



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 086097-2025

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

[REDACTED]

20 FEBRUARY 2026

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SIGNATURE

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DATE

In the matter between:

TEBOGO JACK KGARE

First Applicant

MICHAEL HLENGANI BALOYI

Second Applicant

and

MINISTER OF CORRECTIONAL SERVICES

First Respondent

**CHAIRPERSON OF THE NATIONAL COUNCIL OF
CORRECTIONAL SERVICES**

Second Respondent

JUDGMENT

LABUSCHAGNE J:

[1] The applicants brought an urgent application during January 2026, seeking relief against the Minister for Correctional Services, based on contempt of court. The applicants are convicted prison inmates serving life sentences. They obtained an order for their release on parole on an unopposed basis on 15 December 2025 and are aggrieved that they have not been released. They seek the following relief:

1.1 An order that the Minister of Correctional Services, the first respondent, be declared to be in breach of a court order of 15 December 2025, permitting substituted service of an email and acceptance by the secretarial or legal service at the head office in the event that the sheriff's office is unable to effect personal service on the Minister.

1.2 An order directing the Minister to comply with the court order of 15 December 2025 within 24 hours, failing which the Minister be sentenced to pay a fine of R150 000.00, failing which an order of imprisonment for 60 (sixty) days in Pretoria Central, Kgoši Mampuru II Management Area together with punitive costs.

[2] In a separate application the same applicants brought a **habeas corpus** application against the same respondents for an order declaring the continued detention of the applicants to be unlawful with effect from 02 January 2026 and ordering the respondents to release the applicants on parole or day parole with immediate effect, together with costs on an attorney and client scale.

BACKGROUND FACTS

- [3] The applicants are serving life sentences in Kgoši Mampuru II Correctional Centre in Pretoria. The first applicant was arrested for murder, and he was sentenced to life plus 15 years imprisonment on 18 August 2004. He has been in prison for 21 years. The applicant contends that he has been a candidate for parole since February 2017, but without success. The Minister refused his release on parole most recently on 10 March 2025.
- [4] The applicant brought a review application in June 2025. This matter was removed from the court roll on 10 October 2025 by Morgan AJ due to inadequate service and was re-enrolled on 12 and 14 November 2025. It was again removed by Janse van Nieuwenhuizen J for an affidavit stating that the attorney of the applicants has complied with a directive issued by Judge Morgan AJ when the matter was removed on 10 October 2025.
- [5] The matter was enrolled for 15 December 2025 on an unopposed basis, and it served before Nyathi J. Nyathi J granted an order that the applicants be released within a period of 10 (ten) days of date of the order. That 10 (ten) days expired on 02 January 2026.
- [6] The applicants are effectively seeking the implementation of the order of Nyathi J.

[7] The second applicant has also been incarcerated for 21 years and also seeks implementation of the order of Nyathi J that he be released on parole.

[8] The order granted by Nyathi J needs to be quoted in full. It reads:

“IT IS ORDERED THAT

1. Reviewing and setting aside the respondents’ recommendation(s) and decision(s) taken with regard to the reconsideration of possible placement on parole or day parole of the applicants;
2. The actions of the respondents to be procedurally unfair as it materially and adversely affects the legitimate expectations of the applicants due to their failure to give the applicants adequate notice of the nature and purpose of the proposed administrative action; and a reasonable opportunity to make representations;
3. The first respondent’s decision(s) is found to be irrational on the basis of relying on the advice of the Council of the second respondent that lacks the legal mandate to provide advice on parole matters for persons serving life sentence for crimes committed before October 2004;
4. The decision(s) of the respondents to be *ultra vires* for their failure to comply with mandatory and material procedure or condition prescribed by a provision in the Correctional Services Act, 111 of 1998;

5. In the event that the court grants Prayer 4, it is to be declared that the court has exclusive jurisdiction to reconsider possible placement of parole or day parole of the applicants;

5.1 The respondents are ordered to release the applicants on parole or day parole within a period of 10 days from the date of this order;

6. It is ordered that section 136(3)(b) of the Correctional Services Act 111 of 1998 to be inconsistent with section 9(1) and (3) of the Constitution – for the consideration of parole or day parole of inmates serving life for offenses committed prior to the commencement date of Chapter(s) IV, VI, VII and VIII;

7. Alternatively to Prayer 6 above, that section 136(3)(b) of the Act, be read down and interpreted to save it from being in conflict with the provisions of section 9(1) and (3) of the Constitution;

8. Further and/or alternative relief;

9. Ordering the respondents to pay the costs of this application jointly and severally, the one paying the others to be absolved.

BY ORDER.

REGISTRAR”

SERVICE OF THE APPLICATIONS

[9] When the matter was called before this court, counsel rose for the Minister, advising that the application for contempt was not properly served and advising that his client was unaware of the second application (the “**habeas corpus**” application). Further the court order of Nyathi J had not been properly served.

[10] As the failure to properly serve is a recurring theme in these proceedings, it needs to be stated that proper service on a Minister requires two acts of service, and the State Attorney needs time to obtain instructions and then to advise the Minister on the legal issues.

[11] Section 2(2) and (3) of the State Liability Act, 20 of 1957 read:

“(2) The plaintiff or applicant, as the case may be, or his or her legal representative must-

(a) after any court process instituting proceedings and in which the executive authority of a department is cited as nominal defendant or respondent has been issued, serve a copy of that process on the head of the department concerned at the head office of the department; and

(b) within five days after the service of the process contemplated in paragraph (a), serve a copy of that process on the office of the State Attorney operating within the area of jurisdiction of the court from which the process was issued.

(3) Upon receipt of the process contemplated in subsection (2), the State Attorney must-

- (a) without undue delay, send a written request to the head of the department concerned to provide the State Attorney with written instructions regarding the proceedings; and
- (b) within 10 days of receipt of the process, provide the head of department with legal advice on the merits of the matter.”

[12] It is a matter of concern that applications have been enrolled a number of times without proper service having been effected. Counsel for the Minister advised that he has instructions to challenge the order of Nyathi J on various grounds. These include that the application that preceded the order was not served properly on the Minister as it was not served on the State Attorney. He pointed out that the order of constitutional invalidity was obtained before Nyathi J without a rule 16A notice - an essential precursor to a constitutional challenge – and that the order contained alternatives which are inherently contradictory. As far as the two applications serving before me is concerned, it is common cause that they have not been served on the State Attorney.

[13] It bears noting that the order of Morgan AJ on 10 October 2025 had the effect of removing the matter from the roll to effect proper service on the respondents. This same issue served before Justice Van Nieuwenhuizen J in November 2025 and had ostensibly not been cured by the time the matter served before Nyathi J. Again, the two applications serving before me were not properly served on the State respondents. In light of the aforesaid, the two applications cannot proceed without proper service. The applicants have been granted numerous opportunities for effecting proper service and have again failed to properly serve these applications. These applications will be

struck from my roll and may only be enrolled again once proper service has been effected.

SUSPENSION OF THE ORDER OF NYATHI J

[14] As far as the proposed challenge to the order of Nyathi J is concerned, it is a matter of some import that it be done promptly.

[15] The court has a constitutional right to protect and regulate its affairs in terms of section 173 of the Constitution. It reads:

“173 Inherent power

The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”

[16] The court has the power to suspend an order that is to be challenged, where the interests of justice so require. In terms of rule 45A an order may be suspended to prevent irreparable harm or an injustice. This usually requires an application in terms of rule 45A. As the two applications serving before me as urgent applications were not properly served, the respondents have not had an opportunity to bring a substantive rule 45A application. In this instance it is apparent that the order granted by Nyathi J is about to be challenged for the reasons advanced above. In light thereof that it is to be challenged, execution of that order needs to be suspended in the interests of justice,

insofar as the order is not already suspended by operation of law. This power is exercised in terms of section 173 of the Constitution.

[17] The declaration of invalidity of statutes is a matter that can only take effect upon confirmation by the Constitutional Court. Those orders are therefore already suspended as a matter of law in terms of section 167(5) of the Constitution. The order should have stated this.

[18] In order to avoid uncertainty, I intend granting an order suspending the order of Nyathi J pending the institution of proceedings challenging it either through a rescission or through an appeal.

ORDER

[19] In the premises I make the following order:

1. The contempt application is struck from the roll due to lack of proper service on the respondents.
2. The **habeas corpus** application is struck from the roll due to lack of proper service on the respondents.
3. The two aforesaid applications are struck with costs on Scale B
4. The order of Nyathi J dated 15 December 2025 in case number 086097/25 is suspended pending finalisation of proceedings to be instituted by the respondents challenging the order through an application for rescission, alternatively an appeal.

5. In the event of the respondents failing to institute an application to rescind or appeal the order of Nyathi J within 30 days of this order, or within such extended period as may be granted by a court on application, the order of suspension shall lapse in respect of release of the applicants on parole.



LABUSCHAGNE J

JUDGE OF THE HIGH COURT

APPEARANCES

COUNSEL FOR APPLICANT : ADV MOLOPE-MADONDO

INSTRUCTED BY : LEBOGANG MOLOPE-MADONDO ATTORNEYS

COUNSEL FOR RESPONDENT: ADV PRINSLOO

INSTRUCTED BY : SCHARF ATTORNEYS