



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

Case number: **2022-019404**

10 December 2025

SIGNATURE

DATE

MINISTER OF CORRECTIONAL SERVICES

Applicant

And

MALELELE PHINEAS MAPOTE

Respondent

In re:

MALELELE PHINEAS MAPOTE

Applicant

And

MINISTER OF CORRECTIONAL SERVICES

Respondent

ORDER

The application for leave to appeal is dismissed with costs, including the costs of counsel, where employed on Scale C.

JUDGMENT

This judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by email to the attorneys of record of the parties. The date of the delivery of the judgment is deemed to be 10 December 2025.

Chabedi AJ

Introduction

- [1] This is an application by the Minister of Correctional Services for leave to appeal the whole judgment and order of this Court granted on 24 October 2025 in an application to rescind and set aside two orders granted under the above case number in his absence by the Honourable acting Justice Leso on 12 July 2023, and the Honourable Justice Nyathi on 3 November 2023, in favour of the respondent.
- [2] The rescission application was brought in terms of Rule 31(2) of the Uniform Rules of this Court, alternatively, Rule 42, alternatively, under common law and it was opposed by the respondent.
- [3] It is important to repeat the background history of this case for proper context. The respondent is a prisoner currently serving a life sentence for murder in a Johannesburg Correctional facility, under the Department of Correctional Services since 22 March 2005.
- [4] In the main application, the respondent sought an order directing the Minister to release forthwith, the respondent and a group of long term prisoners whom, it was alleged, qualified for parole by virtue of having served a third of their

imprisonment term in terms of the Correctional Services Act 8 of 1959.¹ The respondent acted as a representative of this class of individuals and sought first, an order classifying the main application as a class action and that he is designated as the representative of the class, and second, an order directing the Minister to arrange for the release of all members of the class on parole forthwith.

- [5] The Minister opposed the main application but failed to file an answering affidavit. On 12 July 2023 Leso AJ granted an order, in the absence of the Minister, certifying the main application as a class action and designating the respondent as the representative of the class of long-term prisoners. On 3 November 2023, Nyathi J ordered the release forthwith of the class of individuals, including the respondent.
- [6] The Minister's application to rescind and set aside Leso AJ's certification order of 12 July 2023, and Nyathi J's release order of 3 November 2023, was dismissed with costs by this court on 24 October 2025. The Minister now seeks leave to appeal the whole judgment and orders of the court.
- [7] The application for leave to appeal was filed out of time by some four days. The applicants filed an application for condonation, which was not opposed. Condonation is therefore granted, in the interests of justice.

Grounds of appeal

- [8] The Minister has raised five (5) grounds of appeal. I point out that the grounds of appeal presented on behalf of the Minister were not confined to the three possible bases on which one may obtain rescission of a judgment, namely, under rules 31(2)(b) and 42(1), and under common law. Counsel for the Minister accepted however that rule 31(2)(b) does not apply, these being application proceedings.

¹ Read with *Phaahla v Minister of Justice and Correctional Services* 2019 (2) SACR 88.

- [9] For the rest, argument was made to sustain both a rescission under rule 42 and in common law, indiscriminately. As discussed later in this judgment, parts of this argument raised new issues not initially presented as part of the Minister's case in the rescission application and some parts, constituted re-argument of the rescission application itself. The argument also generally vacillated between criticism of the judgment sought to be appealed against, and Leso AJ's order. I deal with the grounds of appeal in sequence hereunder.
- [10] The first ground of appeal is that the court did not give due regard and sufficient weight to the explanation given for the Minister's absence, being that the respondent's attorneys failed to invite the State Attorney on Caselines and the State Attorney lacked knowledge of the developments in the case including set down of the hearings, hence the Minister's absence.
- [11] It was argued on behalf of the Minister that this was an adequate and reasonable reason, and the judgment was silent on the respondent's answer to this explanation, which was a bare denial.
- [12] In augmentation of this argument counsel for the Minister argued that Leso AJ ought to have been made aware of the Minister's notice to oppose, at the very least, and should have considered the question whether in those circumstances the matter was properly set down as unopposed. It was argued that as such, the order would not have been granted.
- [13] This argument is new and raised for the first time in the application for leave to appeal. It was not contained in the Minister's application for rescission and did not form part of his argument at the hearing of this matter. The same goes for the argument that the respondent deliberately held back the invitation and only invited the Minister to Caselines after the two orders have been granted, therefore acted improperly. It does not make sense why these facts were simply not included in the founding affidavit filed in the rescission application, instead of being raised for the first time in the application for leave to appeal from the Bar. As highlighted by counsel for the respondent and stated in the

judgment, there was also no replying affidavit to counter anything stated by the respondent in his answering affidavit.

- [14] Not only were these arguments a re-argument of the Minister's case, because they are new, there are no findings on these issues in the judgment, based on which a further reconsideration by another court could yield a different outcome. There was thus no basis to find that there was an error patent the orders of Leso AJ and Nyathi J that warranted a rescission in terms of rule 42.
- [15] In the judgment the court noted the Minister's reason for his absence as the lack of invitation to Caselines as above, however, held that it was wholly inadequate as it did not properly account for the period when the notice to oppose was filed in March 2023 and July 2023 when Leso AJ's order was granted, and November 2023 when Nyathi J's order was granted.
- [16] As the court found, beyond the issue of failure by the respondent to invite the State Attorney on Caselines, there was no other explanation of the Minister's delay in filing an answering affidavit, or any steps taken on his behalf to secure an invitation on Caselines or follow up on the developments of the case to ensure that it is defended. Nothing of this sort was set out in the founding affidavit supporting the rescission of judgment.
- [17] It was stated on behalf of the Minister in the founding affidavit that considerable amount of time was taken collating information on the members of the class, however, there was no explanation as to what then happened after this process or when this process was completed. There was no explanation, at the very least, why an answering affidavit was not filed after this process. It was not even the Minister's case that an answering affidavit was prepared but could not be filed on account of lack of invitation to Caselines. The purported answering affidavit was only filed in February 2024, approximately two months after the two orders have been granted.

- [18] To meet the requisite standard of reasonable and acceptable explanation for the delay for purposes of rescission, a full and adequate explanation of how the default came about must be given.
- [19] The second ground of appeal is that the Minister has prospects of success as contained in the answering affidavit filed in respect of the main application, and the court was incorrect in adopting the approach that the content of that affidavit ought to have been incorporated in the founding affidavit for the rescission of application, because the Minister had requested the court to read that affidavit as if it has been specifically incorporated in the rescission application.
- [20] The answering affidavit was only filed after the granting of the orders sought to be rescinded. The affidavit was irregular and the court found as such. The court had regard to the content of this affidavit to assess whether there could be a *bona fide* defence on the part of the Minister in the interest of fairness. Although counsel for the Minister on the one hand protested this approach, it was submitted on the other that the answering affidavit fully sets out the Minister's defence.
- [21] One of the main grounds of opposition advanced in the answering affidavit was that to the extent that the respondents complained that the Minister failed to make the decision to grant parole to members of the class, the Minister has made the decisions which were communicated to the class members. These decisions were made between March and April 2023, with the result that some of the members of the class were released in June 2023.
- [22] The court was therefore correct in assessing the affidavit and finding firstly, that the Minister, represented by the State Attorney, had sufficient knowledge of the application well before the certification order of 12 July 2023, and subsequently the release order of 3 November 2023, but chose to not take any steps to file an answering affidavit, and second, that the granting of parole and releasing some of the members of the class, as he did, undermined any attempt by the Minister to show a *bona fide* defence, which *prima facie* carries

some prospect of success. The submissions by counsel for the Minister that the granting of parole and releasing of the affected members of the class had nothing to do with the main application, and thus the court's findings were pure speculation, and conjecture are simply contradicted by the very same affidavit sought to be relied on to show *bona fide* defence. These submissions are therefore rejected.

- [23] The third ground of appeal is that there was an irregularity on the part of the respondents on the grounds that they filed two sets of heads of argument for the same case, and the court ought to have found that this irregularity militated against the respondents, in the same manner as it did the irregularities it found on the part of the Minister on the authority *Colyn*.² There is no merit to this argument and it is therefore rejected. More so because counsel for the Minister argued instead, that there were two answering affidavits, without referring to any findings in the judgment on which the complaint was based. When quizzed whether these affidavits were filed in the rescission or in the main application, a clear response was not forthcoming.
- [24] Fourth, the Minister complained that the court erred in finding that the granting of parole by the Minister to some of the members of the class after the main application was launched was evidence first, of his knowledge of the case, and second, that it undermined the existence of a *bona fide* defence, is pure conjecture and speculation and not based on fact. This ground is similar in essence to the second ground already discussed above. For the same reasons as above, it also fails.
- [25] Lastly, as regard the fifth ground, it was argued that it is in the interests of justice to grant rescission so as to allow the main application to be heard on its merits because the release of prisoners on the strength of an order obtained by default may have the potential of endangering the public and therefore the court ought to have had regard to this eventuality as a *bona fide* defence. This

² *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 4A-B.

is a new issue, which did not form part of the Minister's case in the rescission application.

- [26] Whether the orders sought to be rescinded if implemented would result in endangering the public, is a factual enquiry requiring evidence, which evidence was not submitted by the Minister in the application for rescission. This ground also fails.

Conclusion

- [27] In *MEC for Health, Eastern Cape v Mkhitha*,³ the SCA set a more stringent test for an applicant for leave to appeal. It stated that:

“Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”

- [28] In *Ramakatsa and Others v ANC*,⁴ the SCA held that, “Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes.”⁵

- [29] This application fails on these two scores for all of the reasons discussed above.

³ *MEC for Health, Eastern Cape v Mkhitha* 2016 JDR 2214 (SCA) at paras [16] - [17].

⁴ *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31.

⁵ At para [10].

[29] Accordingly, I find that there are no reasonable prospects of success and there are no compelling reasons warranting the granting of leave to appeal. I further find that there are no reasons why costs should not follow the course and why the costs of counsel where employed should not be recovered.

[22] In the premises, I make the following order:

22.1 The application for leave to appeal is dismissed with costs, including the costs of counsel where employed on Scale C.



MPD Chabedi

Acting Judge of the High Court
Gauteng Division, Pretoria

APPEARANCES

For the Applicant: T Mphahlwa
M Mhlanga
State Attorney Pretoria

For the respondent: M Marweshe (Attorney)
M Mthimkhulu
Marweshe Attorneys
Sandton, Johannesburg

Date of hearing: 9 December 2025

Date of Judgment: 10 December 2025