REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 14686/2019

In the matter between:

KAREMA BROWN	Applicant
and	
ECONOMIC FREEDOM FIGHTERS	First Respondent
JULIUS SELLO MALEMA	Second Respondent
ELECTORAL COMMISSION	Third Respondent

JUDGMENT

DIPPENAAR J:

Introduction and chronology of events

[1] This application concerns the obligations of political parties and their leaders under the Electoral Code of Conduct. The first respondent, the Economic Freedom Fighters, and the second respondent, Mr Julius Sello Malema, will collectively be referred to as “the respondents”. For the sake of convenience, the parties will be referred to by name where appropriate.

[2] From the papers it is clear that the parties have an acrimonious relationship and have publicly criticised each other on various occasions. The applicant, Ms Karema Brown, is critical and condemning of the EFF and has expressed her views on various social and other media platforms. The respondents on the other hand express “a long held belief” that Ms Brown is not a bona fide journalist but harbours and actively pursues a political agenda under the guise of independent journalism. She is accused of being an ANC operative and mole, rather than a journalist, and her conduct is criticised as being provocative and falling foul of the Press Code. They further consider her biased and prejudiced against the EFF.

[3] The events which gave rise the present application is the latest of a spate of well publicised incidents between the respondents and various journalists, resulting in proceedings which are currently pending in the Equality Court. These events are relied on by Ms Brown to illustrate a pattern of “hit and run” behaviour on the part of the respondents in relation to journalists, particularly in relation to female journalists who are critical of the EFF. Although the EFF’s alleged conduct vis-à-vis journalists forms the subject-matter of different legal proceedings the existence of such proceedings is at least a factor which is relevant to contextualize the events presently under consideration.

[4] The alleged conduct of the EFF vis-à-vis journalists has attracted substantial concern and criticism from various quarters, including national and international media organisations such as the South African National Editors Forum and Media Without Borders regarding the issue of media freedom in South Africa.

[5] The genesis of the present application lies in a message erroneously sent by Ms Brown, a senior political journalist, on 5 March 2019 to the EFF's WhattsApp group, a platform created by the EFF's national spokesperson, Dr Ndlozi, to communicate directly with journalists covering political and current affairs and to encourage them to report on the EFF's activities. The message had been intended for another WhattsApp group comprising of Ms Brown's colleagues and is described as "a briefing note" by her. The message reads:

> "*Keep an eye out for this. Who are these elders. Are they all male and how are they chosen. Keep watching brief*".

[6] In response, Mr Malema published a screenshot of the applicant's message which contained her name and personal cellular telephone number on Twitter, circled in a thick marker. In the same Twitter post, he claimed that Ms Brown was sending moles to the EFF's event. Mr Malema is followed by approximately 2.38 million Twitter users.

[7] On 6 March 2019, Dr Ndlozi on behalf of the EFF published a statement on its Facebook page, claiming that Ms Brown is not a journalist but an openly admitted ANC operative. He further stated that journalists who hold legitimate positions, and whose integrity has always been consistent with journalistic ethics, should care about what role she plays in the media.

[8] It was undisputed that subsequent to these statements and up to late April 2019, Ms Brown received a barrage of anonymous threatening phone calls and written threats on Twitter and WhatsApp from self-professed EFF supporters. These included deplorable insults and threats of rape, violence and death.

[9] Mr Malema refused to delete the post after various requests from journalists to him, Dr Nlozi and the EFF, via Twitter, to do so and to condemn the threatening behaviour. Mr Malema only removed the tweet from his Twitter account after he had

been threatened with the termination of such account pursuant to a complaint by Media Monitoring Africa.

[10] On 6 March 2019 the EFF held a press conference at which Mr Malema stated that no person should be threatened with rape and violent crime. He further stated of Ms Brown that she was not a journalist, was not governed by bodies that govern journalists and that those rules do not apply to her. He contended that she was a state agent and intelligence operative and was working for state security.

[11] In response, Ms Brown posted a number of posts on the EFF WhattsApp group, accusing the respondents of unlawfulness. The posts included statements such as "*We need to ask the IEC how such a party can be on the ballot box"* and:

> "*This is for the EFF leadership and my colleagues in journalism. I am not afraid of you. Your threats mean nothing to me. And more importantly I will not ask your permission to do my job. I don't need you to tell me what I can do and can't say. You are fascist Thugs. Who masquerade as politicians with your bullying tactics. I will not be deterred by you. Nor am I worried that your supporters will try and hurt me. We live in a constitutional state. And we will defeat forces such as the EFF who want to try and push back the democratic space in which we work. As for the cowards who don't have the courage to stand up to you publicly here on this platform say shame on you. Today its me. Tomorrow its you. I fought against apartheid colonialism and I will fight against thugs today who try and take my freedom away. I am not afraid of you. Any of you. Here me on that. Let it sink in. I will not go away and hide…you have no idea about me. And you cannot stand the fact that I am not afraid or intimidated by you. You are not a political party. You are thugs who intimidate journalists. And I am telling you it won't work with me'.*

[12] On 9 March 2019, Ms Brown referred a complaint to the Independent Electoral Commission ("IEC")[1] with a request under section 95 of the Electoral Act[2] ("the Act") that its chairperson institute criminal proceedings as well as civil proceedings against

[1] Established under Chapter 9 of the Constitution and regulated by the Electoral Commission Act 51 of 1996
[2] 73 of 1998

the respondents and to impose an appropriate remedy under section 96(2) for breaches of section 94 of the Act. She alleged breaches of sections 1, 3(a)-(c), 4, 6, 8(c), 9(a)-(d) of the Electoral Code and reserved the right to institute proceedings if the IEC declined to do so.

[13] On 21 March 2019, she was informed by the independent investigators appointed by the IEC, Bowmans attorneys, that if she wished to institute proceedings against the respondents whilst the investigation was pending, the IEC should be informed accordingly.

[14] On 15 April 2019, the IEC addressed a communication, styled "resolution", to the parties in which it pointed out the limitation on its powers to adjudicate alleged prohibited conduct under Part 1 of Chapter 7 of the Act and sought agreement from the parties to attempt to resolve their disputes through conciliation[3]. No conciliation took place.

[15] On 18 April 2019, after investigation, the IEC declined Ms Brown's request. Its resolution concludes:

> *"Given that there remain disputes of fact and there are issues outside the jurisdiction of the Commission, the Chief Electoral Officer will not be instituting or joining proceedings against the EFF or Mr Malema which Ms Brown may institute. In addition, the Chief Electoral Officer will not be in a position to join Ms Brown in laying criminal charges against the EFF or Mr Malema, as proposed."*

[16] In the interim, and on 10 April 2019, at a further press conference of the EFF, Mr Malema offered an apology to Ms Brown "if she was offended by what I did", stating that it was not his intention to publish her number or that people would insult her.

[3] Acting under section 103A of the Act

[17] Pursuant to the IEC's resolution, Ms Brown launched an urgent application in the high court, in which she sought orders:

> (a) Granting her leave to institute these proceedings in the high court;
>
> (b) Declaring that the respondents have contravened clauses 2, 3, 6 and 8 of the Electoral Code as contained in Schedule 2 to the Electoral Act 73 of 1998 (the Act") and section 94 of the Act.
>
> (c) Issuing a formal warning to the respondents in terms of section 96(2)(a) of the Act;
>
> (d) Directing the respondents to pay a fine of R100 000, jointly and severally, the one paying the other to be absolved, in terms of section 96(2)(b) of the Act;
>
> (e) Directing the respondents to publish an apology to her on their respective Twitter handles within 24 hours of the granting of an order;
>
> (f) Costs of suit on a punitive scale.

[18] Ms Brown brought the application in her own interest and in the public interest under section 38 of the Constitution, specifically in the interests of women and journalists, who are expressly afforded protection by the Electoral Code.

[19] The third respondent, the IEC, abides the decision of this court and has not participated in the proceedings.

[20] The respondents raised a number of technical defences. It is to those defences that I now turn before considering the merits of Ms Brown's application.

Rule 30(1) application

[21] The respondents launched an interlocutory application in terms of r 30(1) of the Uniform Rules of Court in which they sought an order declaring the founding papers an irregular step and striking the application from the roll with costs. The application raised two primary issues; jurisdiction and urgency.

[22] The nub of the application related to the applicant's failure to properly set the matter down in the Electoral Court. It was contended that the High Court lacks jurisdiction and, in the alternative, that the application breached the Uniform Rules of Court and the Practice Manual of this division pertaining to urgency. Ancillary thereto, they objected to Ms Brown's attempts at obtaining directions from the Deputy Judge President of this division regarding the allocation of a date for the hearing of this application.

Jurisdiction

[23] During argument the respondents sought a determination of the question of jurisdiction as a preliminary issue. They advised that appeal proceedings might follow if the ruling was adverse to them. Ms Brown objected to their approach.

[24] A determination of the question of jurisdiction must be made before any other issue, because without jurisdiction this court has no power to make any order in this application[4]. It does not however mean that the question must be determined separately and in isolation before argument on any other issue can be presented. Each case must be determined on its own merits. I declined the respondents' application that the question be determined in limine and separate from the remainder of the issues. In my view, this would not be in the interests of justice and would have resulted in a piecemeal hearing and adjudication of the application.

[4] Makhanya v University of Zululand 2010 (1) SA 62 (SCA) para [29]

[25] Whilst it was not disputed that the high court has concurrent jurisdiction[5] under s 20(4) of the Electoral Commission Act[6], it was contended that Ms Brown disregarded the practice that the courts prefer the specialist forum where there are two forums with concurrent jurisdiction over a particular matter. Reliance was placed on various authorities pertaining to the purpose-built employment framework created by the Labour Relations Act and associated legislation, which are distinguishable. Mindful of the policy consideration that the Constitution recognises the need for specificity and specialisation in a modern and complex society under the rule of law and that the legislature is sometimes specifically mandated to create detailed legislation for a particular purpose[7], it is necessary to consider the relevant legislation.

[26] Sections 20 (4)(a) and (b) of the Electoral Commission Act empowers and enjoins the Electoral Court to make rules regarding electoral disputes and complaints about infringements of the Electoral Code of Conduct as defined in section 1 of the Electoral Act and to determine which courts shall have jurisdiction to hear particular disputes. The Electoral Court has made such rules, being the Rules Regulating Electoral Disputes and Complaints about Infringements of the Electoral Code in Schedule 2 of the Electoral Act 73 of 1998 and Determination of Courts Having Jurisdiction ("the Rules").

[27] In terms of r 2, the magistrates court and the high court have jurisdiction and this court has the jurisdiction to impose the sanctions presently sought by the applicant under section 96(2) of the Act. It is furthermore undisputed that the complaint has arisen within the area of jurisdiction of this court.

[28] The jurisdiction issue was expressly addressed in *National Congress v Democratic Alliance*[8], where it was found that in terms of the Rules, the Electoral Court may only be approached as a court of first instance when a violation of the Electoral Act

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[5] African National Congress v Democratic Alliance 2014 (3) SA 608 (GS)
[6] 51 of 1996
[7] Gcaba v Minister of Safety and Security and Others 2010 (1) SA 238 (CC) paras [56] and [57]
[8] 2014(3) SA 608 (GSJ) paras [13]-[14]

might justify a sanction in terms of sections 96(2)(h) and (i) of the Act. In all other instances, justifying a lesser sanction under section 96(2), the relevant high court or magistrates court has jurisdiction. The jurisdiction of the high court is thus extended, but the high court does not become an electoral court for these purposes.[9] I respectfully agree with these conclusions.

[29] Considering the structure of the relevant provisions, no preference is expressed by the legislature for the specialist court as a court of first instance save in relation to sanctions under section 96(2)(h) and (i) of the Act. The respondents' challenge to the jurisdiction of this court must thus fail.

[30] The respondents' alternative contention that the matter should have been brought in the magistrates court, also lacks merit. A magistrates court has no jurisdiction to make a declaratory order[10], which is part of the relief sought by Ms Brown.

[31] In terms of the full bench decision of the Gauteng Division in *Nedbank v Thobejane and related matters*[11], leave is required to bring a matter before the high court where it shares concurrent jurisdiction with the magistrates court. Although *Thobejane* may be distinguishable on the basis that it pertains to matters where civil money judgments are sought, I consider myself bound by it. In the circumstances of this matter and specifically the nature of the relief sought, which includes declaratory relief extraneous to the relief sought under section 96(2) of the Act, I consider it in the interests of justice to grant Ms Brown leave to institute these proceedings in the high court.

Urgency

[9] In an appeal to the Constitutional Court in Democratic Alliance v African National Congress [2015] ZACC 1 the jurisdiction of the high court was accepted and it was not suggested on appeal that the high court had no jurisdiction, nor that it was inappropriate to approach it as court of first instance.
[10] Steenkamp v South African Broadcasting Corporation 2002 (1) SA 625 A at para 11 and the authorities referred to therein.

[11] (2019 (1) SA 594 GP)

[32] The respondents disputed the urgency of the application and they contended that it was not properly enrolled and did not comply with the requirements of the Practice Manual relating to urgent applications. These contentions underpin the second ground of the Rule 30 application.

[33] The applicant *inter alia* relied on sections 20(1), 20(2), 20(4) and 20(5) of the Electoral Commission Act which provide that hearings and appeals shall enjoy precedence in the courts of law, and Rules 4(6) to (8), which provide for truncated time periods for the exchange of affidavits in matters which involve an infringement of the Electoral Code. Rule 4 (11) of the Rules expressly provides that the Uniform rules are, subject to that rule, *mutatis mutandis* applicable in respect of applications except insofar as otherwise provided. The Practice Manual does not expressly provide for the enrollment of matters concerning a breach of the Electoral Code. The rules create a regime in terms of which infringements of the Electoral Code are to be dealt with on an expedited and urgent basis.

[34] The respondent's criticism of Ms Brown's attempts at obtaining directions from the Deputy Judge President's office lacks merit. The correspondence culminated in a directive from the Chairperson of the Electoral Court that the matter be dealt with by the urgent court of the court where the application was issued.

[35] Every matter must be considered on its own merits in order to determine whether any deviation from the rules and practice is permissible in a given situation. In the present instance, I was persuaded that the nature and extent of the deviations were justified and that sufficient grounds existed to enroll the matter on the urgent roll.

[36] Ms Brown sought a determination of the matter prior to the elections on 8 May 2019 on the basis that the outcome of the application should be known prior to members of the public exercising their votes in the election. Despite sufficient grounds having been established to hear the matter on the urgent roll, I was not persuaded that the urgency was such that it required an immediate determination, considering the

political undertones of the application. In addition, as the characterisation of the penalties under section 96(2) and the applicable test was not fully addressed in argument on 6 May 2019, the parties were requested to provide additional submissions on the issue early the morning after the hearing. These were not timeously received to enable a proper consideration and determination of the matter prior to the election.

[37] Ms Brown urged me to find that the Rule 30 application was an abuse of the process of this court and a stratagem to avoid the application being heard, justifying the granting of a punitive costs order. Whilst I conclude that there is merit in this contention and the application should be refused, I am not persuaded that a punitive costs order would be appropriate. The Rule 30 application falls to be dismissed with costs.

The legislative framework

[38] The relevant provisions of the Act must be interpreted applying section 39(2) of the Constitution which 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 object of the Bill of Rights*".

[39] The Act provides in general terms for the regulation of elections for the National Assembly, the Provincial Legislature and Municipal Councils and related matters.

[40] Section 2 of the Act provides as follows:

> *"Every person interpreting or applying this act must-(a) do so in a manner that gives effect to the constitutional declarations, guarantees and responsibilities contained in the constitution; and (b) take into account any appropriate code".*

[41] Section 94 forms part of the prohibitions under Part 1 of Chapter 7 of the Act. It provides as follows:

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

[42] In terms of section 27(2)(a) of the Act, any registered party that intends to contest an election must, when it submits a list of its candidates, provide a prescribed undertaking binding the party, persons holding political office in the party and its representatives and members to the Electoral Code. Under section 99 of the Act, the Electoral Code must be subscribed to by every registered party before that party is allowed to contest an election, and by every candidate before that candidate may be placed on a list of candidates. The respondents are thus expressly bound by the Code.

[43] The Electoral Code of Conduct Is contained in Schedule 2 to the Act. The purpose of the provision is informed by Item 1 of the Electoral Code of Conduct which provides:

"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.

[44] The relevant provisions of the Code which the applicant contends have been contravened by the respondents, state as follows:

"2 Promotion of Code:

Every registered party and every candidate bound by this Code must:- (a) promote the purpose of the Code when conducting an election; (b) publicise the Code widely in any election campaign: and (c) promote and support effort in terms of this Act to educate voters.

3 Compliance with Code and electoral laws:

Every registered party and every candidate must:- (a) comply with this Code; (b) instruct- (i) in the case of a party, its candidates, persons who hold political office in the party, and its representatives, members and supporters, to comply with this code, and any applicable electoral laws; or (ii) in the case of a candidate, the representatives and supporters of the candidate to comply with this Code and any applicable electoral laws; (c) take all reasonable steps to ensure- (i) in the case of a party, that its candidates, persons who hold political office in the party, and its representatives, members and supporters, comply with this Code and any applicable electoral laws; or (ii) in the case of a candidate, that the representatives and supporters of the candidate comply with this Code and any applicable electoral laws.

6 *Role of women:*

Every registered party and every candidate must- (a) respect the right of women to communicate freely with parties and candidates; (b) facilitate the full and equal participation of women in political activities; (c) ensure the free access of women to all public political meetings, marches, demonstrations, rallies and other public political events; and (d) take all reasonable steps to ensure that women are free to engage in any political activities.

8 *Role of Media:*

Every registered party and every candidate- (a) must respect the role of the media before, during and after an election conducted in terms of this Act; (b) may not prevent access by members of the media to public political meetings, marches, demonstrations and rallies; and (c) must take all reasonable steps to ensure that journalists are not subjected to harassment, intimidation, hazard, threat or physical assault by any of their representatives or supporters."

[45] Section 96(2) of the Act provides:

"If a court having jurisdiction by virtue of section 20(4)(b) 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 the sanctions listed in (a) to (g))

[46] Section 96(3) provides:

"Any penalty or sanction provided for in this section will be in addition to any penalty provided for in Part 3 of this chapter".

[47] Part 3 of Chapter 7 regulates offences and penalties. Section 97 provides: *"Any person who contravenes a provision of Part 1 of this Chapter or a provision of section 107, 108 or 109, is guilty of an offence".* Under section 98, any person convicted of any offence in terms of section 94, is liable to a fine or to imprisonment for a period not exceeding 10 years. These sections make no reference to a registered party.

[48] To determine what the applicable test is to determine whether the respondents have breached the Code it is necessary to consider the characterisation of the sanctions and penalties imposed by section 96(2) of the Act.

[49] As stated by the Constitutional Court in *Democratic Alliance v African National Congress*[12], these are tough provisions, which could operate with calamitous effect on a person or party who falls foul of them. In case of doubt, the prohibitions are to be interpreted restrictively. Any ambivalence or uncertainty about their meaning, must be resolved in favour of liberty. There is further an interpretive presumption that a penal provision includes a requirement of fault, unless there are clear and convincing indications to the contrary. [13] The Constitutional Court further cautioned that where criminal liability and the imposition of the severe penalties under the Act are sought to

[12] 2015 (2) SA 232 (CC) paras [129]-[131], [154]-[157]
[13] DA v ANC Supra paras [154]-[159], where fault was held to be a requirement under section 89(1)

be enforced, the issue of fault would become crucial[14]. I accept that for present purposes, fault is a requirement and strict liability is excluded.

[50] In the present instance, there is no doubt, ambivalence or ambiguity in the provisions of Section 94. It was not contended in argument that there was any ambiguity, either in section 94 or in the provisions of the Code relied upon by Ms Brown.

[51] It is apposite to follow the approach adopted by the Supreme Court of Appeal in *Pather and Another v Financial Services Board and Others*[15] to determine whether the penalties are of a criminal nature. As in *Pather*, the present proceedings are not of a criminal nature. That the facts underpinning the complaint can as well give rise to a criminal offence does not alter the nature of the present complaint, which is primarily concerned with the exercise of a disciplinary power in respect of a limited group of persons possessing a special status. There is no formal accusation of a breach of the criminal law and the proceedings are not initiated by way of a criminal charge.

[52] Ordinarily, the purpose of an administrative penalty is to ensure compliance with the legislation and to give any regulatory authority an effective means of enforcing it. Contraventions have to be discouraged and offences punished for the system to be viable[16]. In determining the nature of the penalty, the following was said by the Supreme Court of Appeal in *Pather*:

> "*The relevant question is not the amount of the penalty in absolute terms, it is whether the amount serves regulatory rather than penal purposes. The fact that the penalty is intended to have a deterrent effect does not mean it is not administrative in nature, because deterrence 'may serve civil as well as criminal goals'. Accordingly, to hold that the mere presence of a deterrent purpose renders such*

[14] Para 159
[15] 2018 (1) SA 161 (SCA) paras [12]-[13].
[16] Pather para 10

sanctions 'criminal' for double jeopardy purposes would severely undermine the Government's ability to effectively regulate institutions.[17]

[53] In applying these principles, I am not persuaded that the penalties in section 96(2) impose 'a true penal consequence' in the sense of deprivation of liberty. As was the case in *Pather*, the administrative penalties and regulatory provisions are collateral to the other provisions of the Act and whilst some have a punitive aspect, they are not criminal or quasi criminal in nature[18]. These proceedings cannot be characterised as being criminal in nature.

[54] The applicable standard to be applied is the normal civil standard[19]. It should however be borne in mind that these are motion, not action proceedings.

Merits

[55] The relief which Ms Brown seeks is final in nature and the application falls to be determined applying the test enunciated in *Plascon Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd*[20], thus on the respondents' version, together with any facts Ms Brown admitted, unless the respondents' version is so far- fetched and untenable that it can be rejected on the papers alone. As these are motion proceedings, a balance of probabilities is not applicable.

[56] To determine whether the respondent's version should be rejected on the papers, the Supreme Court of appeal enunciated the test thus in *Wightmant/a JW Construction v Headfour (Pty) Ltd and Another*[21]:

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[17] Pather supra para 34, footnotes omitted
[18] Pather supra para [10]
[19] Pather supra para [10] which refers to the civil standard and proof on a balance of probabilities.
[20] 1984 (3) SA 623(A). See also Zuma v National Director Public Prosecutions 2009 (2) SA 277 (SCA) para [26]
[21] 2008 (3) SA 371 (SCA) paras [12]-[13]

> "*A real genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed…when the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision".*

[57] The present application must be viewed in the context of the right to freedom of the press under section 16(1) of the Constitution and the importance of the role of the mass media in a democratic society.[22] It must also be viewed in the context of the relationship between the parties. The parties were in agreement that this application does not concern the right to free speech.

[58] The background facts which triggered the application were by and large undisputed.

[59] Ms Brown is a senior political journalist who has denied that she is part of the intelligence community or that she is a member of the ANC or any other political party. She justified her message, which she erroneously had sent to the EFF WhattsApp group, as one emanating from "a bona fide and responsible, if critical, journalist".

[60] The respondents strongly contend the opposite, which is put up to justify their conduct. It is alleged that Ms Brown is not a private person but a well-known public figure, who is biased and prejudiced against the EFF and that these are reasonable grounds to have treated her messages with suspicion and to have drawn attention to them on Twitter. It was further argued that Ms Brown's conduct falls foul of the press code and amounts to a relentless campaign against the EFF. Thus, it was argued that the respondents have merely expressed their right to freedom of expression, that there

[22] Khumalo and others v Holomisa 2002 (5) SA 401 (CC) paras [22]-[24]; National Media Ltd and Others v Bogoshi 1998 (4) SA 1196 (SCA) at 1209H-1210F

was no harassment or intimidation of the applicant and that their comments are justified, considering Ms Brown's conduct. It was contended that a journalist who attacks a political party outside the prescripts of journalistic pursuit and the press code is not entitled to the protection normally afforded by the Constitution. It was further contended that the application is an abuse, intended to disrupt the election campaign of the EFF in violation of its rights and those of Mr Malema.

[61] These arguments however disregard the focus of the present enquiry; it is not the conduct of Ms Brown, who is not bound by the Code, but the respondents' compliance with their own obligations under section 94 of the Act and the Code. The respondents did not launch any counter application for relief against Ms Brown consequent upon her alleged conduct. They have appropriate remedies at their disposal to address any improper conduct on the part of Ms Brown which they may perceive. There is no evidence that they have pursued them.

[62] The respondents' mistrust of Ms Brown and criticism of her conduct however provides context and informs their conduct. Ms Brown's own strident and politically laced responses to the barrage of abuse served to further fuel the flames of discord. It is not surprising that her WhattsApp message was considered provocative and was treated with suspicion by the respondents and their stance was hardened as a result of Ms Brown's resultant conduct.

[63] From her communications on certain social media and other platforms it is clear that she participated actively in very robust political debate and held very strong negative views regarding the respondents. There may well be merit in their criticism of her conduct, but it does not avail the respondents to simply attack her conduct in order to deflect attention from their own.

[64] To determine whether there was a contravention of the Code, the conduct of both the EFF and Mr Malema must be considered throughout the period which followed Mr

Malema's post on Twitter and in context of his influence over his approximately 2.38 million Twitter followers.

[65] There is no evidence to gainsay Mr Malema's express evidence that he did not intentionally include Ms Brown's cellular telephone number in his tweet of 5 March 2019 but inadvertently did so as he wished to place the entire message in context to avoid being accused of distributing "fake news". He tendered this explanation in a press statement on 6 March 2019. Ms Brown's averment that this was intentional is not supported by any evidence and is controverted by Mr Malema's direct evidence as to his intention.

[66] On 6 March 2019, the EFF published a statement on its Facebook page containing various statements regarding Ms Brown, including that she is not a real journalist, but an ANC operative and state agent and had sought to send moles to an EFF event on behalf of the ANC. This resulted in an emotional response from numerous persons who, on their self-expressed versions, are supporters of the EFF. There is no reason to doubt the source of the threats as emanating from these self-professed EFF supporters.

[67] The respondents allege that the EFF supporters took to Twitter to voice their frustration with Ms Brown and her bias and would not have done so but for her own WhattsApp message. This illustrates that the respondents were well aware that their posting of the message on Twitter and subsequent Facebook statement would foster mistrust in Ms Brown and reasonably must have anticipated that it would elicit a response from EFF supporters.

[68] Whilst Mr Malema also stated at a press conference on 6 March 2019 that no person should be threatened with rape and violent crime, he made statements of and concerning Ms Brown which restated and emphasised the very basis on which the harassment of Ms Brown had been based. There was no attempt to curtail the self-professed EFF supporters from continuing with their harassment of her or any

instruction to them to desist from their conduct. It is also unclear whether all of the 2.83 million Twitter followers would have been aware of the press statement or would properly have contextualised or appreciated Mr Malema's statement that no person should be threatened with rape and violence. Absent proper contextualisation by Mr Malema, his comments would not have the requisite results of calling the EFF supporters to order and to instruct them not to harass journalists and specifically Ms Brown.

[69] In their answering papers, the respondents did not meaningfully address their failure to take any steps to stop or stem the tide of abuse and intimidation directed at Ms Brown, despite such facts being peculiarly within their knowledge. It was not suggested that they were not aware of their obligations under the Code or that there was any attempt at compliance with such obligations.

[70] The respondents further did not contend that they were not aware of the threats received by Ms Brown. These threats were expressly brought to the attention of the Mr Malema and other members of the EFF leadership by other journalists who requested them to intervene and stop the abuse. Mr Malema expressly refused to do so and effectively fueled the flames by repeating accusations regarding Ms Brown's status as an ANC operative and mole.

[71] The respondents' bald denial that their allegations that Ms Brown is a member or agent of the ANC was the catalyst which triggered the barrage of abuse from self-professed EFF supporters, is untenable. The abuse commenced immediately after the posting of Mr Malema's Tweet and endured until as late as 27 April 2019, well after Mr Malema tendered an apology on 10 April 2019, more than a month later.

[72] The respondents' bald denial of a causal connection between them and the conduct of the EFF supporters is also untenable. The respondents' respective obligations as political party and candidate under Item 3 of the Code, insofar as it pertains to supporters of the EFF, are to instruct both its members and supporters to

comply with the Code[23] and to take all reasonable steps to ensure that both members and supporters comply with the Code[24]. The use of the conjunctive “and” between members and supporters indicate that these obligations are not limited to the leadership or members of the EFF but also apply to EFF supporters.

[73] Under Item 2 of the Code, the respondents are obliged to promote and support efforts to educate voters and to widely publicise the Code in any election campaign. [25] The respondents are thus obliged to educate and thus familiarise their members and supporters with the provisions of the Code, so that the latter are aware of what is expected of them.

[74] Under Item 8 of the Code, the respondents are expressly obliged to take all reasonable steps to ensure that journalists are not subjected to harassment, intimidation, hazard, threat or physical assault by any of their representatives or supporters[26]. Upon a reading of the express provisions, the respondents’ obligations extend beyond the ambit of members of a political party and includes its supporters.

[75] What steps would be considered objectively as reasonable would depend on the circumstances. In the present instance it would be reasonable to expect the respondents, once they had been aware of the barrage of threats directed at the applicant, to take active steps to admonish their supporters and to caution and instruct them to refrain from their offending conduct. Considering the content of the threats directed at Ms Brown, they fall well within the ambit of being harassing, intimidatory, hazardous and threatening.

[76] The respondents’ conduct falls short of what a reasonable person would consider reasonable in all the circumstances. When requested to intervene and instruct their

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[23] 3(b)
[24] 3(c)
[25] 2(b) and (c)
[26] 8(c)

followers on Twitter to stop their harassment of Ms Brown, the EFF ignored the requests and Mr Malema refused to do so.

[77] The respondents repeated and emphasised their views regarding Ms Brown whilst fully aware of the intimidatory conduct it was eliciting from their followers. Whilst Mr Malema later publicly stated that it was wrong to threaten people with rape and violent crimes in general terms, he did not condemn the abuse of Ms Brown directly and did not instruct his supporters from desisting from such conduct, rather addressing the issue in broad and generic terms. Their conduct exhibited scant regard for the fact that Ms Brown, as a woman, was especially vulnerable to threats of rape and violence in a society in which gender-based violence is prevalent.

[78] The respondents contended that the issue could have been amicably resolved if Ms Brown had approached Mr Malema directly instead of turning to the IEC and had provided the EFF with the names and contact details of the individuals who had sent the threatening messages and made the abusive calls, as she was invited to do by the EFF's national chairperson. It was suggested that she could obtain such information through the various cellular service providers and could get the SAPS to assist her. Absent such information, they were powerless to do anything meaningful to protect her. It was further contended that the EFF would not have hesitated to take disciplinary steps against the offenders. Considering the stance adopted by the respondents and their conduct, including their disavowal of any responsibility for the conduct of their supporters, these averments are speculative and untenable.

[79] On the respondents' own version, it was not disputed that they were fully aware of their actions and specifically the consequences of their inaction, the impact thereof on their supporters and the conduct and consequences which followed. If the respondents did not deliberately intend them, they at least stood reckless to the results which, although they may not have foreseen them initially, were reasonably foreseeable once they had been brought to their attention on more than one occasion from different sources.

[80] The explanations proffered for failing to take any active steps do not pass muster. The respondents did not need to know the identities of their followers to instruct them in general to stop intimidating or threatening Ms Brown. A general and abstract condemnation of abuse is not what was reasonably required from the respondents.

[81] I find, therefore, that the respondents failed to instruct their supporters to comply with the Code and to take reasonable steps to ensure compliance therewith, as expressly required by Items 3 and 8 of the Code.

[82] For the above reasons I find that the respondents failed to comply with their obligations as specified by Items 3(a), 3(b) and 8(c) of the Code.

[83] In failing to comply with their obligations under Item 8(c) of the Code, the respondents in the process further failed to adhere to their obligations under Item 6(a) of the Code, being to respect the right of women to communicate freely with parties and candidates.

[84] In my view, the wording of section 94 of the Act is not ambiguous and relates to any transgression of the Code. It was not contended in argument that the wording of the various items of the Code relied on are ambiguous or unclear or that the breaches alleged were not material.

[85] It follows that the first and second respondents have failed to comply with the Code and have contravened section 94 of the Act.

[86] The evidence, however, in my view does not establish any breach of the remaining Items of the Code relied on by Ms Brown, and she cannot succeed with the relief sought in respect thereof.

Declaratory relief

[87] The determination of whether declaratory relief should be granted is subject to a two- stage enquiry[27]. First it must be determined whether Ms Brown has an interest in any existing, future or contingent right or obligation[28], notwithstanding that she cannot claim any relief consequent upon the determination. If this is established, a discretion must be exercised whether she should be granted relief.

[88] The respondents contended that Ms Brown relied on nothing more than an anxiety that there is a significant risk of a chilling effect on robust media reporting, which she said imperils the prospect of a genuinely free and fair election. I do not agree. Media freedom is one of the cornerstones of a democratic society which enjoys protection under section 16(1) of the Constitution and plays an important role.[29]

[89] In support of this contention, the respondents relied on what is termed “findings” by the IEC. It is contended that these findings, as emanating from a Chapter Nine Institution, stand until set aside. It is common cause that Ms Brown has not sought to institute review proceedings against the IEC resolution. It is argued that, as considerations of public policy come into play in the exercise of a discretion, Ms Brown’s conduct in seeking a parallel finding from the high court is impermissible and against public policy as it sets a precedent that will have deleterious effects on the rule of law.

[90] This argument must fail. Ms Brown’s request to the IEC in its express terms requested the chief Electoral Officer to institute proceedings under section 95 of the Act and approach a court in terms of section 96(2) of the Act to impose an appropriate sanction. It did not seek an adjudication of the alleged breaches, nor did the IEC do so.

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[27] [2015] ZASCA 118 (11 September 2015) para [17]
[28] Section 21(1)(c), Superior Courts Act 10 of 2013
[29] Khumalo and others v Holomisa 2002 (5) SA 401 (CC) paras [22]-[24]

[91] Under the Electoral Commission Act, the IEC lacks the power to adjudicate the present dispute, as appreciated by the IEC who notified the parties accordingly in its resolution of 15 April 2019. It is only empowered to *"adjudicate disputes which may arise from the organisation, administration or conducting of elections and which are of an administrative nature*[30]. This lack of jurisdiction was also recognised in the IEC's resolution of 18 April 2019. Seen in context, the IEC's resolution did no more than provide the parties with its reasons for declining to institute proceedings as requested from it by Ms Brown.

[92] I am not persuaded that public policy considerations militate against the granting of declaratory relief or that Ms Brown was constrained to institute review proceedings rather than the present application. To the contrary, public policy considerations favour the granting of relief.

[93] The respondents further contended that Ms Brown's purpose with the application is not to promote free and fair elections but rather to act as a nuisance factor. In my view it cannot be accepted that the purpose of the application is not *bona fide*. I do, however, not agree with Ms Brown's contention that it was imperative that an order be granted prior to the election, as there is merit in the respondents' contention that any order granted could have been used for political gain.

[94] I am satisfied that Ms Brown has illustrated an interest in an existing and future right or obligation. The issues which arise in the application pertain to a historic breach of the Electoral Code during the run up to the 2019 elections and remain germane to the interests of free and fair elections going forward.

[95] Appropriate and effective relief under section 96(2) of the Act may include a declaration of rights. [31] Were declaratory relief granted in specific terms, it would inform the respondents as to their duties going forward and may well have a deterrent effect on

[30] Section 5(1)(o) of the Electoral Commission Act 51 of 1996
[31] African National Congress v Democratic Alliance Supra para [14.5]

conduct which falls short of the Code. I conclude that it would in the circumstances be an appropriate exercise of the discretion afforded to grant certain declaratory relief.

Sanctions under section 96 (2) of the Act.

[96] Section 96(2) provides:

> *"If a court having jurisdiction by virtue of section 20(4)(b) 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……..(the sanctions listed in (a) to (g))*

[97] In considering what penalty or sanction is appropriate, this court has the duty to ensure that any violation of the Act is cured with effective relief.[32] The applicant has sought a formal warning and the imposition of a fine of R100 000.00.

[98] Considering the express wording of the section, the sanctions are not limited to those listed in subsections 2(a) to 2(g) and affords a discretion which must be exercised judicially. The listed sanctions do not relate only to those that can be imposed before an election, but also to sanctions that can be imposed thereafter[33].

[99] In my view, the violation of the Act principally lies in the respondents' failure to instruct and take reasonable steps to ensure that their supporters do not harass, intimidate, threaten or abuse journalists and especially women. The respondents' previous conduct cannot be countenanced which has had the effect of jeopardising free and fair elections by fostering a chilling effect on robust media reporting. Relief is not rendered moot because the May 2018 elections have passed.

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[32] African National Congress v Democratic Alliance supra para [14]
[33] For example section 96(2)(g)

[100] The factors which must be taken into account in determining an appropriate sanction include the context in which these proceedings arose and the role Ms Brown herself played in triggering the chain of events and the resultant discord which followed. Ms Brown's WhattsApp message that had been erroneously sent to the EFF's WhattsApp group ignited the hostility with which the respondents responded. The strident and political tone adopted by Ms Brown in her responses on social media to the EFF, only fueled the flames of discord and did little to garner the respondents' sympathy for her plight. Whilst the conduct of the respondents must be severely criticised and the supine attitude they adopted to their obligations condemned, the provocative stance adopted by Ms Brown constitutes a weighty mitigating factor in determining an appropriate sanction.

[101] As stated by the Constitutional Court in *DA v ANC*:[34]

> *"Political life in democratic South Africa has seldom if ever been polite, orderly and restrained. It has always been loud, rowdy and fractuous. 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".*

[102] In my view, the imposition of a formal warning under section 96(2)(a) of the Act would be an appropriate and effective sanction, which would serve as a guideline to the respondents for their obligations and future conduct. It would also serve as an effective deterrent against any future transgressions as in any future proceedings the existence of a prior sanctioned infringement would be taken into account in imposing any appropriate sanction.

[103] Considering all the facts and factors, I am not persuaded that the additional imposition of a fine in an arbitrary amount would be a necessary further deterrent

[34] 2015 2 SA 232 CC para 33

sanction. It was not contended in argument that any other sanctions would be appropriate.

Apology

[104] Ms Brown further sought an apology from the EEF and Mr Malema on their respective Twitter handles. She has not particularised the terms of the apology sought.

[105] It is not disputed that Mr Malema has publicly apologised to Ms Brown for publishing her cellular telephone number on Twitter. Her complaint is that the apology was belated and insincere. Mr Malema apologised for publishing Ms Brown's number on various occasions, *inter alia* at a press conference held by the respondents on 10 April 2019. The apology was recorded thus in a media article, relied on by the respondents:

> "*If Karema had said to me you can't put my number on Twitter and apologise, I would have apologised…If I offended Karema in any way I want to apologise today. If she is offended by what I did my intention was not to insult her".*

[106] In the answering papers, such apology was repeated. In the respondents' response to the request of the IEC to engage in voluntary mediation, they offered to condemn the contents of the tweets received by Ms Brown as abusive, racist, misogynist and unlawful and to repeat such condemnation in public, if needed. The papers are silent as to whether this was ever done.

[107] Ms Brown does not accept these apologies, which she considers to be insincere and an attempt at escaping liability. Applying the relevant test, I must accept the respondents' version, which cannot be rejected on the papers as palpably false or untenable.

[108] In my view Ms Brown will be adequately vindicated by the order I propose to make and an apology would only serve to foster the animosity which already exists

between the parties. Considering the context of the application, I am not persuaded that an order should be granted in the terms sought.

Costs

[109] The parties each accused the other of an abuse of process. As such they each sought a punitive costs order against the other, including the costs of two counsel. I am not persuaded that it is in the interests of justice to grant a punitive costs order. It was not disputed that the complexities of the matter justified the employment of two counsel.

[110] For the above reasons I am satisfied that Ms Brown is entitled to relief. There is no reason to deviate from the normal principle that costs should follow the result.

Order

[111] I grant the following order:

(a) The respondent's application in terms of Rule 30(1) is dismissed with costs;

(b) The applicant is granted leave to institute these proceedings in the High Court;

(c) It is declared that the first and second respondents have contravened section 94 of the Act by failing to comply with the provisions of items 3(b), 3(c), 6(a), 6(c) and 8(c) of the Electoral Code as contained in Schedule 2 to the Electoral Act 73 of 1998 (the Act").

(d) A formal warning is issued to the first and second respondents in terms of section 96(2)(a) of the Act for contravening section 94 of the Act as stated in (c) above.

(e) The respondents are directed to pay the costs of the application, including the costs of two counsel, jointly and severally, the one paying, the other to be absolved.

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F DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	:	06 May 2019
DATE OF JUDGMENT	:	06 June 2019
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