CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 76/14

In the matter between:

DEMOCRATIC ALLIANCE Applicant

and

AFRICAN NATIONAL CONGRESS First Respondent

INDEPENDENT ELECTORAL COMMISSION Second Respondent

Neutral citation:	*Democratic Alliance v African National Congress and Another* [2015] ZACC 1
Coram:	Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Van der Westhuizen J and Zondo J
Judgments:	Zondo J with Jafta J and Leeuw AJ concurring (main judgment): [1] to [115] Cameron J, Froneman J and Khampepe J with Moseneke DCJ and Nkabinde J concurring (joint judgment): [116] to [169] Van der Westhuizen J with Madlanga J concurring (separate judgment): [170] to [208] Order: [169]
Heard on:	11 September 2014
Decided on:	19 January 2015
Summary:	Alleged breach of section 89(2)(c) of the Electoral Act — publication of false information to influence outcome of election — alleged breach of Electoral Code of Conduct — defence of fair comment — opinion — sections 16 and 19 of the Constitution —

freedom of expression — right to vote — right to free and fair elections — does section 89(2)(c) of Electoral Act apply to a statement of opinion or does it apply only to statements of fact? — analysis of case law on fair comment — penal provisions to be interpreted restrictively — was published statement false? — statement that "the Nkandla report shows how Zuma stole your money to build his R246m home" held to be opinion and not statement of fact and not to breach section 89(2)(c) of Electoral Act — appeal from Electoral Court to Supreme Court of Appeal competent — leave to appeal granted — appeal upheld — decision of Electoral Court set aside.

ORDER

On appeal from the Electoral Court (hearing an appeal from the South Gauteng High Court, Johannesburg):

1. Leave to appeal is granted.
2. There is no order as to costs.
3. The order of the Electoral Court is set aside and replaced with the following:

   "The appeal is dismissed."

JUDGMENT

ZONDO J (Jafta J and Leeuw AJ concurring):

Introduction

[1] This case concerns a statement published by the Democratic Alliance (applicant) on 20 March 2014 by way of a bulk short message service (SMS) to more than 1.5 million potential voters in Gauteng concerning President Jacob Zuma,

President of the African National Congress(first respondent) and of the country. The applicant sent the SMS with the intention of persuading the recipients thereof to vote for itself and not to vote for the first respondent, its main political rival. President Zuma was the first respondent's presidential candidate for the May 7, 2014 elections. The elections were for members of Parliament and Provincial Legislatures.

[2] The first respondent took the view that the applicant's statement about its President was false and was published with the intention of influencing the outcome of the election. It also contended that, for that reason, the SMS constituted a breach of section 89(2)(c) of the Electoral Act[1] and/or item 9(1)(b) of the Electoral Code of Conduct issued under the Electoral Act. It, therefore, made an application to the South Gauteng Division of the High Court (High Court) for an interdict and other relief against the applicant on the basis that the applicant was not entitled to publish the SMS.

[3] The applicant contended that the SMS constituted fair comment or an opinion that could be honestly and genuinely held by any fair person, that the SMS was not false and that the publication of the statement did not constitute a breach of section 89(2)(c) of the Electoral Act or item 9(1)(b) of the Electoral Code of Conduct.

[4] This case raises the question of the relationship or intersection between, on the one hand, the applicant's right to freedom of expression[2] which includes the right to

[1] 73 of 1998.

[2] Section 16 of the Constitution reads:

> "(1) Everyone has the right to freedom of expression, which includes—
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> (a) freedom of the press and other media;
>
> (b) freedom to receive or impart information or ideas;
>
> (c) freedom of artistic creativity; and
>
> (d) academic freedom and freedom of scientific research.
>
> (2) The right in subsection (1) does not extend to—
>
> (a) propaganda for war;
>
> (b) incitement of imminent violence; or

impart information or ideas as well as the constitutional right to campaign for a political party or cause and, on the other, the right to free and fair elections[3] and every adult citizen's right to vote.[4] In this regard it must be emphasised that this Court has said that the right to vote entrenched in section 19(3) of our Constitution is a right to vote in free and fair elections.[5] It has also said that the right to vote "is indispensable to, and empty without, the right to free and fair elections".[6]

[5] The publication of false information by a political party or a candidate for election concerning a rival political party or a rival candidate in order to gain votes or in order for certain voters not to vote for a certain party is anathema to the notion of free and fair elections and may violate the citizens' right to free and fair elections. A statutory prohibition of the publication of a false statement during election campaigns is a limitation of the right to freedom of expression and the right to campaign. However, at the same time such a prohibition enhances the right to free and fair elections. All of these rights entrenched in our Bill of Rights will need to be borne in mind in interpreting section 89(2)(c) of the Electoral Act. However, before I deal with the question whether the applicant was entitled to publish the SMS in issue, it is necessary to set out the background to the dispute.

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

[3] Section 19(2) of the Constitution reads:

"Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution."

[4] Section 19(3) of the Constitution reads:

"Every adult citizen has the right—

(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and

(b) to stand for public office and, if elected, to hold office."

[5] See *New National Party of South Africa v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) (*New National Party*) at para 14.

[6] Id at para 12.

Background[7]

[6] The applicant is a registered political party. It is the official opposition party in Parliament. The first respondent is also a registered political party. It is the ruling party in South Africa and has been the ruling party since the historic elections of 1994.

[7] President Zuma became President of the first respondent in December 2007. Less than two years later, in May 2009, he became President of the country.

[8] In May 2009 officials of the Department of Public Works (DPW) and representatives of the South African Police Service (SAPS) visited President Zuma's private residence in Nkandla, KwaZulu-Natal to determine whether the residence had sufficient security measures to ensure the safety of the President and his family. They found that the residence did not have sufficient security measures.

[9] In about 2009 President Zuma made arrangements for the design and, ultimately, the building of three additional houses in the Nkandla residence. To this end, he appointed Mr Makhanya, an architect.

[10] In August 2009 the DPW secured the approval of an amount of R27 893 067 for the installation of security measures in the President's private residence. By February 2010 the costs were estimated to have escalated to about R80 836 249. By July 2010 they were said to have gone up to R130 604 267.02.

[11] In about December 2011 the Public Protector received complaints about the escalating costs that were being incurred in connection with the installation of alleged security measures in President Zuma's private residence. The complainants included the applicant and some members of the public. The complainants requested the

[7] Most of the background used here is taken from the Public Protector's Report titled "Secure in Comfort" dated March 2014 (also known as the Nkandla Report). According to the report, the Public Protector furnished the President with a provisional report to enable the President to comment on it before the final report was released to the public. It does not appear that the President disputed any aspects of the background used here.

Public Protector to investigate the costs. The Public Protector's investigation took two years.

[12] On 18 February 2014 President Zuma declared 7 May 2014 as a public holiday and the day on which national and provincial elections would be held. In due course the applicant, the first respondent and other political parties that were registered to contest the elections signed the Electoral Code of Conduct issued under the Electoral Act and committed themselves to observing its provisions.

[13] On 19 March 2014 the Public Protector released the report of her investigation. The report is normally referred to as the Nkandla Report (Nkandla Report or Report). On 20 March 2014 the applicant sent a message to 1 593 682 cellphones of potential voters in Gauteng by way of an SMS. The message read:

> "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."

The reference in the message to "Zuma" is a reference to President Zuma. During this time the applicant and the first respondent were involved in serious election campaigns throughout the country. It is common cause that, in sending the SMS to the more than 1.5 million potential voters, the applicant intended to influence the outcome of the election that was to be held on 7 May 2014.

In the High Court

[14] The first respondent took the view that, in publishing the SMS, the applicant had acted in breach of section 89(2)(c) of the Electoral Act and item 9(1)(b) of the Electoral Code of Conduct. Section 89(2)(c) of the Electoral Act precludes any registered political party or candidate from publishing any "false information" with the intention of influencing the conduct or outcome of an election. The first respondent, therefore, brought an urgent application in the High Court for an interdict restraining the applicant from further disseminating or distributing the SMS and for an

order compelling the applicant to send another SMS to the same recipients with an apology in certain specific terms.

[15] The first respondent contended that the SMS meant that the Nkandla Report had found that President Zuma had stolen R246 million to build his home. The first respondent said that the Nkandla Report had not made any such finding and, therefore, the SMS was false. According to the first respondent, this meant that the applicant had published false information with the intention of influencing the outcome of the election as contemplated in section 89(2)(c) of the Electoral Act. It contended that, for that reason, the publication of the SMS was in breach of this statutory provision and the Electoral Code of Conduct. The applicant, continued the contention, was not entitled to publish the SMS.

[16] The applicant opposed the first respondent's application. It pointed out that the SMS did not mean that the Nkandla Report had found that President Zuma had stolen R246 million to build his home. It disputed that the SMS was false. It contended that the SMS meant that the Nkandla Report showed how President Zuma had stolen "your money" to build his R246 million home. It contended in its answering affidavit that, "read in light of the Nkandla Report, the SMS express[ed] an opinion that a fair person might honestly and genuinely hold in light of the facts in the Report and the Report must be understood and read in its totality".

[17] A critical issue that emerged from the affidavits was whether the SMS constituted an expression of comment/opinion or constituted a statement of fact. The applicant maintained that the SMS constituted fair comment or was an expression of opinion while the first respondent maintained that it was a statement of fact.

[18] The matter came before Hellens AJ. He referred, among others, to the right to freedom of expression in section 16 of the Constitution, its importance, particularly during election campaigns and the constitutional right to political activity provided for in section 19 of the Constitution. He concluded that the SMS was an expression of

opinion. The Court held that an expression of opinion was not prohibited by section 89(2)(c) of the Electoral Act and item 9(1)(b) of the Electoral Code of Conduct. In considering the matter, the High Court appears not to have considered the distinction between a statement of opinion and a statement of fact. It held that the applicant had been entitled to publish the SMS. It dismissed the first respondent's application. It subsequently granted the first respondent leave to appeal to the Electoral Court.

In the Electoral Court

[19] The first respondent appealed to the Electoral Court[8] against the judgment and order of the High Court. On the merits, the parties' contentions before the Electoral Court remained the same as before the High Court. In a unanimous judgment written by Mthiyane DP, the Electoral Court concluded that the SMS was not a comment or opinion but a statement of fact. The Court also held that the statement was false because the Nkandla Report did not find that President Zuma had stolen "your money" to build his R246 million home. The Court held that, in publishing the SMS with the intention of influencing the outcome of the election, the applicant had acted in breach of section 89(2)(c) of the Electoral Act and item 9(1)(b) of the Electoral Code of Conduct. It upheld the first respondent's appeal. It declared the publication of the SMS to have been a contravention of section 89(2)(c) of the Electoral Act and item 9(1)(b)(ii) of the Electoral Code of Conduct. It ordered the applicant to send to the same cellphone numbers an SMS in terms prescribed by the Court to, in effect, retract the earlier SMS. The Court refused to order the applicant to apologise to the first respondent.

In this Court

Jurisdiction

[20] This matter clearly raises constitutional issues. It implicates, at a general level, the right to freedom of expression which includes the right to impart information or

[8] The Electoral Court was constituted by Mthiyane DP, Moshidi J, Wepener J, Adv M Mthembu and Adv Pather. Mthiyane DP is Deputy President of the Supreme Court of Appeal whereas Moshidi J and Wepener J are Judges of the High Court.

ideas. Since the publication of the SMS was part of the applicant's campaign for the 2014 elections, the matter also implicates in particular:

(a) the right to campaign for a political party or cause as entrenched in section 19(1) of the Constitution;

(b) every citizen's right to free and fair elections as entrenched in section 19(2) of the Constitution; and

(c) every adult citizen's right to vote as entrenched in section 19(3) of the Constitution.

[21] The matter implicates the last mentioned two rights because the Electoral Act, which the first respondent contends the applicant's publication of the SMS breached, seeks to regulate and give content and effect to the right to free and fair elections in section 19(2) of the Constitution and to the right to vote entrenched in section 19(3) of the Constitution. The question that this Court must determine, if we grant leave to appeal, is whether in our law it is permissible for a political party or candidate for elections to publish a false statement concerning a rival or rival party with the intention of influencing the outcome of an election. Obviously, we can only reach that question if the statement was false. This Court clearly has jurisdiction in respect of this matter.

[22] This Court's jurisdiction is not ousted by the provisions of section 96(1) of the Electoral Act.[9]

Leave to appeal

[23] This Court grants leave to appeal if it is in the interests of justice that leave to appeal be granted. A question that arises in this matter is whether an appeal from a

[9] *African National Congress v Chief Electoral Officer, Independent Electoral Commission* [2009] ZACC 13; 2010 (5) SA 487 (CC); 2009 (10) BCLR 971 (CC) (*African National Congress*). Section 96(1) of the Electoral Act reads:

> "The Electoral Court has final jurisdiction in respect of all electoral disputes and complaints about infringements of the Code, and no decision or order of the Electoral Court is subject to appeal or review."

decision of the Electoral Court to the Supreme Court of Appeal is competent in the light of the provisions of section 96(1) of the Electoral Act. This question arises because, if an appeal to the Supreme Court of Appeal is competent, that would be one of the factors that this Court would have to take into account when considering whether it is in the interests of justice to grant the applicant leave to appeal to this Court without having first appealed to the Supreme Court of Appeal.

[24] Section 96(1) reads:

> "The Electoral Court has final jurisdiction in respect of all electoral disputes and complaints about infringements of the Code and no decision or order of the Electoral Court is subject to appeal or review."

This provision was considered by this Court in *African National Congress*[10] in relation to the question whether it ousted this Court's appellate jurisdiction against a decision of the Electoral Court in respect of an electoral dispute or a complaint about an alleged infringement of the Electoral Code of Conduct. This Court held that the provision did not oust this Court's jurisdiction conferred upon it by the Constitution. It held that section 96(1) should be interpreted in a manner that is consistent with the Constitution. It pointed out that, indeed, section 2 of the Electoral Act provides that any person interpreting or applying the Electoral Act must do so in a manner that "gives effect to the constitutional guarantees".[11]

[25] This Court held that, were section 96(1) to be interpreted so as to oust this Court's jurisdiction, it would be inconsistent with section 167(3)(a) of the Constitution as it was then. That provision said at the time that this Court was the highest Court in all constitutional matters. This Court then held that section 96(1) must be read "to mean that no appeal or review lies against a decision of the Electoral Court concerning

[10] *African National Congress* above n 9.

[11] Id at para 7.

an electoral dispute or a complaint about an infringement of the Code, save where the dispute itself concerns a constitutional matter within the jurisdiction of this Court".[12]

[26] Section 168(3) of the Constitution provides:

> "The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in respect of labour or competition matters to such extent as may be determined by an Act of Parliament."

In terms of section 18 of the Electoral Commission Act[13] the Electoral Court has the same status as the High Court. This means that it is a court contemplated in the phrase "or a court of a status similar to the High Court of South Africa" in section 168(3) of the Constitution.

[27] The applicant's argument, as I understood it, was that the phrase "to such extent as may be determined by an Act of Parliament" in section 168(3) of the Constitution qualified the phrase "the High Court of South Africa or a court of a status similar to the High Court of South Africa" and that there was no such Act in respect of the Electoral Court. I do not agree. That phrase qualifies the words "except in respect of labour or competition matters" and not "the High Court of South Africa or a court of a status similar to that of the High Court". Therefore, in respect of appeals from the Electoral Court to the Supreme Court of Appeal in electoral disputes or complaints about the infringement of the Electoral Code of Conduct, section 96(1) must be interpreted in the same way in which this Court interpreted it in *African National Congress*[14] in relation to the jurisdiction of this Court. The result is that appeals from the Electoral Court to the Supreme Court of Appeal concerning electoral disputes or complaints about alleged infringements of the Electoral Code of Conduct are competent.

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[12] Id.

[13] 51 of 1996.

[14] See [9].

[28] Notwithstanding the fact that an appeal from the Electoral Court to the Supreme Court of Appeal is competent, I am of the opinion that it is in the interests of justice that we grant leave to appeal. This is because:

(a) the matter raises important constitutional issues;

(b) there are reasonable prospects of success;

(c) we have already heard full argument on all the issues in the matter; and

(d) if we insisted that the matter should first go to the Supreme Court of Appeal, we may end up hearing the same matter for the second time after it has been to the Supreme Court of Appeal.

The merits

Constitutional and statutory framework

[29] The dispute between the applicant and the first respondent is whether the applicant was entitled to publish the SMS that it published on 20 March 2014 concerning President Zuma in connection with the Nkandla Report. The first respondent contends that the applicant was not entitled to publish the SMS. Its ground for this contention is that the publication of the SMS constituted publication of false information with the intention of influencing the outcome of an election and that is proscribed by section 89(2)(c) of the Electoral Act and item 9(1)(b) of the Electoral Code of Conduct issued under the Electoral Act.

[30] The applicant disputes the first respondent's contention. It contends that, although it did publish the SMS with the intention of influencing the outcome of the election, in doing so it was expressing fair comment or an opinion which could genuinely and honestly be held by any fair minded person about President Zuma in the light of the Nkandla Report. This is the defence of fair comment that one finds in the law of defamation.

[31] In considering whether the applicant's conduct constituted a breach of section 89(2)(c), it is necessary to bear in mind the constitutional and statutory framework that is relevant to the question. In this regard the starting point is that the dispute between the parties is an electoral dispute. The publication of the SMS was done as part of the applicant's election campaign ahead of the May 2014 elections. The first respondent brought its application in the High Court because it believed that the applicant had acted in breach of section 89(2)(c) and item 9(1)(b) of the Electoral Code of Conduct. To determine whether this is, indeed, so it is necessary to have regard to the Constitution, the Electoral Act and the Electoral Code of Conduct.

[32] Section 16(1) of the Constitution confers upon everyone the right to freedom of expression which includes freedom to receive or impart information or ideas. Section 19(1) confers upon "every citizen" the freedom to make political choices which includes the right "to campaign for a political party or cause". The applicant relied heavily upon these rights. However, these are not the only rights entrenched in the Bill of Rights that are implicated in this matter. Although the first respondent did not specifically refer to or rely upon other rights in the Bill of Rights, undoubtedly it is necessary, in considering this matter, to also have regard to the rights entrenched in section 19(2) and (3)(a) of the Constitution.

[33] Section 19(2) reads:

> "Every citizen has the right to *free*, *fair* and regular elections for any legislative body established in terms of the Constitution." (Emphasis added.)

Section 19(3)(a) reads:

> "Every adult citizen has the right—
>
> (a) to vote in elections for any legislative body established in terms of the Constitution".

In *New National Party*[15] this Court held that "*[t]he right to vote contemplated by section 19(3) is a right to vote in free and fair elections* in terms of an electoral system prescribed by national legislation which complies with the aforementioned requirements laid down by the Constitution".[16] (Emphasis added.) This Court also said that the Constitution "recognises that it is necessary to regulate the exercise of the right to vote so as to give substantive content to the right".[17]

[34] The Electoral Act is national legislation that seeks to regulate and give content and meaning to the right to free and fair elections and the right to vote. Indeed, in *New National Party* this Court pointed out that the national legislation that prescribes the electoral system required by the Constitution is the Electoral Act.[18] It is because the Electoral Act seeks to regulate and give content to the right to vote and the right to free and fair elections that the Electoral Act contains provisions that proscribe certain conduct in connection with elections and provides for the Electoral Commission to issue an Electoral Code of Conduct.

[35] Section 99(1) of the Electoral Act reads:

> "The Electoral Code of Conduct must be subscribed to—
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> (a) by every registered party before that party is allowed to contest an election; and
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> (b) by every candidate before that candidate may be placed on a list of candidates in terms of section 31."

[36] Section 99(2) of the Electoral Act reads:

> "*In order to promote free, fair and orderly elections*, the Commission may compile and issue any other Code." (Emphasis added.)

[15] Above n 5.

[16] Id at para 14.

[17] Id at para 13.

[18] Id at para 14.

Section 94 of the Electoral Act provides:

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

Prohibited conduct under Part 1

[37] Part 1 of Chapter 7 of the Electoral Act prohibits various types of conduct. The purpose of the prohibition is to ensure conditions that are conducive to the achievement of free and fair elections to which, as section 19(2) of the Constitution provides, all the citizens of this country are entitled. It is also to ensure that the right to vote in free and fair elections that this Court spoke about in *New National Party* is not infringed.

[38] The conduct prohibited under Part 1 falls under seven headings. These are: undue influence, impersonation, intentional false statements, infringement of secrecy, prohibitions concerning voting and election materials, prohibitions concerning placards and billboards during elections and obstruction of, or, non-compliance with, a direction of the Electoral Commission, chief electoral officer and other officers.

[39] Section 88 prohibits anyone from resorting to impersonation in order to register as a voter or in order to vote. Section 90(1) prohibits any interference with a voter's right to secrecy when casting a vote. Section 92 reads:

> "From the date on which an election is called to the date the result of the election is determined and declared in terms of section 57, no person may deface or unlawfully remove any billboard, placard or poster published by a registered party or candidate."

Section 97 renders any person who contravenes Part 1 of Chapter 7 of the Electoral Act guilty of an offence. Section 108 provides that on voting day no person may—

> "(a) hold or take part in any political meeting, march, demonstration or other political event; or
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> (b) engage in any political activity, other than casting a vote in the area within the boundary of a voting station".

The provisions of section 108 clearly limit the right to freedom of expression, the right to freedom of movement, freedom of association, the right to campaign and the right to take part in certain political activities. The purpose of all these limitations to those fundamental rights is to create conditions that are conducive to the attainment of free and fair elections.

[40] Schedule 1 to the Electoral Act is the Electoral Code of Conduct. It, too, prohibits certain types of conduct. In item 1 it makes its purpose clear:

> "The purpose of this Code is to promote conditions that are *conducive to free and fair elections*, including—
>
> (a) tolerance of democratic political activity; and
>
> (b) free political campaigning and open public debate." (Emphasis added.)

Item 9 of the Electoral Code of Conduct also deals with prohibited conduct. For example, it provides:

> "(1) No registered party or candidate may—
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> (a) use language or act in a way that may provoke—
>
> (i) violence during an election;
>
> . . .
>
> (b) publish false or defamatory allegations in connection with an election in respect of—
>
> (i) a party, its candidates, representatives or members; or
>
> (ii) a ward candidate or that candidate's representatives".

Item 4 of the Electoral Code provides in part:

> "(1) Every registered party and every candidate must—
>
> (a) publicly state that everyone has the right—
>
> (i) to freely express their political beliefs and opinions;
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> (ii) to challenge and debate the political beliefs and opinions of others;
>
> (iii) to publish and distribute election and campaign materials, including notices and advertisements;
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> (iv) to lawfully erect banners, billboards, placards and posters;
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> . . .
>
> (b) publicly condemn any *action that may undermine the free and fair conduct of elections*.
>
> (2) Every registered party and every candidate must accept the result of an election or alternatively challenge the result in a court." (Emphasis added.)

[41] Against the above background it is now appropriate to interpret section 89(2)(c) of the Electoral Act. In seeking to interpret this provision, it is important to bear in mind the interpretive injunction in section 39(2) of the Constitution. Section 39(2) reads:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

In *Hyundai*[19] this Court pointed out that "judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section". Later on Langa DP warned that such an interpretation should not be unduly strained.[20] Langa DP quoted with approval a passage from *National Coalition for Gay and Lesbian*

[19] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at para 23.

[20] Id at para 24.

Equality[21] in which it was pointed out that interpreting legislation in a way which "promotes the spirit, purport and objects of the Bill of Rights as required by s 39(2) of the Constitution . . . is limited to what the text is reasonably capable of meaning".

[42] We must ensure that the interpretation we give to section 89(2)(c) is not only consistent with the right to freedom of expression but also with all citizens' right to free and fair elections and with every adult citizen's right to vote in free and fair elections. The right to freedom of expression is certainly not the only constitutional right with which the meaning we give to section 89(2)(c) must be consistent. Equally important is the need for us to also give section 89(2)(c) a meaning that is consistent with the right to free and fair elections. As this Court said in *New National Party*, the right to vote entrenched in our Constitution is a right to vote in free and fair elections. This means that any conduct that threatens to render an election unfree and unfair is conduct that threatens citizens' rights to vote and to free and fair elections. To state the obvious, an election that any political party or candidate wins as a result of false statements would be an unfair election. As such it would be an infringement of the citizens' right to *free and fair* elections. It is, therefore, important that no one resorts to making false statements about a political party, its leaders or candidates in order to win votes or to divert votes from a political rival.

[43] Through O'Regan J in *Khumalo*[22] this Court quoted with approval the following statement by Cory J in *Hill v Church of Scientology of Toronto*:[23]

> "False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society."[24]

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[21] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 23-4.

[22] *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) (*Khumalo*) at para 35.

[23] *Hill v Church of Scientology of Toronto* (1995) 126 DLR (4th) 129 SCC.

[24] Id at para 106.

Writing for a unanimous Court, O'Regan J herself said in *Khumalo*:

> "There can be no doubt that the constitutional protection of freedom of expression has at best an attenuated interest in the publication of false statements."[25]

[44] The right to free and fair elections and the right to vote in such elections are very important rights in our democracy. Dealing with the importance of the right to vote in free and fair elections, this Court said in *New National Party*:

> "The importance of the right to vote is self-evident and can never be overstated. There is, however, no point in belabouring its importance and it is sufficient to say that the right is fundamental to a democracy, for without it there can be no democracy. *But the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless*."[26] (Emphasis added.)

[45] Later on this Court said in the same case:

> "The Constitution takes an important step in the recognition of the importance of the right to exercise the vote by providing that all South African citizens have the right to free, fair and regular elections. It is to be noted that all South African citizens irrespective of their age have a right to these elections. The right to vote is, of course, indispensable to, and empty without, the right to free and fair elections; the latter gives content and meaning to the former. The right to free and fair elections underlines the importance of the exercise of the right to vote and the requirement that every election should be fair has implications for the way in which the right to vote can be given more substantive content and legitimately exercised. Two of these implications are material for this case: each citizen entitled to do so must not vote more than once in any election; any person not entitled to vote must not be permitted to do so. The extent to which these deviations occur will have an impact on the fairness of the election. This means that the regulation of the exercise of the right to

[25] *Khumalo* above n 22 at para 35.

[26] *New National Party* above n 5 at para 11.

> vote is necessary so that these deviations can be eliminated or restricted in order to ensure the proper implementation of the right to vote."[27] (Footnote omitted.)

[46] In interpreting section 89(2)(c) we should look for an interpretation that strikes 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. As this Court said in *Khumalo*: "[A]lthough freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be construed in the context of the other values enshrined in our Constitution".[28] In this regard it must be remembered that the provisions of the Electoral Act that may be seen to limit the right to freedom of expression such as section 89(2)(c)—

(a) serve a good purpose in our democracy; they seek to create conditions that are conducive to the attainment of free and fair elections which sustain our democracy; and

(b) operate only for a few months in every five year electoral cycle relating to national and provincial elections as well as municipal elections; generally, they limit that right for about four months in every cycle of 60 months relating to either election.

[47] The reason for my emphasis of the right to free and fair elections and the right to vote is that the first respondent's complaint was that, in publishing the SMS, the applicant resorted to the publication of a false statement about its presidential candidate with the intention of influencing the election outcome. It contends that such conduct constituted a breach of section 89(2)(c). Our Constitution demands nothing short of free and fair elections. The publication of false statements by one or other party in order to obtain votes that it may otherwise not have received is inconsistent with the right to free and fair elections and is a threat to the right to free and fair elections and to the proper exercise of the right to vote.

[27] Id at para 12.

[28] *Khumalo* above n 22 at para 25.

[48] Section 89(1) and (2) of the Electoral Act reads:

> "(1) No person, when required in terms of this Act to make a statement, may make the statement—
>
> (a) knowing that it is false; or
>
> (b) without believing on reasonable grounds that the statement is true.
>
> (2) No person may publish any false information with the intention of—
>
> (a) disrupting or preventing an election;
>
> (b) creating hostility or fear in order to influence the conduct or outcome of an election; or
>
> (c) influencing the conduct or outcome of an election."

[49] A comparative reading of the provisions of section 89(1) and those of section 89(2) reveals that—

(a) under subsection (1)(a) what is prohibited is two types of conduct; the one type of conduct is making a statement knowing that it is false, the other, which is under subsection (1)(b), is the making of a statement that the person making it has no reasonable grounds to believe is true; this means that the making of a false statement when the maker of the statement has reasonable grounds to believe is true is not prohibited by subsection (1)(b).

(b) under subsection (2) what is prohibited is the publication of false information with the intention of doing any one or more of the things specified in paragraphs (a) to (c). The false information must be published with the intention of—

(i) disrupting or preventing an election;

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

(iii) influencing the conduct or outcome of an election.

Under subsection (2) the publication of false information is not prohibited if it is not done with any of the intentions provided for in (i) to (iii). Under subsection (1) an express allowance is made for a person to make a statement that is false without being hit by the prohibition therein if he or she has reasonable grounds for believing that the information or statement is true. Under subsection (2) no express allowance is made for a person to publish false information and not be hit by the prohibition just because he or she has reasonable grounds to believe that the information is true.[29]

[50] The prohibition against the publication of false statements with the intention of influencing the outcome of an election serves a good purpose in our democracy. The holding of elections that are not fair would be an infringement of the right to free and fair elections. The use in an election by any political party or candidate of false statements about its opponents in order to influence the outcome of an election stands in conflict with the citizens' rights to free and fair elections. Without free and fair elections, we would have no democracy.

[51] In my view the meaning of section 89(2)(c) is simply that it prohibits the publication of false information with the intention of influencing the conduct or outcome of an election. It was not the applicant's case that, even if the SMS was false, the publication of the SMS was not a breach of section 89(2)(c) because the applicant believed on reasonable grounds that the SMS was true. It was only in its application for leave to appeal to this Court that the applicant made an attempt to

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[29] It is to be noted that section 87(3) and (4) also contains features similar to section 89(1) in regard to knowledge. Section 87(3) reads:

> "*No person, knowing that another person is not entitled to be registered as a voter*, may
>
> (a) persuade that that other person is entitled to be registered as a voter; or
>
> (b) represent to anyone else that that other person is entitled to be registered as a voter."
>
> (Emphasis added.)

Section 87(4) reads:

> "*No person, knowing that another person is not entitled to vote*, may—
>
> (a) assist, compel or persuade that other person to vote; or
>
> (b) represent to anyone else that that other person is entitled to vote." (Emphasis added.)

introduce that defence. It had not included that defence in its answering affidavit in the High Court which is where it had to state its defence. Its defence was simply that the SMS constituted fair comment or an opinion that any fair person could have honestly and genuinely held and that the SMS was not false.

[52] Even if it can be said that the applicant reasonably believed that the SMS was true, an interdict could still be granted against it if the information it published was false and was published with the intention of influencing the conduct or outcome of the election. All that would be required is to satisfy the requirements for an interdict. This is so because, for such proceedings – which must be distinguished from criminal proceedings – it is not necessary to prove fault.[30] As I have said earlier, the publication of false information with the intention of influencing the conduct or outcome of an election is a threat to, or, a violation of, the right to free and fair elections which every political party contesting elections is entitled to protect and defend. Every such political party has an interest in the holding of a free and fair election. That political party may approach a court for an interdict when anybody does anything that threatens the possibility of having free and fair elections.

The meaning of the SMS

[53] The material part of the applicant's SMS read:

> "The Nkandla report shows how Zuma stole your money to build his R246m home."

The applicant contends that this SMS meant that the Nkandla Report shows how President Zuma stole taxpayers' money to build his R246 million home. That amounts to repeating the wording of the SMS and it is not helpful. The applicant contends that the SMS did not mean that the Nkandla report found that Mr Zuma had stolen taxpayers' money.

[30] *Long John International Ltd v Stellenbosch Wine Trust (Pty) Ltd and Others* 1990 (4) SA 136 (D) at 143I-H; *R & I Laboratories (Pty) Ltd v Beauty Without Cruelty International* (*South African Branch*) 1990 (3) SA 746 (C) at 754A-755H; and *Hawker v Life Offices Association of South Africa and Another* 1987 (3) SA 777 (C) at 780H-781A.

[54] In its answering affidavit in the High Court the applicant said about the meaning of the SMS:

> "The approach by the ANC suggests that the SMS is false because the Nkandla Report does not find the President guilty of the crime of theft. *The SMS does not, however, suggest that the Report* made that finding." (Emphasis added.)

The applicant went on:

> "Instead, the SMS notes that the Report 'shows how' President Zuma stole".

In other words the applicant says that in the SMS it was simply noting "that the Nkandla Report shows how President Zuma stole . . ." In its founding affidavit filed in this court in support of the application for leave to appeal, the applicant also said:

> "In the first place, the SMS did not allege that the Report made the positive finding that President Zuma 'stole' but that it shows how President Zuma 'stole taxpayers' money for the purposes of building his own home'."

The first respondent contends that the SMS meant that the Nkandla report had found that President Zuma had stolen taxpayers' money to build his R246m home.

[55] In seeking to determine the meaning of the SMS, it is important to bear in mind that it must be given the meaning which an ordinary reasonable reader would have given it.

[56] In the *South African Associated Newspapers Ltd & Another v Yutar*[31] the then Appellate Division of the Supreme Court of South Africa (now the Supreme Court of Appeal) had to give a meaning to a *Sunday Times* poster that read: "How Dr Yutar misled the Court". The similarity between that statement and the part of the SMS that

[31] *South African Associated Newspapers Ltd and Another v Yutar* 1969 (2) SA 442 (A) (*Yutar*).

reads: "how Zuma stole your money" is remarkable. The *Sunday Times* of the same day carried an article that was headed: "Examination of documents in *Van Schalkwyk* case shows that: Dr. Yutar misled the Court". About the meaning of the words in the poster: "How Dr Yutar misled the Court", the Appellate Division said:

> "The poster is a separate document. It is true that the words 'How Dr Yutar misled the Court' were intended as an invitation to read the relevant article in the *Sunday Times* of that day, but, to the knowledge of the appellants, a great many people would not accept that invitation. They would see the poster and not read the paper. *What the poster told them, in a general way and without reference to any particular occasion, was, in effect, that Dr. Yutar misled the Court and that, if they read the paper, they would be told how he did it*."[32] (Emphasis added.)

A few lines later the Court said that the statement "How Dr Yutar misled the Court" suggested that "the reader [would] find in the paper an exposition of the manner in which Dr Yutar [had] misled the Court". The Appellate Division later went back to the issue and said:

> "As far, at any rate, as those are concerned who did not read the article, the poster conveyed, as a simple statement of fact . . . that Dr. Yutar had misled the court".[33]

[57] The Appellate Division also made another example of a statement using the word "how". It said:

> "If, for instance, a poster should read: 'How A murdered B'; that would amount to a factual statement that A murdered B coupled with an indication that the reader will find in the paper a description of how the deed was done. I can find no distinction between such a poster and the one here in question."[34]

In the present case the applicant's SMS contained the words "how Zuma stole your money to build his R246m home". It is important to bear in mind that the material

[32] Id at 453E-F.

[33] Id at 453H-I.

[34] Id at 453G-I.

part of the SMS included the first four words of the SMS. Those words were: "The Nkandla report shows" which are then followed by the words: "how Zuma stole your money to build his R246m home". Using the approach of the Appellate Division in *Yutar* in regard to the statement "How Dr Yutar misled the Court", I am of the view that an ordinary reasonable reader would regard the four words "The Nkandla report shows" as denoting nothing more than the source where the statement that Mr Zuma stole "your money to build his R246m home" would be found.

[58] The meaning contended for by the applicant is one that would require an ordinary reasonable reader to engage in an analysis of the SMS that I think an ordinary reasonable reader is unlikely to undertake. In this regard it is appropriate to remember Holmes JA's warning in *Dorfman v Afrikaanse Pers Publikasies(Dorfman).*[35] There Holmes JA said that -

> "A court in deciding whether a newspaper report is defamatory must ask itself what impression the ordinary reader would be likely to gain from it. In such an inquiry the court *must eschew any intellectual analysis of the contents of the report and must also be careful not to attribute to the ordinary reader a tendency towards such analysis or an ability to recall more than an outline or over-all impression of what he or she has just read*."[36] (Emphasis added.)

In my view this passage applies with equal force to a case such as the present.

[59] An ordinary reasonable reader who read the statement in the SMS would not think that the Nkandla Report could give an exposition of how Mr Zuma stole the taxpayers' money without making a finding that he had stolen taxpayers' money to build his home. Accordingly, an ordinary reader would have understood the SMS as saying that the Nkandla Report was to the effect that Mr Zuma stole "your money to build his R246m home". The meaning of the SMS that the applicant contends for would only apply if the SMS read: "An analysis of the Nkandla Report shows how

[35] *Dorfman v Afrikaanse Pers Publikasies (Edms) Bpk* 1966 (1) PH J9 (A).

[36] Id at 46.

Zuma stole your money to build his R246m home". In other words, this meaning would indicate that how Mr Zuma stole "your money" was not a conclusion of the Nkandla Report but a conclusion resulting from an analysis of the Nkandla Report.

[60] In my view an ordinary reasonable reader would have understood the SMS to say that the Nkandla report stated or found that President Zuma stole taxpayers' money to build his R246 million home and explained how he had done that. I think that, if someone said, for example: "The article in this newspaper shows how the accused killed his lover", ordinarily one would understand that person to be saying that the newspaper article states that the accused killed his lover and has details of how he did it.

[61] It may well be that there may be cases where a newspaper article would be able to show how an accused killed his lover without stating that he killed her or him but, in my view, that is not the meaning that an ordinary reasonable reader would ordinarily attach to such a statement. The same applies if someone made the statement: "This judgment shows how A stole government funds". An ordinary reasonable reader would understand that statement to mean that the court's judgment has found that A stole government funds and it gives details of the manner in which he stole the funds. An ordinary reasonable reader would not think that a court's judgment could say how A stole government funds without in fact saying that he stole those funds. Ordinarily, a newspaper article or a judgment that shows how an accused killed his lover or that shows how A stole government funds will more often than not contain a statement or finding that the accused killed his lover or that A stole government funds.

[62] In these circumstances I conclude that the SMS meant, and would ordinarily have been understood by an ordinary reasonable reader to mean, that the Nkandla report said or found that President Zuma had stolen taxpayers' money to build his R246 million home and the Report gave details of how he had done that. In my view it is, to say the least, implicit in the statement: "The Nkandla report shows how Zuma

stole your money to build his R246m home" that the report says or finds that Mr Zuma stole taxpayers' money to build his home.

Does section 89(2)(c) apply to an opinion?

[63] The next question for determination is whether the prohibition in section 89(2)(c) covers an expression of opinion. In my view, it does not. This is because what section 89(2) prohibits is the publication of "false information" and an opinion cannot be said to be false. An opinion may be wrong or unjustified but it cannot be said to be false. Only a statement of fact can be said to be false. Accordingly, the expression of any opinion by one political party about another political party or its leader is not hit by the prohibition in section 89(2). The applicant would, therefore, have been entitled to express any opinion about President Zuma that it wanted to express provided that such an opinion was honestly held by it and had some acceptable factual foundation.

The applicant's defence

[64] It is now necessary to look at fair comment as a defence because that is the defence upon which the applicant relies. That fair comment is the applicant's defence is based on the fact that the applicant said so in its answering affidavit in the High Court. Mr Selfe said:

> "The declaratory relief sought in paragraphs 2 and 3 of the notice of motion rests [on] the allegation that the SMS is false. As indicated above, it is submitted that the proper test is whether the SMS amounts to fair comment – in the sense that it qualifies as an honest, genuine expression of opinion relevant to the facts upon which it is based. In this regard it is further submitted that the SMS does indeed constitute such a protected expression of opinion based upon the Nkandla Report."

In submitting in the last sentence of this quotation that the SMS constituted "a protected expression of opinion", Mr Selfe may have been influenced by this Court's

suggestion in *McBride*[37] that the defence of fair comment should be called: "protected comment".[38]

[65] That the applicant's defence is fair comment is also supported by the manner in which the applicant formulated its defence. It formulated it in the same manner in which fair comment is formulated as a defence in defamation cases. In its answering affidavit the applicant formulated its defence thus:

> "It is submitted that, read in the light of the Nkandla Report, *the SMS expresses an opinion that a fair person might honestly and genuinely hold in the light of the facts in the Report*. In this regard, the Report must be understood and read in its totality." (Emphasis added.)

The applicant took this wording from case law that deals with "fair comment" as a defence in defamation cases. A reference to a few cases will demonstrate this. In *Crawford v Albu*,[39] Innes CJ quoted Buckley LJ as having said in *Hunt v Star Newspaper Co*:[40]

> "The question for the jury is whether the comment is in their opinion beyond that which a *fair man*, however extreme might be his views in the matter, might make *honestly* and without malice and which was not without foundation."[41] (Emphasis added.)

In *Crawford*[42] Innes CJ also made the following statement about the definition of "fair comment" as given by Collins MR in *McQuire v Western Morning News Company*

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[37] *The Citizen 1978 (Pty) Ltd and Others v McBride* [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) (*McBride*).

[38] Id at para 84, where this Court said in the first sentence:

> "Perhaps it would be clearer and helpful in the understanding of the law if the defence were known rather as "protected comment".

[39] *Crawford v Albu* 1917 AD 102 (*Crawford*) at 115.

[40] [1908] 2 KB 309 at 321.

[41] Id at 323.

[42] Above n 39 at 115.

Limited:[43] "I think we may with advantage adopt it by saying that any genuine expression of opinion is fair if it is relevant and if it is not such as to disclose actual malice."[44]

[66] This Court also said in *McBride*:

> "As already indicated, it is a requirement in our law that the comment sought to be protected must qualify as an honest genuine (though possibly exaggerated or prejudiced) expression of opinion relevant to the facts upon which it was based, and not disclosing malice."[45]

In the affidavit in support of its application for leave to appeal to this Court the applicant even submitted that "the Electoral Court erred in failing to understand the SMS as a legitimate expression of opinion and a *fair comment* protected by the Constitution". (Emphasis added.) The applicant also said:

> "The DA submits instead that the correct interpretation of the Act and the Code should be guided by the manner in which courts have dealt with the concept of lawfulness in defamation cases."

[67] The applicant also referred to *National Media Ltd & Others v Bogoshi*,[46] *Pienaar and Another v Argus Printing and Publishing Co Ltd*,[47] *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party*,[48] *Mthembi-Mahanyele v Mail and Guardian Ltd and Another*,[49] *The Citizen 1978 (Pty) Ltd v McBride*[50] and *Hardaker v*

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[43] *McQuire v Western Morning News Company Limited* [1903] 2 KB 100 at 112. See also *Marais v Richard en 'n Ander* 1981 (1) SA 1157 (A) at 1167-8.

[44] Id at 115.

[45] Above n 37 at para 103.

[46] *National Media Ltd & others v Bogoshi* [1998] ZASCA 94; 1998 (4) SA 1196 (SCA); [1998] 4 All SA 347 (A).

[47] *Pienaar and Another v Argus Printing and Publishing Co Ltd* 1956 (4) SA 310 (W).

[48] *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* [1992] ZASCA 63; 1992 (3) SA 579 (AD); [1992] 2 All SA 185 (A).

[49] *Mthembi-Mahanyele v Mail and Guardian Ltd and Another* [2004] ZASCA 67; [2004] 3 All SA 511 (SCA).

[50] *McBride* above n 37.

Phillips.[51] All these cases are defamation cases. In written submissions in this Court, Counsel for the applicant devoted a section to a discussion of these cases and submitted that "speech must be accommodated if it amounts to a fair comment".

[68] I refer to all the above in order to show that the discussion of fair comment and cases on that topic in this judgment is necessitated by the fact that the applicant relied on fair comment as a defence.

[69] I am not certain that fair comment is a competent defence to a case based on a breach of section 89(2)(c) of the Electoral Act. However, in the circumstances of this case I am prepared to assume that it is. That being the case, it is necessary to consider whether the applicant has proved fair comment as a defence.

[70] In *Roos v Stent and Pretoria Printing Works, Ltd*[52] Innes CJ quoted the following statements by Lord Justice Fletcher Moulton in *Hunt v Star Newspaper Co*:[53]

> "The law as to fair comment, so far as is material to the present case stands as follows: In the first place, comment, *in order to be justifiable as fair comment must appear as comment* and must not be so mixed up with facts that the reader cannot distinguish between what is report and what is comment. The justice of this rule is obvious. *If 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. In the one case the insufficiency of the facts to support the inference will lead fair-minded men to reject the inference. In the other case, it*

[51] [2005] ZASCA 28; 2005 (4) SA 515 (SCA).

[52] *Roos v Stent and Pretoria Printing Works, Ltd* 1909 TS 988 at 999 (*Roos*).

[53] *Hunt* above n 40 at 309.

> *merely points to the existence of extrinsic facts which the writer considers warrant the language which he uses*."[54] (Emphasis added and footnotes omitted.)

[71] Innes CJ said in *Roos* that in *Hunt v Star Newspaper Co* Lord Justice Fletcher Moulton was dealing with a case where "the facts which were commented upon did appear in the publication but were so mixed up with the comments that it was impossible to say what were the facts and what was comment".[55] He said that Lord Justice Fletcher Moulton's words seemed to him to "apply à fortiori to cases where the facts commented upon are not placed before the reader at all".[56] Innes CJ continued:

> "*There must surely be a placing before the readers of the facts commented upon before the plea of fair comment can operate at all*. I do not wish to be misunderstood upon this point; I do not desire to say that in all cases the facts must be set out verbatim and in full; *but in my opinion there must be some reference in the article 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*."[57] (Emphasis added.)

[72] In *Roos,* Smith J also referred with approval to the passage quoted by Innes CJ from the judgment of Lord Justice Fletcher Moulton in *Hunt's* case. Smith J also said:

> "If the defence of fair comment cannot be sustained when the fact and comment are so intermingled as to be indistinguishable the one from the other, *à fortiori* it cannot be fair comment if none of the facts on which the expression of opinion is based appear".[58]

However, Smith J went on to say that he thought that there could be cases-

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[54] Id.

[55] *Roos* above n 52 at 999.

[56] Id.

[57] Id at 999-1000.

[58] Id at 1010.

> "where the facts are so notorious that they may be incorporated by reference."[59]

He then continued:

> "but in the present [case] no reference was made to any sources from which the writer deduced the facts on which he based the assertion complained of. No opportunity was afforded to a reader of the article to know the grounds on which the imputation was based. I therefore think that the defence of fair comment should fail."[60]

[73] In *Crawford* Innes CJ also said that the defence of fair comment is available only if it is "based upon facts expressly stated or clearly indicated and admitted or proved to be true".[61] In *Johnson v Beckett*[62] Harms AJA examined the requirement that the facts upon which a comment is made must be stated in the article or publication. In this regard he referred to cases such as *Roos*, *Crawford* and others. He concluded that-

> "[l]iterary criticism may be justified by reference to published works referred to in general or by implication in the alleged defamatory statement."[63] (Citation omitted.)

The Appellate Division did not reverse the requirement that the facts must be stated in the publication. It only affirmed that this requirement does not apply if the criticism refers to published works referred to in general or by implication in the alleged defamatory statement.

[74] Smith J also said in *Roos*:

> "If the defence of fair comment cannot be sustained when the facts and comment are so intermingled as to be indistinguishable the one from the other, à fortiori it cannot

[59] Id.

[60] Id at 1014.

[61] Id at 1009.

[62] *Johnson v Beckett* [1991] ZASCA 175; 1992 (1) SA 762 (A).

[63] Id at 780H-I.

> be fair comment if none of the facts on which the expression of opinion is based appear."[64]

Later, Smith J said in the same case:

> "It is clear that they are not fair comment, because none of the facts on which they are based appear in the article."[65]

[75] In *McBride*[66] this Court said:

> "The defence of protected or 'fair' comment requires at the outset that the facts be 'truly stated.' *This means that to receive the benefit of the defence it must be clear to those reading a publication* '*what the facts are and what comments are made upon them'. A commentator is not protected if he or she 'chooses to publish an expression of opinion which has no relation, by way of criticism to any fact before the reader*." [67] (Emphasis added and footnotes omitted.)

In this last sentence this Court made it clear that a commentator is not protected if the opinion does not relate to "any fact [placed] before the reader". The rationale for this is that the reader must be able to separate fact from opinion and assess the correctness or otherwise of the opinion for himself or herself. If an opinion is expressed without any facts placed before the reader, the reader is deprived of the opportunity of assessing the correctness of the opinion himself or herself.

[76] In *McBride* this Court also pointed out:

> "The requirement that the facts must be truly stated does not mean, as Innes CJ pointed out a century ago, that 'in all cases the facts must be set out verbatim and in

[64] *Roos* above n 52 at 1010.

[65] Id at 1013.

[66] *McBride* above n 37.

[67] Id at para 88.

> full.' *This is because 'there may be cases where the facts are so notorious that they may be incorporated by reference*."[68] (Emphasis added and footnotes omitted.)

This Court pointed out that in *Crawford* the Court took into account notorious facts about the labour disturbances on the Witwatersrand during 1913 and 1914 from which the publication had arisen even though the comment had not expressly set them out. This Court then said: "It was enough [in the *Crawford* matter] that the facts were 'in the common knowledge of the person speaking, and those to whom the words [were] addressed'."[69] (Footnotes omitted.)

[77] It is important to also refer to another passage in this Court's judgment in *McBride* where this Court said:

> "The Citizen's claim that Mr McBride lacked contrition was therefore unfounded and false. *Alternatively, if the Citizen wished to express the view that Mr McBride was not contrite, it was obliged to inform its readers of the facts underlying its opinion, since they were not notoriously known*. As the trial [J]udge found, the information was available to the Citizen at the time it claimed Mr McBride lacked contrition. It made no reference to it. Its assertion was therefore a far-going and unwarranted untruth".[70] (Emphasis added.)

[78] In its answering affidavit in the High Court the applicant formulated its defence thus:

> "It is submitted that, *read in light of the Nkandla Report*, the SMS expresses an opinion that a fair person might honestly and genuinely hold in [the] light of the facts in the Report. In this regard, the Report must be understood and read in its totality." (Emphasis added.)

This is not what the applicant said in the SMS. This is what it said in its answering affidavit in the High Court. Note must be taken of the fact that in this passage the

[68] *McBride* above n 37 at para 89.

[69] Id.

[70] Id at para 121.

applicant's case is that through the SMS it was expressing an opinion that a fair person might honestly and genuinely hold "in light of the facts in the Report". In other words, the facts upon which its alleged opinion was based were those to be found in the Report. The applicant's case, as set out in its answering affidavit in the High Court, was not that its opinion was based on facts that were notorious and would have been known to the recipients of the SMS simply by virtue of their notoriety.

[79] In so far as the applicant contends that the SMS was a comment or opinion, the law requires that the facts upon which a comment is based must be stated in the publication unless they are sufficiently notorious that the persons who read or hear the comment would have known those facts. In this case the applicant relies on the conclusions or findings of the Public Protector in the Nkandla Report. The Nkandla Report was released on 19 March 2014 and the applicant published its SMS the following day. It did not set out any of those findings or facts in its SMS. There would still have been enough room in the SMS for it to have included at least three or four of the most serious findings of the Public Protector upon which its alleged comment or opinion was based. It did not do so. In *Telnikoff*[71] Lord Keith said:

> "In my opinion the letter must be considered on its own. The readers of the letter must have included a substantial number of persons who had not read the article or who, if they had read it, did not have its terms fully in mind."[72]

[80] It is not the applicant's case that the recipients of its SMS were persons who fell into a category of persons who would have read the Nkandla Report by the time they received the SMS nor is it its case that the recipients were a category of persons who are likely to have had access to the Report shortly after their receipt of the SMS. This case must simply be decided on the basis that the recipients of the applicant's SMS were potential voters in Gauteng who most probably had not read the Nkandla

[71] *Telnikoff v Matusevitch* [1991] 4 All ER 817 (HL) (*Telnikoff*).

[72] Id at 821.

Report by the time they received the applicant's SMS. There is also no basis to think that most of them would have read the report soon after receiving the SMS.

[81] The applicant has not advanced reasons why it could not have waited longer before it published its SMS. Waiting longer would have given people in general an opportunity to read the findings of the Public Protector in the newspapers so that, when the recipients of its SMS received it, they would have been likely to be aware of those findings. The election day was still about seven weeks away, namely 7 May 2014. The applicant could have easily allowed at least another three weeks after the release of the Nkandla Report to lapse before publishing its SMS. By then, it could well be said that, even if people did not have access to the Nkandla Report itself, they may have been familiar with some of its findings that would have been disseminated or commented upon in the media. The applicant elected to publish its SMS only one day after the release of the Report when many people would not have become familiar with its findings. It must take the consequences of its election. The defence of fair comment upon which the applicant relies is not available as the facts on which it was based were neither stated in the SMS nor notorious.

[82] I also do not think that to justify its failure to state in the SMS the facts on which the alleged opinion was based it is open to the applicant to argue that there was limited space for a long message on a cellphone. I think that this is not open to the applicant because it was up to it to choose another medium of communication to convey its opinion which would have allowed it to state the facts upon which the alleged opinion was based. The applicant could have taken out an advertisement in a newspaper. Obviously, that would have been far more costly than sending an SMS but the applicant should have thought of the limitations of space on a cellphone before it chose the SMS as the medium of communication it was going to use. The only exception to the requirement that the facts on which a comment or opinion is based must be stated in the publication concerned is a case where the facts are notorious. In this case the findings of the Public Protector were not as yet notorious at the time the SMS was published. They should, therefore, have been briefly stated in the SMS.

[83] With the changes required by the context, this Court should say to the applicant what it said to The Citizen in *McBride* about the statement that Mr McBride was not contrite. This Court should say that —

> "[i]f the [applicant] wished to express the view that [President Zuma 'stole your money to build his R246 million home'], it was obliged to inform [the recipients of the SMS] of the facts underlying its opinion since they were not notoriously known . . . the information was available to the [applicant at the time it claimed that the Nkandla Report shows how Zuma stole your money to build his R246m home.]"

[84] It is now necessary to examine the first respondent's case. The question is whether the first respondent did show that the applicant acted in breach of the provisions of section 89(2)(c) and item 9(1)(b) of the Electoral Code of Conduct. I have already held that a statement of opinion or comment is not hit by the provisions of section 89(2)(c) but that only a statement of fact is hit by that provision. A statement of fact is hit by that provision if it has been published, is false and the publication was made with the intention of influencing the conduct or outcome of an election. The next question for determination is whether the SMS constituted a statement of fact or a statement of opinion or comment.

Was the applicant's SMS an expression of comment/opinion or a statement of fact?

[85] About fair comment as a defence, Innes CJ said the following in *Roos* which might throw light on the distinction between comment and a fact:

> "[I]t is obvious that to entitle any publication to the benefit of this defence it must be *clear to those who read it what the facts are and what comments are made upon them*. And for two reasons. Because it is impossible to know whether the comments are fair unless we know what the facts are; and because the public must have an opportunity of judging of the value of the comments. *If a writer chooses to publish an expression of opinion which has no relation, by way of criticism, to any fact before the reader, then such an expression of opinion depends upon nothing but the writer's*

> *own authority, and stands in the same position as an allegation of fact*. It cannot be covered by a plea of fair comment."[73] (Emphasis added.)

In my view it cannot be said that it was "clear to those who read" the SMS what the facts were and what comments were being made upon them. This was a case in which, as the last portion of this passage says, a writer chose to publish a statement which had no relation by way of criticism, to *any fact before* the reader. Therefore, it stands in the same position as an allegation of fact.

[86] In the second last sentence in this passage[74] Innes CJ says in effect that an expression of opinion where the writer does not put any facts before the reader stands in the same position as an allegation of fact. In *Roos*, Smith J pointed out "three things" that he said must be established in order for the defence of fair comment to succeed. The third one that he gave was that—

> "*it must clearly appear* that the words are intended as comment, and not as an independent assertion of fact on the part of the person using them. It is often not at all an easy matter to decide as to what is a comment and what is an assertion of fact. As the Court pointed out in *Van Gorkom's* case, comment may appear in the guise of a statement of fact, but it will not cease to be comment if it is clearly intended as such".[75] (Emphasis added.)

It cannot be said that it "clearly appears" that the SMS was intended as comment. On the contrary, it seems that it was intended to convey to the reader that the Nkandla Report stated as a fact that President Zuma had stolen taxpayers' money.

[87] In *Crawford* the words which the defendant had used to describe certain people including Crawford for which he was sued for defamation were: "they are criminals in

[73] *Roos* above n 52 at 988.

[74] This is a reference to the passage quoted in [85].

[75] *Roos* above n 52 at 1009.

the fullest sense of the word".[76] The defendant's defence was that those words constituted fair comment. The trial Court had found that that statement was in essence comment upon a prior statement of fact to the effect that all the strife on the Witwatersrand had been caused by Crawford and his fellow deportees.[77]

[88] Innes CJ took the view that the statement that "they are criminals in the fullest sense of the word" was a statement of fact. In explaining himself, he, inter alia, said that, whether or not the statement constituted comment depended "upon the meaning to be given to the words – whether they should be taken in their ordinary sense or not".[78]

[89] Later on and with regard to the reasons given by the trial Judge for his view that the statement constituted comment, Innes CJ said:

> "No doubt the respondent called the appellant and others criminals, because of the part they played in the strikes and labour disturbances to which he had made a general reference. To that extent his remark might be regarded as inference. But all inference is not necessarily comment. An allegation of fact may be plainly inferred, and yet may be made in such a shape that it remains fact. And that, I think, was the position here, if the words used [are to] be taken in their plain and usual sense. The presumption is that ordinary words convey to those who hear them their ordinary meaning. 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. . . 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. It was not, as it seems to me, a question of how the attitude and conduct of the deportees could be best described, whether as fanatical or*

[76] *Crawford* above n 39 at 105.

[77] Id at 117.

[78] Id at 118.

criminal. The speaker in the passage complained of was not criticising their actions, but stigmatising the men."[79] (Emphasis added.)

[90] Later, Innes CJ said:

"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. . . But the question is not what he intended, but what his language in its ordinary signification meant."[80]

[91] In *Crawford* Solomon JA said:

"Now, it is true that on the face of it the statement that 'the deported men were criminals in the fullest sense of the term' appears as a statement of fact, but that does not conclude the matter, for a comment may take the form of a statement of fact. This is very well brought out in some of the later English cases, but nowhere more clearly than in the judgment of Field, J in the case of *O'Brien v Salisbury* where he says: *'It seems to me . . . that comment may sometimes consist in the statement of a fact and may be held to be comment, if the fact so stated appears to a be a deduction or conclusion come to by the speaker from other facts stated or referred to by him, or in the common knowledge of the person speaking, and those to whom the words are addressed, and from which conclusion may be reasonably inferred. If a statement in words of a fact stands by itself naked without reference, either express or understood, to other antecedent or surrounding circumstances notorious to the speaker, and to those to whom the words are addressed, there would be little, if any, room for the inference that it was understood otherwise than as a bare statement of fact, and thus if untrue there would be no answer to the action ;but, if, although stated as a fact, it is preceded or accompanied by such other facts, and it can be reasonably based upon them, the words may reasonably be regarded as comment and comment only, and, if honest and fair, excusable.*"[81] (Emphasis added and citation omitted.)

[79] *Crawford* above n 39 at 118-9.

[80] Id.

[81] Id at 125-6.

[92] Where the last sentence of this passage says "without reference either express or understood, to other antecedent or surrounding circumstances", it refers to antecedent or surrounding circumstances that are notorious to the speaker or writer as well as notorious to "those to whom the words are addressed". In the present case the findings of the Public Protector in the Nkandla Report were not yet notorious. The applicant's SMS made no reference to facts that were notorious to the recipients of the SMS. That being the case, Solomon JA's statement in the above passage that in such a case "there would be little, if any, room for the inference that [the statement] was understood otherwise than as a bare statement of fact" applies with equal force to the SMS. The recipients of the SMS would have understood the SMS as nothing else but a statement of fact. The applicant's SMS did not appear, and, was not recognisable, to the ordinary reasonable person as a comment. It appeared and was recognisable as a statement of fact.

[93] In *Crawford* Solomon JA regarded as a correct statement of the law Buckley LJ's statement of the circumstances under which he held in *Hunt v Star Newspaper Co*[82] that the defence of fair comment applied. In *Crawford* Solomon JA said in part:

> "These are clearly set forth by the learned Judge in the court below as follows: (1) The allegation must appear and be recognisable to the ordinary reasonable man as comment and not as a statement of fact".[83]

[94] In *Crawford* Innes CJ said:

> "It is possible, however, for criticism to express itself in the form of an assertion of fact deduced from clearly indicated facts. In such cases it will still be regarded as comment for the purposes of this defence. The operation of the doctrine will not be ousted by the outward guise of criticism. *Then the superstructure of comment must rest upon a firm foundation, and it must be clearly distinguishable from that*

[82] *Hunt* above n 40 at 323.

[83] *Crawford* above n 39 at 125.

> *foundation. It must relate to a matter of public interest and it must be based upon facts expressly stated or clearly indicated and admitted or proved to be true. There can be no fair comment upon facts which are not true. And those to whom the criticism is addressed must be able to see where fact ends and comment begins, so that they may be in a position to estimate for themselves the value of the criticism. If the two are so entangled that inference is not clearly distinguishable from fact, then those to whom the statement is published will regard it as founded upon unrevealed information in the possession of the publisher; and it will stand in the same position as any ordinary allegation of fact*".[84] (Emphasis added and footnotes omitted.)

[95] In *Moolman v Cull*[85] Centlivres AJA, writing for a unanimous Appellate Division, said:

> "*Any matter, therefore, which does not indicate with reasonable clearness that it purports to be comment, and not statement of fact cannot be protected by the plea of fair comment.*"[86] (Emphasis added.)

Can it be said that the applicant's SMS indicated with "reasonable clearness" that it purported to be comment and not a statement of fact? The answer is no. If the answer is no, then it was not a comment or opinion but a statement of fact.

[96] In *Pearce v Argus Printing & Publishing Co Ltd*[87] Davis J said:

> "What differentiates a comment from a statement of fact? I venture to think that the test may be thus stated. If the statement is such that a reasonable hearer or reader will perceive it to be an opinion or inference drawn from the facts stated, then it is a comment. If, on the other hand, a reasonable man would think that it is not based on those facts, but stands alone, or that it is based on other facts which are within the

[84] Id at 114-5.

[85] *Moolman v Cull* 1939 AD 213.

[86] Id at para 221.

[87] *Pearce v Argus Printing & Publishing Co Ltd* 1943 CPD 137.

> knowledge of the speaker or writer, but which he has not stated, then it is a statement of fact."[88]

On this test the applicant's SMS is an allegation of fact. An ordinary reasonable reader of the SMS would not subject it to the same scrutiny to which a lawyer or professor or Judge would subject it. As Williamson JA said in his concurring judgment in *Dorfman*: "The test is, certainly not how a trained lawyer after an astute and careful analysis of the words, might understand the article nor how any supercritical reader might read it."[89] 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 and, therefore, as a statement of fact and not as a comment. It is how an ordinary reasonable reader would have perceived or understood the SMS that counts.

[97] In *Yutar*[90] the Appellate Division said:

> "As indicated, inter alia, in *Crawford v Albu*, comment may take the form of a statement of fact, where such a statement is a deduction or conclusion from other facts. But as pointed out by Innes CJ in that case every inference is not necessarily comment. 'An allegation of fact may be plainly inferred, and yet may be made in such a shape that it remains fact'. *To qualify as comment, one of the requirements it has to satisfy is that it 'must appear and be recognisable to the ordinary reasonable man as comment and not as a statement of fact.*"[91] (Emphasis added and footnote omitted.)

[98] In *Hardaker v Phillips*[92] the Supreme Court of Appeal re-affirmed that the test for determining whether a statement is one of comment or opinion or one of fact is

[88] Id at 144.

[89] *Dorfman* above n 35 at 46.

[90] Above n 30 at 453-4.

[91] Id.

[92] Above n 52.

that the allegation must appear and be recognisable to the ordinary reasonable person as comment and not as a statement of fact. There, the Supreme Court of Appeal said:

> "The test is whether the reasonable reader of Hardaker's affidavit would understand his statement as a comment. One of the hallmarks of a comment is that it is connected to and derives from discernible fact. This is a textbook instance of a comment plainly presented as such. Hardaker expressly related it to the facts on which he based it ('based on this evidence'). That he sought to obtain the court's endorsement for his conclusion – the purpose of a 'submission' – does not detract from its status as a comment".[93] (Footnotes omitted.)

[99] In *McBride* this Court said:

> "[I]f the *Citizen* wished to express the view that Mr McBride was not contrite, it was obliged to inform its readers of the facts underlying its opinion, since they were not notoriously known. As the trial judge found, the information was available to the Citizen at the time it claimed Mr McBride lacked contrition. It made no reference to it."[94]

In this passage this Court said that, if the facts upon which an alleged opinion is based are not made known to the reader in circumstances where those facts are not notoriously known, this would be an indication that the statement is not an opinion or comment but a statement of fact. In *McBride* this Court also took the statement that Mr McBride lacked contrition as a statement of fact. No facts were stated in the article upon which that statement was based. We must apply this principle to the applicant's SMS. If we apply this principle to the SMS, the conclusion would be that the applicant's SMS was not comment or opinion but was a statement of fact.

[100] In *Telnikoff* one of the questions that the Court had to determine was whether certain statements made in a letter by the defendant as a response to an article that had been written previously by the appellant were statements of fact or statements of

[93] Id at para 27.

[94] *McBride* above n 37 at para 121.

opinion or comments. In deciding that question, the Court had to answer the question whether the letter had to be read alone for this purpose or whether it had to be read together with the article previously published by the appellant. Writing for the majority, Lord Keith said:

> "In my opinion the letter must be considered on its own. The readers of the letter must have included a substantial number of persons who had not read the article or who, if they had read it, did not have its terms fully in mind."[95]

The readers of the SMS would have included a substantial number of people who had not yet read the Nkandla Report.

[101] Later on in *Telnikoff*, Lord Keith said:

> "The writer of a letter to a newspaper has a duty to take reasonable care to make clear that he is writing comment, and not making misrepresentations about the subject matter upon which he is commenting. *There is no difficulty about using suitable words for that purpose, such as those which Lloyd LJ thought capable of being implied. Likewise any newspaper editor should be under no difficulty in observing whether his correspondent has used language apt to make clear that what he writes is pure comment and does not contain misrepresentations about what he is commenting on.*"[96] (Emphasis added.)

These words apply with equal force to this case. The applicant should have made it clear in the SMS that it was giving comment or an opinion. It did not do so. Later on in the same judgment, Lord Keith said:

> "Any critic, whether private or public, whether individual or press, must simply make *clear that he is not quoting the plaintiff but is commenting on words which the plaintiff has uttered.*"[97] (Emphasis added.)

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[95] *Telnikoff* above n 71 at 821.

[96] Id at 822.

[97] Id at 825.

[102] In Canadian law the test for determining whether a statement is one of fact or is an expression of opinion or comment seems to be the same. In *WIC Radio*[98] Binnie J said: "What is comment and what is fact must be determined from the perspective of a 'reasonable viewer or reader'".[99]

[103] There is a duty on the writer of a comment or opinion to make it clear that he or she is making a comment. In *Moolman* the Appellate Division said:

> "Any matter, therefore, which does not indicate with reasonable clearness that it purports to be comment and not statement of fact cannot be protected by the plea of fair comment."[100]

[104] In *WIC Radio*[101] the Supreme Court of Canada also seems to suggest that the absence of a factual foundation to a statement is an indication that the statement is not to be regarded as comment. In that case it was said:

> "It is true that '[t]he comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. What is important is 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."[102]

In the same case it was also said:

> "It should go without saying that people evaluate statements of opinion differently than statements of fact. In discussing what constitutes a statement of fact as opposed to comment, Lord Herschel noted that the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful

[98] *WIC Radio Ltd v Simpson* [2008] 2 SCR 420 (*WIC Radio*).

[99] Id at para 27.

[100] *Moolman* above n 85 at 221.

[101] Above n 98.

[102] Id at para 31.

> acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct."[103]

[105] This Court's statement in *McBride* that, "if the *Citizen* wished to express the view that Mr McBride was not contrite, it was obliged to inform its readers of the facts underlying its opinion since they were not notoriously known"[104] suggests that, where the facts upon which an alleged comment or opinion is based are not notorious, a writer's failure to inform the readers of those facts may be taken as an indication that the statement is a statement of fact and not opinion.

[106] In regard to the statement: "How Dr Yutar misled the Court", which appeared in a poster of the *Sunday Times*, the Appellate Division said in *Yutar*:

> "In so far as it informed the public at large that [Dr Yutar] had misled the court, it is not, I think, identifiable as comment. It does not suggest that an inference is being drawn from facts stated in the paper, but that the reader will find in the paper an exposition of the manner in which Dr Yutar misled the court. Such an exposition is not the same as an inference from facts. If, for instance, a poster should read: 'How A murdered B; that would amount to a factual statement that A murdered B coupled with an indication that the reader will find in the paper a description of how the deed was done. I can find no distinction between such a poster and the one here in question. As far, at any rate, as those are concerned who did not read the article, the poster conveyed, as a simple statement of fact, and not by way of identifiable comment, that Dr Yutar had misled the court; and to that extent; this defence cannot avail the appellants."[105]

[107] It seems to me that, if the statement in the poster: "How Dr Yutar misled the Court" was correctly taken as a statement of fact, then the statement: "how Zuma stole your money. . ." must also be accepted as a statement of fact. Of course, the statement

[103] Id at para 70.

[104] *McBride* above n 37 at para 121.

[105] *Yutar* above n 31 at 453-4.

in issue in the present case is not just "How Zuma stole your money to build his R246m home" but it is "The Nkandla report shows how Zuma stole your money to build his R246m home". The question that arises is whether the four words "The Nkandla report shows. . . " which appear before the words "how Zuma stole your money to build his R246m home" change what is otherwise a statement of fact into a statement of opinion or comment.

[108] I do not think that the four words have the effect of changing a statement of fact into a statement of opinion or comment. The only difference that these words introduce is to indicate the source that shows that "Zuma stole your money to build his R246m home".

[109] That the statement: "The Nkandla report shows how Zuma stole your money to build his R246m home" is one of fact becomes clearer when put in the passive voice. In the passive voice that sentence would read: "How Zuma stole your money is shown by the Nkandla report".

[110] I conclude that the SMS constituted a statement of fact and not comment or an opinion.

Was the statement in the SMS false?

[111] The applicant accepts that the Nkandla report did not say or find anywhere that President Zuma stole taxpayers' money to build his home. In its answering affidavit in the High Court, the applicant's deponent said that "[t]he SMS does not suggest that the [Nkandla] Report made [the finding that the President was guilty of theft]".

[112] The reference to a "licence to loot" that is made in the Report is not directed at the President. Indeed, it falls outside the section of the Report that focuses on the findings concerning the President. Also, the statement in the Report relating to "misappropriation" of funds was not directed at the President. It relates to other people. Indeed, it does not appear in the section of the Report that contains specific

findings concerning the President. In my view the most serious finding in the Report against the President is one to the effect that the President failed to ask pertinent questions when he saw certain improvements being made to his home which had nothing to do with security measures for his residence but he failed to do so. The Nkandla report directed this criticism at the President on the basis that, as President of the country, it was his duty to prevent the abuse of taxpayers' money. In the Report the Public Protector also says that the President ought to have intervened when the media broke out with reports of a huge escalation of costs for the Nkandla project.

[113] These findings of the Public Protector do not say that the President stole taxpayers' money. They say that, when the President learnt of the escalations of costs, he should have intervened to find out what exactly the position about the costs was. The criticism is that, in failing to intervene, the President failed to meet the standard of conduct that could reasonably be expected from a Head of State or leader who had the obligation to protect the resources of the South African people. I understand this finding to mean that the President was negligent and failed to show leadership that could be expected from someone occupying the position that he occupies. The Report does not go beyond this and does not attribute theft to the President.

[114] I conclude that the statement in the SMS was false and, since the other elements of a violation of section 89(2)(c) had been met, the applicant did violate section 89(2)(c) of the Electoral Act and item 9(1)(b) of the Electoral Code of Conduct. I am therefore, in respectful agreement with the unanimous conclusion of the Electoral Court. The applicant and first respondent agreed that, whatever the outcome, no order as to costs should be made.

[115] In the result I would dismiss the appeal and make no order as to costs.

CAMERON J, FRONEMAN J AND KHAMPEPE J (Moseneke DCJ and Nkabinde J concurring):

[116] This dispute is about the boundaries of free speech affecting elections. The Electoral Act[106] (Act) provides that no person may publish "any false information" with the intention of influencing the conduct or outcome of an election.[107] Similarly, the Electoral Code (Code), which parties undertake to comply with during elections,[108] prohibits false allegations about a party and its members.[109] The applicant, the Democratic Alliance (DA), accepts these provisions are constitutionally valid but denies they apply to an SMS it sent out. The SMS was sent in bulk to nearly 1.6 million voters on 20 March 2014, the day after the Public Protector released a report on construction work at President Zuma's home at Nkandla (Report). That was some seven weeks before the 2014 general elections. The DA admits that the SMS was intended to influence the outcome of the elections. It read:

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[106] 73 of 1998.

[107] Section 89 reads:

> "(1) No person, when required in terms of this Act to make a statement, may make the statement—
>
> (a) knowing that it is false; or
>
> (b) without believing on reasonable grounds that the statement is true.
>
> (2) No person may publish any false information with the intention of—
>
> (a) disrupting or preventing an election;
>
> (b) creating hostility or fear in order to influence the conduct or outcome of an election; or
>
> (c) influencing the conduct or outcome of an election."

[108] The Code binds every registered party and every candidate contesting an election. See section 99(1) of the Act and item 3 of the Code.

[109] Item 9(1)(b) reads:

> "(1) No registered party or candidate may—
>
> . . .
>
> (b) publish false or defamatory allegations in connection with an election in respect of—
>
> (i) a party, its candidates, representatives or members; or
>
> (ii) a candidate or that candidate's representatives".

> "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."

[117] The first respondent, the African National Congress (ANC), objected to the SMS, asserting that it violated section 89(2) of the Act and item 9(1)(b) of the Code because it disseminated false information. The ANC sought, but was denied, urgent relief in the High Court.[110] On appeal to the Electoral Court, its complaint prevailed.[111] That Court found that the SMS was a statement of fact and the factual claim it made was clearly false. It therefore transgressed the provisions. The Court ordered the DA to retract the SMS by dispatching another SMS to all those who had received it, saying: "The DA retracts the SMS dispatched to you which falsely stated that President Zuma stole R246m to build his home. The SMS violated the Code and the Act."

[118] This application challenges that outcome. We have read the judgments by our colleagues Zondo J (main judgment) and Van der Westhuizen J. We embrace the main judgment's fuller exposition of the facts, as well as its findings that this Court has jurisdiction to hear the matter, that the interests of justice favour our hearing it, and that leave to appeal must be granted. But we differ from its conclusion. In our view, the appeal should not fail. It must succeed.

An issue of interpretation

[119] What is at stake here is an issue of statutory interpretation. It is not a defamation case.[112] The law of defamation must be invoked with caution. The rights and interests weighed against each other in a defamation case are not those at issue here. The reputation and dignity of a particular person are not at the forefront of the statutory interpretation enquiry before us. The requirements to sustain a defamation

[110] *African National Congress v Democratic Alliance and Another* [2014] ZAGPJHC 58; 2014 (3) SA 608 (GJ).

[111] *African National Congress v Democratic Alliance and Another* [2014] ZAEC 4; 2014 (5) SA 44 (EC).

[112] Item 9(1)(b)(ii) of the Code includes a prohibition on defamatory allegations, but the ANC disavowed any reliance on defamation.

claim, as well as those that underlie defences to the claim, are grounded in the competing rights to and interests of freedom of expression as against those of dignity and reputation.[113] To import the latter considerations here would unnecessarily distort a fairly straightforward enquiry into the meaning and purpose of statutory provisions.

[120] The primary task is to ascertain what kinds of "information" and "allegations" are hit by the prohibition in section 89(2) of the Act and item 9(1)(b) of the Code. Are they only factual statements, or do they include expressions of opinion? To get to the answer we must start with the Constitution.

Constitutional setting

[121] We start with three obvious propositions: the cherished value of being able to speak freely and uninhibitedly; the importance of this value to our country's elections; and the need to interpret penal provisions restrictively.

[122] First, freedom of expression.[114] This Court has already spoken lavishly about this right. The Constitution recognises that people in our society must be able to hear, form and express opinions freely. For freedom of expression is the cornerstone of democracy. It is valuable both for its intrinsic importance and because it is instrumentally useful. It is useful in protecting democracy, by informing citizens, encouraging debate and enabling folly and misgovernance to be exposed. It also helps

[113] *Khumalo* above n 22 at paras 26-8.

[114] Section 16 of the Constitution provides:

> "(1) Everyone has the right to freedom of expression, which includes—
>
> (a) freedom of the press and other media;
>
> (b) freedom to receive or impart information or ideas;
>
> (c) freedom of artistic creativity; and
>
> (d) academic freedom and freedom of scientific research.
>
> (2) The right in subsection (1) does not extend to—
>
> (a) propaganda for war;
>
> (b) incitement of imminent violence; or
>
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

the search for truth by both individuals and society generally. If society represses views it considers unacceptable, they may never be exposed as wrong. Open debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values.[115]

[123] What is more, being able to speak freely recognises and protects "the moral agency of individuals in our society".[116] We are entitled to speak out not just to be good citizens, but to fulfil our capacity to be individually human.

[124] Second, and crucially for this case, being able to speak out freely is closely connected to the right to vote and to stand for public office.[117] That right lay at the core of the struggle for democracy in our country. Shamefully, it was for centuries denied to the majority of our people. In celebrating the democracy we have created, we rejoice as much in the right to vote as in the freedom to speak that makes that right meaningful. An election without as much freedom to speak as is constitutionally permissible would be stunted and inefficient. For the right to freedom of expression is one of a "web of mutually supporting rights" the Constitution affords.[118] Apart from

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[115] *McBride* above n 37 at para 82.

[116] *South African National Defence Union v Minister of Defence* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) (*SANDU*) at para 7, endorsing *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W); 1996 (6) BCLR 836 (W) at 608G-609A.

[117] Section 19 of the Constitution provides:

> "(1) Every citizen is free to make political choices, which includes the right—
>
> (a) to form a political party;
>
> (b) to participate in the activities of, or recruit members for, a political party; and
>
> (c) to campaign for a political party or cause.
>
> (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
>
> (3) Every adult citizen has the right—
>
> (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
>
> (b) to stand for public office and, if elected, to hold office."

[118] *SANDU* above n 116 at para 8, endorsing the judgment of Mokgoro J in *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* [1996] ZACC 7; 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC) at para 27.

its intense connection to the right to vote, it is closely related to freedom of religion, belief and opinion,[119] the right to dignity,[120] as well as the right to freedom of association[121] and the right to assembly.[122]

[125] As this Court has noted, these rights, operating together, protect the rights of people not only individually to form and express opinions, but to establish associations and groups of like-minded people to foster and propagate their views. They confirm the importance, both for a democracy and the individuals who comprise it, of being able to form and express opinions – particularly controversial or unpopular views, or those that inconvenience the powerful.

[126] The corollary is tolerance. We have to put up with views we don't like. That does not require approval. It means the public airing of disagreements. And it means refusing to silence unpopular views.[123] As Mogoeng CJ has recently explained:

> "Ours is a constitutional democracy that is designed to ensure that the voiceless are heard, and that even those of us who would, given a choice, have preferred not to entertain the views of the marginalised or the powerless minorities, listen."[124] (Footnote omitted.)

[127] Third, by prohibiting publication of false information during an election, section 89(2) and item 9(1)(b) place a limit on freedom of expression. The parties accept that it does so for good and justifiable reason. But what must we take it to mean? Our interpretation must be guided by the fact that the provision imposes severe penalties on those who breach it. Any person who contravenes section 89(2) or

[119] Section 15 of the Constitution.

[120] Section 10.

[121] Section 18.

[122] Section 17.

[123] *SANDU* above n 116 at paras 7-8.

[124] *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC) at para 43.

item 9(1)(b) is guilty of a criminal offence.[125] Anyone convicted is liable to a fine or to imprisonment for up to 10 years.[126]

[128] Quite apart from liability to criminal prosecution and imprisonment, the Act gives the Electoral Court extensive additional powers to punish transgressors. When that Court finds that a person or registered party has contravened section 89(2) or item 9(1)(b), it may impose "any appropriate penalty or sanction".[127] The statute specifies a long list of what punishments may be appropriate. They may include a formal warning, a fine of up to R200 000, the forfeiture of a deposit, prohibiting the person or party from using any public media or holding public events or canvassing or electoral advertising, reducing the number of votes obtained by the person or party, or

[125] See sections 94 and 97 of the Act.

[126] Section 98(a).

[127] Section 96(2) reads:

> "If a court having jurisdiction by virtue of section 20(4)(b) of the Electoral Commission Act finds that a person or registered party has contravened a provision of Part 1 of this Chapter it may in the interest of a free and fair election impose any appropriate penalty or sanction on that person or party, including—
>
> (a) a formal warning;
>
> (b) a fine not exceeding R200 000;
>
> (c) the forfeiture of any deposit paid by that person or party in terms of section 27(2)(e);
>
> (d) an order prohibiting that person or party from—
>
> (i) using any public media;
>
> (ii) holding any public meeting, demonstration, march or other political event;
>
> (iii) entering any voting district for the purpose of canvassing voters or for any other election purpose;
>
> (iv) erecting or publishing billboards, placards or posters at or in any place;
>
> (v) publishing or distributing any campaign literature;
>
> (vi) electoral advertising; or
>
> (vii) receiving any funds from the State or from any foreign sources;
>
> (e) an order imposing limits on the right of that person or party to perform any of the activities mentioned in paragraph (d);
>
> (f) an order excluding that person or any agents of that person or any candidates or agents of that party from entering a voting station;
>
> (g) an order reducing the number of votes cast in favour of that person or party;
>
> (h) an order disqualifying the candidature of that person or of any candidate of that party; or
>
> (i) an order cancelling the registration of that party."

disqualifying the person's or party's candidature entirely. The statute provides expressly that these penalties or sanctions are "in addition to" the criminal penalties specified.[128]

[129] These are tough provisions. Very tough. They show the statute's proscriptions have meaning. And they could operate with calamitous effect on a person or party who falls foul of them. These considerations point to how we must approach the interpretation of section 89(2) and item 9(1)(b). In case of doubt, we are obliged to interpret their prohibitions restrictively. This means that we must resolve any ambivalence in them, or uncertainty about their meaning, against the risk of being penalised.

[130] The restrictive interpretation of penal provisions is a long-standing principle of our common law.[129] Beneath it lies considerations springing from the rule of law. The subject must know clearly and certainly when he or she is subject to penalty by the state. If there is any uncertainty about the ambit of a penalty provision, it must be resolved in favour of liberty.[130]

[131] This Court has endorsed this approach.[131] And indeed the Bill of Rights gives these considerations added force. It posits the rule of law as a founding value of our constitutional democracy.[132] It entrenches the common law's protections against arbitrary deprivation of liberty and imprisonment.[133] The common law presumption in

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[128] Section 96(3).

[129] Burchell *Principles of Criminal Law* 3 ed (Juta & Co Ltd, Cape Town 2008) at 101-2; De Ville *Constitutional and Statutory Interpretation* (Interdoc Consultants, Cape Town 2000) at 200-2; Du Plessis *Re-Interpretation of Statutes* (Butterworths, Durban 2002) at 160-1; and Snyman *Criminal Law* 5 ed (LexisNexis, Durban 2008) at 247-8.

[130] *S v Toms; S v Bruce* [1990] ZASCA 38; 1990 (2) SA 802 (A) at paras 33-4; *S v Moroney* 1978 (4) SA 389 (A) at 405C-D; *S v De Blom* 1977 (3) SA 513 (A) at 532; and *S v Arenstein* 1964 (1) SA 361 (A) (*Arenstein*) at 365-6.

[131] *S v Coetzee* [1997] ZACC 2; 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC) (*Coetzee*) at para 165 and *Scagell v A-G* [1996] ZACC 18; 1997 (2) SA 368 (CC); 1996 (11) BCLR 1446 (CC) at para 33 (both cases rejecting interpretations of ambiguous statutory provisions that would have imposed liability without fault).

[132] Section 1(c) of the Constitution.

[133] Section 12 provides:

favour of interpreting penalty provisions restrictively therefore applies with added force under the Constitution. And the interpretive injunction in the Bill of Rights itself requires us to interpret section 89(2) and item 9(1)(b) to promote its spirit, purport and objects.[134]

[132] Conversely, suppressing speech in the electoral context will inevitably have severely negative consequences. It will inhibit valuable speech that contributes to public debate and to opinion-forming and holds public office-bearers and candidates for public office accountable. Because those who speak may not know – indeed, often cannot know – in advance whether their speech will be held to be prohibited, they may choose not to speak at all.

[133] To these propositions, which earlier we called obvious, we add a further observation. Political life in democratic South Africa has seldom been polite, orderly and restrained. It has always been loud, rowdy and fractious. That is no bad thing. Within the boundaries the Constitution sets, it is good for democracy, good for social life and good for individuals to permit as much open and vigorous discussion of public affairs as possible.[135]

"(1) Everyone has the right to freedom and security of the person, which includes the right—

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right—

(a) to make decisions concerning reproduction;

(b) to security in and control over their body; and

(c) not to be subjected to medical or scientific experiments without their informed consent."

[134] Section 39(2) provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[135] *McBride* above n 37 at paras 99-100.

[134] 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.[136]

[135] So freedom of expression to its fullest extent during elections enhances, and does not diminish, the right to free and fair elections.[137] The right individuals enjoy to make political choices is made more meaningful by challenging, vigorous and fractious debate.

Meaning of section 89(2) and item 9(1)(b)

[136] Now to the nub. What do the prohibitions in section 89(2) and item 9(1)(b) mean? We must, of course, read the provisions in context.[138] Chapter 7 of the statute, in which section 89(2) appears, has five parts: prohibited conduct; enforcement; offences and penalties; additional powers and duties of the Electoral Commission; and other general provisions.

[137] Part 1 groups the statute's prohibitions together. It creates several criminal offences. These are also, as explained, subject to the Electoral Court's additional

[136] In *United States v Alvarez* 132 S Ct 2537 (2012) at 2550, the Supreme Court of the United States said:

> "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth."

Summarising this and other Supreme Court cases, a federal district court in the United States stated in *Susan B Anthony List v Ohio Elections Commission* case 1:10-cv-720 (SD Ohio 2014) at 3 that—

> "the answer to false statements in politics is not to force silence, but to encourage truthful speech in response, and to let the voters, not the Government, decide what the political truth is".

[137] This right is contained in section 19(2) of the Constitution, see above n 118.

[138] See *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28 and *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at paras 17-9.

sanction and penalty powers. In summary, these are prohibitions on "undue influence", particularised as prohibiting any person from compelling or persuading voters to register or to vote or interfering with the independence or impartiality of the Electoral Commission;[139] impersonating a voter or candidate;[140] "[i]ntentional false statements" – the provision at issue here;[141] infringing a voter's right to secrecy in casting a ballot;[142] unauthorised use of voting or election materials or the voters' roll;[143] defacing or unlawfully removing billboards, placards or posters;[144] obstructing the Electoral Commission, the chief electoral officer and other officers;[145] and contravening the Code.[146]

[138] It is evident from the setting in which section 89 appears that its prohibition on false information is designed, as are most of the other prohibitions grouped with it, primarily to protect the mechanics of the conduct of an election: voting, billboards, ballot papers, election stations, observers, vote counts. It is directed to protecting the rights enshrined in section 19 of the Bill of Rights,[147] namely the rights to make political choices, to free, fair and regular elections and to vote and stand for public office. Here, that the prohibition relates specifically to false "information" is an indication, bolstered by the context, that it is election-related information that must not be falsely disseminated.

[139] Seen in this context, the "false information" prohibited by section 89(2) would, thus, for the most part, relate to the kind of statements that could produce the effects

[139] Section 87 of the Act.

[140] Section 88.

[141] Section 89, see above n 107.

[142] Section 90.

[143] Section 91.

[144] Section 92.

[145] Section 93.

[146] Section 94.

[147] See above n 117.

set out in the provision itself. These are disrupting or preventing an election;[148] creating hostility or fear in order to influence the conduct or outcome of an election;[149] or influencing the conduct or outcome of an election.[150] In other words, a contextual reading of the provision suggests that the kind of false statements prohibited are those that could intrude directly against the practical arrangements and successful operation of an election.

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

[141] It is to these statements that the prohibition in section 89(2) is directed. The context indicates that section 89(2) is directed to those statements that are intended to influence the conduct or outcome of an election by falsely representing information about the practical arrangements regarding the conduct of the election itself.

[142] The SMS at issue here was very far from the practical conduct of the election. It was designed to influence voters' views about the President and his party. It was not designed to thwart those who disagreed with its content from exercising their right to vote peaceably and effectively.

[143] Given the increased opportunity during election times to refute false statements aimed, not at the conduct of the elections, but its outcome by influencing voters' views about opposing parties, it may be argued that this kind of "information" does

[148] Section 89(2)(a) of the Act.

[149] Section 89(2)(b).

[150] Section 89(2)(c).

not fall within section 89(2)'s prohibition at all. It is the kind of assertion that can best and most easily be countered by immediate refutation in public debate, at political rallies, on the radio, in newspapers or on television.

[144] But we need not go that far. For the moment all we need to say is that section 89(2)'s prohibition does not apply to opinion or comment, but only to statements of fact. On its own terms, the section does not prohibit comments. It prohibits only "false information". "Information" means only factual statements, not comments.[151]

[145] And indeed a comment or opinion may be criticised for being unfair or unreasonable, but rarely for being "false". So the section's use of this word strengthens the inference that it means to prohibit only factual statements, not opinions. Item 9(1)(b), which prohibits false "allegations", is equally limited to factual statements. This interpretation is supported by other provisions in the Code that aim to foster the free exchange of comment and opinion.[152]

[146] This then is the reason why the SMS falls altogether outside the ambit of these provisions. It was not a statement of fact. It was an interpretation of the content of the Report. What is significant is that the SMS does not convey a factual assessment by the DA itself. It offered those who received it an interpretation of a separate source. That source, it said, "shows how" something occurred. The source was the Report, to which it directly referred for its authority.

[147] This, on its own, is enough to warrant the conclusion that the SMS, being comment on and interpretation of a separate source, does not fall within the section 89(2) or item 9(1)(b) prohibition.

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[151] *S v South African Associated Newspapers Ltd and Others* 1970 (1) SA 469 (W) (*South African Associated Newspapers)* at 473E and *S v Theron* 1968 (4) SA 61 (T) (*Theron*) at 63B-C.

[152] See items 1(b) and 4(1)(a).

[148] As mentioned earlier, this is not a defamation matter. But it may nevertheless be helpful to draw on the distinction between fact and comment invoked in defamation law, as the main judgment does. Even on its own terms defamation law does not contradict the conclusion we have reached. It recognises that something qualifies as a factual claim when it "depends upon nothing but the writer's own authority".[153] On the contrary, the SMS was a statement that merely pointed to the existence of extrinsic facts its author considered warranted the language he used.[154] In short, even if viewed from the perspective of defamation law, it was comment, rather than a statement of fact.[155]

[149] It is in this respect that this case differs from the defamation claim at issue in *Yutar*.[156] Unlike *Yutar*, the present case concerns a criminal prohibition, and is not about defamation or protected or "fair" comment. But the defamation cases also draw an important divide between statements of fact, which claim inherent authority for the assertions they make, and comments, which refer elsewhere for authority, as did the SMS here. In *Yutar*, as the main judgment notes,[157] a newspaper placard proclaimed "How Dr Yutar misled the Court". The newspaper report itself was prominently headlined "Dr Yutar misled the Court". Above this headline, but in much smaller and less prominent lettering, were the words "Examination of documents in *van Schalkwyk* case shows that".[158] The Appellate Division found that the poster and the headline did

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[153] *Roos* above n 52 at 998. See also Fagan "The Gist of Defamation in South African Law" in Descheemaeker and Scott (eds) *Iniuria and the Common Law* (Hart Publishing, Oxford 2013) at 188-91.

[154] See *Hunt v The Star Newspaper Company Limited* [1908] 2 KB 309 at 319-20. As the Court held in *Hultzer & Das v Van Gorkom* 1909 TS 232 (*Hultzer*) at 241—

> "it is not always easy to disentangle a statement of the facts from the comment made upon those facts. A statement does not necessarily cease to be comment because it appears in the form of a statement of fact. It may be a deduction from the facts and intended as a comment upon those facts, and yet appear in the guise of a statement of fact."

[155] See *Crawford* above n 39 at 127-9. As Fagan above n 153 points out at 190, "assertions qualifying as fair comment are in reality just assertions made with the intention that they be non-authoritative". He also states at 191, summarising *Crawford*, *Roos* above n 52 and *Hultzer* id, that our courts have "explicitly recognised, first, that whether an assertion amounts to a comment or not turns, critically, on the intention with which it was made and, secondly, that the relevant intention is the intention that the assertion be authoritative".

[156] Above n 31.

[157] At [56]-[57].

[158] *Yutar* above n 31 at 449F-G.

"not suggest that an inference [was] being drawn from facts stated in the paper" and therefore were defamatory because they were "not . . . identifiable as comment".[159] As the Appellate Division explained of the poster and the headline:

> "To the ordinary reasonable reader these positive, emphatic statements of allegedly established fact, would not . . . 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".[160]

[150] As the Appellate Division in *Yutar* noted, the distinction between comments and statements of fact "is not an easy distinction to draw".[161] Here, the crucial difference is that the SMS itself refers for its authority to a different source: the Report. It does not claim to be authoritative in itself. This makes it an interpretation and a comment, rather than an assertion of fact.

[151] And it does not matter that the facts justifying the comment were not listed at length in the SMS. It is enough that it referred to the facts it relied upon. The SMS says the "report shows how" – and the Report was readily accessible to the public. The controversy surrounding the improvements at Nkandla was, in addition, a major news item, in all media, accessible to all sections of society.

[152] The SMS indicated that the Report would show "how" the money was stolen. In other words the method or modality of how a misappropriation of the public's money occurred. And crucially, "*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]".[162] In other words, the SMS tendered to its recipients an interpretation of the Report. A reasonable reader of the SMS would have understood this.

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[159] Id at 453F-G.

[160] Id at 454F-G.

[161] Id at 454B.

[162] *Concise Oxford English Dictionary* 11 ed (OUP, Oxford 2009).

[153] The SMS therefore was not intended to be, and did not hold itself out as being, authoritative. It rather based its conclusion, and was a comment, on the Report. This leads us to the conclusion that the SMS falls entirely outside the ambit of section 89(2) and item 9(1)(b).

Presumption against strict liability

[154] A further issue needs to be addressed. This also follows from the ground-rule of our law that penal provisions must be strictly construed. There is no suggestion, and the ANC did not claim, that the DA sent out the SMS knowing that what it said constituted "false information". This means that, in law, the author acted innocently. And the requirement of a guilty mind "is not an incidental aspect of our law relating to crime and punishment, it lies at its heart".[163] Strict criminal liability is therefore not easily countenanced.[164] There is thus an interpretative presumption that a penal prohibition includes a requirement of fault.[165] It will be read to do so unless there are "clear and convincing indications to the contrary".[166]

[155] Section 89(2) contains no express fault requirement. Nor does it "clearly or by necessary implication" exclude one.[167] It is true that section 89(1) expressly includes a fault requirement, while section 89(2) does not.[168] But this is far from conclusive, especially since the heading to the entire section is "Intentional false statements".

[156] Where the text is equivocal, the provision's scope and object, the extent of the punishment it imposes, and the ease with which the provision may be evaded if

[163] *Coetzee* above n 131 at para 162 (judgment of O'Regan J) and the authorities cited therein.

[164] Id.

[165] See also, with reference to the law in foreign jurisdictions, the comprehensive discussion in *Coetzee* id at paras 162-76.

[166] *Arenstein* above n 130 at 365C-D, quoted in *Coetzee* id at para 165 (judgment of O'Regan J). See also *Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City Council* [1994] ZASCA 2; 1994 (3) SA 170 (A) at 176H-J; *S v Oberholzer* 1971 (4) SA 602 (A) at 610H; and *R v H* 1944 AD 121 at 125.

[167] *Coetzee* id at para 166, quoting *Harding v Price* [1948] 1 KB 695 at 700.

[168] See [48].

culpability were, or were not, required become particularly prominent.[169] We have already explained the importance of free speech, especially in political contexts. And the penalties that the breach of section 89(2) attract are stiff. Significantly, often one cannot know in advance whether a statement one makes will turn out to be true or false. If the prohibition were strict, it would be all but impossible to avoid it. This leads to the conclusion that the lawmaker must usually expressly exclude fault. In the absence of express language, penal provisions must be read to require fault.[170]

[157] So it would be intolerable, and at odds with constitutional values, to say that someone can be held liable (and exposed to significant fines, election bans and criminal liability) for making a statement they reasonably believed was true. The injustice of this, and the chilling effect it would have on all who do not know the facts with complete certainty – in other words, all of us – is a powerful consideration. Here, where there are few textual indications supporting the imposition of strict liability, it is determinative.

[158] For these reasons, section 89(2)'s prohibition must be read to contain a requirement of fault. The same is true for item 9(1)(b) of the Code.

[159] This does not, however, impact directly on the relief sought in the kind of case that we are dealing with here. The ANC sought mandatory relief aimed at preventing further prejudice to it from the alleged wrong committed by the DA. The relief sought was akin to that sought in a mandatory interdict, where positive conduct on the part of the alleged wrongdoer is required to terminate continuing wrongfulness. In those circumstances fault is not a requirement for the grant of an interdict. We caution, however, that when criminal liability and the imposition of the severe civil penalties under the Act are sought to be enforced, the issue of fault will become crucial.

[169] *Arenstein* above n 130 at 365, citing *R v H* above n 166 at 126.

[170] *Coetzee* above n 131 at para 165.

Was the SMS false?

[160] In this Court and the courts below, the DA contended that there was yet a further reason why the appeal must succeed. The information the SMS conveyed about the Report, it urged, was not "false". The ANC, by contrast, supported the finding of the Court below, pointing out that the Report nowhere makes any explicit finding that the President "stole" any money.

[161] For its part, the DA pointed to the fact that the Report shows this. The Report finds that the expenditure the state incurred "was unconscionable, excessive, and caused a misappropriation of public funds".[171] To misappropriate means "dishonestly or unfairly take for one's own use".[172]

[162] The DA urged that words cannot be rigidly defined. Their colloquial and metaphorical meanings can change through their usage by different persons in different contexts. The word "stole" must be interpreted as ordinary readers of the SMS would understand it – in the context of robust and opinionated election campaigning. It must not be understood overly technically. The word "stole" certainly does not require a criminal conviction of theft and is not limited strictly to theft's legal definition.[173] It encompasses – and this the ANC conceded in its argument before us – a wide range of "other corruption-related crime[s]".

[163] The DA further pointed out that the Report finds that the construction work effected at Nkandla represented "a toxic concoction of a lack of leadership, a lack of control and focused self-interest".[174] It expressly concludes that the President was

[171] The Report above n 7 at 56, para (xi)(d)(1) and 430, para 10.4.1.

[172] *Concise Oxford English Dictionary* above n 162.

[173] Here, the DA invoked *McBride* above n 37, where this Court adjudicated a defamation claim in which the defendant had described the plaintiff as a "murderer". Of that word and its cognates, this Court held at para 70:

> "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."

[174] The Report above n 7 at 422, para 9.4.66.

"aware of what the Nkandla project entailed".[175] The President's private architect, Mr Minenhle Makhanya, the Report finds, acted as "the main go-between" between the President and the project team. It describes Mr Makhanya as serving the interests of two masters. But, as de facto project manager, "even a Minister could have had difficulty countermanding" him.[176]

[164] What was more, the officials involved in the Nkandla project "erroneously accepted that due to the fact that the project related to the security of the President . . . and because it was driven from the Department of Public Works head office and the Ministry of Public Works, the deviation from the norms was justified and not to be questioned".[177] The focus of the project team was from the start "on creating an ideal situation rather than a reasonably safe and affordable one".[178] And it was this that created "a licence to loot situation" by the government.[179]

[165] As the DA emphasised in argument, the Report crucially finds that the President was aware of all of this. The site-progress minutes indicate that detailed aspects were discussed with the President.[180] On at least one occasion, in May to June 2010, he complained about the slow progress of the security features and that this was impacting the schedule for the completion of the new residences.[181] The Report finds that the President thus "allowed or caused extensive and excessive upgrades that go beyond necessary security measures to be made to his private residence, at state expense".[182] The DA noted that the Report concludes that "the President tacitly

[175] Id at 423, para 9.5.3.

[176] Id at 31-3, paras 6 and 8-9.

[177] Id at 34-5, para 14.

[178] Id at 38, para 25.

[179] Id at 39, para 28.

[180] Id at 176-9, para 6.45.

[181] Id at 149, para 6.19.1 and 339, para 7.30.3.

[182] Id at 424-5, para 9.5.12.

accepted the implementation of all measures at his residence and has unduly benefited" from them.[183]

[166] In addition, though the President told Parliament that his family had built their own houses and the State had not built any for the family or benefited them, the Report finds "this was not true".[184] The Report also sets out the attempts made to elicit a response from the President and his apparent reluctance to give one.[185]

[167] Notwithstanding the findings of the Electoral Court, and the conclusion the main judgment reaches, we find it unnecessary to determine whether or not the SMS was false. We have found that section 89(2) and item 9(1)(b) do not target comments, opinions and interpretations. We have further found that the SMS conveyed the DA's interpretation of the Report, and that it was therefore not part of the Act's and Code's proscriptions. In these circumstances, it is unnecessary for us to decide whether the SMS was in addition not false.

[168] For the reasons we have given, the appeal must succeed.

Order

[169] The following order is made:

1. Leave to appeal is granted.
2. There is no order as to costs.
3. The order of the Electoral Court is set aside and replaced with the following:
   "The appeal is dismissed."

[183] Id at 437, para 10.9.1.4.

[184] Id at 438, para 10.10.1.1.

[185] Id at 270, para 6.79.

VAN DER WESTHUIZEN J (Madlanga J concurring):

Introduction

[170] One of the most crucial components of a democracy is the right to free, fair and regular elections.[186] This right is closely related to the rights to recruit members for a political party and to campaign for a political party or cause.[187] And it speaks for itself that without the right to freedom of expression,[188] none of these political rights can be exercised.

[171] But rights often compete and have to be limited. The rights to free campaigning and free speech may have to be limited in view of the constitutional demand for fair, but also free, elections.

[172] The Electoral Act[189] aims to strike a balance between those competing rights. At the heart of this matter is the wording of section 89(2)(c), which prohibits people from publishing "false information" with the intent of "influencing the conduct or outcome of an election".[190] This wording has to be interpreted and applied to the SMS

[186] Section 19(2) of the Constitution provides: "Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution."

[187] Section 19(1) of the Constitution provides, in relevant part, that every citizen is free to make political choices which includes the rights—

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

[188] Section 16(1) of the Constitution provides:

> "Everyone has the right to freedom of expression, which includes—
>
> (a) freedom of the press and other media;
>
> (b) freedom to receive or impart information or ideas;
>
> (c) freedom of artistic creativity; and
>
> (d) academic freedom and freedom of scientific research."

[189] This Court held, in *New National Party* above n 5, that the Electoral Act prescribes the electoral system required by the Constitution.

[190] Item 9(1)(b) of the Electoral Code, which is Schedule 2 of the Electoral Act, states that no registered party or candidate may publish false or defamatory allegations in connection with an election in respect of a party, its candidates, representatives or members or a candidate or that candidate's representatives.

the DA sent to voters in the run-up to the 2014 elections, that "[t]he Nkandla report shows how Zuma stole your money to build his R246m home". The question is thus: did the DA publish "false information"?

[173] The wording of the Electoral Act must be interpreted within the context of the right to free and fair elections, the right to campaign for a political party or cause and the right to freedom of expression. Free speech and robust criticism are central in any democratic election.[191] Whereas the rights to free elections and campaigning require maximal freedom and thus a narrow interpretation of the prohibition in section 89(2)(c), the demands of fairness in elections and a reasonably free choice for voters require that voters not be misled by blatantly false statements in the campaigning process. The main judgment by Zondo J correctly points out:

> "The publication of false information by a political party or a candidate for election concerning a rival political party or a rival candidate in order to gain votes or in order for certain voters not to vote for a certain party is anathema to the notion of free and fair elections and may violate the citizens' right to free and fair elections."[192]

[174] Few would dispute 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. Providing gross misinformation to, and thus exercising undue influence over, voters could restrict their ability to decide for whom to vote and thus also be an obstacle to free elections. But an unduly restrictive limitation of free expression and campaigning may have the same effect. In this context the realities of communication and the meaning and value of words and labels are important. The law often has to draw lines between what is legal and what is illegal, but we are

[191] This sentiment is echoed in item 1 of the Electoral Code:

> "The purpose of this Code is to promote conditions that are conducive to free and fair elections including—
>
> (a) tolerance of democratic political activity; and
>
> (b) free political campaigning and open public debate."

[192] Main judgment at [5].

multi-dimensional human beings in a society with a brutal history. Our country is known for robust political discourse. The language we often use is as colourful as our rainbow nation and as informal and unruly as our people sometimes are.

[175] I am indebted to the main judgment for sketching the background of this case. For that judgment's exposition of the history and development of defamation law and the defence of fair comment, I am grateful. I agree that it is in the interests of justice to grant leave to appeal to the DA. However, I disagree with the main judgment's findings on the merits of the appeal, as well as some of the reasoning behind it.

[176] I agree with the outcome and order proposed in the joint judgment by Cameron J, Froneman J and Khampepe J. I appreciate and agree with their analysis of the right to freedom of expression and its intersection with the right to participate in free and fair elections. The focus of this case must indeed be the interpretation of section 89(2)(c) of the Electoral Act and item 9(1)(b) of the Electoral Code. This is not a defamation case. President Zuma has not sued the DA and the ANC has not raised his dignity as an issue. Of course human dignity is a founding value of our Constitution and everyone has an inherent right to it.[193] In that sense, it is always an over-arching consideration when rights are at stake. But it is not any individual's dignity that is primarily in issue here.

[177] The prohibition must be interpreted narrowly. The harsh criminal and other sanctions occasioned by the violation of section 89(2) and the robust political electioneering context in which the message was published necessitate this approach, as pointed out by the joint judgment. However, I do not think that the question of criminal intent, which the author of the SMS might or might not have had, is relevant to this inquiry.

[193] Section 1(a) of the Constitution provides that South Africa is one, sovereign, democratic state founded on the values of "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms". Section 10 provides: "Everyone has inherent dignity and the right to have their dignity respected and protected."

[178] Most significantly, I diverge from my colleagues on the necessity to determine whether the SMS contains a "factual statement" or an "opinion" or "comment", in order to decide if it constitutes "false information". I do not think, as the main judgment finds, that an opinion can never be "false information".[194]

[179] Just as this case is not about defamation, it is also not about the President's conduct or liability, legally, ethically, or otherwise; the veracity of the Nkandla Report; or the effect or authority of the Public Protector's recommendations. Those issues will have to be considered properly by this Court if and when necessary. This judgment makes no findings on them. It deals with the interpretation of section 89(2) and item 9(1)(b) and their application to the wording of the SMS.

Factual statements and opinions

[180] The Electoral Act prohibits the publication of "false information". On its face, it seems to imply some kind of *factual* utterance.[195] The term "information" is used, but a statement of fact is not explicitly required. It certainly does not expressly exclude comments or opinions. But if something is not a factual statement, how can it be false? The main judgment holds that it cannot be.[196] The joint judgment finds that a comment or opinion can "rarely" be false.[197] If electioneering information is not factual, it must be an opinion, commentary, a personal belief or a value judgment, and therefore (generally) beyond the scope of being either false or true. Thus it would fall outside the ambit of the provision, the judgments by my colleagues hold.

[181] If the DA sent an SMS stating that a candidate, who was alive and well, had died of a heart attack, that would have been easily identifiable as false information. Had it run under the slogan that a candidate would make or has made a terrible

[194] Main judgment at [63]. See also the joint judgment at [144] to [146].

[195] Indeed in *South African Associated Newspapers* above n 151 at 473D-E and *Theron* above n 151 the Courts held that "information" can only relate to factual statements.

[196] Main judgment at [63].

[197] Joint judgment at [145].

President, hardly anybody would disagree about it being an opinion. At first glance, agreeing that the SMS contained an opinion implies that section 89(2)(c) of the Act does not apply. A view that it is a statement of fact, on the other hand, seems to allow the possibility that the SMS was unlawful, because the statement of fact may be false. An investigation is then called for to determine whether the Nkandla Report indeed "shows how" President Zuma "stole" taxpayers' money.

[182] On closer consideration, one finds that this clear-cut boundary between a factual statement and an opinion may well be something of a fiction. Whereas extremes on both ends of the fact/opinion continuum are easily identifiable, in reality there is no clear line somewhere in the middle that makes this a binary inquiry. Saying that a government "ruined our economy" or "took us into a war" looks as if it is a factual assessment, but it is readily apparent that it may rather be an assessment of policies, according to criteria, numbers and statistics which people on different sides of the political spectrum disagree about. It is a matter of opinion, even though it is presented in a factual manner. The difficulty in determining on which side of the divide a statement falls is illustrated by the case law on fair comment as set out comprehensively in the main judgment and also referred to in the joint judgment.[198] For example, in *Roos*, Smith J said that "the defence of fair comment cannot be sustained when the facts and comment are so intermingled as to be indistinguishable".[199] In *Yutar* it was said that the distinction between comments and factual statements "is not an easy [one] to draw".[200] Indeed, does labelling a comment as "unfair" not mean that it is unreasonably far from the truth, or indeed "very, very false"?

[183] The joint judgment maintains that the SMS is comment because it offers an interpretation of the Nkandla Report, to which it directly refers for its authority. Even under defamation law, it is not a claim the perceived truth of which "depends upon

[198] See the main judgment at [64] to [110] and the joint judgment at, for example, [148] to [150].

[199] *Roos* above n 52 at 1010, as discussed in the main judgment at [70].

[200] *Yutar* above n 31 at 454A-B, as discussed in the joint judgment at [149] to [150].

nothing but the writer's own authority".[201] In other words, the text was not purporting to be authoritative and was therefore not capable of being "false information".

[184] However, could it not be said that the message was intended to be *authoritative* about the *content* of the source?[202] It may well be that the author had no intention for the audience to have regard to that source and wishes the audience to believe the conclusion regarding it. The SMS might take advantage of the prolixity or complexity of the source, or perhaps the multiplicity of sources on that issue. This may be possible to infer from the nature of the source or its accessibility. It seems we have not been able to escape the problems with the either/or analysis by simply relying on the fact that an external source has been referenced. The SMS could have made an outrageous claim about the Nkandla Report, like it "shows how Zuma is now living in Costa Rica". Would it still be an opinion just because it says that an external source "shows" something? Can we not then say that it is false, even if it depends on the writer's authority as far as the contents of the Nkandla Report are concerned?

[185] We are left in an invidious position where it is not clear on which side of the line the words fall. Should this thin and dubious line definitively determine whether the statement is immune to section 89(2)(c), or subject to its prohibition and even its criminal consequences? This seems to be in conflict with the purpose of the provision, namely to address the harm of misinformation wrongly influencing people and undermining their right to vote freely in a fair election.[203] Surely we must accept

[201] The joint judgment at [148], referring to *Roos* above n 52 and to Fagan above n 153.

[202] As English law has recognised, and as pointed out in the main judgment at [79], sometimes reference to an authority is not sufficient to guarantee the inference that the statement is a comment. See *Telnikoff* above n 71.

[203] This is my understanding of the harm the Electoral Act is trying to address which I have deduced from item 1 of the Electoral Code, read with section 2 of the Electoral Act and section 19(2) of the Constitution. This understanding also follows logically from the language of section 89(2)(c) itself, which prohibits "publish[ing] any false information with the intention of influencing the conduct or outcome of an election". The Oxford English Dictionary defines "influence" as "to affect the mind or action of; to move or induce by influence; *sometimes especially to move by improper or undue influence*". (Emphasis added). (*The Oxford Dictionary* 2 ed (OUP, Oxford 1991).) I note that the verbs in the rest of section 89(2) – namely, "disrupting" and "preventing" in subsection (a) and "creating hostility or fear" in subsection (b) – all involve purposely negative actions. Given this, and the overall purpose of the Electoral Act and Electoral Code, it is sensible to impute the more negative connotation of "influencing", and to understand this term to mean, in the context of section 89(2)(c), to influence the conduct or outcome of an election wrongly, unduly or improperly.

that at some stage, even a comment, value judgment or opinion can become "false". For this reason, to focus on whether a statement is one of fact or opinion is to follow a red herring. To simply call an utterance an opinion, and therefore immune to the provisions of the Act however unfair or wrong it might be, seems arbitrary.

[186] Some opinions are harmful exactly because they deviate very far from the truth. A political party could disseminate the following message: "In our opinion" or "We think that" the government "will be closing polling stations tomorrow. Do not waste your time going to vote". Or perhaps: "Our medical experts think that the candidate will die in three weeks". These would be opinions. Should they be immune to the Electoral Act simply on that basis? I do not think so. These so-called opinions are deceptions and may induce people to refrain from voting as they would otherwise have done. An exemption for opinions would undermine the Electoral Act's ability to address the harm it seeks to prevent.

[187] The logical difficulty with the binary analysis is evident in the main judgment's statement that a comment does not trigger the application of section 89(2)(c) "provided that such an opinion was honestly held . . . and had some acceptable factual foundation".[204] The judgment concedes that certain comments are capable of being false or at least tending to be "not true" when the opinion is not based on supporting facts.

[188] This difficulty is further demonstrated by the joint judgment. It states that because an opinion can rarely be criticised for being false, the use of the term "false" in section 89(2)(c) is an indication that the provision was intended to apply only to factual statements.[205] The joint judgment argues that this intention is also evident from the use of the term "information" in section 89(2)(c) and the word "allegation" in item 9(1)(b) of the Code, which my colleagues argue can also only contemplate a

[204] Main judgment at [63].

[205] Joint judgment at [145].

factual statement.[206] The judgment concludes that "[t]his, on its own, is enough to warrant the conclusion that the SMS, being comment on and interpretation of a separate source, does not fall within the section 89(2) or item 9(1)(b) prohibition".[207]

[189] But the judgment then considers whether the SMS actually was false.[208] It concludes that it is unnecessary to decide whether in addition to being an opinion it was false.[209] This is puzzling. Why investigate, with reference to quotations from the Nkandla Report, whether a statement is "false", if it is unnecessary to do so because the Electoral Act and Code do not apply to opinions? To my mind this admits that the words are indeed falsifiable or verifiable, opinion or not. Is the SMS perhaps one of the rare cases the joint judgment suggests exist when a comment can be false? Rare or not, those statements cannot be impervious to the provisions of the Electoral Act and Code. The terms "information" and "allegation" are not so straightforward in their scope and meaning that a statement which has some small degree of implied value judgment or interpretation escapes their ambit.

[190] In *McBride*[210] this Court held that the statement that Mr McBride lacked contrition was capable of being false.[211] But many would argue that a conclusion as to whether someone is contrite is a judgment or opinion. Courts generally say in judgments that "in my view" or "in my opinion", for example, a convicted person has shown no remorse and on that basis impose devastating sentences. Indeed in *McBride* this Court analysed "contrite" both as if it were factual and then, alternatively, as if it were comment or "opinion".[212] It was in the latter context that it found the "assertion [was] . . . a far-going and unwarranted untruth".[213] If we agree that an "opinion" does

[206] Id at [144] to [145].

[207] Id at [147].

[208] Under the heading: "Was the SMS false?" Id at [160] to [167].

[209] Id at [167].

[210] *McBride* above n 37.

[211] Id at para 121.

[212] Id.

[213] Id at para 121. See also paras 116 and 120.

not fall outside the realm of the reasonably justifiable or verifiable and is capable of being an "untruth", then surely it may, in certain cases, be capable of being "false information". If we glibly assume that an *opinion* can never or rarely be false, we could just as well say that *information* can never be false, because if it is, it is not "information". Terms like "disinformation" and "misinformation" are often used. Yet, section 89(2)(c) talks about "false information".

[191] We are not the only court to have faced the need to venture into these murky waters. In a number of decisions the European Court of Human Rights concluded that the distinction between facts and opinions cannot be determinative.[214] With local politics as the background, that Court observed that—

> "the distinction between statements of fact and value judgments is of less significance in a case such as the present, where the impugned statement is made in the course of a lively political debate at local level and where elected officials and journalists should enjoy a wide freedom to criticise the actions of a local authority, even where the statements made may lack a clear basis in fact."[215]

This perspective seems pertinent in the sphere of national elections and relating to statements made by political adversaries.

[192] As a result, it does not matter all that much whether the message by the DA is considered to be a factual statement or an opinion. It falls somewhere on a continuum. What matters is whether the statement is purporting to describe a readily falsifiable state of affairs which poses a real danger of misleading voters and undermining their right to a free and fair election. This accords with the objects of the Electoral Act, within the context of the Constitution.

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[214] *Kita v Poland* [2008] ECHR 663 at para 46; *Lombardo v Malta* [2007] ECHR 323 at para 60 and *Dyuldin and Kislov v Russia* [2007] ECHR 685 at para 49.

[215] *Lombardo* id.

"False information"?

[193] The term "false" must be interpreted narrowly. This is because robust political debate is fundamental to the democratic process. The constitutional validity of the limitation in section 89(2)(c) on the right to freedom of expression and to campaign is not challenged. The limitation is presumably reasonable and justifiable in an open and democratic society and not an unduly restrictive means to achieve its purpose.[216] It is reasonable and justifiable that an intrusion on vital free campaigning must be proportional to the aim of prohibiting the publication of blatantly misleading or intimidating information, in order to give effect to the right to participate in free and fair elections.

[194] 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.[217] Perhaps fairly little of what electioneering politicians say is wholly incapable of being labelled as "false" in one way or another. This cannot mean, however, that each and every campaign statement of questionable veracity falls foul of the Electoral Act.

[195] 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

[216] Section 36 of the Constitution.

[217] That said, we should avoid relying too heavily on an interpretation which analyses exactly how a particular voter would construe the message. One must be realistic about political debates in our society and not hypothesise about whether ordinary readers of the text message are able to establish the "truth", or have enough time to study or read the Nkandla Report. This enquiry is too complex and involves an analysis of voter attitudes, levels of literacy, campaign strategies, media debates, communication tools, and so on. The multiplicity of factors would lead to a level of arbitrariness. For example, the main judgment relies on the fact that the Nkandla Report was released the day before the SMS was sent, which meant that there was not enough time for the facts to become notorious. But the argument could go either way in the context of an election. If there was ample time after the publication for the content of the Nkandla Report to become notorious prior to the elections, then people would be able to determine for themselves whether the comment was reasonable or fair prior to casting a vote. It would also have given the ANC an opportunity to rebut the allegations and enrich the political debate centred around the Nkandla Report. This argument adds an unnecessary extra layer of complication, however. In the end, these particular circumstances in themselves cannot change the nature of the text from "false" to "not false" or otherwise.

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. If the statement does refer to an external source or authority then, to determine the location on the continuum, the source referred to, the precise way in which it was referred to and the nature of the conclusion are relevant.

[196] Some words are inherently value-laden or subjective. Nebulous adjectives like "terrible" or "dishonest" and verbs like "to fail" or "to ruin" tend to alert the audience that something is mainly an opinion. A statement about a candidate being dead or the President living in Costa Rica is not similarly flexible. This must be more strictly and literally verified by the Court. Of course there is an inherent subjectivity when it comes to the semantics of language, but a court inevitably has to engage with it.

[197] In this case the SMS did not say that the Report "shows *that* Zuma stole" money. It says it "shows *how*". That it "shows how" could reasonably be understood to mean that somewhere in the Nkandla Report there are one or more explicit statements that President Zuma stole money, with an explanation of the method he used. From that perspective, it looks like a factual assessment, especially taking into account that the Public Protector undoubtedly carefully drafted the language in the Nkandla Report. The SMS would then be false. But one may understand "shows how" differently, for example as a synonym for "illustrates". This would imply that the reader need not bother to look for a specific description of the act of *stealing* in the text of the Nkandla Report, but that an overall picture or impression is referred to.

[198] Reference to an external source (the Nkandla Report) in a manner that could suggest a value judgment, in the context of a political campaign, requires a generous approach to scrutinising its veracity – in this case a more generous understanding of the word "stole". Many words and labels have different meanings, legally and

otherwise. This Court has dealt with the meaning of linguistic labels like "murder" and has held that the ordinary meaning of a word is relevant, not just the technical legal definition.[218] It has also dealt with the significance of labels like "rape"[219] and "marriage".[220]

[199] Used freely, to "steal" may have several meanings. We accuse people of stealing an employer's time, or another's life or happiness, or even someone's thunder. These are figurative uses of the word. The more literal context of *stealing money* constrains the possible meaning of the word. Our analysis has to be confined to the possible meanings that the word "stole" is reasonably capable of having in the present context. We do not have to accept all possible meanings of the word. Language has to mean something concrete and specific at some point, at least for the law to function.

[200] So then, what does "stole" mean? It falls somewhere between obviously opinion-based terms like "terrible" or "became rich from taxpayers' money" on the one end of the continuum and a clearly factual observation like "died" or "is living in Costa Rica" on the other.

[201] To have "stolen" cannot possibly refer only to a criminal conviction on a charge of theft. If so, a complainant would hardly be able to lay a charge, aimed at a trial and conviction, by telling police that someone "stole" something.

[202] Someone who steals commits the crime of "theft", which has a legal definition of course.[221] However, dictionaries tell us that to "steal" is indeed used to mean to

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[218] *McBride* above n 37 at para 70.

[219] *Masiya v Director of Public Prosecutions, Pretoria and Another* [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (CC).

[220] *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC).

[221] According to Snyman above n 129 at 483, to secure a conviction of theft, the state must prove that an accused—

> "unlawfully and intentionally appropriates moveable, corporeal property which—

"thieve", but also to "take for oneself". It is even used to describe actions like misappropriation or embezzlement.[222] The terms theft, fraud and robbery are commonly used interchangeably, although these are separate criminal offences in our law. To steal has also been defined as to "take without permission or legal right and without intending to return it".[223]

[203] Could the fact that the Report "shows how" President Zuma benefited unjustifiably from tax payers' money be described as showing a way of "stealing" on a wide conception of the word? It seems so. The text was not a legal statement. It was an election punchline. The exposition of some parts of the Nkandla Report demonstrates that these could well be construed to justify the view disseminated by the DA. The Nkandla Report for example found that the expenditure incurred "was unconscionable, excessive, and caused a misappropriation of funds".[224] It expressly concludes that the President was "aware of what the Nkandla Project entailed"[225] and uses the word "benefitted" more than once.[226] This judgment simply notes select

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(a) belongs to, and is in the possession of, another;

(b) belongs to another but is in the perpetrator's own possession; or

(c) belongs to the perpetrator but is in another's possession and such other person has a right to possess it which legally prevails against the perpetrator's own right of possession

provided that the intention to appropriate the property includes an intention permanently to deprive the person entitled to the possession of the property, of such property."

[222] *The Oxford Dictionary, Thesaurus and Wordpower Guide* 2 ed (OUP, Oxford 2001). Snyman id explains at 484 that in South Africa embezzlement – which consists in appropriating someone else's property already in possession or control of the perpetrator – is not a separate crime but a form of theft.

[223] *Concise Oxford English Dictionary* above n 162.

[224] The Nkandla Report above n 7 at 56, para (d)(1) and 430, para 10.4.1.

[225] Id at 423, para 9.5.3.

[226] Id at 431, para 10.5.3, where it states:

> "President Zuma improperly benefited from the measures implemented in the name of security which include non-security comforts such as the Visitors' Centre, such as the swimming pool, amphitheatre, cattle kraal with culvert and chicken run."

It also states at 437, para 10.9.1.4:

> "It is my considered view that as the President tacitly accepted the implementation of all measures at his residence and has unduly benefited from the enormous capital investment from the non-security installations at his private residence, a reasonable part of the expenditure towards the installations that were not identified as security measures in the list

examples from the Nkandla Report. The joint judgment gives a comprehensive account of the extracts of the Nkandla Report supporting the conclusion that the statement is not false.[227]

[204] According to the Nkandla Report, there was "misappropriation" of taxpayer money.[228] The President benefitted from it. The misappropriation appears to have been tacitly accepted and in certain circumstances caused by the President, as set out in the Nkandla Report.[229] The Nkandla Report seems to "show" that the President at least accepted actions which resulted in the misuse of taxpayer money which should not have been used on the project.[230] It does not indicate that the President intended to return the appropriated money. 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.

[205] The SMS cannot be said to contain "false information" within the meaning of section 89(2)(c) of the Electoral Act or "false allegations" in terms of item 9(1)(b) of the Electoral Code, as interpreted within the context of the constitutional protection of the rights to free and fair elections, free campaigning and freedom of expression. The Electoral Court erred in this regard.

[206] As stated earlier, the references to the Nkandla Report in this judgment are not intended to contain any findings on the veracity of the Nkandla Report or the liability of the President for theft or anything else. The judgment investigates the link between the SMS and the Nkandla Report.

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compiled by security experts in pursuit of the security evaluation, should be borne by him and his family."

[227] See the joint judgment at [161] to [166].

[228] The Nkandla Report above n 7 at 56, para (d)(1) and 430, para 10.4.1.

[229] Id at 149, para 6.19; 178, para 6.45.10; 339, para 7.30.3; 423, para 9.5.3; 424-5, para 9.5.12 and 437, para 10.9.1.4.

[230] Id.

[207] It is not necessary to deal with questions of strict liability and fault.[231] That inquiry is not triggered because the SMS is not "false information".

[208] The application for leave to appeal should be granted and the appeal should be upheld.

[231] As the joint judgment does at [154] to [158].

For the Applicant:	I Jamie SC and D Borgström instructed by Minde Shapiro & Smith.
For the First Respondent:	G Malindi SC, S Ebrahim, Y Saloojee and E Webber instructed by M V Gwala and Associates.