



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

CASE NO: **299/21**
DATE HEARD: **03/09/2021**
DATE DELIVERED: **15/10/2021**

In the matter between:

THE MINISTER OF CORRECTIONAL SERVICES	1 st Applicant
THE COMMISSIONER: CORRECTIONAL SERVICES	2 nd Applicant
THE HEAD: TSWELOPELE CORRECTIONAL SERVICES	
THE HEAD OF CASE MANAGEMENT COMMITTEE:	3 rd Applicant
TSWELOPELE CORRECTIONAL SERVICES	4 th Applicant
THE CHAIRPERSON OF THE CORRECTIONAL SUPERVISION AND PAROLE REVIEW BOARD; TSWELOPELE CORRECTIONAL CENTRE	5 th Applicant

and

ANTHONY OZUKALU	1 st Respondent
TITUS NKUNA	2 nd Respondent
PRINCE EDWIN NWAUGURU	3 rd Respondent
JORAM NKIRIHO	4 th Respondent

Coram: MOSES AJ

JUDGMENT

Moses AJ:

1. The dispute presently before Court is one of costs.
2. The Applicants is *casu* argued that the costs of this application ought not to be granted in favour of the Respondents. Mr Mphalwa who appeared on behalf of the Applicants, submitted during oral arguments in Court that there are essentially two (2) reasons why the Respondents should not be awarded costs: firstly that exceptional circumstances exist in *casu* which militate against a cost order in favour of the Respondents; and secondly that the Court order granted by Eillert AJ on 7 April 2021 under this very same case number was sought, and granted in error. Hence in this application initially, the Applicant brought a rescission application to rescind the afore-mentioned judgment.
3. The Respondents in *casu* argued during oral submissions in Court, represented by Mr Kgotlagomang that, in as much as the Applicants had withdrawn their application, on the eve of the hearing of that matter, as a result of which the Respondents were dragged back to Court to oppose the said rescission application, the Respondents are/were entitled to the costs and hence the Court should find in the Respondents' favour.

A Brief Case History

4. On 17 February 2021 the present Respondents launched an urgent application which was heard by Eillert AJ, wherein they, qua Applicants sought, *inter alia*;
 - 4.1 that the application be heard on an urgent basis and their departure from the Rules of Court, insofar as it may be necessary be condoned;

4.2 that a Rule Nisi do issue calling on the then Respondents, now the Applicants herein, to show cause on a date to be determined by this Court, why the following final orders should not be granted:

- 4.2.1 The Respondents are interdicted from keeping the Applicants in detention at Tswelopele Correctional Centre, Kimberley;
 - 4.2.2 The Respondents are directed to immediately release the Applicants from detention;
 - 4.2.3 That the detention of the Applicants be declared unlawful;
 - 4.2.4 That the unlawful detention of the Applicants, pending the decision of the Department of Home Affairs whether they wish to deport the Applicants, be declared wrongful and set aside;
 - 4.3 That the orders given in terms of paragraphs 4.2.1 to 4.2.4 operate as interim interdicts with immediate effect pending the return day of the Rule Nisi.
 - 4.4 Costs on an attorney and client scale; and
 - 4.5 That the Applicants (now Respondents) be granted leave to supplement their papers if necessary, and if the said application becomes opposed.
5. The said application became opposed indeed and it was eventually heard by, and argued before, Eillert AJ. According to Mr Kgotlagomang, who appeared in that court on behalf of the said Applicants – now the Respondents – the issues before Court were fully ventilated by all parties concerned.
6. The First Applicant (now the First Respondent) in that case was convicted of dealing in drugs on 27 October 2017 in the Thembaletu Magistrate's Court and sentenced to six (6) years imprisonment which commenced on 27 October 2017.¹
7. The Second Applicant therein (now Second Respondent) was convicted of housebreaking and theft in Mossel Bay on 22 July 2019, and sentenced to twelve (12) years imprisonment, of which five (5) years were conditionally

¹ Paragraph 21 – 22 of that Founding Affidavit.

suspended, thus effectively serving a seven (7) year imprisonment with effect from 22 July 2019.²

8. The Third Applicant therein (now Third Respondent) was convicted in the Lephalale Magistrate's Court for dealing in drugs on 6 December 2016, and was sentenced on that date, to five (5) years direct imprisonment.³
9. The Fourth Applicant (now Fourth Respondent) was convicted in the then Port Elizabeth Magistrate's Court of fraud on 15 October 2018, and was sentenced to eight (8) years imprisonment with effect from that date.⁴
10. In terms of a Presidential Proclamation in terms of section 84(2) of the Constitution, a remission of sentence was proclaimed for qualifying inmates at the time, with effect from 16 December 2020. The effect hereof was that the said First Applicant was granted a twelve (12) month remission of sentence, Second Applicant, 24 months, Third Applicant, twelve (12) months, and the Fourth Applicant, 24 months. All of them were/are foreign nationals at the time.⁵
11. Earlier this year a letter was addressed to the Senior Public Prosecutor, Springbok, dated 5 February 2021, by these Applicants' attorney of record, indicating, *inter alia*, that the Department of Correctional Services had in fact decided to release all these Applicants with effect from 25 November 2020, and that they would have been so released, but for the intervention at the time, of the Department of Home Affairs, pointing out that certain of these inmates were in fact also physically attacked by the responsible unit of the Department of Home Affairs, and requesting the intervention of/by the said senior Public Prosecutor at the time.
12. The then Respondents, now the Applicants herein, duly gave Notice of their intention to oppose the said application, dated 18 February 2021, pursuant whereunto they served and filed their opposing papers, the answering affidavit which was deposed to by one Vuzumzi T Ncwadi, signed by him and dated 22 February 2021. He is the Legal Administration Officer within the Department of

² Ibid; paragraph 23.

³ Ibid, paragraph 25.

⁴ Ibid; paragraph 27.

⁵ Ibid; paragraph 29.

Correctional Services. I point out momentarily that he is/was also the main deponent to the founding affidavit in the afore-mentioned application for rescission of the judgment of Eillert AJ as above-stated.

13. In this answering affidavit the said deponent, Mr Ncwadi, *inter alia*, alleged that:
 - 13.1 the Department of Home Affairs should be joined in those proceedings as a party as they have a direct and substantial interest in the matter;⁶
 - 13.2 the Respondents (the present Applicants) over that the date for placement on parole for all the applicants is 28 April 2021, respectively, although their maximum release dates are 2023, 2024 and 2026 respectively;⁷
 - 13.3 it seems that part of their parole conditions were that the applicants were to be handed over to the Department of Home Affairs upon with date of placement on parole so that they be deported (sic) to their countries of origin.⁸
 - 13.4 It is admitted that the Applicants were informed of their release date of 25 November 2020, and the third Applicant on 25 January 2021;⁹
 - 13.5 The warrant for their detention was, and is still valid to keep all of them in the Correctional Centre, until their placement date arrived and until they were duly handed over to the officials of home affairs for deportation; and
 - 13.6 It is admitted that the applicants were informed by officials that since Home Affairs did not arrive to take them into their custody, that they had to go back to their units.¹⁰
14. Then on 24 March 2021 the following Court Order was issued by Eillert AJ, after, so it was submitted by counsel, the matter had been argued and all relevant issues fully ventilated:

⁶ Answering Affidavit, paragraph 10.

⁸ Ibid; paragraph 25.

⁹ Ibid para 35 emphasis added.

¹⁰ Ibid.

"IT IS ORDERED THAT:

1. *The requirements of the Uniform rules as to form, service and time limits are dispensed with this matter is hereby heard on an urgent basis;*
 2. *The current detention of the Applicants at the Tswelopele Correctional Centre, Kimberley is hereby declared unlawful;*
 3. *The issue of an appropriate order for the release of the Applicants from their current detention as well as an appropriate order as to costs are suspended pending finalization of the rule nisi as provided for in paragraph 4 below.*
 4. *A rule nisi is hereby issued calling upon the Respondents as well as the Department of Home Affairs ("the DHA"), the Immigration Inspectorate ("the Inspectorate") or the designated Immigration Officer ("the Immigration Officer"), whichever is applicable in the circumstances of this matter, to appear before this Court on 7 April 2021 at 09h30 to show cause, if any, why the following orders should not be made:*
 - 4.1 *that the DHA, the Inspectorate or the Immigration Officer be joined as the Sixth Respondent in this matter;*
 - 4.2 *that the DHA, Inspectorate or the Immigration Officer shall file an affidavit, together with such supporting documents as may be appropriate, on an urgent basis and on a date to be determined by this Court on 7 April 2021, to inform this Court,*
 - (a) *whether the Applicants are lawfully entitled to reside and/or sojourn within the Republic of South Africa;*
 - (b) *should the Applicants not be lawfully entitled to reside and/or sojourn within the Republic of South Africa, what order this Court should consider making in addition to an order for the release of the Applicants from detention;*
 - 4.3 *An appropriate cost order, which is to include the wasted costs incurred as a result of the non-joinder of the necessary party or parties to this application.*
 5. *The Office of the State Attorney is directed to identify the relevant official(s) in the DHA, the Inspectorate or the relevant Immigration Officer, upon whom a copy of the papers in this application is/are to be served and to provide such information to the Applicant's attorneys, together with the name and surname of the attorney in their offices who is responsible for the representation of the DHA, before or on 25 March 2021.*
 6. *The Applicants are directed to cause a copy of the application papers and this order to be served upon the official(s) identified in terms of paragraph 3 above as well as the attorney in the Office of the State Attorney responsible for the representation of the DHA, before or on 30 March 2021."*
15. It is apparent, and this Court was advised during oral submissions, that the Department of Home Affairs never made any entry of appearance in the said proceedings, despite the above-stated court order.

16. On 7 April 2021 Eillert AJ issued the following Court order:

*“HAVING HEARD **MR KGOTLAGOMANG** for the Applicants and **MR SEKGOBELA** for the Respondents and having read the documents filed of record;*

IT IS ORDERED THAT:

1. *The Rule Nisi issued on 24 March 2021 is discharged.*
 2. *The Respondents are ordered to take all necessary steps to effect the immediate release of the 1st, 2nd and 4th Applicants on Parole, and the immediate release, without qualification, of the 3rd Applicant.*
 3. *The Respondents are ordered to pay the costs of the application.”*
17. It is this court order that the current Applicants, the then Respondents, subsequently sought to be rescinded. They also lodged an application for leave to appeal the said court order.
18. As was pointed out above, the Applicants subsequently abandoned their application for leave to appeal the said court order of 7 April 2021.
19. It is also common cause that the Applicants never applied to also have the court order dated 24 March 2021 rescinded and/or set aside, to date of this hearing.
20. It is furthermore common cause that the current Applicants subsequently withdrew this current application for rescission of the above-stated Court order of 7 April 2021, on the eve of the hearing date of that application, because all the Respondents in casu had in the meantime been released on parole by the Department of Correctional Services. This only left the issue of costs to be determined.

The Applicable Legal Principles

21. In this regard this Court is guided by the trite principle set out in the matter of **Gamlan Investments (Pty) Ltd and Another v Trillion Cape (Pty) Ltd**¹¹ where the court referred with approval to the judgment of **Jenkins v SA Boiler Makers, Iron & Steelworkers & Ship Builders Society 1946 WLD 15** where it was held (as paraphrased by the court in Gamlan) that :

¹¹ 1996 (3) SA 692 (CPD) at 700G,

‘where a disputed application is settled on a basis which disposes of the merits except insofar as the costs are concerned, the Court should not have to hear evidence to decide the disputed facts in order to decide who is liable for costs, but the Court must, with the material at its disposal, make a proper allocation as to costs.’ (emphasis added).

22. This Court is in agreement with Price J in the **Jenkins** matter at **para 18**, where in the court stated :

“I cannot imagine a more futile form of procedure than one which would require Courts of law to sit for hours, days, or perhaps even for weeks, trying dead issues to discover who would have won in order to determine questions of costs, where cases have been settled by the main claims being conceded.”

23. The court in **Gamlan**¹² took this principle further and went on to draw attention to the finding in the **Jenkins** matter, as the former put it, that

“Costs ... must be decided on broad general lines and not on lines that would necessitate a full hearing on the merits of a case that has already been settled. This approach is certainly to be commended. Costs, more particularly at present, play a very important role in litigation and the presiding judicial officer should, in my view, discourage the incurring of unnecessary costs by making an appropriate order in this respect.”

24. As a general rule costs should follow the course, however the court retains a discretion, to be exercised judicially upon a consideration of all relevant facts, and that costs should be awarded to the successful party, a rule which should not be departed from without good grounds.¹³

25. The general rule, in relation to costs orders where a litigant withdraws his or her action, is that the withdrawing party is liable to pay the costs of the proceedings. There must be very sound reasons why the other party should not be entitled to his or her costs. This is so because the withdrawing party is in the same position as an unsuccessful litigant, and should be responsible for costs.¹⁴

¹² Gamlan *supra*

¹³ See: Gamlan (*supra*); See also Levben Products (Pty) Ltd v Alexander Films (Pty) Ltd 1957 (4) SA 225 (SR) 227

¹⁴ Germishuys v Douglas Bespoelingsraad 17373 (3) SA 299 (NC) AT 300 D- E.

26. It is a fundamental principle of South Africa jurisprudence that out courts decide on disputes between the parties before them; they do not pronounce on abstract questions of law when there is no actual dispute to be resolved.¹⁵
27. The above principle has been a component of our jurisprudence for over a century. In **Geldenhuys & Neethling v Beuthin**¹⁶, the then appellate division held as follows:
- “After all courts of law exist for settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important”.*
28. The Constitutional Court has endorsed the principle and persistently warned against courts deciding on moot cases. A case is moot and therefore not justiceable if it no longer presents an existing or live controversy between the parties.¹⁷
29. In **Radio Pretoria v Chairman, Independent Communications Authority of South Africa**,¹⁸ the Supreme Court of Appeal also reaffirmed the principle and held that the principle has not been diluted and courts will not make determinations that will have no practical effect.

A Brief Evaluation

30. Drawing on these principles and applying it to the facts of this case, the following objective facts stand out:
- 30.1 the Applicants herein, on their own papers, in what I call the first application, which led to the Court Order of 24 March 2021 as above-stated, admitted that the Respondents herein were in fact already informed, and hence granted parole with effect from 20 November 2020, but that their further detention was caused by the fact that the

¹⁵ Coin Security Group (Pty) Ltd v SA National Union for Security Officers & Others 2001 (2) SA 872 (SCA) at par 9.

¹⁶ 1918 AD 426 at 411

¹⁷ National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others 2000 (2) SA 1 (CC) at par 21.

¹⁸ 2005 (1) SA 47 SCA.

Department of Home Affairs did not come to “take them into their custody” apparently for purposes of their deportation.¹⁹

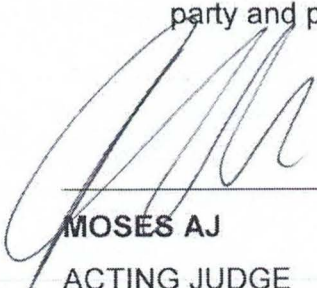
- 30.2 On the Applicants own admission furthermore – in the said first application as above-stated, the minimum date of the Respondents’ release on parole was in and around November 2020, the Third Respondent – then the Third Applicant’s release date being 21 January 2021, before they – the then Applicants, were necessitated to launch that first application.
 - 30.3 The Department of Home Affairs, never entered any appearance in the said proceedings, despite the Court Order of 24 March 2021, to date hereof.
 - 30.4 The present Applicants also never applied for the rescission and/or setting aside of that Court Order of 24 March 2021, to date hereof.
 - 30.5 The present Applicants abandoned their Application for leave to appeal the Court Order dated 7 April 2021, as above-stated;
 - 30.6 The present Applicants withdrew the present application to rescind and/or set aside the Court Order dated 7 April 2021, as stated above, on the eve of the hearing date of the said application; and
 - 30.7 The Applicants’ Department of Correctional Services in fact released all the Respondents on parole before the hearing date of the aforestated application.
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31. In the circumstances, and on the objective facts of this case, no good grounds, nor exceptional circumstances had been shown to exist to cause this Court from departing from the general rule regarding costs, namely that it should follow the course.
 32. It needs to be pointed out specifically, that despite the Applicants’ counsel emphasising the alleged defectiveness of the founding papers of the

¹⁹ See paragraphs 13 to 16 above.

Respondents – the Applicants in the first application - no such issue was taken by them at the time despite the fact that both the deponent to the Answering Affidavit therein, and the Founding Affidavit in the latter application, being the same person. And despite the fact that the then Respondents' legal representative and counsel, also being the same legal representatives who were involved in both applications.

33. The present counsel on behalf of the Applicants before this Court, was not involved in this matter at the time.
34. In any event and based on those alleged "defective" founding papers, more specifically the affidavits of those deponents in the first application, the said Court Order of 24 March 2021 was issued, was and remains binding and enforceable, and was never rescinded and/or set aside, no such application for its rescission and/or being set aside had been brought by and/or on behalf of the then Respondents – the Applicants herein.
35. **In the circumstances and in the result the following order is hereby made:**

The Applicants are to pay the Respondents' costs on the scale as between party and party, the one paying the other to be absolved.



MOSES AJ

ACTING JUDGE

NORTHERN CAPE DIVISION

For the applicant: **Adv. M Mpahlwa**
 (oio **State Attorney**)

For the respondents: **Mr C Kgotlagomang**
 (oio **Towell & Groenewaldt Attorneys**)