# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
# JUDGMENT

**Reportable**
Case No:1068/2019

In the matter between:

**THE ELECTORAL COMMISSION OF SOUTH AFRICA** **APPELLANT**

and

**THE DEMOCRATIC ALLIANCE** **FIRST RESPONDENT**

**THE GOOD PARTY** **SECOND RESPONDENT**

**THE AFRICAN NATIONAL CONGRESS** **THIRD RESPONDENT**

**Neutral citation:** *Electoral Commission of South Africa v Democratic Alliance and Others* (1068 /2019) [2021] ZASCA 103 (23 July 2021)

**Coram:** MAYA P, ZONDI AND SCHIPPERS JJA AND GOOSEN AND SUTHERLAND AJJA

**Heard:** 11 September 2020

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 12h00 on 23 July 2021.

**Summary:** Elections **–** Electoral Act 73 of 1998 (EA) – prohibition on persons publishing false information in s 89(2) to influence outcome of election – Code of Conduct in Schedule 2 to EA – item 9(1)*(b)* – prohibition on parties and

candidates publishing false or defamatory allegations – Electoral Commission Act 51 of 1996 (ECA) – powers of the Electoral Commission – s 5(1)*(o)* of ECA – limited to adjudication of disputes of administrative nature – alleged contravention of Code – member of political party fired – not a dispute of administrative nature – Electoral Commission has no jurisdiction to determine a complaint of a contravention of Code or to impose a remedy therefor.

## ORDER

**On appeal from:** The Electoral Court of South Africa, Johannesburg, Wepener J (Mbha JA, Lamont J and S Pather (member) concurring):

The appeal is dismissed.

## JUDGMENT

**Schippers JA (Maya P, Zondi JA and Sutherland and Goosen AJJA concurring):**

[1] The central issue raised by this appeal, which is with the leave of the Electoral Court, concerns the powers of the appellant, the Electoral Commission of South Africa (the Commission). More specifically, it is whether the Commission is empowered to make a finding that a provision of the Code of Conduct (the Code) contained in Schedule 2 to the Electoral Act 73 of 1998 (the Electoral Act), has been contravened and to impose a sanction for the contravention.

[2] The matter arises from a complaint lodged with the Commission on 2 March 2019 by the second respondent, the Good Party, that the first respondent, the Democratic Alliance (DA), had contravened s 89(2) of the Electoral Act and item 9(1)*(b)* of the Code in the run up to the national and provincial elections held on 8 May 2019. The Good Party alleged that the DA had published false information with the intention of influencing the outcome of an election, and false and defamatory allegations concerning its leader, Ms Patricia De Lille.

[3] The third respondent, the African National Congress (ANC), is not a party to the appeal. It had been joined as a party in an application launched by the DA in the Electoral Court, to review and set aside the Commission's decision on the Good Party's complaint, as well as its decision not to investigate a complaint by the DA against the ANC, lodged on 24 March 2019. The DA alleged that the ANC had falsely stated that the DA had 'made a profit of R1 billion' from water tariffs in the City of Cape Town, which was a contravention of item 9(1)*(b)* of the Code and s 94 of the Electoral Act. The Commission concluded that the DA's complaint 'can only be decided by a court of law as it will be best placed to make a determination on the alleged violation of the provisions of both the Electoral Act and the Code'. In its answering affidavit in the review application the Commission undertook to investigate the complaint against the ANC, which rendered the relief sought by the DA academic.

## Facts

[4] The basic facts are uncontroversial. It is common ground that Ms De Lille is a former member of the DA and that it had prepared a document entitled, '[t]he guidelines of the call-centre campaigners of the Democratic Alliance' (the guidelines), used by its party agents, call-centre operators and campaigners when canvassing for votes for the DA. The guidelines contained standard responses to questions raised by voters as to why they should vote for the DA and the reason for Ms De Lille's exit from the party.

[5] The guidelines, in relevant part, read:

'[STANDARD RESPONSES TO BE USED]

**"Why should I vote for the DA"**

. . .

**"Infighting / you fired PDL"**

We fired Patricia de Lille because she was involved in all sorts of wrongdoing in the City of Cape Town. The DA doesn't allow corruption, and we'll take action against anyone, even our own members.'

[6] In her letter of complaint dated 2 March 2019, Ms De Lille alleged that these statements were a contravention of s 89(2) of the Electoral Act, which proscribes the publication of false information with the intention of influencing the outcome of an election, and that they were also false and defamatory and a breach of item 9(1)*(b)* of the Code. She said:

'1. I was not fired by the DA. I resigned from the DA with effect from 31 October 2018. The DA attempted to "fire" me but their conduct, in so doing, was found to be unlawful and set aside by order of the Western Cape High Court.

2. I have not been involved in any wrongdoing nor has any court or any other appropriate forum found me guilty of any wrongdoing.

3. I am not corrupt, have not been involved in any corrupt activities, and have never been accused of, or found guilty of, any corrupt activities.'

In what follows, I refer to the words complained of and these allegations as 'the complaint'.

[7] The complaint was lodged, Ms De Lille said, because the DA's conduct interfered with the holding of free and fair elections, and undermined tolerance of democratic political activity, free political campaigning and open public debate. It had also caused immeasurable damage to her reputation, and was intended to undermine her candidacy and election prospects, and those of her party.

[8] On 29 March 2019 the DA responded to the complaint. Its response was essentially that the statements complained of did not 'threaten the mechanics of the conduct of the 2019 election', and did not violate s 89(2) of the Electoral Act

or item 9(1)*(b)* of the Code. The statement that Ms De Lille 'was involved in all sorts of wrongdoing' was a comment based on notorious facts regarding Ms De Lille's tenure as Mayor of the City of Cape Town (the City).

[9] The facts concerning Ms De Lille's tenure as Mayor, in summary, were these. The DA had repeatedly tried to force Ms De Lille out of the mayoral seat and the party. Indeed, this is common ground. In late 2017 the DA brought disciplinary proceedings against her on charges of intimidation, criminality and misconduct. On 24 January 2018 the DA caucus in the City passed a motion of no confidence in Ms De Lille. This led to a motion of no confidence in the City Council. Ms De Lille survived the motion by one vote.

[10] On 8 April 2018 the DA amended its constitution by adding a clause to allow it to remove a member if he or she refused to resign after a caucus motion of no confidence. Subsequently, the DA invoked the new clause and demanded that Ms De Lille provide reasons why she should not be forced to resign. On 25 April 2018 the DA caucus again adopted a motion of no confidence in Ms De Lille.

[11] On 8 May 2018 the DA took a decision to expel Ms De Lille from the party, which would have resulted in the loss of her position as Mayor. However, she successfully challenged that decision in the Western Cape High Court.[1] In the course of those proceedings the City Council voted on 31 May 2018 to strip Ms De Lille of her executive powers.

[12] Another motion of no-confidence in Ms De Lille as Mayor was tabled for resolution on 26 July 2018. A day before the motion was going to be debated, the

[1] The case is reported as *De Lille v Democratic Alliance* [2018] 3 All SA 684 (WCC).

DA and Ms De Lille entered into a settlement agreement in terms of which Ms De Lille agreed to resign as Mayor by 31 October 2018, which she did. In exchange for her resignation, the DA did not proceed with the pending disciplinary charges against her.

[13] By letter dated 15 April 2019, the Commission informed the parties of its decision on the complaint. It stated that the question as to whether s 89(2) of the Electoral Act had been contravened was 'a matter for the courts to decide'. It decided that the DA had contravened item 9(1)*(b)* of the Code, solely on the basis that the statement that Ms De Lille had been fired (the impugned statement), was false. The Commission said:

'With respect to the statement made by the DA that Ms De Lille was "fired", the Commission finds that the statement is false. This finding is based on the agreement concluded between the parties on 4 August 2018 and the resignation letter of Ms De Lille, dated 3 August 2018. Furthermore, the DA, in his own submissions, dated 20 March 2019 admitted that: "Ms De Lille resigned as Mayor in exchange for the DA dropping the disciplinary charges against her".'

[14] I interpose to say that on the facts, this conclusion was incorrect. The majority judgment in *DA v ANC* (Cameron J, Froneman J and Khampepe J) held that because s 89(2) of the Electoral Act and item 9(1)*(b)* of the Code limit the right to freedom of expression and impose severe penalties on those who breach them, in case of doubt they must be interpreted restrictively. Any ambivalence in them or uncertainty about their meaning, must be resolved 'against the risk of being penalised'.[2] In the New Shorter Oxford English Dictionary,[3] the word 'fired' is defined as including, 'Expel (a person) forcibly; dismiss, discharge'. Ms De Lille obviously was not an employee. So, a person to whom the impugned statement was published could never conclude that she had been discharged or

[2] *Id* paras 127-129 and 193.
[3] W R Trumble and A Stephenson *The New Shorter Oxford English Dictionary* 5 ed (2002) vol 1 at 963.

dismissed in that sense. But what is clear, as a statement of fact, is that Ms De Lille was forcibly expelled from her position as Mayor and member of the DA. Stated differently, she had no real choice but to resign. If she had not, the DA would have proceeded with the disciplinary charges of intimidation, criminality and misconduct against her. Ms De Lille was forcibly expelled from or fired by the DA.

[15] The Commission found that the statements that Ms De Lille 'was involved in all sorts of wrongdoing in the City of Cape Town', and that 'the DA doesn't allow corruption', constituted opinion or comment. These allegations had to be verified and could not be said to be false. The DA had in fact charged Ms De Lille with corruption and wrongdoing, but the internal disciplinary proceedings brought against her were terminated because the charges had been withdrawn by the DA in exchange for her resignation.

[16] The Commission issued the following directions:

'REMEDIES

(a) In light of the above-mentioned findings, the Commission has invoked item 7(c) of the Electoral Code of Conduct which provides that:

"Every registered party and every registered candidate must give effect to any lawful direction, instruction or order of the Commission or a member, employee, office of the Commission or the chief electoral officer."

Accordingly, the Commission directs the DA:

(b) to cease and desist from making any further false statements in relation to Ms De Lille being "fired" from the DA.'

(c) to issue a public apology for the false statement published in respect of Ms De Lille being "fired" within three (3) days of the receipt of this letter.'

[17] On 18 April 2019 the DA launched an application in the Electoral Court to review and set aside the Commission's decision that it had violated item 9(1)*(b)* of the Code, and its decision to grant the Good Party a remedy. The DA contended that the Commission's decision was unlawful because the impugned statement was 'both fair comment and factually true'. The term 'fired' meant that the DA 'got rid of', 'pushed out', 'removed' or 'dismissed' Ms De Lille. It was a general term used to indicate that the DA had forced her to resign as Mayor.

[18] The DA alleged that the impugned statement was a comment based on the facts relating to Ms De Lille's tenure as Mayor of the City of Cape Town, outlined above. The DA said that she had resigned 'in response to enormous pressure to do so from the DA and under threat of disciplinary sanction'.

[19] Concerning the powers of the Commission, the founding affidavit states that s 95(1) of the Electoral Act and item 7*(f)* of the Code, read together, authorises the Commission to conduct an investigation to establish whether s 89(2) or item 9(1)*(b)* of the Code has been violated and to make a finding in that regard. Section 95(1) empowers the chief electoral officer to institute civil proceedings before a court, including the Electoral Court, to enforce a provision of the Act or the Code. Item 7*(f)* of the Code requires every registered party and every candidate 'to co-operate in any investigation of the Commission'.

[20] The founding affidavit further states that the Commission 'may not, however, make a binding recommendation based on such a finding without approaching the Electoral Court', for the following reasons. It has no such power under the Electoral Act or the Code. When the Act grants the Commission the power to make a binding order without recourse to the Electoral Court, it does so expressly. In terms of the statutory framework, the power to enforce the Act or the Code lies with the courts. The Commission does not have the power to hand

down binding rulings, since such a power would undermine public perceptions of its independence. The Rules Regulating Electoral Disputes and Complaints about Infringements of the Electoral Code of Conduct and Determination of Courts having Jurisdiction (the Rules),[4] contain detailed provisions to ensure compliance with the *audi alteram partem* principle. And the scope of the Commission's power to issue binding directives must be interpreted restrictively.

[21] The Commission opposed the application but did not seek a costs order. The basis of its opposition was that the impugned statement was one of fact. It denied that the statement had to be understood 'broadly and metaphorically' as alleged by the DA. It claimed that the DA did not lay a proper basis for the conclusion that the statement was true. The Commission contended that it had the power to impose the relevant sanction, and that the separation of investigative and remedial powers between the Commission and the courts respectively, as submitted by the DA, was inconsistent with the scheme of the electoral legislation and regulations, designed to ensure the speedy resolution of complaints.

**The Electoral Court's findings**

[22] The Commission relied on s 190 of the Constitution, s 5(1)*(o)* of the Electoral Commission Act 51 of 1996 (the ECA) and item 9(1)*(b)* of the Code as the source of its power for the decision that the DA had contravened the Code and the sanction imposed. The Electoral Court held that s 190 of the Constitution, which deals with the establishment and obligations of the Commission, 'does not create the power the Commission sought to use'. The court said that the power to adjudicate disputes arising from 'the organisation, administration or conducting of elections and which are of an administrative nature' envisaged in s 5(1)*(o)* of

[4] The 'Rules Regulating Electoral Disputes and Complaints about Infringements of the Electoral Code of Conduct in Schedule 2 of the Electoral Act, 1998 (Act No. 73 0F 1998) and Determination of Courts Having Jurisdiction, published under GN 2915, *GG*19572, 4 December 1998.'

the ECA, means that the Commission 'may adjudicate disputes regarding the mechanics of an election'. The Commission had no power to adjudicate an issue which was not administrative in nature. Neither the empowering statute nor the Code provide for any remedies that the Commission may enforce. This was a further indication that the Commission had no power to grant the remedies that it did.

[23] The court said that the impugned statement was one made by a political party against an individual and was within the realm of free speech. It referred to the majority judgment in *DA v ANC*,[5] in which it was held that the primary purpose of s 89(2)*(c)* of the Electoral Act is 'to protect the mechanics of the conduct of an election'; that the prohibition on disseminating false information concerns 'election-related information'; and that the kind of false statements prohibited include those that 'intrude directly against the practical arrangements and successful operation of an election.' The court held that it did not matter whether the impugned statement was false, since item 9(1)*(b)* was 'not applicable as the statement does not impact on the mechanics or conduct of an election'.

[24] The court stated that where the Electoral Act empowered the Commission to decide an issue, it did so in specific terms. There is no express power conferred on the Commission to enforce item 9(1)*(b)*. This led to the conclusion that the Commission did not have such power. Consequently, the court concluded that decisions of the Commission were invalid and had to be set aside.

[25] The Electoral Court issued the following order:

'1. The decision of the Commission that the statement made by the DA that Ms De Lille was "fired" was false, is reviewed and set aside.

[5] *Democratic Alliance v African National Congress and Another* [2015] ZACC 1; 2015 (2) SA 232 (CC) para 138.

2. The decision of the Commission that the applicant acted in violation of item 9(1)*(b)* of the Electoral Code of Conduct is reviewed and set aside.

3. The remedies imposed by the Commission consequent upon its aforesaid decisions are reviewed and set aside.

4. There is no order as to costs.'

**The powers of the Commission**

[26] The source of the Code and the obligation of political parties to comply with it is the Electoral Act. What then does the Electoral Act say about breaches of the Code? The answer is that there are three provisions dealing specifically with contraventions of the Code. The most serious is s 97 of the Act, which renders a breach a criminal offence, subject to the substantial penalties set out in s 98. Then there are the administrative penalties provided under s 96 of the Electoral Act. These can be imposed by various courts, designated for that purpose by the Electoral Court under the mechanism for determining complaints of contraventions in terms of s 20(4) of the ECA, read with the Rules made by the Court. Finally, the Commission is empowered to try and conciliate a complaint of a breach of the Code under s 103A of the Electoral Act.

[27] Only the last of these vests specific powers in the Commission, and those are not powers of determining complaints and granting remedies. The chief electoral officer is entitled in terms of s 95 of the Electoral Act to institute civil proceedings before a court, including the Electoral Court, to enforce a provision of the Act. Although not expressly provided, it would also be open to the Commission to lay criminal charges arising out of contraventions of the Code. But none of these provisions empowered the Commission to act as it did in this case.

[28] Counsel for the Commission submitted that s 190(1) and (2) of the Constitution, in terms of which the Commission is enjoined to manage elections and is granted additional powers prescribed by national legislation,[6] it had both the power to determine a complaint concerning a breach of the Code and to take remedial action in that regard. Alternatively, and at worst for the Commission, so it was submitted, it has the power to determine whether a complaint regarding a breach of the Code is well-founded.

[29] Counsel for the DA contended that on receiving a complaint, the Commission may investigate whether a party or candidate has contravened item 9(1)*(b)* of the Code. After an investigation, it is empowered to make a finding as to whether the Code has been contravened and to decide what further steps, if any, should be taken under the Electoral Act. The source of this power, it was argued, was the Commission's functions in s 5 of the ECA to ensure that elections are free and fair,[7] and to promote conditions conducive to free and fair elections,[8] s 95(1) of the Electoral Act and item 7*(f)* of the Code.

[30] The reliance on s 190(1) and (2) of the Constitution was misplaced for the simple reason that the Commission said it made its finding that the DA had contravened the Code, 'in the exercise of its administrative adjudicative powers' purportedly in s 5(1)*(o)* of the ECA. When taking the remedial action, the Commission ostensibly acted in terms of item 7*(c)* of the Code. A decision deliberately and consciously taken under the wrong statutory provision cannot be

---

[6] Section 190 of the Constitution provides:
'(1) The Electoral Commission must–
*(a)* manage elections of national, provincial and municipal legislative bodies in accordance with national legislation;
*(b)* ensure that those elections are free and fair; and
*(c)* declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.
(2) The Electoral Commission has the additional powers and functions prescribed by national legislation.'
[7] Section 5(1)*(b)* of the Electoral Commission Act (the ECA).
[8] Section 5(1)*(c)* of the ECA.

validated by the existence of another statutory provision authorising that action,[9] be it the Constitution or other legislation. For the same reason, the Commission's reliance in its answering affidavit on ss 99, 100, 103 and 103A of the Electoral Act in support of its assertion that national legislation conferred on the Commission additional powers to 'compile, issue and enforce the Code', was misconceived. In any event, none of those provisions ground the power to make a finding that the Code has been contravened or to take remedial action under it.

[31] Secondly, the Commission is precluded from relying directly on the Constitution by the principle of subsidiarity: where legislation has been enacted to give effect to a constitutional right, a litigant must either rely upon that legislation or challenge its constitutionality. It cannot bypass legislation and rely directly upon the right.[10] The Electoral Act and the ECA give effect to the right to free and fair elections enshrined in s 19(2) of the Constitution, to which the Commission's functions under s 190(1) of the Constitution are inextricably linked.[11]

[32] Whether the Commission has the power to make a finding that the Code has been contravened must be sourced in the ECA or the Electoral Act. The powers and functions of the Commission are set out in s 5 of the ECA. For present purposes only s 5(1)*(o)* of the ECA – the only provision in the electoral legislation which authorises the Commission to adjudicate disputes – is relevant. The question is whether the complaint falls within the ambit of disputes that 'arise from the organisation, administration or conducting of elections and which are of an administrative nature'.

---

[9] *Minister of Education v Harris* 2001 (4) SA 1297 (CC) paras 16-18; *Howick District Landowners' Association v Umgeni Municipality and Others* [2006] ZASCA 153; 2007 (1) SA 206 (SCA) paras 21-22.
[10] *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2016 (1) SA 132 (CC) paras 160-161 (per Khampepe J) and paras 44-66 (per Cameron J).
[11] *New National Party v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC) para 12.

[33] A complaint that a political party has breached item 9(1)*(b)* of the Code by publishing false or defamatory allegations about the candidate of another party, plainly is not a dispute of an administrative nature within the meaning of s 5(1)*(o)* of the ECA. The complaint does not pertain to the management of affairs,[12] nor the arrangements and work needed to control the operation of an organisation.[13] It has nothing to do with the management, organisation or administration of an election. Neither does it relate to the electoral or regulatory framework necessary for the process of conducting elections. The Electoral Court was thus correct to hold that the conduct complained of was not a dispute of an administrative nature.

[34] In my view, s 5(1)*(o)* is a powerful indicator that Parliament did not intend to confer on the Commission the power to adjudicate disputes concerning a contravention of the Code. If that was the intention, such power would have been expressly granted in the ECA. Instead, the Commission's power to adjudicate disputes is strictly circumscribed. This interpretation is buttressed by the provisions of item 103A of the Code. It expressly authorises the Commission to resolve a complaint by conciliation, not adjudication. Item 103A provides:

'**Conciliation in disputes and complaints** – The Commission may attempt to resolve through conciliation any electoral dispute or complaint about an infringement of the Code brought to its notice by anyone involved in the dispute or complaint.'

[35] Given the Commission's basic duty to manage elections and to ensure that they are free and fair, and the fact that the Commission is generally the first port of call for a complaint, the purpose of item 103A is not surprising. It is a sensible and workable provision. This case illustrates the point. The answering affidavit states:

---

[12] W R Trumble and A Stephenson *The New Shorter Oxford English Dictionary* 5 ed (2002) vol 1 defines 'administrative' as 'Pertaining to the management of affairs'.

[13] https://dictionary.cambridge.org/dictionary/english/administrative.

'[T]he Commission also believes (on the basis of its experience from 1994 to date) that the principle of attempting to address a party's concerns in party liaison committees and by encouraging conciliation in the exercise of its powers under s 103 and 103A read with s 5(1)(a)-(c) is, in the South African context, appropriate . . .
'Consequently, the Commission has only referred one matter in terms of the breach of section 89 and the Code, to the Electoral Court – that was in the course of the 2016 local government and municipal elections . . . .'

[36] It follows that s 7*(f)* of the Code, which obliges parties and candidates 'to co-operate in any investigation by the Commission', does not vest the Commission with the power to make a finding that the Code has been breached. Item 7 contains general provisions concerning the role of the Commission in the conduct of free and fair elections. It enjoins parties and candidates, inter alia, to recognise the Commission's authority; to assure voters of its impartiality; to maintain effective lines of communication with the Commission and other registered parties; and to facilitate access by members, employees and officers of the Commission, and the chief electoral officer to public meetings, rallies and other public political events of parties or candidates.

[37] It is within this context that the obligation in item 7*(c)* of the Code 'to give effect to any lawful direction, instruction or order of the Commission, or a member, employee or officer of the Commission, or the chief electoral officer', must be understood. And the injunction in item 7*(f)* to co-operate in an investigation by the Commission is hardly surprising – a power of investigation is necessary for the resolution of disputes by conciliation in terms of item 103A of the Code.

[38] The principle of legality, an aspect of the rule of law, requires that a body exercising a public power must act within the powers lawfully conferred on it.[14] The exercise of public power must not be arbitrary or irrational.[15] The Constitutional Court has described the principle of legality as the 'bedrock of our constitutional dispensation'.[16] The Commission violated this principle when it decided that the DA had breached the Code, and imposed a sanction therefor.

[39] The scheme of Chapter 7 of the Electoral Act, in my view, places it beyond question that the Commission has no power to decide that there has been a contravention of the provisions of Part 1 of Chapter 7, or item 9 of the Code, or to impose any sanction for such contravention. That power may only be exercised by courts having jurisdiction in terms of s 20(4) of the ECA.[17]

[40] The Electoral Court, in terms of s 20(4) of the ECA, has determined that a magistrate's court or high court in whose area of jurisdiction any electoral dispute or complaint about an infringement of the Code has arisen, has jurisdiction to hear such complaint. That determination was made in the Rules.

[41] Sections 87 to 93 of the Electoral Act list various forms of prohibited conduct during the holding of elections. Section 99 provides that every registered party and candidate must subscribe to the Code before the party may be allowed to contest an election, or the candidate placed on a list of candidates. In terms of s 94, 'No person or registered party bound by the Code may contravene or fail to

---

[14] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) paras 56 and 58.
[15] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 85.
[16] *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* [2013] ZACC 25; 2014 (2) SA 228 (CC) para 1.
[17] Section 20(4)*(b)* of the ECA requires the Electoral Court to determine which courts shall have jurisdiction to hear particular disputes and complaints about infringements of the Electoral Code of Conduct.

comply with a provision of that Code'. All these provisions are clearly vital to the conduct of free and fair elections.

[42] In terms of s 95(1), the chief electoral officer, the head of the administration of the Commission,[18] 'may institute civil proceedings before a court, including the Electoral Court, to enforce a provision of this Act or the Code'. Section 95(1) does no more than authorise the Commission itself to approach a court to compel compliance with the Act or Code. It does not, as stated in the founding affidavit, authorise the Commission 'to approach a court having jurisdiction for an "appropriate penalty or sanction", including one of the orders itemised in section 96(2) of the Electoral Act' after it has found a contravention of the Code.

[43] Consistent with s 95(1) of the Electoral Act, s 96(2) confers on *courts* having jurisdiction the power to impose any appropriate penalty or sanction on a person or party for a contravention of Part 1 of Chapter 7 of the Act, including the sanctions listed in s 96(2).[19] These sanctions, which include prohibiting a person or party from using any public media, holding public events or canvassing

---

[18] Section 12(2)*(a)* of the ECA.

[19] Section 96(2) of the Electoral Act provides:
'If a court having jurisdiction by virtue of section 20(4) of the electoral commission act finds that a person or registered party has contravened a provision of part one 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 200 000;
*(c)* the forfeiture of any deposit paid by that person or party in terms of section 27(2)*(e)*;
*(d)* an order preventing 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)* this 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 agent of that person or any candidate 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.'

or electoral advertising, reducing the number of votes obtained by the person or party, or disqualifying the person's or party's candidature entirely, have been described in the majority judgment in *DA v ANC* as 'very tough'.[20] And they may be imposed in addition to any criminal penalty provided for in Part 3 of Chapter 7.[21]

[44] Part 3 lists the offences and penalties in relation to the prohibited conduct. Section 97 states that any person who contravenes a provision of Part 1 – which includes s 94 – is guilty of an offence. Section 98 provides that any person convicted of any offence, inter alia, in terms of s 89(2) or s 94, is liable to a fine or imprisonment for a period up to 10 years.

[45] The plain wording, context and purpose of the provisions of Chapter 7 of the Electoral Act,[22] and in particular ss 97 and 98, in my opinion, illustrate the manifest absurdity of an interpretation that the Commission is empowered to make a finding that the Code has been contravened, and to grant a remedy for such contravention. Rule 2(4) of the Rules provides that the offences referred to in Part 1 of Chapter 7 'are dealt with in accordance with the legislation applicable to criminal matters'. It would mean that the Commission effectively has the power to determine that a person is guilty of an offence. Such an interpretation would also cut across the carefully crafted procedure to enforce Chapter 7 of the Electoral Act and the Code. An interpretation that renders a statutory provision or indeed an entire statutory scheme, pointless, must be avoided.[23]

---

[20] *DA v ANC* fn 1 paras 128-129.
[21] Section 96(3) of the Electoral Act; *DA v ANC* fn 1 para 129.
[22] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA (SCA); 2012 (4) SA 593 (SCA) paras 18 and 25, affirmed in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* [2018] ZACC 33; 2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC) para 29.
[23] *Attorney-General Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 at 436, cited with approval in *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) para 57.

[46] Contrary to the Commission's assertion that absent the power to 'order a party to do anything' consequent upon a breach of the Code, the Commission is rendered 'toothless', the legislative scheme not only enables the Commission to compel compliance with the Code, but also creates an expedited and effective procedure for the adjudication of complaints.

[47] As stated, in terms of the Rules, magistrates' courts, high courts and the Electoral Court have jurisdiction to hear electoral disputes and complaints about infringements of the Code.[24] A party may approach a court directly in respect of any electoral dispute or complaint about the infringement of the Code.[25] Proceedings are instituted by way of application.[26] Answering affidavits must be delivered three days after an application is lodged.[27] Replying affidavits are due two days later.[28] The matter is then set down on an urgent basis.[29] The presiding officer may curtail these already short time periods even further if the matter is particularly urgent.[30]

[48] To sum up. The Commission has no power under s 190 of the Constitution or s 5(1)*(o)* of the ECA, to make a finding that the Code has been contravened. Item 7*(c)* of the Code does not confer on the Commission any power to impose a sanction for a breach of the Code. At best, the Commission is empowered, in terms of s 103A of the Electoral Act, to resolve a complaint about an infringement of the Code through conciliation.

[49] Item 94 of the Code states that no person or registered party may contravene the Code or fail to comply with its provisions. Section 97 of the

[24] Rules 2(1)-(3) of the Disputes and Complaints Rules.
[25] *Id* rule 2(3).
[26] *Id* rule 4(1).
[27] *Id* rule 4(6).
[28] *Id* rule 4(7).
[29] *Id* rule 4(8) read with s 20(5) of the Electoral Commission Act.
[30] *Id* rule 4(10).

Electoral Act makes this an offence subject to a fine or imprisonment for a period not exceeding 10 years. Therefore, only a criminal court has the power to decide whether a provision of the Code has been contravened and to impose a sanction for such contravention. The Commission has no power to do so.

**A decision on the proper construction of item 9(1)*(b)* is inappropriate**

[50] There is one final issue: the Electoral Court's interpretation of item 9(1)*(b)* of the Code, more specifically that it was inapplicable because the impugned statement did not impact on the mechanics or conduct of an election, in accordance with the holding in *DA v ANC*. Item 9(1)*(b)*, which applies only to registered parties and candidates, reads:

'**Prohibited conduct** – (1) No registered party or candidate may–

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

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

(ii) the candidate or that candidate's representatives;'

[51] The Commission criticised the Electoral Court's finding on the ground that *DA v ANC* was no basis for it, and requested this Court to decide the proper interpretation of item 9(1)*(b)* of the Code, since it is of considerable importance to the Commission, political parties and the general public. It was also submitted that certainty and finality on the proper construction of item 9(1)*(b)* is essential, given the inevitability of future elections.

[52] The request must be declined. This Court has found that the Commission was not empowered to decide that the DA had contravened item 9(1)*(b)* of the Code and to grant the Good Party a remedy. A decision on the proper construction of item 9(1)*(b)*, in my opinion, would be tantamount to furnishing an advisory

opinion to litigants on an issue no longer in dispute between them. It would not be definitive of the powers of the Commission, nor the rights of political parties and candidates under the Code. An advisory opinion adjudicates nothing and is not binding. More than a century ago Innes CJ said:

'Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.'[31]

[53] What is not an abstract question in my view, however, is whether it has been decided that the prohibition on false information in s 89(2) of the Electoral Act or item 9(1)*(b)* of the Code, is confined to 'the mechanics or conduct of an election', as found by the Electoral Court. In *DA v ANC* the complaint was that an SMS sent out by the DA which stated, 'The Nkandla report shows how Zuma stole your money to build his R246m home', was a contravention of s 89(2) and item 9(1)*(b)*.

[54] The majority in *DA v ANC* described the main issue thus:

'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?'[32]

[55] The judgment contains obiter remarks about the opportunity during election times to refute statements, not directed at the conduct of elections, but its outcome by influencing voters' views about opposing parties. The majority stated that it was arguable that this kind of 'information' did not fall within the prohibition in s 89(2), but was of the kind that could immediately be refuted in

[31] *Geldenhuys and Neethling v Beuthin* 1918 AD 426 at 441, affirmed in *Director-General Department of Home Affairs and Another v Mukhamadiva* [2013] ZACC 47; 2014 (3) BCLR 306 (CC) para 33.
[32] *DA v ANC* fn 1 para 120.

public debate, at political rallies, or in the print or electronic media. Then the majority concluded:

'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.'[33]

[56] Consequently, the majority judgment in *DA v ANC* does not hold that the prohibition on false information in s 89(2) of the Electoral Act or item 9(1)*(b)* of the Code, has no application beyond statements regarding 'the mechanics of the conduct of an election'.[34] The majority specifically declined to decide this issue.

[57] But the case also illustrates the complexities in the construction of provisions such as s 89(2) of the Electoral Act and item 9(1)*(b)* of the Code, implicating as they do, fundamental rights such as freedom of expression and the limits on that right, and the right to vote and stand for public office.[35] This, in a country where political life 'has seldom been polite, orderly and restrained', but 'loud, rowdy and fractious'.[36] Five justices of the Constitutional Court held that s 89(2) and item 9(1)*(b)* are not aimed at comments or opinions, and that it was unnecessary to decide whether the statement complained of was false.[37] Two justices concluded that that in order for the statement to be false it had to 'describe a readily falsifiable state of affairs which poses a real danger of misleading voters and undermining the right to a free and fair election'.[38] It was 'an election punchline' and it did not contain false information.[39] These conclusions were

[33] *DA v ANC* fn 1 para 144, footnote omitted.
[34] *Id* para 138.
[35] *Id* paras 122-131.
[36] *Id* para 133.
[37] *Id* para 167.
[38] *Id* para 192 per Van der Westhuizen J.
[39] *Id* paras 203 and 205.

arrived at in the context of a real dispute. It is even more perilous to decide issues of interpretation in the abstract.

[58] The DA asked for an order granting it the costs of the appeal because the Commission had acted unlawfully and the party was compelled to come to court to correct the illegality. However, it has been demonstrated that the DA's interpretation of the relevant statutory provisions is unsustainable. In *Competition Commission v Pioneer Hi-Bred*,[40] the Constitutional Court said that when a state actor is litigating in the course of fulfilling its statutory duties, it should not be inhibited in the bona fide fulfilment of its mandate by the threat of an adverse costs award. This is such a case. Moreover, it is undesirable that matters involving the conduct of elections should be decided without the benefit of the views of the Commission.[41] For these reasons, there should be no order as to costs.

[59] In the result the appeal is dismissed.

_____

A SCHIPPERS
JUDGE OF APPEAL

[40] *Competition Commission of South Africa v Pioneer Hi-Bred International Inc and Others* [2013] ZACC 50; 2014 (2) SA 480 (CC); 2014 (3) BCLR 251 (CC) paras 23 and 24.
[41] *Electoral Commission of the Republic of South Africa v Inkatha Freedom Party* [2011] ZACC 16; 2011 (9) BCLR 943 (CC) para 34.

APPEARANCES

| | |
|---|---|
| For appellant | S Budlender SC and N Luthuli<br>Harris Nupen Molebatsi Inc<br>Johannesburg<br>c/o Webbers Attorneys, Bloemfontein |
| For first respondent | M Bishop and P Olivier<br>Minde Shapiro & Smith Inc, Cape Town<br>Symington De Kok Attorneys<br>Bloemfontein |