

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
HELD AT PRETORIA**

CASE NO: 079635/2024

DOH: 24 June 2025

DECIDED: 05 December 2025

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

[Redacted Signature]

SIGNATURE

05 December 2025
DATE

In the matter between:

MINISTER OF CORRECTIONAL SERVICES

Applicant

And

OBED MAMOGOBA

First Respondent

**NATIONAL COUNCIL OF CORRECTIONAL
SERVICES**

Second Respondent

CORRECTIONAL SUPERVISION AND PAROLE BOARD

Third Respondent

This judgment has been handed down remotely and shall be circulated to the parties by way of email / uploading on Caselines. The date of hand down shall be deemed to be 05 December 2025.

ORDER

1. The application for rescission succeeds.
2. Each party pays their own costs.

JUDGMENT

Bam J

Introduction

1. This application for rescission came before me as an urgent motion during the urgent court week of 24 June 2025. The order sought to be rescinded was granted in default of the applicant on 2 June 2025 by Nthambeleni AJ (the order). In his Notice of Motion, the applicant prays that:
 - (i) The non-compliance with the rules relating to forms, service and time period as provided for in the Uniform Rules be condoned and that the application be heard as one of urgency.
 - (ii) The order of 2 June 2025 be and is hereby rescinded.

- (iii) Alternatively, and in the event the court does not grant prayer (ii), that execution of the order be and is hereby suspended, pending finalization of the rescission.
2. The rescission, according to the founding papers, is based on common law while the heads of argument suggest that the rescission is founded on Rule 42(1) (a) of the Uniform Rules. The latter rule provides for rescission of an order sought or granted erroneously. First respondent opposed the application urging that the court find that the applicant had failed to make a case for urgency. As to the merits, first respondent submitted that the applicant had not properly explained his default and had failed to plead facts establishing a *bona fide* defence. First respondent submits that on the applicant's version, he poses no risk to society. He claims he has been before the Parole Board on various occasions and he has been recommended for parole. First respondent suggests that the applicant has no basis to refuse parole and has accordingly failed to meet the requirement of a *bona fide* defence.

Background

3. The application arises from the following common cause facts: First respondent was convicted of murder of a 10 months' old baby. He was sentenced to life imprisonment in 2004. In July 2024, when he had served a period of 19 years, he brought an urgent motion seeking an order that the applicant consider him for parole. On 1 November 2024, the applicant decided not to release first respondent on parole. He advised him to undergo further psychometric assessment. First respondent was aggrieved by the applicant's

decision. Thus, on or about 4 December 2024, he instituted proceedings to review and set aside the applicant's decision to refuse him parole.

4. On 21 February 2025¹ first respondent launched an application to compel the applicant to furnish him with a record of his decision, as envisaged in Rule 53 (1) (b) of the Rules. According to the deponent of the applicant's affidavit, Ms Ndivhuo Nesamari, a legal manager employed by the department of Correctional Services, the applicant, through his office, instructed the office of the State Attorney to oppose the review application. It appears from the record that the State Attorney failed to oppose the application. It is alleged in the founding affidavit that although the State Attorney had been furnished with the record prior to the hearing of the application to compel, it failed to file the record and also failed to oppose the application to compel. The application to compel as a result was granted unopposed on 9 April 2025 against the applicant, the second and third respondents.
5. On 2 June, the application for review was granted. The court not only set aside the applicant's decision, but it also substituted the applicant's decision refusing first respondent parole and authorized that first respondent be released within 10 days from date of the order. Such a step is authorized in terms of Section 8 (1) (ii) (c) (aa) of PAJA, where exceptional circumstances exist. Further, the applicant, together with the second and third respondents, were mulcted in costs on an attorney client scale. When the applicant

¹ All dates from this point onwards are in the year 2025 unless otherwise specified.

received the court order on 5 June 2025, he gave instructions to have the order rescinded. The present application was launched on 17 June.

Issues

6. The following issues are to be decided:
 - (i) Whether the application is urgent.
 - (ii) Whether the applicant has met the requirements of Rule 42 (1) (a).
 - (iii) In the event the court does not grant the rescission, whether the applicant has made out a case for the suspension of execution of the order.

Urgency

7. Having carefully considered the application, I was of the view that the applicant would certainly not be afforded substantial redress in the event the matter were to be heard in the ordinary course. My views took into account, firstly, the trite principle that a court order is binding and must be complied with, until it has been set aside by a competent authority. Based on first respondent's averments in his answering affidavit, it was clear to me that unless this court comes to the assistance of the applicant, first respondent would undoubtedly press for his release in terms of the court order. Thus, in order to address the urgency, immediately after briefly hearing the parties, I issued an order directing that execution of the order be suspended pending my decision on the matter. I further invited the parties to file supplementary heads dealing with the issue of 'exceptional circumstances' which underscores the principle of separation of powers. Those submissions have

been taken into account in the preparation of this judgment. This court thanks the parties for their supplementary submissions.

Applicable legal principles

8. The relevant rule dealing with rescission or variation of orders is Rule 42(1).

The Rule reads:

‘(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;’

9. Rule 31 (2) (b) on the other hand, deals with rescission of a judgment granted by default and it requires the applicant to establish facts demonstrating good cause. In *Government of the Republic of Zimbabwe v Fick and Others*², the court described the elements of good cause thus:

‘At common law the requirements for rescission of a default judgment are twofold.

First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.’

² (CCT 101/12) [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) (27 June 2013), paragraph 85.

10. On the other hand, an applicant who pursues their rescission application on the basis of Rule 42 (1) (a) need not demonstrate good cause but must show, 'that the judgment against which they seek a rescission was erroneously granted because "there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if aware of it, not to grant the judgment' *Zuma v Secretary of the Judicial Commission of Inquiry*³

11. In *FirstRand Bank Limited t/a First National Bank v Shabalala*, this court, with reference to *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) interpreted that the words,

' "erroneously granted" to mean "the error committed by the Court which granted the order must be in the form of a mistake in law which appears on the record of the proceedings itself. It follows, so he continued, that a Court in deciding whether a judgment was erroneously granted is, like a Court of appeal, confined to the record of proceedings" '4.

12. In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* it was said that:

'The rule caters for mistake. Rescission or variation does not follow automatically upon proof of a mistake. The rule gives the courts a discretion to order it, which must be exercised judicially ...'

³ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021).

⁴ (23762/2013) [2016] ZAGPJHC 9 (5 February 2016), paragraph 33.

Summary of the parties' submissions

13. The applicant points out that at the time the court made the order substituting the decision of the applicant with that of its own, the court did not have access to the record of the decision (the record) as it has not been filed. The applicant submits that this is common cause if one has regard to respondent's application to compel, which was granted unopposed. On this basis, the applicant submits that the court had nothing before it to establish the exceptional circumstances called for in Section 8 (1) (c) (ii) (aa) of PAJA.
14. The applicant further submits that had the court been placed in possession of the record, it would not have granted the order. This, according to the applicant, is based on the fact that it was not brought to the court's attention that in the reports of the two professionals, namely the Social Worker and Psychologist, first respondent's version of how the offence was committed varies materially. The applicant further points out that the two versions vary from the version placed before the court which convicted first respondent. On this basis, the applicant submits that first respondent was not candid with the review court. On this ground alone, the applicant submits that he has made a case for rescission on the basis of Rule 42 (1) (a).
15. First respondent vigorously resisted the applicant's assertion that the application is urgent. Given my ruling that the applicant had made a case for urgency, nothing further need be said regarding urgency. As to the merits, first respondent avers that the applicant has failed to explain his failure to oppose

the review application. First respondent states that the applicant's reference to the failures by the State Attorney without an affidavit from the relevant person from that office falls short of the requirement for the applicant to set out a case explaining their default.

16. On the requirement of a *bona fide* defence, first respondent submits that the applicant has no defence at all. He criticizes the applicant's choice of isolating the part dealing with conflicting versions of how the offence was committed instead of accepting that neither report characterizes him as a danger to society. He submits that the two reports convey a positive message about him and on that basis, he should be released.

Analysis

17. The applicant points out that at the time the review court made its decision to substitute his decision, it had not been placed in possession of the record. A court can only substitute its own decision with that of the administrator upon identifying exceptional circumstances. The relevant parts of Section 8 (1) of PAJA dealing with remedies in proceedings for judicial review reads: The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-

'(c) setting aside the administrative action and-

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases-

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action;'

18. In *Gauteng Gambling Board v Silverstar Development Ltd and Others*, the court reasoned:

‘An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognize its own limitations. See *Minister of Environmental Affairs & Tourism and Others v Phambili Fisheries (Pty) Ltd*; *Minister of Environmental Affairs & Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) at paras [47] to [50], and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at paras [46] to [49]. That is why remittal is almost always the prudent and proper course.’⁵

19. In *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another*, the Constitutional Court had the following to say:

‘[42] The administrative review context of section 8(1) of PAJA and the wording under subsection (1)(c)(ii)(aa) make it perspicuous that substitution remains an extraordinary remedy. Remittal is still almost always the prudent and proper course.

[43] In our constitutional framework, a court considering what constitutes exceptional circumstances must be guided by an approach that is consonant with the Constitution. This approach should entail affording appropriate deference to the administrator. Indeed, the idea that courts ought to recognise their own limitations still rings true. It is informed not only by the deference courts have to afford an administrator but also by the appreciation that courts are ordinarily not vested with the skills and expertise required of an administrator.’⁶

⁵ (80/2004) [2005] ZASCA 19; 2005 (4) SA 67 (SCA) (29 March 2005), paragraph 29.

⁶ [2015] ZACC 22.

20. First respondent's reliance on *Walus v Minister of Justice and Correctional Services and Others* is of no assistance to him. In that case, after perusing the record of decision, the court was satisfied that it was in as good a position as the Minister to determine whether the applicant be released on parole. In this regard the court noted:

'[86] It is important to emphasise that courts only substitute their decisions for those of government functionaries in exceptional cases. It is not something the courts do lightly nor should they.

[91] In my view, this Court is in as good a position as the Minister to determine whether the applicant should be released on parole. [92] The other factor that should be taken into account in deciding whether to remit the matter to the Minister or to order the Minister to place the applicant on parole is the history of this matter. That history reveals that not only has the applicant served 28 years of imprisonment of his life imprisonment sentence but he has also complied with all that the various Ministers of Correctional Services and the Parole Board have required him to do in order to improve his prospects of being granted parole.'⁷

21. In the present case, the court substituted its decision for that of the administrator without the benefit of the record. Accordingly, it could neither establish exceptional circumstances nor could it satisfy itself that it was in as good a position as the applicant to release the first respondent. I am satisfied that the order was erroneously granted. The rescission application must therefore be granted.

⁷ [2022] ZACC 39.

Costs

22. It is trite that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*⁸. Although the applicant has been successful, it is in the interests of justice that each party pays their own costs.

Order

1. The applicant's non-compliance with the rules relating to forms, service and time period as provided for in the Uniform Rules is condoned and that the application is heard as one of urgency
2. The application for rescission succeeds.
3. Each party pays their own costs.

[Redacted Signature]

BAM J

**JUDGE OF THE HIGH COURT
OF SOUTH AFRICA, GAUTENG
DIVISION, PRETORIA**

Date of Hearing:

24 June 2025

Date of Judgment:

05 December 2025

⁸ (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995), paragraph 3.

Appearances:

Counsel for the Applicant

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Instructed by:

State Attorney

Pretoria

Counsel for the First Respondent:

Adv D.B Melaphi

Instructed by:

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