

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)**

Case No: 1587/2020

In the matter between:

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|----------------------------|-------------------------|
| INDHRAMBAL GOBERDAN | First Applicant |
| BRENNAN SAM | Second Applicant |
| ANTHONY BEAN | Third Applicant |
| SARIKA CHETTY | Fourth Applicant |
| ALTHEA RHODES | Fifth Applicant |

And

| | |
|--|---------------------------|
| SIYABULELA SITSHETSHE | First Respondent |
| KHOTSO SEITHLEKO | Second Respondent |
| NOMSA MGXWATI | Third Respondent |
| ASANDA NOLUSU | Fourth Respondent |
| ZUKISWA ZOKUFA | Fifth Respondent |
| NATIONAL UNION OF PUBLIC SERVICE AND ALLIED WORKERS | Sixth Respondent |
| THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS | Seventh Respondent |

JUDGMENT

BESHE J:

Introduction

[1] The ten natural persons involved in this matter, being first to fifth applicants and first to fifth respondents are officials attached to the National

Prosecuting Authority (NPA). The sixth respondent is a trade (workers) union. Seventh respondent is the National Director of Public Prosecutions.

[2] The applicants seek an order interdicting first to sixth respondents from making and publishing defamatory statements that are against them as well as some ancillary relief. Incidentally, the applicants also seek an unconditional retraction and apology for the defamatory statements to, amongst others the National Director of Public Prosecutions (Seventh Respondent).¹

[3] First applicant describes herself as an advocate and Senior Deputy Director of Public Prosecutions. Second applicant, as Regional Court Senior Public Prosecutor. Third applicant as a Director of Administration. Fourth applicant as a District Court Public Prosecutor and fifth applicant as a Senior Prosecutor of the Regional Courts.

[4] **Ms Goberdan** describes the first to fifth respondents as follows:

First respondent: District Court Public Prosecutor, adding that he is currently suspended pending the finalisation of a disciplinary enquiry. Second respondent as a District Court Prosecutor. Third respondent as a Regional Court Prosecutor. Fourth and fifth respondents as District Court Prosecutors, with the latter also being an advocate.

No relief is sought against the seventh respondent but as I stated an apology / retraction is sought on its behalf by the applicants.

[5] First applicant also gives a racial breakdown of the composition of the parties as being the following:

First, second and fourth applicants are South Africans of black Indian ethnic origin. Third applicant is white South African and fifth applicant is a black coloured South African. First to fifth respondents are all black South Africans.

¹ Prayer 3 of the Notice of motion.

[6] As background information which appears to be common cause applicants point out that the current National Director of Public Prosecutions assumed her position on 1 February 2019. That since her appointment, the National Director of Public Prosecutions has sought to root out racism and corrupt practices within the National Prosecuting Authority. That during the National Director of Prosecutions' first meeting with prosecutors in the Eastern Cape in November of 2019 wide ranging complaints were raised including those of alleged racism within the National Prosecuting Authority in the Eastern Cape division. During that meeting, second respondent made allegations of racism, nepotism and favouritism against the first applicant as well as other National Prosecuting Authority managers in the Eastern Cape. According to the first applicant, a few days after the meeting and without any investigation into these allegations, she was removed as the Acting Director of Public Prosecutions in the Eastern Cape. During the Eastern Cape meeting mentioned earlier, the National Director of Public Prosecutions invited those who had raised complaints of racism, nepotism and favouritism to refer such complaints to her office. According to the first applicant, after this meeting she expressly requested the National Director of Public Prosecutions to investigate these allegations. During March 2020, an advocate in private practice **Advocate Bono** was appointed to investigate the complaints. As at the time of the institution of this application in July 2020 the investigation was still ongoing. (The Notice of Motion is dated 29 July 2020).

Applicants' complaint

[7] Regarding the alleged defamatory statements, first applicant points out that:

"The application concerns defamatory material contained in a number of grievances that were authored by the respondents and communicated or published by them to different individuals and sent to me on the 12 December 2019. In addition thereto, the seventh respondent issued

a media release on its website containing information that self-evidently emanated from the first to sixth respondents.”

[8] It is common cause that first respondent lodged a grievance with the first applicant in her capacity as Acting Director of Public Prosecutions Eastern Cape Division, on 12 December 2019 complaining about not being shortlisted for a number of senior prosecution positions despite meeting the required criteria for appointment. This was contained on what appears to be an official form for use by aggrieved employees. In the space provided for a proposed solution the following appears:

“That the process of filling these vacancies be started de novo. That the shortlisting and interviewing panel be composed by different senior officials from other divisions to avoid this nepotism and favouritism.”

[9] According to the first applicant this grievance was also sent to the National Director of Public Prosecutions and thereby, so she contends published to the National Director of Prosecutions. Applicants consider the reference to nepotism and favouritism as referring to first, second and fifth applicants who served on the interviews in respect of two East London positions.

[10] From the grievance, it emerges that first respondent applied for vacancies in East London and Port Elizabeth and did not make the shortlist. First applicant states that she did not take part in selection process but sat on the interviews for the two East London vacancies. Second and fifth applicants do not recall why first respondent was not shortlisted, but deny it was as a result of nepotism and favouritism.

[11] It is not clear how many officials comprised the selection panel. First, second and fifth applicants contend that the allegations made by first respondent in this regard are defamatory of first, second and fifth respondent. Also annexed by the applicants is a letter addressed to the National Prosecuting

Authority and sent to first applicant's email address on the 7 December 2019 from Scorpion Legal Protection. This entity's name is also provided in first respondent's grievance form as that of his representative. It confirms acting on behalf of the first respondent in this letter. In the letter written reasons why the first respondent was not shortlisted are sought in terms of *Section 33 (2) of the Constitution*. Part of the letter records that first respondent pointed out that at a meeting which was held on 1 August 2019 first applicant commented as follows:

"When posts advertised do you think we will take people like Sitshetshe (first respondent) obviously no." Further, that first respondent believes that this has a bearing on him not being appointed. First applicant contends that these allegations are false and defamatory of her.

[12] A further reference is made to an annexure marked C, a letter addressed to the National Director of Public Prosecutions by "South African National Prosecutors Union". The letter states that the union is in the process of being registered. That it is, at that stage operating as a group of concerned prosecutors, and refer to a meeting its members had with the National Director of Public Prosecutions on 19 March 2019. The letter points to a flawed recruitment process countrywide. A request is made for the freezing of current vacancies with the process of filling posts being started *de novo*. That shortlisting and interviewing panels should be composed of senior officials from other Divisions or Regions to avoid nepotism.

[13] The South African National Prosecuting Union is not a party to these proceedings.

[14] Applicants assert that because the letter quotes first and fifth respondents under enquiries, it can therefore be read as having been written on their behalf and or with their authority.

[15] I note that no reference is made to the applicants in this letter although it refers to "poor leadership issues" in the East London cluster.

[16] Annexure FA8 is yet another letter that is addressed to the National Director of Public Prosecutions, this time by fifth respondent on behalf of the concerned group of South African Prosecutors in which reference is made to a meeting that was held with the National Director of Public Prosecutions on the 19 March 2019. Applicants state that they do not rely on any part of this letter, they however complain that it makes sweeping, unsubstantiated and false allegations about corruption, nepotism and victimization in all the provinces of South Africa.

[17] The letter is quite detailed about *inter alia*, alleged manipulation of statistics so that certain employees can get performance bonuses. (Example of Western Cape given). I am not sure what the purpose of attaching this letter as it relates to problems in the Western Cape. In my view however, this letter points to widespread dissatisfaction by a certain sector of prosecutors with their treatment in the workplace mostly by senior members of the National Prosecuting Authority.

[18] The applicants also complain about another grievance that the second respondent addressed to the National Director of Public Prosecutions on the 12 December 2019 which was also copied to the first and fifth respondents. (Annexure FA9). From this, applicants contend, it is reasonable to conclude that the first and fifth respondents support and align themselves with what second respondent says in the email. The subject of the communication is said to be Nepotism and racism in our workplace. The letter (email) starts off by reminding the National Director of Public Prosecutions that during the meeting with prosecution staff on the 15 November 2019, she provided them with an email addressed. She invited or encouraged them to immediately bring to her attention any traces of racism and / or nepotism that they experience. That she also assured them that they will not be subjected to any victimization.

[19] **Mr Seithleko** then goes on to detail what he considers to be nepotism and racism. Briefly stated that he was appointed as an aspirant prosecutor

during 2015 together with fourth applicant. First applicant was part of the interviewing panel. Later he was informed by fourth applicant that first applicant is her aunt. That first applicant failed to declare this during the interviews mentioned above. During 2016 a vacancy occurred in Peddie, fourth applicant refused a direction to go and work in Peddie citing religious and dietary reasons. There was no insistence on her going to work in Peddie. Second respondent was instead sent to Peddie. Later it was suggested she fills a vacant post in Alice, another rural town. This was also resisted by second applicant. She still works in Zwelitsha. He gives details about the ill treatment he gets at the hands of the second applicant. How other prosecutors get preferential treatment. Part of the letter reads:

“Ms Indra can stand beside you presenting your visit as if she’s clean? This is what infuriated many people because these people are made to sit in interviews today wanting us to be good people yet we know they are racist.”

The letter ends with a plea to **Ms Batohi** (the National Director of Public Prosecutions) to start the filling of posts *de novo* and rid herself of the rot that prevails within the National Prosecuting Authority.

[20] Applicants deny these allegations. First applicant denies that fourth applicant is her niece or that she favoured her. Fourth applicant did not tell second respondent that first applicant is her aunt. First applicant states that Zwelitsha is like Alice and Peddie – a rural area. I am not certain that Zwelitsha fits the description of a rural area though.

[21] The next complaint is as regards a letter that was also addressed to the National Director of Public Prosecutions by the third respondent on the 10 December 2019 marked annexure “F”. In the letter **Ms Mgxwati** essentially complains about not being shortlisted for a number of advertised posts in the Eastern Cape, despite meeting requirements for appointment to the positions. And states the reasons why she does not understand why she was left out. She also complains of being treated badly by her superiors who also formed part of

the selection panels. She complains that the appointment process is fraught with victimization, nepotism as the shortlisting was done by managers who have been victimizing prosecutors working under their supervision.

[22] The applicants claim that the allegations against them are false and defamatory of them.

[23] Applicants' next complaint concerns a press release that was published on the website of the seventh respondent. The press release is dated 4 June 2020. According to the applicants, the press release contained information which patently emanated from one or more or all of the respondents and contains material which is defamatory to them. They point out that a press release is meant to be read by the public generally and by the supporters of the trade union concerned. Likewise, the wide ranging allegation / accusations made against the applicants are denied by the applicants. In respect of some of them an explanation is proffered. The title / heading of the press release reads:

NUPSAW CONDERMS PROSECUTING AUTHORITY (NPA) FOR DISCRIMINATION AGAINST BLACK PROSECUTORS

Allegations made in the press release include inter alia:

First applicant is said to have withdrawn many case against members of the "favoured races" and proceeded with the same offence involving black people. Cases against his son were not placed on the court roll.

A cluster chief prosecutor who works from Queenstown and utilizes a Personal Assistant while she is supposed to be working in Graaff Reinet.

A junior prosecutor (name supplied) who was given an opportunity to act in the Regional and High Courts to the exclusion of other prosecutors and has since been appointed as a state advocate in the High Court.

Fifth applicant who has never prosecuted who does not want independent prosecutors in Eastern Cape and prefers prosecutors who are from outside East London.

Fourth applicant who refused to go to Peddie citing religious beliefs resulting in second respondent being ordered to go to Peddie.

Preferential treatment being given to third applicant even though he was alleged to have defrauded the National Prosecuting Authority of R1 000 000.00.

Second applicant being biased against black prosecutors. About him insulting a black prosecutor. And of victimizing young black prosecutors. It ends up by calling on the National Director of Public Prosecutions to intervene.

[24] A demand by second applicant's attorney for a retraction and apology in respect of the press release was sent to the sixth respondent. A similar demand was also addressed to the second respondent.

[25] In response thereto, the National Organiser of sixth respondent, in addition to denying the claim put forward by the second applicant, stated that the union will not be intimidated by the desire to muzzle its members into silence thereby eroding their constitutionally guaranteed right to freedom of expression.

[26] Applicants assert that they have met the requirements for an interdict. In that they manifestly have a right not to have their good names damaged by means of defamation / defamatory statements. First applicant sketches out the profile of each of the applicant. Including their qualifications, work experience, standing in the community etc.

[27] Regarding their apprehension of harm, applicants state that they fear that respondents will continue to defame them. They drew the court's attention to a letter that was addressed by a member of Parliament to the National Director of Public Prosecutions dated 17 July 2020. Which letter was brought to first applicant's attention. In part, this letter reads: *I believe what frustrates this group*

of concerned prosecutors the most is the feeling that their emails and letters to you, as well as meetings with you, have been for naught. They feel they have not been properly heard nor have any of the complaints been addressed, for whatever reason, and they are now being victimized by National Prosecuting Authority middle management for speaking out". Reference is also made to Facebook messages between second and fourth respondents.

[28] It is asserted by the applicants that in view of the fact that the respondents, in particular second and sixth have refused to desist from the conduct complained of, they do not have an alternative remedy but to approach the court for the relief they seek.

Respondents' case

[29] The answering affidavit is deposed to by the general secretary of the sixth respondent **Mr Success Mataisane** and confirmed by first to fifth respondents where it relates to them. First to fifth respondents are said to be members of the union (sixth respondent).

[30] The application is only opposed by the first to sixth respondents. Seventh respondent, the National Director of Public Prosecutions, is the head of the National Prosecuting Authority and therefore state advocates and prosecutors resort under her. The National Director of Public Prosecutions did not enter the fray even though she is cited as seventh respondent, is the head of the National Prosecuting Authority, and that this matter, as parties on both sides acknowledge, emanates from grievances that were also addressed to the National Director of Public Prosecutions.

[31] Surprized by the apparent lack of interest in the matter, I enquired whether notice about this application had reached the office of the National Director of Public Prosecutions, came to the attention of the National Director of Public Prosecutions. I required proof of service on the National Director of Public Prosecutions and ordered that the matter stands down for proof of same.

On resumption, I was informed by **Mr Potgieter** of the State Attorneys' office that seventh respondent would abide by the court's decision.

[32] First to sixth respondents raised the following preliminary issue(s):

The court is called upon to dismiss the application on the basis that there has been a delay in instituting these proceedings.

That this is tantamount to the applicants having either not felt defamed or having condoned respondents' actions. There is no merit to this objection. Second applicant in particular tried to prevail upon some of the respondents to desist from making the statements complained of. The applicants have demonstrated that the actions on the part of the first to sixth respondents were ongoing.

[33] Another point raised is that applicants conceded that the National Prosecuting Authority was bedevilled by corruption and racism when the current National Director of Public Prosecutions assumed office. Yet they want to gag the respondents when they express their discontent about the same issues. That therefore the application is vexatious and frivolous and should be dismissed.

Premature approach to court

[34] This yet another point that is raised by the respondents. This, on the basis that the applicants or at the least first applicant prevailed on the National Director of Public Prosecutions to investigate the allegations of racism. To that end, **Advocate Bono** was tasked with such an investigation, however before same could be concluded, the applicants approached this court. On the basis that the applicants have elected the route of the investigation, they cannot abandon that process before completion and alter their course of election. The same can be said of the respondents. They have continued to wage their battle

against what they consider as unfair treatment against them despite the ongoing *Bono* investigation.

Truth and Public Interest

[35] In my view, this is a defence on its own to the merits of dispute between the parties. This defence is raised on the basis, so it is contended, that Black prosecutors in the East London region have been maligned and White and Indian prosecutors given preferential treatment in terms of treatment in the workplace such as career advancement and access to benefits. First to fifth respondents' complaints / grievances have by and large been alluded to in applicants' founding papers. I do not think that it will serve any purpose to repeat them. They are however confirmed by the respondents. According to them, the complaints raised by first to fifth respondents, and later published by the sixth respondent are true / factual and in the public interest. And that the application falls to be dismissed on this ground as well. The respondents assert that they were exercising their constitutional rights to freedom of expression as well as their right to lodge grievances in the workplace. Expressing their lived experiences without any intention to defame or besmirch the names of the applicants. That in any event applicants acknowledged the existence of racism and corrupt practices within the National Prosecuting Authority.

[36] First to sixth respondents assert that the statements complained of are not defamatory, they are either true and or made in the public interest. In support of this assertion, they point the following factors out:

Black prosecutors in the East London Region have been maligned with White and Indian prosecutors getting preferential treatment in the work place. They give an example of a white prosecutor with less experience than first to fifth respondents who was made to act in the Regional Court. A system that was in place of rotating prosecutors for exposure in the Regional Court being stopped

on the arrival of the said white prosecutor. This resulted in the said prosecutor (identity given) being appointed as a prosecutor in the High Court.

White, Indian and Coloured prosecutors not being placed in offices in the rural Eastern Cape where there is minimal exposure to meaningful work and experience.

Fourth applicant's refusal to be transferred to Alice, a rural town.

Second applicant appointing fourth applicant to act as Control Prosecutor in Zwelitsha ahead of more senior Black prosecutors.

Third applicant being absolved of allegations of fraud on a technicality, of undue delay in instituting the proceedings amongst others.

Third respondent being denied use of a state motor vehicle resulting in her having to use public transport to travel from King William's Town to Stutterheim with case dockets. Yet prosecutors belonging to other races being allowed to use state motor vehicles.

That fourth applicant did tell the second respondent that first applicant is her aunt.

Black prosecutors not being appointed to promotional posts despite applying for such posts.

Respondents assert that these incidents demonstrate that the statements made by the first to fifth respondents as grievances and published by sixth respondent are true and are in the public interest. This in view also of the fact that the National Prosecuting Authority is a public office that should engender confidence to members of the public.

[37] First to fifth respondents contend that they are exercising their right to lodge grievances in the work place. They had no intention to defame the

applicants but that they were expressing their real and lived experiences as Black prosecutors in the Eastern Cape.

[38] As far as the sixth respondent is concerned, it is asserted that in an established constitutional democracy, trade unions exist to agitate and create pressure on employers to treat their employees who would be members of the trade unions fairly. They should not be gagged. Further that the sixth respondent was approached by Black Prosecutors around the country with reports of racism within the National Prosecuting Authority – and decided to publish the complaints as a call to action on the part of the National Prosecuting Authority.

[39] Respondents complain about the failure to join the South African National Prosecutors Union and yet applicants drew the court's attention to a letter purportedly penned on behalf of the said Union and urge the court to disregard statements attributed to this Union. Respondents maintain that they do not have a duty in law to remove the statements made claiming that they do not constitute defamatory material. And that therefore the applicants have not established a clear right in this regard.

[40] In reply, applicants contend that the respondents make bold assertions without any evidence to support them.

[41] I am constrained to disagree with this supposition. Respondents' assertions were mostly substantiated by means of examples in support thereof. With the result that applicants endeavoured to rebut them. It is noteworthy that the applicants once again confirm in reply that their case is based on what they consider as defamatory material that is contained in the grievances of the 12 December 2019 and the sixth respondent's press release on 4 June 2020.

[42] Applicants reiterate that the respondents have acted contrary to the National Prosecuting Authority's Code of Conduct and Social Media Policy. They annexed both documents as part of their papers.

[43] Applicants acknowledge that trade unions are obliged to advance the cause of their members and to address the scourge of racism, but they are not entitled to defame non-member employees.

Discussion

[44] It is trite the requisites for an interdict are²:

1. A clear right;
2. An injury actually committed or reasonably apprehended;
3. The absence of any other satisfactory remedy.

An interdict may be used to restrain publication of defamatory material. This is what the applicants are seeking to do. There can be no doubt that the applicants have a clear right not to be defamed.

[45] Have the applicants been defamed? What amounts to defamation? In the publication *Law of Delict*, **Neethling et Potgieter**³ defamation is defined as follows:

Defamation is the intentional infringement of another person's right to his good name. To elaborate, defamation is the wrongful, intentional publication of words or behaviour concerning another person, which has the effect of injuring his status, good name and reputation.

In a bid to answer this question and in view of the fact that this matter involves a contest between the right to human dignity and right to freedom of expression / speech. I will be mindful of the following instructive remarks that were made by Ngcobo CJ in the matter between **The Citizen and McBride**:⁴

“[148] But our Constitution knows no hierarchy of rights. As we pointed out in *Mamabolo* –

² The leading case in this regard is *Setlogelo v Setlogelo* 1914 AD 221.

³ *Law of Delict* by Neethling – Potgieter – 8th Edition page 400.

⁴ 2011 (4) SA 191 CC at 237 - 238 paragraphs [148] – [149].

‘the Constitution, in its opening statement and repeatedly thereafter, proclaims three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom.’

Thus freedom of expression is just as important as human dignity—‘it is not a pre-eminent freedom ranking above all others’. The same is true of human dignity and equality. What must be stressed are points that this court has made previously, that ‘(w)ith us the right to freedom of expression cannot be said automatically to trump the right to human dignity’ and ‘freedom of expression does not enjoy superior status in our law’. This is true not just of freedom of expression, but also of human dignity and equality.

[149] The question is how to balance these rights, both in principle and as applied to a particular set of circumstances.

[150] The tension between these rights manifests itself in the context of a claim for defamation. The law of defamation is aimed at protecting the dignity of individuals. As this Court has recognised, in democratic societies ‘the law of defamation lies at the intersection of the freedom of speech and the protection of reputation or good name’. When considering a claim based on defamation, the proper approach is to strive to achieve an appropriate balance between the protection of the right of freedom of expression, on the one hand, and the right to human dignity, on the other.”

It is common cause or not disputed that the statements complained of were made by the respondents (first to sixth respondents). It is trite that once this fact has been established, the statements are *prima facie* wrongful. It therefore rests with the respondents to dispel the said wrongfulness. Or put differently, once publication of the words has been proved, this amounts to *prima facie* proof of wrongfulness. Wrongfulness arises and the *onus* of rebutting wrongfulness shifts to the defendant (respondents in this case). This the respondents may do by raising and proving by means of acceptable evidence, the existence of a ground/s of justification. In their publication, ***Neethling and Potgieter***⁵ make the point that there is no *numerous clausus* of grounds of justification. That apart from the traditional grounds of justification in this regard, new grounds of justification may develop in accordance with the *boni mores* of our constitutional community. One of the grounds of justification the respondents seek to place

⁵ Page 405 – 7.

reliance on is that of the statements being the truth and in the public interest. This in addition to other points raised by the respondents. After detailing a number of incidents that gave rise to first to fifth respondents' grievances, respondents conclude by asserting that the incidents concerned demonstrate that statements made in the form of a grievance by first to fifth respondents and later published by sixth respondent are true and in the public interest. They also point out that the National Prosecuting Authority is a public office that must engender confidence both in its internal and external operations to the public. There can be no doubt that the citizens of this country will have confidence in a prosecuting authority knowing its decisions are not determined or influenced by colour, race, or ethnic or social origin of the person involved. That everyone will be treated equally. Be it in the appointment of its officials or in deciding who to prosecute. I am of the view that the statements were made in the public interest and in the process of seeking the National Director of Public Prosecutions' intervention.

[46] Earlier in this judgment I alluded to what appears to be the indifference of the National Director of Public Prosecutions in this matter. As acknowledged by all concerned, the genesis of this matter can be traced to the grievance/s raised by the first to fifth respondents to *inter alia* the National Director of Public Prosecutions. This they did in response to an invitation by the National Director of Public Prosecutions after the allegations were made at a meeting she held with the protagonists. This at a time, even by applicants' own admission, the National Prosecuting Authority was bedevilled by racism and corrupt activities. Was it therefore not appropriate and reasonable in the circumstances to raise the complaints and provide the relevant information to the National Director of Public Prosecutions. Can it be said that in the content in which the statements were made and the persons to whom they were made they were defamatory, that the respondents intended to injure the good name of the applicants? In

Nehawu v Tsatsi⁶ a point was made that the question whether the statements are relevant to the occasion involves a value judgment. I do not think that there can be any dispute that in the context of the grievance(s) raised the statements were relevant.

[47] The applicants are not only complaining about the statements having been published in a press release by the sixth respondent in its website. They are also complaining about the contents of a letter from Scorpion Legal Protection. This is a letter that was sent to the first applicant on behalf of first respondent. This was a request for reasons as to why first respondent was not shortlisted. The letter recorded what in first respondent's belief may have led to him not being shortlisted. The applicants are clearly also taking issue with the contents of statements made by the respondents in a letter addressed to the National Director of Public Prosecutions wherein they were responding to her invitation to draw any traces of racism or nepotism they experienced to her attention.

[48] In the circumstances, can it be said that the respondents had the intention to infringe applicants' right to good name? Or that they acted wrongfully? A schedule of the statements complained of appears from annexure "A" to the applicants' heads of argument. Those are contained in the following documents:

- 1. Contents of grievances forwarded to the first applicant by the respondents and later published in the City Press Newspaper. The names of the officials against whom the allegations were not mentioned;*
- 2. Part of the contents of the letter from Scorpion Legal Services mentioned earlier;*
- 3. Letter written by fifth respondent on behalf of "the concerned group of South African prosecutors". (In this regard, the applicants state that they*

⁶ 2006 (6) SA 327 at 332 [12].

do not rely on any passage of the letter as being directly defamatory of them, they have included it because it formed part of the grievance(s) of the 12 December 2019.⁷);

4. The contents of the grievance of the 12 December 2019 addressed to the National Director of Public Prosecutions from second respondent;

5. Grievance letter addressed to the National Director of Public Prosecutions by third respondent;

6. Sixthly and lastly, the press release in sixth respondent's website.

An assertion is made in this regard that the information in the press release patently emanated from one or more or all the respondents.⁸

[49] The respondents insist that they were expressing genuine concerns about their personal experiences / lived experiences at the work place. About the treatment that was meted to them by the applicants. As well as the disparities they observed in the handling of cases. The applicants on the other hand are adamant that the allegations are false.

[50] Even though falsity of the statement is not an element of defamation, a person who relies on the defence that the statement is true and for the public benefit, bears the *onus* of proving on a balance of probabilities, that the statement is true.⁹ In ***Malema v Rawula***, it was pointed out that “*the defence of truth and public interest is founded on the recognition of a right to publish a defamatory statement which is true, where the publication is in the public interest*”.¹⁰ Earlier in the ***Malema*** judgment¹¹ the court had found that the respondent had laid a supportable foundation that the defence of truth and

⁷ Paragraph 52.2 of Founding Affidavit page 34 of indexed papers.

⁸ Paragraph 51.1 of the Founding Affidavit page 45 of the indexed papers.

⁹ Lawsa, Volume 14 (2) 3rd Edition (2007), National Media Ltd and Others v Bogoshi 1998 (4) SA 1196 SCA at 1218.

¹⁰ (139/2020) [2021] ZASCA 23 June 2021 [64].

¹¹ *Malema supra*.

public interest was available to be pursued. Further that the statement on Facebook did not emanate from an unidentified source, suggesting that the respondent was privy to that information because at the time of the publication he was a member of the Economic Freedom Fighters (EFF). The same applies in this matter. First to fifth respondents have first-hand information about what was happening at their workplace, in the National Prosecuting Authority in particular in the Eastern Cape and specifically the East London Region. And they sought to draw the National Director of Public Prosecutions' attention to their grievances as per her invitation.

[51] Even though I am not required to declare the statements complained of as defamatory, it is implicit from prayer 1 of the notice of motion that the relief sought by the applicants is to interdict restraining the respondents from making and or publishing defamatory statements concerning the applicants.

[52] In my view, the respondents have succeeded in showing on a balance of probabilities that the defence of truth and public interest is available to them. It provides them with justification for making the statements complained of in the context in which they were made and in respect of the persons to whom they were made.

No other satisfactory remedy available to the applicants.

[53] The applicants contend that there is no alternative satisfactory remedy which is available to them. The applicants assert that the respondents in particular first to fifth have acted in complete disregard to the provisions of the National Prosecuting Authority's Code of Conduct as well as Social Media Policy. They also point out that the Code requires that in the event that prosecutors act in breach of its terms, their conduct must be reported to the

relevant supervising authority who should consider appropriate steps to be taken. They took the trouble to annex both documents (Code of Conduct and Social Media Policy) to their founding papers. It is however not clear why disciplinary action was not initiated against the respondents in this regard or why that route was not a satisfactory remedy. The applicants also gave the respondents notice to oppose the referral of the matter / dispute to mediation.¹² The reason proffered for being opposed to such referral is the history of this matter and the extreme bad faith displayed by the first to sixth respondents. (I am not certain in what way the respondents are said to have displayed extreme bad faith). As well as the refusal by second and sixth respondent to comply with a demand from second applicant to make certain unequivocal undertakings regarding the statements complained of. No such demand was made to first, third, fourth and fifth respondents. Such was only made on behalf of second applicant. I do not think that this refusal was an impediment to mediation. As I said, I am not privy to the extreme bad faith displayed by the respondents. It is also not clear how fourth respondent is implicated in the making and publication of defamatory statements complained of.

Sixth respondent

[54] My remarks regarding the defence of truth and public interest apply to the sixth respondent as well. Applicants assert that the media statement that was issued by the sixth respondent was released at the instance of first to fifth respondents. The basis for this assertion is, so it is contended, the content of the statement which self-evidently emanates from the first to fifth respondents. There is no evidence that media release was issued at the instance of the first to fifth respondents. Be that as it may, the role of trade unions was aptly

¹² In terms of Rule 41 A of the Uniform Rules of this court.

enunciated in ***South African National Defence Union v Minister of Defence and Others***¹³ as follows:

“[1] Trade unions play a vital role in most democratic societies. Beyond taking up the cudgels on behalf of workers and acting in advancing their rights and interests, trade unions play a larger role in the political and economic discourse and debates within society. That this is so is understandable, as workplace issues can hardly be insulated from the issues that impact on the broader wellbeing of the society. It is accordingly not uncommon, nor may one add undesirable, for trade unions to increasingly express themselves forcefully and with principle on a wide range of issues that may relate to economic policy, foreign affairs, poverty, social inclusion and such related matters.”

The press release should also be viewed against this backdrop.

[55] In respect of first to sixth respondents where there is evidence they made the statements complained of, they have been rationally motivated and the defence of truth and public interest is available to them.

[56] In the circumstances and for the reasons stated above, I am not satisfied that the applicants have made out a case for the relief that they seek.

[57] Accordingly, the application is dismissed with costs.

N G BESHE
JUDGE OF THE HIGH COURT
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¹³ 2012 (4) SA 382 GNP at 383 [1].

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