BLURRED LINES: FAIR COMMENT OR STATEMENT OF FACT

Category: Commercial Law,Media and OTT
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"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 above statement forms part of the contents of a "controversial" mobile phone short message service ("**SMS**") which earlier this month, caused the African National Congress ("**ANC**") to bring an urgent interdict before the South Gauteng High Court, Johannesburg to seek an order against the Democratic Alliance ("**DA**"). The application sought in declaring that the dissemination of the text message via SMS, by or on behalf of the DA amounts to a publication of false information in the Electoral Act, No. 73 of 1998 (as amended), as well as the Electoral Code "The Code".

The ANC believed the sms made a false statement of fact. The DA however argued that the content of this SMS was not a false statement of fact but constituted fair comment. What therefore constitutes fair comment?

It is a defence in law that any publication of defamatory material which is based on true facts and which is shown to be in the public interest is justified and lawful i.e. fair comment. Where such publication falsely makes statements of facts, the defamation is unjustifiable and unlawful.

In order for fair comment to be proved, there are certain requirements that need to be met, namely;

(a) *The statement must amount to comment or opinion and not be a statement of fact*. This enquiry considers what the reasonable reader would perceive the statement to be.

(b) *The comment must be fair*. The comment must be that is a genuine expression of an opinion which is relevant and is not published out of malice or exaggerated. It is a statement that can reasonably be inferred from the facts upon with it relies.

(c) Comment must be based on facts which are true. As it states the facts must be true.

(d) The facts upon which the comment is based must expressly be stated in the material containing the comment, or clearly indicated or incorporated by reference.

(e) The comment must relate to a matter of public interest.

Cameron J once noted that "*political debate in South Africa has always been robust. It is good for democracy, that open and vigorous discussion on public affairs should "maximally" be allowed*". In considering the context within which the SMS was sent, the statement was relevant when in taking into account the issue and understanding the decision of the court. Importantly the thin line between what constitutes fact versus opinion came to the fore.

It could be argued that even though the document on which the DA based the SMS is highly critical of the President, it was never quite articulated that money was stolen and based on this an incorrect factual statement was made rather than accurate information, or opinion, which undermined the spirit of free and fair elections.

On the other hand it could be argued and as the High Court found echoing Cameron J's sentiments,

that in the context of the robust political debate, that the contents of the SMS is an opinion that a fair person might honestly hold, that it was a genuine expression of opinion relevant to facts upon which it was based, not disclosing malice and ultimately that it was ultimately fair comment.