, however, that these principles are both too abstract and incomplete. Consequently, in cases where the three overarching principles do not seem to answer the question, courts have looked elsewhere. One of the most important subsidiary principles has been that of audience autonomy. The most succinct exposition of the autonomy principle was set out by the South African Human Rights Commission in *Manamela v Shapiro*, via the legal philosopher Ronald Dworkin:

> [M]orally responsible people insist on making up their own minds what is good or bad in life or in politics, or what is true and false in matters of justice or faith. Government insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to head opinions that might persuade them to dangerous or offensive convictions. We retain our dignity, as individuals, only by insisting that no one – no official and no majority – has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it.[73]

The Constitutional Court has affirmed this proposition on a number of occasions. In *South African National Defence Union*, and subsequently in *Islamic Unity Convention*, the Court framed one of the purposes of free speech to be about 'the recognition and protection of the *moral agency* of individuals in our society'.[74] In *Case* the Constitutional Court struck down a 1967 obscenity statute, in part, because it deprived 'willing persons of the right to be exposed to the expression

---

[68] *Horrocks v Lowe* [1975] 2 AC 135.

[69] I borrow this term from D Milo, G Penfold & A Stein 'Freedom of Expression' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) Chapters 42–25.

[70] *S v Mamabolo* [2001] ZACC 17, 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC); *R v Keegstra* [1990] 3 SCR 697; *Raghu Nath Pandey v Bobby Bedi ILR* (2006) 1 Delhi 927 (High Court of Delhi, India).

[71] *Gardener v Whitaker* 1995 (2) SA 672 (E), 1994 (5) BCLR 19 (E); *Irwin Troy v Quebec (Attorney-General)* [1989] 1 SCR 927.

[72] *Islamic Unity Convention v The Independent Broadcasting Authority* [2002] ZACC 3, 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC); *Ranjit Udeshi v State of Maharashtra* AIR 1965 SC 881; *Keegstra* (note 70 above); *New York Times v Sullivan* (note 26 above).

[73] R Dworkin *Freedom's Law* (1997), quoted in *Manamela v Shapiro* Case Reference No GP/2008/1037/E MOKONYAMA, available at http://www.politicsweb.co.za/documents/zapiro-not-guilty-of-hate-speech--sahrc.

[74] *South African National Defence Union v Minister of Defence* [1999] ZACC 7, 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at para 7; *Islamic Unity Convention* (note 72 above) at para 26.

of others'.[75] In so doing, the Court noted that 'freedom of speech is a *sine qua non* for every person's right to realise her or his full potential as a human being *free of the imposition of heteronomous power* … the right to receive others' expressions … is … foundational to each individual's empowerment *to autonomous self-development*'.[76] The clearest statement of this principle, however, was provided by O'Regan J in her concurring opinion in *NM v Smith*, where she understood the freedom of expression (along with dignity and privacy) as:

> [T]he constitutional celebration of the possibility of morally autonomous human beings *independently able to form opinions and act on them.* As Scanlon described in his seminal essay on freedom of expression, an autonomous person – '… cannot accept without independent consideration the judgment of others as to *what he should believe or what he should do.* He may rely on the judgment of others, but when he does so he must be prepared to advance independent reasons for thinking their judgment likely to be correct, *and to weigh the evidential value of their opinion against contrary evidence.*'[77]

It is interesting to note that both Dworkin and O'Regan J use the word 'opinion' (which, again, begs the question about where to draw the line between facts and opinions). Scanlon uses the more ambiguous 'judgment', while *Case* simply uses the broader 'expression'. However, the autonomy principle – which specifically envisages audiences determining their responses to speech by the exercise of their *own* faculties of reasoning – is clearly in conflict with the idea that audiences are expected to take a speaker's defamatory statement as valid merely if the underlying bases are not already known to them or not provided to them by the speaker.

It is at this point that two important points need to be made. First, while autonomy is a relevant consideration for courts to take into account while interpreting or even adjudicating upon the constitutionality of speech-restricting legislation, it is not *dispositive*. For instance, in *British American Tobacco*,[78] the Supreme Court of Appeal upheld a ban on tobacco advertising as a justified limitation upon the freedom of expression under s 36, because of the importance of public health as a goal, and the impossibility of a narrower legal framing. The Court specifically acknowledged the autonomy concern in withholding commercial expression from willing, mature adults; however, it also stated that this concern was overridden as part of the overall justificatory analysis.[79] Indeed, in the context of both defamation and false election speech, a strict application of autonomy would rule out restrictions on *any* false statements, since listeners would be expected to exercise their autonomous faculties to distinguish the true from the false. The argument from autonomy, therefore, must be understood as a limited claim: as an integral aspect of the constitutional guarantee of free speech,

[75] *Case v Minister for Safety and Security* [1996] ZACC 7, 1996 (3) SA 617 (CC), 1996 (5) BCLR 608 (CC) at para 25.

[76] Ibid at para 26 (emphasis added).

[77] *NM & Others v Smith & Others* [2007] ZACC 6, 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC) at para 145 (concurring opinion of O'Regan J, emphasis added).

[78] *British American Tobacco South Africa (Pty) Ltd v Minister of Health* [2012] ZASCA 107, [2012] 3 All SA 593 (SCA).

[79] This case is slightly complicated by the fact that the Court referred on a few occasions to the 'addictive' nature of smoking, indicating that perhaps, as a constituency, smokers qua smoking are not in a position to make entirely autonomous decisions.

autonomy must play a non-trivial role in determining *where* to strike the balance between freedom of expression and reputation/fair elections.

Secondly, even though the autonomy principle is invoked by courts as a *general* justification for the existence of a right to free expression, its scope is anything but universal. One set of limitations is placed by the text of the South African Constitution itself. Section 16(2) of the Constitution stipulates that the right to freedom of expression does not extend to 'propaganda for war', 'incitement of imminent violence' and 'advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'. Bracketing the somewhat difficult instance of 'incitement to imminent violence', it is nonetheless clear that propaganda for war and certain kinds of advocacy of hatred are two forms of expression (and, in fact, two forms of *opinion*) where the Constitution specifically denies audiences the opportunity to exercise their autonomous moral agency in accessing and evaluating speech.[80]

It might be argued that the very fact that the Constitution expressly lists out categories of speech where the autonomy principle does not apply, implies that in all other situations it does. There are, however, immediate counter-examples (which are not limited to the South African context). Laws regulating medical malpractice, consumer fraud and insider trading are three instances of speech-restrictions that seem to be founded on bases that are antithetical to the autonomy principle. Professor Robert Post argues, therefore, that in modern societies, there exists a range of relationships that are *structured* either by autonomy or by *dependence* (ie authority).[81] The relationship between a doctor and her patient is an example *par excellence* of the latter kind. A patient is *not* expected to take her doctor's advice as just another first-order reason to be added to the balance of reasons in deciding which medicine to consume but, rather, to take it as *authoritative* (in the sense discussed above). So also, to a lesser extent, the consumer/seller relationship.

We are now in a position to understand that the split in judicial opinion over the fair comment defence is grounded in a difference over where to locate defamatory statements on the autonomy/dependence-authority spectrum. Judgments that insist on a 'notoriety' standard, or that the underlying factual basis must be *made* known to the audience, probably agree with Innes CJ's reasoning that in the absence of the underlying facts, listeners are likely to believe that the defamatory statement is based on 'unrevealed facts' within the possession of the speaker. Furthermore, these judgments take this psychological fact as an acceptable normative basis for structuring the fair comment defence. On the other hand, some of the later judgments (especially *Spiller*), which only require that the underlying facts be *referred* to, envisage a far greater role for audience autonomy in the context of defamation.

[80] In this way, the South African Constitution does not accept the principle of 'content neutrality', that is commonly understood to explain American free speech law. See, eg, *West Virginia Board of Education v Barnette* 319 US 624 (1943).

[81] See, eg, R Post 'Recuperating First Amendment Doctrine' (1995) 47 *Stanford Law Review* 1249.

We are also in a position now to understand the interplay between the fair comment defence, and the interpretation of s 89(2)(c) in *DA v ANC*, in the context of the Court's stated objective of balancing the constitutional principles of the freedom of speech with fair elections.[82] The relevance of fair comment jurisprudence to the interpretation of s 89(2)(c) depends on whether and to what extent *political speech* during an election campaign is similarly positioned on the autonomy/authority spectrum as defamation and defamatory statements.[83]

It is particularly interesting that, in their written submissions before the Court, both the DA and the ANC focused on the *nature* of an election campaign with a view to how audiences do and ought to receive election speech. The ANC argued, for instance, that:

> 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 … voters rely in large part on the information that they receive from political parties during the election period … 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.[84]

And, subsequently:

> 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 … 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.[85]

For the ANC, therefore, a combination of limited resources and time, large volumes of information, and an atmosphere of 'distrust', pushed election speech even further down the spectrum away from autonomy and towards

[82] This method of analysis may be found in *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International & Another* [2005] ZACC 7, 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC).

[83] See *R v Parliamentary Election Court* [2010] EWHC 3169 at para 110 (Interestingly, when the UK Queen's Bench had to interpret a provision of the Representation of the People Act, 1983, which penalised false statements 'in relation to personal character or conduct' of a rival candidate, it did so by framing the legislative policy in the language of autonomy. It noted that:

> [G]iven the practical experience of politics in a democracy, that unfounded allegations will be made about the political position of candidates in an election ... the statutory language makes it clear that Parliament plainly did not intend the 1895 Act to apply to such statements; *it trusted the good sense of the electorate to discount them.* However, statements as to the personal character of a candidate were seen to be quite different. *The good sense of the electorate would be unable to discern whether such statements, which might be highly damaging, were untrue* (emphasis added)(one may, of course, disagree with this on the merits).

[84] G Malindi & S Ebrahim 'First Respondent's Heads of Argument' at para 34, available at http://www.constitutionalcourt.org.za/Archimages/22210.PDF (emphasis added).

[85] Ibid at para 44.2.6.

dependence-authority, than defamatory speech. This justified an interpretation of s 89(2)(c) that would adopt the notoriety/knowledge characterisation of fair comment.

The DA, on the other hand, cited precedent to establish that 'greater latitude' was accorded to political speech than other kinds of speech.[86] Furthermore, it directly responded to the ANC's claim, arguing instead that speech had a heightened importance during election periods because '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'.[87]

A hint of this analysis is found in the judgment of the High Court, which ruled in favour of the DA. The High Court noted that a 'multi-party system of democratic government'[88] was a right guaranteed under the Constitution. And further, according to the High Court, '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'.[89] Although not framed directly in the language of autonomy, the stress on a '*multi-party*' system envisages a political environment in which clashing messages are put before the electorate for its consideration.[90]

In the Constitutional Court, however, not much by way of such analysis was forthcoming. The Dissent spoke of the need to find an 'appropriate balance between the right to freedom of expression and to campaign, on the one hand, and, on the other, the right to free and fair elections and the right to vote in free and fair elections'.[91] It expressed uneasiness with using defamation and fair comment standards to interpret s 89(2)(c) and the DA's SMS.[92] But then it went ahead and directly applied the *McBride* and *Telnikoff* standards of notoriety, and of placing the facts before the reader, without any further explanation.[93] As argued above, this direct importation of the fair comment standard misses a crucial interpretive step (as well as failing to explain the reason for picking *McBride/Telnikoff* over *Spiller/Kemsley*, when both are equally traceable to Innes CJ's formulations in *Roos* and *Crawford*).

[86] I Jamie & D Borgström 'Applicant's Heads of Argument' at para 47, available at http://www.constitutionalcourt.org.za/Archimages/22208.PDF (emphasis added). See also Spitz (note 23 above).

[87] Ibid at para 56.1. This is not, of course, a *direct* response to the ANC's characterisation of speech during election periods.

[88] *DA v ANC* (note 1 above) at para 44.

[89] Ibid (emphasis added). See also *Brown v Hartlage* 456 US 45, 61 (1982)(while considering a provision that penalised offering 'material benefits' for votes, the American Supreme Court made a similar point: 'In a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent.'); *Vote No!* (note 33 above)('In the political context, a campaign's factual blunder is most likely noticed and corrected by the campaign's political opponent rather than the State'); *Rickert v State of Washington* No 32274-9-II (2005) (Washington Court of Appeals).

[90] The use of background constitutional principles for interpreting the scope of speech-regulating legal provisions was fleshed out by the Constitutional Court in *Laugh It Off* (note 82 above).

[91] *DA v ANC* (note 1 above) at para 46.

[92] Ibid at para 69.

[93] Ibid at paras 79, 92, 96 and 110.

The Majority was more aware of the issue. It recognised the moral agency that lay at the heart of the constitutional free speech guarantee,[94] the importance of being able to '*form* and express'[95] political opinion, and the need for 'open and vigorous discussion of public affairs'.[96] Most importantly, it noted that:

> During an election this open and vigorous debate is given another, more immediate dimension. Assertions, claims, statements and comments by one political party *may be countered* most effectively and quickly by refuting them in public meetings, on the internet, on radio and television and in the newspapers. An election provides greater opportunity for *intensive and immediate public debate* to refute possible inaccuracies and misconceptions aired by one's political opponents.[97]

Much like the ANC, therefore, the Majority opinion located its interpretation in the context of how speech operates during elections. While not directly addressing the ANC's contentions, the Majority nonetheless made the crucial argument that in an election campaign, the opportunity for *counter-speech* is particularly high.[98] The connection with autonomy is obvious: in an environment where audiences have access to multiple, contesting sides of an issue, their ability to exercise their autonomous judgement is facilitated and heightened.[99]

This then explains the Majority's contrary reading of the fair comment precedent. Unlike the Dissent, the Majority focused simply on *Roos*' proposition that a 'factual claim' is that which 'depends upon nothing but the writer's own authority',[100] and used that to argue that the SMS was a 'comment' since it referred to the Nkandla Report as the relevant authority. Interestingly, the Majority did not even refer to the *McBride-Telnikoff* gloss on the authority argument. That the Majority was aware of *McBride* was obvious: it cited *McBride* thrice, once for the proposition that 'open debate enhanced truth-finding',[101] the second time for the proposition that 'open and vigorous discussion of public affairs'[102] is good

[94] Ibid at para 123.
[95] Ibid at para 125 (emphasis added).
[96] Ibid at para 133.
[97] Ibid at para 134 (emphasis added). See also *Brown v Hartlage* (note 89 above).
[98] In this, the Majority was drawing upon a long tradition of free speech philosophy that had its origin in Justice Brandeis' famous concurring opinion in *Whitney v California* 274 US 357, 377 (1927) (Brandeis J, concurring)('If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.') In his concurring opinion, Van der Westhuizen J seemed to be hinting at just such an interpretive framework, when he argued that 'if a political party were allowed to communicate to millions of voters *on the eve of election day* that the elections had been postponed or that the leader of another party had died, and this was not true, the elections could hardly be fair'. *DA v ANC* (note 1 above) at para 174 (the Majority also cited this example, but omitted 'on the eve of election day'). This is exactly a situation in which the effects of 'counter-speech' would be limited, at best.
[99] On this point, see also *S v Mamabolo* [2001] ZACC 17, 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC)(The Court upheld the constitutionality of the penal contempt of court provision. One of the bases for the judgment was that judges don't have the opportunity to respond to criticism, thus negativing the possibility of errors being 'corrected' over time).
[100] *DA v ANC* (note 1 above) at para 148.
[101] Ibid at para 122.
[102] Ibid at para 133.

for democracy, and the third time for the proposition that words with multiple meanings ought not to be understood 'overly technically'.[103]

Telnikoff, which was central to the Dissent's argument, was not cited at all. If the Majority was giving a faithful account of the fair comment defence, as incorporated into its interpretation of s 89, then these would be serious lapses. However, on my reading, once the Majority had decided that the relationship between electoral candidates and voters was structured by a heightened consideration for autonomy and independent moral agency,[104] its choice of the *Spiller/Kemsley* gloss on fair comment,[105] requiring merely incorporation of the underlying facts through reference, was clearly justified. Recall, once again, the pivotal statement of the law in *Spiller*:

> [T]he comment must, however, identify at least in general terms what it is that has led the commentator to make the comment, *so that the reader can understand what the comment is about* and the commentator can, *if challenged*, explain by giving particulars of the subject matter of his comment why he expressed the views that he did.[106]

In other words, the responsibility of the speaker ended at the point of ensuring that the listener knew that there existed *some* underlying basis of the 'comment'. After that, it was up to the listener to 'challenge' the speaker, if she so desired, and obtain the further information she might need to 'make up her mind' on the merits of the comment. This position, with its emphasis on audience autonomy, was at the heart of the Majority's ruling that once the DA's SMS had *referred* to the Report (which was in the public domain) as its source of authority, its statement qualified as a 'comment' and was beyond the scope of s 89(2)(c).

Where the Majority judgment remained incomplete, however, was in its failure to acknowledge and articulate the autonomy-based foundations of this argument with sufficient clarity. At another point in its judgment, it came close to doing so again but just stopped short. While examining the scheme of Chapter 7 of the Electoral Act (within which s 89 was located), which had provisions penalising impersonation of voters and candidates, infringing secrecy, obstructing officers etc, the Majority noted that, taking a contextual interpretation, even s 89(2)(c) would have to be held to be limited to statements that 'could *intrude directly* against the practical arrangements and successful operation of an election'.[107] The Majority then observed:

> An example given during oral argument was a statement falsely informing voters that a voting station, or voting stations in a particular region, had been closed. Examples can easily be multiplied. False statements that a candidate for a particular office has died, or that voting hours have been changed, or that a bomb has been placed, or has exploded, at a particular voting station, or that ballot papers have not arrived, or omit a particular

[103] Ibid at para 162.

[104] See also *Brown v Hartlage* (note 89 above) at 46 (A similar point was made where the Court bluntly stated: 'The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech.')

[105] Without citing *Spiller*.

[106] *Spiller* (note 31 above) at para 104 (emphasis added).

[107] *DA v ANC* (note 1 above) at para 139 (emphasis added).

> candidate or party, would all have the effect of jeopardising the practical mechanics of securing a free and fair election.[108]

What is important about the Majority's examples is that each of them – to borrow American vocabulary – are 'content-neutral' with respect to *substantive expression* about political parties or candidates. In other words, they are concerned not with *how* voters exercise their choices in response to election speech, but that they *exercise* it in the first place. Perhaps unfortunately, however, the Majority declined to develop this argument further, holding that it was not necessary to do so in light of its finding that the DA's SMS was a comment.[109] The underlying basis, however, was evidently that of autonomy,

> Let us sum up the argument. The key point of difference between the Majority and the Dissent on the interpretation of s 89(2)(c) of the Electoral Act was the extent to which a 'comment' must list out the 'facts' upon which it is based, in order to prima facie be taken out of the prohibitive ambit of the term 'false information'. Both the Majority and the Dissent relied upon the fair comment defence in defamation law, the roots of which lie in Innes CJ's observation that to qualify as a comment, a statement must not rely upon 'its own authority'. The Dissent invoked the interpretation of this principle in subsequent cases such as *McBride* (and the common law case of *Telnikoff*) to hold that the underlying facts must be sufficiently 'notorious', which the Nkandla Report was not. Consequently, the Dissent held that the DA's SMS was a 'fact', and that – in turn – required answering the further question of whether it was 'true' or 'false'. The Majority, on the other hand, relied upon Innes CJ's statement itself (and also, unknowingly, followed the dictum of the UK Supreme Court in *Spiller*) to hold that as long as the DA's statement had *referenced* its source (which was in the public domain) it was a 'comment', and therefore beyond the scope of s 89(2)(c).
>
> I have argued that the disagreement between the Majority and the Dissent was not simply a disagreement about what the defence of fair comment, properly understood, required, but a deeper disagreement about the nature of the relationship between candidates and constituents in the context of a political election, and in the constitutional context of the rights to free speech and a multi-party democracy. The Majority was correct in holding that incorporation by reference was sufficient, but the major premise of that argument – that election speech was structured by a relationship of heightened autonomy between speakers and audiences – remained unarticulated.
>
> The Majority also appeared to believe that after drawing the fact/comment distinction in favour of the latter, its job was done. This, however, is not immediately obvious. As the Concurrence pointed out, had the DA's SMS said that the Nkandla Report 'shows how Zuma is now living in Costa Rica', then surely there was a strong case for classifying this as 'false information', even though it referenced the Report as its authority.[110] This is why, in fact, the defence of fair comment requires not merely that there be a 'comment', but that it be

[108] Ibid at para 140.
[109] Ibid at para 144.
[110] Ibid at para 184.

'fair' – a word that has been interpreted to mean requiring a relationship of 'relevance' between the underlying facts and the defamatory statement.[111] The underlying justification appears to be – once again – that if my stated source has no relevant relation with my defamatory statement, then it can hardly constitute authority for it (regardless of my claims). The statement in question, therefore, once again becomes reliant upon the *speaker* for its authority. And likewise, even if the Dissent was correct that the DA's SMS *did* constitute a statement of fact, it would still need to show that the statement was 'false' for it to fall within s 89(2)(c). This would require it to examine what, precisely, was the *meaning* of the SMS.

Consequently, after deciding upon the correct interpretation of s 89(2)(c), there was some further work to be done: the Court had to interpret what the DA's SMS meant. This task was undertaken by the Dissent and by the Concurrence. Let us turn to that issue.

III What the SMS Said (and What It Meant)

Let us go back to the DA's SMS. It 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.'

There are three possible readings of this text. *First*, that the Nkandla Report had made a finding that President Zuma committed the crime of theft to build his home. This was the holding of the Electoral Court[112] and of the Dissent in the Constitutional Court.[113] *Secondly*, that an *interpretation* of the Nkandla Report *illustrated* that Zuma committed the crime of theft. This seemed to be the understanding of the Majority opinion in the Constitutional Court.[114] And *thirdly*, that the Nkandla Report had found that President Zuma was responsible for the unethical use of public funds to build his home. This was the interpretation of the High Court[115] and of the Concurrence in the Constitutional Court.[116]

As the Concurrence correctly pointed out, the word 'stole' was certainly *capable* of a range of meanings that went beyond the legally recognised crime of theft. Indeed, very recently, the Queen's Bench for Saskatchewan had actually found that the word 'steal', in a newspaper article critical of a Canadian politician's utilisation of public money, simply referred to 'improper use of taxpayer funds'.[117] On what basis, then, could a court select one of these three interpretations of the DA's message? Let us first look at the Dissent. The Dissent found that an '*ordinary reasonable reader* would perceive the SMS as saying that the Nkandla Report said that Mr Zuma stole taxpayers' money to build his R246 million home'.[118] The

[111] *Spiller* (note 31 above)(In *Spiller*, *amicus curiae* argued that the 'fairness' requirement be jettisoned altogether, and the defence be rechristened the defence of 'comment'. The Supreme Court rejected the argument).
[112] *ANC v DA* (note 8 above) at para 18.
[113] *DA v ANC* (note 1 above) at paras 57 and 60.
[114] Ibid at para 152.
[115] *ANC v DA* (note 8 above) at paras 58, 70 and 72.
[116] *DA v ANC* (note 1 above) at paras 198–203.
[117] *Vellacott v Saskatoon Starphoenix Group Inc* 2012 SKQB 359 at para 82.
[118] *DA v ANC* (note 1 above) at para 96 (emphasis added).

Majority, on the other hand, held that "'*shows* how" must not be understood literally to mean that the Report actually says, in as many words, that the President is guilty of theft. It may also mean "demonstrate[s] or prove[s]" … in other words, the SMS tendered to its recipients an interpretation of the Report. A *reasonable reader* of the SMS would have understood this.'[119]

Both the Majority and the Dissent, therefore, treated the DA's SMS as a linguistic artifact, and interpreted it from the point of view of a hypothetical 'reasonable' reader. Unsurprisingly – and despite relying on the same set of precedents – they differed on how the reasonable reader would have interpreted the SMS. This is not novel. In *Crawford*, which both judgments relied on, the question was how to interpret the phrase 'they are criminals in the fullest sense of the word', used to refer to certain labour leaders who had been deported. The Trial Court judge observed that:

> [Did the speaker] mean ... that the plaintiff and his friends were criminals ... that they belonged to the criminal classes and had been convicted or deserved conviction for crimes for which they could properly be branded as criminals or did he mean that men who were responsible for all the trouble to which he had referred might be truthfully described as criminal? In my opinion the latter and not the former is the correct view.[120]

The basis of the trial judge's finding was that the speaker had used the word 'fanatics' just before using the word 'criminal' and had stated that 'fanatics' was an inadequate description. Consequently, it would appear that the word 'criminal' had not been used in its legal sense but in the sense that 'these men were leaders of the labour movement and had taken a leading part in inciting the people and that it was their conduct which was mainly responsible for the results which ensued'.[121] However, on appeal, Innes CJ disagreed:

> The *ordinary meaning* of criminal is one who has committed a crime, that is, an offence against society punishable by the State. As generally used it connotes moral guilt. A man who has contravened a municipal regulation would not properly be described as a criminal; the word is reserved for graver cases. So that to say that men are 'criminals in the fullest sense of the word' means that, whether convicted or not, they have broken the criminal law, and are wrongdoers of the criminal class. No doubt the word 'criminal' may be used in a somewhat different sense. When employed as an adjective in such expressions as 'criminal negligence,' it may signify nothing more than 'highly reprehensible.' *But here it was used as a description of the men, not as an attribute to their conduct. And it would naturally have been so understood.*[122]

Innes CJ went on to examine the rest of the speech, which – in his view – affirmed his opinion, and concluded in the following manner:

> It must be assumed that those words were understood in their *ordinary sense*; if they were capable of another interpretation no evidence was called to prove that the hearers adopted it. So far as the defendant is concerned, he did say that he did not mean criminals in the ordinary sense of the word; he meant that the attitude they took up was criminal. If

[119] Ibid at para 152 (emphasis added).
[120] *Crawford* (note 44 above) at 107.
[121] Ibid at 108.
[122] Ibid at 118 (emphasis added).

> that was his intention he certainly employed an unfortunate form of expression. But the question is not what he intended, but what his language *in its ordinary signification meant*. When questioned as to why he differentiated between Creswell and the others, he said: 'A fanatic has honest motives, a criminal is not honest. They want to injure the employer rather than help the employees.' *So that the matter of moral guilt was present to his mind*.[123]

A similar analysis was undertaken in *McBride* which – again – was relied upon by both judgments in *DA v ANC*. The question in that case was whether calling an amnestied person a 'murderer' was defamatory. McBride argued that a 'murderer' necessarily meant someone who had been convicted of murder in a court of law. The effect of the amnesty – which McBride had been granted – was to wipe out all *legal consequences* of the act of killing. Consequently, it was 'false' to call him a murderer in light of his amnesty. The Constitutional Court disagreed, holding:

> [T]his 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.[124]

The Court buttressed this argument by going into the history of the amnesty statute, and noting that McBride's interpretation would 'disturb the delicate interplay of benefit and disadvantage the statute reflects, thereby also creating an untenable anomaly in that only those convicted, but not those never charged, would gain immunity from truthful description of their deeds'.[125]

There are obvious differences in the way that *Crawford*, *McBride*, and the Majority and Dissent in *DA v ANC* interpreted the terms 'criminals', 'murderer' and 'stole', all of which have both legal and non-legal meanings. But there is something more important that unites them: all the judgments focused on the 'ordinary meaning' of the word used, and how it would be understood by an ordinary, 'reasonable' listener. To clarify the ordinary meaning, the judgments analysed the relevant text itself, and – in the case of *Crawford* – what was said before and after the offending phrase. To put it more technically, the judgments' attribution of meaning to words and phrases was limited to an examination of their *linguistic context* – that is, a word, its historical associations, its syntactic setting and so on.

Contrast this with the Concurrence. Like the Majority, the Concurrence held that the word 'false' must be construed narrowly, in light of the importance

[123] Ibid at 119 (emphasis added)(Similarly, while Solomon J dissented, and noted that the word 'criminal' had a broad range of meanings, his finding that 'on this occasion', the word 'criminal' was being used to refer to the deported persons being the cause of labour troubles, was simply based on a close textual reading of the speech itself. Although Solomon J did state that in his view, the hearers would have understood the speaker to be using the word 'criminal' in this broad sense, he did not explain what it was about 'the occasion' that prompted this selection).

[124] *McBride* (note 30 above) at para 70. In its written arguments before the Constitutional Court, the ANC relied on McBride to advocate the 'ordinary meaning' of stole as an act of theft. Malindi & Ebrahim (note 84 above) at paras 62–63.

[125] *McBride* (note 30 above) at para 78.

of freedom of expression and a robust political discourse.[126] It then made the following important observation:

> In a pre-election environment *people are generally aware* that political *slogans can be highly exaggerated interpretations of facts* and that they come from a partisan and subjective viewpoint. In modern-day democracies spoilt by a multitude of media opportunities, political parties formulate punchy, provocative and less-than-accurate sound-bites all the time, *and are given a wide berth to do so*. Perhaps fairly little of what electioneering politicians say is wholly incapable of being labelled as 'false' in one way or another. …
>
> The point on the fact/opinion continuum where a statement lies will dictate the level of scrutiny that ought to be applied in determining its veracity or accuracy. The more the statement tends to be a judgment, opinion, or comment, the less strictly we ought to evaluate its accuracy. If it is purely an opinion or rhetorical tool, there is more room for exaggeration or provocative paraphrasing. If it purports to convey a straightforward fact, such as 'the polling stations will be closed', there is little room for reasonable interpretation or cajoling of the exact wording of the message before it becomes undeniably false.[127]

The Concurrence went on to find – in tune with the Majority – that the term 'shows how' could be understood as a synonym for 'illustrates'.[128] Since, therefore, there was the suggestion of a value judgment, '*in the context of a political campaign*',[129] a generous approach needed to be taken. The Nkandla Report *had* found that there had been misappropriation of public money, with at least the tacit acceptance of the President. In this light, the Concurrence held that since, 'used freely',[130] the word 'stole' had a range of meanings, which included misappropriation and embezzlement, and since the DA's SMS was 'not a legal statement … [but] an *election punchline*',[131] 'the conduct alleged in the Nkandla Report does fall under a broadly conceived but reasonably possible meaning of the word "stole", *used in the context of an election campaign*'.[132]

Unlike the Majority and the Dissent, in the concurring opinion, we do not find a single reference to what the 'ordinary reasonable reader' would make of the

[126] *DA v ANC* (note 1 above) at para 193.
[127] Ibid at paras 194–195 (emphasis added).
[128] Ibid at para 197.
[129] Ibid at para 198 (emphasis added).
[130] Ibid at para 199.
[131] Ibid at para 202 (emphasis added).
[132] Ibid at para 204 (emphasis added). Here, the Concurrence's approach bears some parallels with the observations of the Canadian Supreme Court in *WIC Radio*. The Court observed that '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 *in the context of political debate, commentary, media campaigns and public discourse*.' *WIC Radio* (note 30 above) at para 26 (emphasis added), citing R Brown *The Law of Defamation in Canada* (2 ed, 1994) 27–317. In other words, the word 'stole' might suggest a factual statement if uttered in a court of law but a comment if uttered as part of a political campaign. Its *meaning* would depend on the non-linguistic context. The Saskatchewan Queen's Bench in *Vellacott*, on the other hand, appeared to go only part of the distance, holding that the word 'steal' as referring to a politician's conduct would be understood by 'reasonably well-informed members of the public *reading the impugned articles*' as referring to improper use of public money, and noting, subsequently, that the media was not to be held to a standard of 'linguistic blindness'. *Vellacott* (note 117 above) at para 82 (emphasis added). Both *WIC Radio* and *Vellacott* were relied on by the DA in its written submissions before the Constitutional Court. Jamie & Borgström (note 86 above) at paras 71 and 78.

DA's SMS. What we do find – on five distinct occasions – is a direct reference to the 'context of an election campaign' in order to discern *what meaning is to the attributed to the word 'stole'*. The Concurrence's basic argument was that election discourse involved hyperbole and exaggeration, something of which people were 'generally' aware. Consequently, words like 'stole', which possessed both a narrow technical meaning as well as a broader, non-technical one, were to be understood as carrying the latter *if and to the extent they were used as part of political discourse* (eg, as an 'election punchline').[133] In other words, the Concurrence's interpretive method went beyond a reading of the text itself and included its *non-linguistic context*.

It is necessary to draw an important distinction here. The Majority referred, as well, to the 'loud, rowdy and fractious'[134] nature of South African political life and the 'more immediate dimension'[135] that it took during elections. This insight, however, was used by the Majority to enhance the scope of freedom of expression during elections (partially through the autonomy principle discussed above) and not to interpret the meaning of the DA's SMS itself.[136] Similarly, the High Court relied on an observation of the Witwatersrand Court in *Pienaar*, where it had been noted 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 … [and] the public and readers of newspapers that debate political matters, are aware of this.'[137] Although this observation is strikingly similar to the Concurrence's, even in *Pienaar*, the 'forthrightness' of South African political discourse was used by the court to examine the scope of the freedom of expression, and not to interpret the content of a defamatory utterance.[138] And similarly, in *McBride*, the Constitutional Court's invocation of the purposes of the Promotion of National Unity and Reconciliation Act 34 of 1995 (Amnesty Act) did not play a role in its attributing meaning to the term 'murderer', but the *policy* question of whether it was consistent with the purposes of the Amnesty Act to prohibit calling an amnestied person a murderer, on the pain of damages.[139]

[133] See also *Rickert* (note 89 above)('political speech is usually as much opinion as fact').

[134] *DA v ANC* (note 1 above) at para 133.

[135] Ibid at para 134.

[136] See also Jamie & Borgström (note 86 above) at para 45. Similarly, an argument that 'public figures' have to be thicker skinned than ordinary citizens is relevant for interpreting or limiting the extent of freedom of speech, but not to *this* enquiry.

[137] *Pienaar v Argus Printing and Publishing Co Ltd* [1956] 3 All SA 193 (W), cf *ANC v DA* (note 8 above) at para 47.

[138] See also *Argus Printing and Publishing Ltd v Inkatha Freedom Party* [1992] ZASCA 63, 1992 (3) SA 579 (AD), [1992] 2 All SA 185 (A)('right-thinking people are not likely to be greatly influenced in their esteem of a politician by derogatory statements made about him by other politicians or political commentators').

[139] For an exposition of this distinction in legal philosophy, see G Bhatia 'Understanding and Interpretation: A Fresh Defence of Dworkin's Interpretivist Theory of Law' (2015) 40 *Australian Journal of Legal Philosophy* 66.

The Concurrence's interpretive approach, therefore, broke new ground.[140] In technical terms, it privileged the *pragmatic meaning* (ie, by factoring in non-linguistic contexts) of a linguistic utterance over its *semantic*, or *sentence meaning*. The difference between the two is illustrated by Paul Grice: If I am standing at a crossroads, and a man driving in a car comes up to me and asks for directions to the nearest petrol pump, he clearly wants to be directed to a *functional* petrol pump. If I direct him to the nearest petrol pump, but which happens to be closed, I have faithfully excavated the semantic meaning of his utterance but misunderstood the pragmatic context in which he asked his question. The situation would be reversed if the man was in the area, doing a count of all petrol pumps.[141]

The example is simple but the point is an important one. The interpretation of a linguistic utterance is incomplete without attention to its pragmatic, non-linguistic background. However, this does not automatically mean that the complete pragmatic meaning is what the *law* requires in every case. The answer to that question depends upon the normative purposes that the law seeks to accomplish. Consider, for instance, hate speech. In *Afriforum v Malema*, the Equality Court was asked to attribute meaning to the phrase 'shoot the farmer/Boer' when sung by a political leader, in a public address, ostensibly as part of a 'liberation song'. The Court had to decide whether to understand the phrase in a metaphorical sense, that is, about the destruction of the apartheid regime, or in a more literal sense, that is, actually expressing an intention to shoot farmers/Boers. In finding the latter, the Court held that in the case of multiple meanings, 'the search is not to discover an exclusive meaning but to find the meaning the target group would reasonably attribute to the words'.[142] Considering that the entire purpose of hate speech law was to protect targeted minorities from discrimination, and to give them a sense of security in inhabiting a shared space, the Court correctly decided to attribute meaning to the impugned phrase by taking the *point of view* of the targeted group, within the existing historical and social context.

Consider, on the other hand, *Le Roux v Dey*.[143] The Supreme Court of Appeal had to decide whether it was defamatory for a student to photoshop a school teacher's and school principal's faces onto the bodies of two naked bodybuilders

[140] Perhaps tellingly, where Van der Westhuizen J lays out his interpretive approach and then applies it, the only reference to precedent is for the proposition that technical terms have multiple meanings. *DA v ANC* (note 1 above) at paras 194–204, and in particular para 198. *Pienaar* is not cited. Interestingly, however, in *Yutar*, which both the Majority and the Dissent referred to extensively (although not in this point), the Court, in determining the meaning of the word 'confirm' as used in a court submission, noted that 'in relation to evidence, the word "confirm", although it is capable of the wider meaning, is frequently *used in our Courts* to express a lesser notion than complete confirmation in each and every respect'. *Yutar* (note 45 above) at 6.

[141] P Grice *Studies in the Way of Words* (1991) 32.

[142] *Afriforum v Malema* [2011] ZAEQC 2, 2011 (6) SA 240 (EqC), 2011 (12) BCLR 1289 (EqC) at para 109. See also *South African Human Rights Commission v Qwelane* [2017] ZAGPJHC 218, [2017] 4 All SA 234 (GJ), 2018 (2) SA 149 (GJ)(the High Court, sitting as the Equality Court, found Jon Qwelane's homophobic speech to be in violation of the provisions of the Equality Act. Crucially, the decision was based, in part, on witness testimony of members of the LGBTI+ community, who personally affirmed the discrimination they had faced as members of a protected group, as well as the psychological impact of homophobic slurs upon them).

[143] [2010] ZASCA 41, 2010 (4) SA 210 (SCA), [2010] 3 All SA 497 (SCA).

involved in homoerotic action. The students argued that the audience in this case, being limited to members of the school, would have been 'in the know' and would not have drawn any association between what the photoshopped picture was apparently portraying, and the actual relations between the teacher and the principal. The (partially) dissenting opinion accepted this argument, and framed it as a question of *meaning*:

> If one were to apply the traditional test by postulating the reaction of hypothetical ordinary right-thinking persons generally, *such persons who are outsiders to the particular school would not know or understand the context in which it was created or published*: thus, they would not know the two men whose faces have been superimposed onto the naked bodies; they would not know their true character and disposition; they would therefore not see the incongruity in the situation; they would not recognise the strategically placed school emblems and would not understand the significance of those emblems in relation to the two figures depicted in the picture. They would not know that the picture was created and circulated by adolescent schoolboys in an attempt to poke fun at their principal and vice-principal. *In short, such outsiders would not understand the 'natural and ordinary meaning' conveyed by the picture* – as little as if a picture were shown to them bearing a subtitle in Mandarin. The subtitle in Mandarin would first have to be translated before the reasonable person of ordinary intelligence would be able to determine whether or not it carries a defamatory meaning. Here, the reasonable outsider would require a 'translation' of a different kind before being able to interpret the picture in question.
>
> *The audience for which the picture was intended, namely the defendants and their fellow learners at the school, saw it quite differently*. Some of them received it on their cell phones, others saw the printout that was made by the second defendant. Their reactions, while not decisive, were certainly significant. Being familiar with the context, they immediately recognised the attempt at humour and laughed at the incongruity conveyed by the picture.[144]

The majority in *Le Roux*, on the other hand, while agreeing that the 'reasonable person' was not an abstraction, and had to be contextualised, nonetheless rejected the argument on the basis that 'interpretation is an objective issue. *Actual loss of reputation is not required, nor is belief in the defamation.*'[145] In other words, the difference in *Le Roux* between the majority and the dissent in deciding what (pragmatic) factors were *relevant* for determining 'meaning' depended upon their disagreement over what defamation was actually *about* (demonstrable loss of

[144] Ibid at paras 60–61 (emphasis added).

[145] Ibid at para 15 (emphasis added). See also *Le Roux & Others v Dey* [2011] ZACC 4, 2011 (3) SA 274 (CC), 2011 (6) BCLR 577 (CC)(On appeal, the separate judgments of the Constitutional Court dealt with the issue, although not in detail. For example, in a dissenting opinion (holding that there was no defamation) Froneman and Cameron JJ noted that '*in the school context*, the likely childish origins of the image would, without doubt have played a role in, if not determined, the likely viewer's assessment and understanding of the image' (at para 162). The Majority, on the other hand, applied the test of the 'reasonable reader of ordinary intelligence', which it conceded was a 'legal construct' (at paras 89–90). I have, however, discussed the judgment of the Supreme Court of Appeal because, on this issue, the elaboration of the arguments is more detailed and lucid, and the difference between the two approaches starker).

reputation or merely a 'tendency' towards loss of reputation).[146] Indeed, there are other situations where there might be good *reasons* for selecting semantic meaning over pragmatic meaning. For instance, there are some legal scholars who argue that the interpretation of *statutes* should be limited to their semantic meaning for reasons of democracy, the rule of law, and given that the pragmatic context is unavailable to the audience.[147]

However, in *DA v ANC*, the Dissent (and to a lesser extent, the Majority) failed to provide reasons for selecting the semantic meaning of 'stole' over its pragmatic meaning. In fact, it would appear that the context of elections, and the context of the Electoral Act, is one that would *require* close attention to pragmatic meaning. Since s 89(2)(c) is part of a series of provisions aiming to prevent 'unfair influence' upon elections, a point specifically highlighted by all three opinions, the starting point of any enquiry would need to be in what manner, precisely, a particular statement 'influenced' potential voters. For this, one would need to examine not how an abstract, 'reasonable' person would understand the offending text but how a *potential voter during an election campaign* would understand it.

What the Concurrence understood – without fully articulating it – was that the statement 'the Nkandla Report shows how Zuma stole your money to build his R246m home' would *mean* different things depending upon whether the statement was read out in court, whether it was part of an academic biography of President Zuma, or whether it was communicated by a rival political party to its constituents in an election campaign. His concurring opinion – unlike the Majority and the Dissent – was sensitive to the non-linguistic background of a linguistic utterance and, consequently, in its interpretation of what the DA's SMS meant, is more persuasive than either.

IV Conclusion

In this essay, I have argued that *DA v ANC* was correctly decided by the Constitutional Court. The DA's SMS did not violate s 89(2)(c) of the Electoral Act or the Code. More specifically, I have argued that there were two significant points of difference between the Majority and the Dissent, and between the Dissent and the Concurrence.

First, the Majority and the Dissent disagreed on whether a reference to the Nkandla Report as the 'source' of the claim in the DA's SMS was sufficient to

[146] English cases, in deciding upon the range of meanings possible to attribute to a defamatory utterance, have largely adopted the test of the 'ordinary, reasonable' viewer or reader (see, for example, *Skuse v Granada Television* [1993] EWCA Civ 34; *Gillick v BBC* [1995] EWCA Civ 46), or that of 'ordinary and natural meaning', which is the meaning that 'ordinary men and women going about their affairs' (*Lewis v Daily Telegraph* [1964] AC 234, 266) or readers as 'reasonable men' would have understood (see, for example, *Slim v Daily Telegraph* [1968] 2 QB 157). One arguable exception to this rule is the concept of innuendo, which is not so much about the linguistic *meaning* of an utterance but about the *implications* that it conveys (in light of certain extrinsic facts). As Lord Hodson explained in *Lewis v Daily Telegraph* at 271: '[A] man is a good advertiser only becomes capable of a defamatory meaning if coupled with proof, for example, that he was a professional man whose reputation would suffer if such were believed of him.'

[147] See, for example, G Bhatia 'The Politics of Statutory Interpretation: The Hayekian Foundations of Justice Antonin Scalia's Jurisprudence' (2015) 42(3) *Hastings Constitutional Law Quarterly* 525.

characterise the statement in the SMS as a 'comment' (and therefore, prima facie, beyond the scope of s 89(2)(c)). I argued that the Majority was correct to hold that it was, but fell short of providing an adequate conceptual grounding for this finding. This was especially important, because the history of fair comment and defamation law, which was relied on by way of analogy by both judgments, could be read to be equally supportive of both points of view. The crucial missing step, in my view, was an analysis of the extent to which, relative to the context of defamation, an election campaign presupposed a relationship of autonomy between candidates and constituents. Drawn from constitutional principles and precedent, and applied to the facts of this case, the principle of autonomy, when read into s 89(2)(c) of the Electoral Act, only required the DA to refer to the Nkandla Report, which was already in the public domain. The DA discharged this obligation.

While the Majority stopped at this point, the Dissent and the Concurrence addressed the further – and in my view, necessary – question regarding the *meaning* of the DA's SMS. While the Dissent found that the SMS insinuated that the Nkandla Report had alleged that President Zuma had committed the crime of theft, the Concurrence read the word 'stole' in a broader sense. I argued that the root of the disagreement was the Dissent's application of a semantic theory of linguistic meaning, while the Concurrence adopted a pragmatic theory of meaning. A full interpretation of any linguistic utterance requires the non-linguistic, pragmatic context to be taken into account. Consequently, if the Dissent wished to limit the range of meanings of the DA's SMS to those covered by semantic/sentence meaning, then the onus was upon it to justify that choice. This it failed to do. On the other hand, the context of an election – as the Concurrence understood – seemed to require an even greater scrutiny of the full pragmatic meaning of statements, a scrutiny that would lead to the conclusion that the word 'stole', in the SMS, was not limited to 'the crime of theft'.

Therefore, I would argue that it is a combined reading of the Majority and the Concurrence, in light of the theoretical concepts outlined above, that provides a complete answer to the set of constitutional questions raised in *DA v ANC*. Furthermore, these concepts are not limited to defamation or to electoral speech, but apply to a range of issues that arise under s 16 of the Constitution. In particular, the principle of audience autonomy is important in deciding when concepts from one field of free speech jurisprudence can be migrated to another. Perhaps more importantly, audience autonomy can assist courts in deciding how to strike the 'balance' between free speech and other constitutional rights, or under the social interests mandated by s 36 of the Constitution. Close attention to the principle of audience autonomy – and the extent to which it applies in the area of free speech law under consideration – would help courts to craft responsive balancing principles under the Constitution. In addition, when it comes to interpreting speech acts themselves, courts must be cognisant of the distinction between semantic and pragmatic meaning, and ask themselves whether the context requires one or the other. The courts' hate speech jurisprudence already reflects an awareness of this principle, and there are strong signs that other areas will as well.