

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no: CCT76/14

In the matter between:

DEMOCRATIC ALLIANCE

Applicant

and

AFRICAN NATIONAL CONGRESS

First Respondent

**INDEPENDENT ELECTORAL COMMISSION
OF SOUTH AFRICA**

Second Respondent

APPLICANT’S PRACTICE NOTE

Nature of the proceedings:

1. Application for leave to appeal against the judgment and order of the Electoral Court, delivered on 6 May 2014.

Issues that will be argued, and summary of the DA’s argument:

2. The case concerns the lawfulness of a campaign message, transmitted by the Applicant (“the DA”) on 20 March 2014 to the cellphones of voters in

Gauteng by means of a short message service (“SMS”), in the run-up to national and provincial general elections which were held on 7 May 2014.

3. The SMS dealt with a Report released by the Public Protector on 19 May 2014 into improvements effected to the private residence of Pres. Zuma in Nkandla, KwaZulu-Natal. The SMS stated that the Report “*shows how*” Pres. Zuma “*stole your money to build his R246m home*”
4. The First Respondent (“the ANC”) brought proceedings against the DA, complaining that content of the SMS was false, and as such violated:
 - 4.1. Section 89(2)(c) of the Electoral Act 73 of 1998 (“the Act”); and
 - 4.2. Item 9(1)(b) of the Electoral Code of Conduct (“the Code”), which is included as schedule 2 to the Act
5. The DA disputes that the SMS violated the Act and the Code, and shall argue that, based on a proper understanding of the Report:
 - 5.1. The SMS was substantially true; or
 - 5.2. Based on a proper interpretation of the Act and the Code, the SMS did not constitute false speech proscribed by those provisions.

6. A proper interpretation of the Act and the Code should avoid it applying in a manner which would violate the constitutional protections of free speech (section 16) and political activity (section 19).
7. To guide the proper interpretation of the Act and the Code, The DA shall argue that this Court should take guidance from:
 - 7.1. The development in the law of defamation of the objective lawfulness of political speech and comment;
 - 7.2. The elevated importance of unhindered free speech in election periods;
and
 - 7.3. Comparable foreign experience.

Portions of the record that are relevant:

8. All irrelevant aspects of the Record have been omitted by agreement between the parties.

An estimation for the duration of oral argument:

9. The case can be fully argued within one (1) day

Authorities on which the Respondent's will place particular reliance:

10. A list of authorities is attached to the Applicant's heads of argument, which denotes those cases on which particular reliance will be placed.

ISMAIL JAMIE SC

DAVID BORGSTRÖM

Chambers
Cape Town
22 July 2014