REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 14562/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. NO

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SIGNATURE **DATE:** 29 April 2022

In the matter between:

NYATHELA, FREDDIE **FIRST APPLICANT**

THE SOUTH AFRICAN ROADIES ASSOCIATION **SECOND APPLICANT**

And

THE NATIONAL ARTS COUNCIL OF SOUTH AFRICA **FIRST RESPONDENT**

MANGOPE, ROSEMARY **SECOND RESPONDENT**

In *re* the application of:

THE NATIONAL ARTS COUNCIL OF SOUTH AFRICA **FIRST RESPONDENT**

MANGOPE, ROSEMARY **SECOND RESPONDENT**

JUDGMENT

Manoim J

[1] This is an application for rescission of an order that had been granted on an unopposed basis. The order was granted on 20 September 2018 and is based on defamatory allegations that the applicants had made concerning the respondents.

[2] Briefly the order required the applicants in this rescission (Freddie Nyathela (Nyathela) and the South African Roadies Association (SARA)) to:

a. Remove certain defamatory material concerning the respondents from their social media sites; and

b. Interdicted them from making on social media and otherwise, defamatory statements about the respondents including "…the same or similar to the subject matter of this application".

[3] The second applicant (SARA) is a voluntary association that represents the interests of persons who provide sound and lighting solutions to the musical industry. Its focus is to provide skills training on this aspect of the industry to previously disadvantaged individuals The first applicant (Nyathela) is its president.

[4] The first respondent, the National Arts Council of South Africa (NACSA) is an organ of state, established in terms of the National Arts Council Act, 56 of 1997. Relevant to this application is that NACSA provides funding from the public purse to persons and organisations engaged in the creative industry sector. The second respondent Rosemary Mangope (Mangope) was at the relevant time its chief executive officer.

[5] During 2014 Nyathela applied to NACSA for funding for his organisation. He made at least two applications; there is some dispute if he caused a third funding application to be made in 2015 (he alleges it was a fake to discredit his two earlier applications) but that is irrelevant to the current matter.

[6] He was unsuccessful in his applications. Aggrieved by these refusals which he considered unfair, Nyathela became vocal and made accusations against NACSA and Mangope, inter alia, accusing her and NACSA of maladministration,

corruption and abuse of power. These allegations were first published in three articles in the Sowetan Newspaper and later on a social website belonging to SARA and a private twitter account belonging to Nyathela, for a period ranging from April 2015 well into 2017.

[7] The respondents then applied for an interdict against NACSA and Nyathela in April 2018. I will refer to this from now on as the main application.

[8] The applicants filed a notice of intention to oppose and then in May 2018 brought an application in terms of rule 35(12) for discovery of certain documents and for security for costs in terms of Rule 47. Both applications were opposed by respondents. The applicants then brought an application to compel in terms of Rule 35(12) in July 2018. Meantime the respondents had set the main matter down on the unopposed roll on the 24 July.

[9] The applicants objected and the main matter was by consent removed from the roll. The respondents then filed an affidavit opposing the Rule 35 application in August. Thus this application was then opposed. However, the applicants never took any further steps to set this Rule 35 application down. Nor did the applicants file an affidavit to oppose the main application.

[10] The respondents had the main application set down on the unopposed roll for 20 September. There was no appearance for the applicants and the order was granted.

[11] There is no dispute that the notice of set down for that day had been properly served on the applicant's correspondent attorneys. But due to an error made by the correspondent (which is acknowledged together with a *mea culpa*) the set down never came to the notice of the applicants or their instructing attorneys. Accordingly, the order was granted on an unopposed basis. This is the order the applicants now seek to rescind.

Basis for the challenge

[12] The applicants seek rescission on three possible bases. Rule 31(2)(b), Rule 42 and the common law.

[13] Rule 42 applies when an order has been granted erroneously in the absence of an affected party.

[14] There is no basis to invoke this rule. The order was not granted erroneously. The applicants were properly served with notice of the set down of the application

– this is not disputed – and it is the fault of their attorneys, not the respondents who had complied with the rules that they were not appraised of the set down.

[15] This was clearly set out in the leading case on this point *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) where the court held:

"*The defendant describes what happened as a filing error in the office of his Cape Town attorneys. That is not a mistake in the proceedings. However, one describes what occurred at the defendant's attorneys' offices which resulted in the defendant's failure to oppose summary judgment, it was not a procedural irregularity or mistake in respect of the issue of the order. It is not possible to conclude that the order was erroneously sought by the plaintiff or erroneously granted by the Judge. In the absence of an opposing affidavit from the defendant there was no good reason for Desai J not to order summary judgment against him."*

[16] The facts of this case are identical to those in Colyn. There is no basis then for rescission under Rule 42.

[17] Rule 32(1) and the common law basis for rescission both have a common aspect: Under rule 32 the applicant must show that he has a bona fide defence to the plaintiff's claim.[1]

[18] Under the common law the applicant must show the applicant must show he has a bona fide defence, which prima facie has some prospect of success.[2]

[19] The sting of the defamation published by the respondents on their website is to accuse the respondents of corruption, maladministration and abuse of power. Other allegations are made but this was the most serious to be made out in the main application.

[20] The applicants defence is that these comments were justified as being true and to the public benefit or fair comment. It is trite law that in defamation where a

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[1] See for instance *Standard Bank of SA Ltd v El-Naddaf* 1999 (4) SA 779 (W) at 784
It is sufficient to set out facts that would constitute a defence at trial: *Nathan (Pty) Ltd v All Metals (Pty) Ltd* 1961 (1) SA 297 (D) at 300F; *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd* 1980 (4) SA 570 (W) at 575–5

[2] *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042

party raises such a defence that party bears an onus; not merely an evidential onus.[3]

[21] After these claims had been made by the applicants, two investigations into them were conducted at the instance of the Department of Arts and Culture. These investigations were conducted by independent firms. Both firms concerned came to the conclusion that there was no basis to the allegations.

[22] In addition, Ms Mangope became the subject of internal disciplinary proceedings. In a supplementary affidavit she reports that the following the inquiry she was found not guilty.

[23] The applicants attempt to show a bona fide defence by criticising the two investigations on procedural grounds. Even if this criticism is correct, and I express no view on this, it does not help them. What they fail to show is that they have any facts to justify the accusations they made in the first place. They have not begun to make out such a case.

[24] Nor does the interdict constitute a grave invasion of their democratic rights to criticise the first respondent for denying its funding application. They may not make defamatory comments but they are not gagged from otherwise commenting.

[25] The applicants have failed to demonstrate that they have a bona fide defence. I do not consider therefore that there is any basis made out for rescission either under Rule 32 or the common law.

[26] The application must fail

Costs

[27] At a late stage in this litigation the first and second respondents became separately represented, as Mangope was no longer employed by NACSA.

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[3] See for instance *Kemp v Another v Republican Press (Pty) Ltd* 1994 (4) SA 261 (E) where the court held that: *"One of the ways in which the presumption of unlawfulness may be rebutted is by showing that the publication was made on a so-called 'privileged occasion', for example that the words complained of are true and their publication to the public benefit - in which case the publication is regarded as being in the interest of public policy and therefore lawful - see for example Borgin v De Villiers and Another 1980 (3) SA 556 (A) at 571. The defence of truth in the public benefit thus relates to the 'onregmatigheidselement' of the delict of defamation - Marais v Richard en 'n Ander 1981 (1) SA 1157 (A) at 1166G-1167A and H Neethling v Du Preez and Others 1994 (1) SA 708 (A) at 770C. Accordingly, in our law, a defendant in a defamation action is burdened with a full onus, not merely an evidential onus, of proving the facts in support of his defence of truth in the public benefit - Neethling v Du Preez (supra, in particular at 770H-J).*

Mangope had separate heads of argument drawn up by counsel on her behalf and was separately represented at the hearing. However, both in heads of argument and at the hearing, her counsel made common cause with counsel for the first respondent. It would be unfair to make the applicants pay the for the cost of two legal teams. I will therefore only award one set of costs for that period and those are awarded to the first respondent.

ORDER

1. The application is dismissed.
2. Costs are awarded to the first and second respondent, up until the time they became separately represented, and thereafter to the first respondent only.

N MANOIM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 29 April 2022.

Date of Hearing:	8 March 2022
Date of Judgment:	29 April 2022

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