

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2022-058300

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

A handwritten signature in black ink, appearing to read "De Vos".

Date: 22 December 2023

In the matter between:

MOSHOESHOE MOKOBE ISHMAEL

APPLICANT

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

FIRST RESPONDENT

NATIONAL COUNCIL FOR CORRECTIONAL SERVICES

SECOND RESPONDENT

MINISTER OF POLICE

THIRD RESPONDENT

NATIONAL COMMISSIONER OF THE

SOUTH AFRICAN POLICE

FOURTH RESPONDENT

MFUNZANA MASIBULELE CHRIS

FIFTH RESPONDENT

MANDLA MATHAPHUNA

SIXTH RESPONDENT

JUDGMENT

[1] DE VOS AJ

- [1] The applicant, Mr Moshoeshoe, seeks the committal of the first respondent, the Minister of Justice and Correctional Services, for contempt of Court. The basis for the request for committal is the Minister's failure to comply with an order of this Court granting Mr Moshoeshoe parole. The first, fifth and sixth respondents oppose the relief. These respondents also launched a counter-application suspending the orders granted in this matter, pending the finalisation of a rescission application.
- [2] Mr Moshoeshoe is serving a life sentence at Johannesburg Correctional Centre. Mr Moshoeshoe was convicted in 2005 for a botched robbery committed in 2000.¹ Mr Moshoeshoe has applied for parole. On two occasions, the National Council for Correctional Services ("National Council") recommended that Mr Moshoeshoe be denied parole. On both occasions, the Minister accepted this recommendation and denied Mr Moshoeshoe parole.
- [3] Mr Moshoeshoe, aggrieved with this decision, launched an application to review the Minister's decision to deny him parole. Mr Moshoeshoe was successful in his review application. On 11 August 2023, the Court granted an order which reviewed the National Council's recommendation and the Minister's decision to refuse Mr Moshoeshoe parole. The Court did not remit the matter for reconsideration by the decision-makers but substituted the decisions. The Court ordered the Minister to release Mr Moshoeshoe within ten days of the order. The order, in essence, granted Mr Moshoeshoe parole. I will refer to this as the parole order.
- [4] The Minister, however, did not release Mr Moshoeshoe on parole. Mr Moshoeshoe then launched the first of three contempt applications. The first contempt application resulted in the first contempt order, granted on 12 September 2023, which held the Minister in contempt but afforded the Minister 10 days to explain the non-compliance with the parole order. The Minister did not respond, and Mr Moshoeshoe was not released. Mr Moshoeshoe then launched a second contempt application. This resulted in the second contempt order, dated 31 October 2023, which again held the

¹ S v Molimi and Another (249/05) [2006] ZASCA 43; 2006 (2) SACR 8 (SCA) (29 March 2006) is the judgment on conviction of the applicant.

Minister in contempt and provided ten days to explain the non-compliance. Again, the situation did not change. The Minister did not respond, and Mr Moshoeshoe launched a third contempt application. The third contempt application had teeth; it sought the committal of the Minister. It is this third contempt application that this Court heard on its urgent roll.

- [5] The Minister opposes the contempt application and seeks an order suspending the operation of the existing orders, pending the outcome of an application to rescind the three existing orders. The crux of the Minister's opposition is, to state it simply, that the Minister had no knowledge of any of the existing applications or orders. It was only on 21 November 2023 that the current contempt application came to the Minister's attention. None of the earlier applications or orders came to the Minister's attention, as they had not been properly served.
- [6] Service is not the most dazzling aspect of litigation. It hinges, generally, on the examination of a return of service. A return of service states, without adornment, that the Sheriff handed over a pleading to a specific person at a specified address. Its function, however, is indispensable to a fair and transparent legal process. The purpose of the procedural requirement of service is to give effect to fundamental principles of our legal system. Service is the practical method in which a party is informed of proceedings instituted against them. It is the concrete step that places a party in a position to decide whether they wish to oppose the relief sought against them, present the Court with their factual version, and submit arguments for the Court to consider.
- [7] Without compliance with this procedural safeguard, a party is denied every procedural right afforded in litigation. A party who does not know they are being sued cannot defend themselves or assert any of their rights. Worse, they will not even know that an order is being granted against them. A person who is unaware of proceedings against them is denied not only the right to be heard but also to be in Court and see that justice takes place openly. If service is defective, it permits proceedings and Court orders to be granted behind a person's back. Whilst there are specific instances where service is not required, this is not one of those cases.

- [8] Proper service reassures a Court that the proceedings are not taking place covertly and that a party's absence is a result of their election not to attend rather than not being informed of the hearing. It prevents orders from being taken by stealth.
- [9] Service of process against the Minister is statutorily prescribed. The State Liability Act, 20 of 1957, requires a two-step service process. First, the pleadings must be served on the Head of the Department and second on the State Attorney within five days of service on the Head of the Department. Parliament has implemented these service requirements fully aware of the broad scope of issues and frequency in which the Minister will be cited as a party to litigation, purely by virtue of the Minister's dual departmental role. The purpose of section 2(2) was explained by Makgoka JA in *Minister of Police v Molokwane*² as to ensure that the relevant executive authority (the Minister in this case) is "afforded effective legal representation in the matter by the State Attorney".
- [10] Service, in these proceedings, must then be tested against these standards. The review application was not served on the Minister's Head of Department nor on the state attorney within five days of service on the Head of Department. Similarly, the first and second contempt applications were not served on the Head of the Department nor on the state attorney. Not one of these requirements was met.
- [11] It is not only a matter of procedural formality, as the defective service meant, practically, that the Minister was unaware of the applications. The Court knows this as the Minister has revealed the correspondence between the parties the moment this litigation came to the Minister's attention. The response from the Minister was swift and transparent. It is also demonstrably clear, from this correspondence, that the Minister and those who work in his office first became aware of this litigation on 21 November 2023.
- [12] Mr Moshoeshoe's legal representative, Mr Marweshe, did not dispute that service was not affected in compliance with the State Liability Act. Mr Marweshe repeatedly submitted that three Courts had found the service to be sufficient. The submission must be considered in context. All three applications served in the unopposed Court, two of them in the urgent Court – on an unopposed basis. In none of the matters was the defective service raised by Mr Moshoeshoe's legal representatives. This

² 2022 JDR 1956 (SCA)

Court has the practice note and written submissions in all three of these matters. In not one of these documents does Mr Moshoeshoe's legal representatives bring to the Court's attention that the service was defective.

[13] The issue of service was, therefore, not a matter which was brought to the attention of any of the previous Courts dealing with this matter. None of the previous Courts were made aware of the error in the applications before them. It is on this basis, the existence of an error of which the Court was not aware, that the Minister has launched a rescission application. The Minister contends that these orders were erroneously granted, as there existed at the time of the order a fact of which the Court was unaware, which would have precluded the granting of the judgment and which would have induced the Court, if aware of it, not to grant the judgment. The defective service, contends the Minister, is such a fact.

[14] To make matters worse, the original notice of motion for the review application did not contain a stated day. The notice did not tell the Minister on what day relief was being sought. The absence of a stated day in the notice of motion renders the notice irregular.³ Even if the Minister had received the notice of motion, even if the Sheriff had placed it in the Minister's hand – the Minister would not have been in a position to attend Court to oppose the relief, as the notice did not provide a date for the hearing. Again, transparency of court proceedings generally requires that a party knows on what day to come to Court to see their matter being argued and considered by a court. The applicant's representatives failed to give the Minister notice of the day on which the matter would be heard.

[15] Curing such a defect would require the applicant's representatives to serve a notice of set down on the Minister. The notice of the set down of the review application, unhelpfully, was not served at all and was only uploaded onto caselines. In other words, aside from the defective service, the notice itself failed to provide the Minister with the information necessary to attend Court.

[16] It is against this background that the Minister seeks an order suspending the operation of the parole order and the two contempt orders. The Court is empowered

³ Mashaba v Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud In The Public Sector, Including Organs of State and Others (14261/21) [2022] ZAGPPHC 586 (16 August 2022); Meme-Akpta and Another v The Unlawful Occupiers of ERF 1168, City and Surban,44 Nugget Street, Johannesburg and Another (38141/2019) [2022] ZAGPJHC 482 (26 July 2022).

to grant such relief by virtue of its inherent powers, Rule 45A and section 173 of the Constitution. In fact, Rule 45A is specially crafted for exactly the set of circumstances before the Court. Mudua J in *Peach v Kudjoe*⁴ held that a litigant, against whom the decision which is the subject of an application for rescission was given, “can always approach a Court under Rule 45A to suspend its execution pending the finalisation of an application for rescission.” As a general rule, laid down in *Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO and Others*,⁵ a Court will only do so where injustice will otherwise ensue.

[17] Mr Raphahlalo, for the Minister, submitted that if the suspension order is not granted:

- a) The obligation to implement rescindable orders continues, with the risk of imprisonment for the contempt thereof.
- b) If implemented and the rescission application succeeds, the applicant will have to be re-imprisoned because the Minister cannot afford an offender who is not fully rehabilitated on parole.
- c) While on parole, the fact that he was released prematurely will expose him to stigma and rejection, and he will be prone to committing offences again.
- d) The Minister will always be at the risk of being sued in delict for any criminal acts committed by the applicant since he is not fully rehabilitated.

[18] In addition, Mr Raphahlalo submitted that parole is not a right but a privilege and the only right asserted by the applicant to be released is derived from the order, which is the subject of a rescission application. Of course, added Mr Raphahlalo, if the orders are rescinded, the applicant can still prosecute his review application.

[19] I find these submissions unassailable.

[20] As the applications were demonstrably defectively served, I conclude that the Minister has presented a basis for this Court to suspend the operation of the three existing court orders, specifically the parole order and the two contempt orders. It would be unjust to hold the Minister to orders obtained by stealth, in circumstances where the Minister has take the appropriate steps to challenge the orders.

⁴ (unreported, GP case no 2016/30120 dated 10 January 2018) at paragraph 16

⁵ 2011 (4) SA 149 (SCA) para 51

[21] Aside from the interest of the Minister, parole is a matter that involves important considerations of the victims of the crimes and society's interests. These would not be respected were Mr Moshoeshoe released on parole without proper ventilation of the issues. For all these reasons, the Court suspends the operation of the three orders granted in this matter.

[22] The suspension of the court orders would be a sufficient basis to disallow the present request for the Minister's committal. The Minister cannot be imprisoned for non-compliance with court orders obtained without the Minister's knowledge – where the validity of those orders is properly challenged. However, due to the importance of this matter, the Court will follow a belt and braces approach and consider Mr Moshoeshoe's application for the Minister's committal.

[23] The requirements for committal for contempt are the existence of an order, service of the order, non-compliance with the order, and the non-compliance must be wilful and mala fide. The question is whether the above-mentioned requirements have been established. Where imprisonment of the alleged contemnor is sought, as in this application, the criminal standard of proof applies. The applicant must prove the above-mentioned elements beyond a reasonable doubt.

[24] Assuming that the other requirements had been met, then mala fides would be presumed. The Minister is then expected to tender an explanation which, on the balance of probabilities, rebuts the inference of *mala fides*. When such an explanation is tendered, the onus to prove beyond reasonable doubt that the non-compliance was motivated by willfulness and *mala fides* is on the applicant. In *Fakie*, it was held:

“A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him- or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).”⁶

[25] On the facts before this Court, upon receipt of the second contempt order from the applicant's attorney on 21 November 2023, the orders were

⁶ *Fakie NO v CCII Systems (Pty) Ltd* (653/04) [2006] ZASCA 52; 2006 (4)SA 326 (SCA) para 7

given immediate attention by the Minister's legal advisers. The Minister has disclosed this correspondence to the Court, and they demonstrate that the Minister's legal advisors saw the order for the first time. The communication displayed the seriousness with which the order was treated. In an act of transparency, the applicant's attorney was included in the internal communication. Mr Raphahlelo submitted that this was a mark of openness and good faith. I agree.

[26] The Minister's team, armed with the parole order, investigated the matter. They discovered that not only was the Minister unaware, but the Head of the Department of Correctional Services and the State Attorney had no record of such applications and the orders concerned. The Minister then took steps to (1) apply for rescission of the orders and (2) seek the suspension of their operation pending finalisation of the rescission applications.

[27] It weighs with the Court that the Minister, through no fault of the Minister or his office, was facing the threat of imprisonment. Despite this threat, the Minister took a decision to, as Mr Raphahlalo submitted, "do the proper thing". The Minister elected not to avoid incarceration by simply complying with the orders - which appear on their face to have been improperly obtained. Rather, the Minister set out to ensure that the Court was provided with a full set of facts in determining whether Mr Moshoeshoe's release on parole was lawful.

[28] In this regard, Mr Raphahlalo submitted that delaying implementation of the orders until the application for the suspension thereof is decided cannot be evidence of malice on the part of the Minister. Whether the action was right or wrong is not the issue; the Minister did so because of a genuine belief that it was the proper thing to do.

[29] In the premises, I find that the explanation for the default is sufficient to rebut an inference, if any, of *mala fide*. The onus to prove *mala fides* beyond a reasonable doubt in the face of the Minister's explanation lies with the applicant. The applicant has not succeeded in proving any *mala fide*, let

alone beyond reasonable doubt. For these reasons, the application for contempt fails to satisfy the requirement of mala fides and fails to be dismissed.

[30] There are two matters that require consideration at this stage. The first is the issue of urgency. The applicant contended that the matter was urgent; it involved Mr Moshoeshoe's detention and allegations of contempt. The Minister's representative, Mr Raphahlelo, did not oppose urgency. I find that the matter is urgent.

[31] Lastly, the issue of costs. Mr Raphehlelo submitted that -

“We are here because the provisions relating to service were ignored, and orders were granted by default. I submit that the applicant failed the respondents in this regard. The applicant has been consistent in disregarding the law regulating service of process on state respondents because even the present application was not served on the State Attorney.”

[32] I, again, find these submissions unassailable. It also weighs with the Court that Mr Moshoeshoe's legal representatives, upon receipt of the Minister's explanation for his default, did not accept the error was, in fact, theirs, but to the contrary, doubled down and persisted with relief against the Minister on an urgent basis seeking punitive costs.

[33] I am mindful of the fact that Mr Moshoeshoe is protected by the *Biowatch rule*, as there is no allegation of vexatious litigation before me - and that service is not a matter that falls to him. On this basis, I cannot grant costs against Mr Moshoeshoe.

[34] However, it weighs with the Court that three court orders were sought and obtained surreptitiously and then persisted even after the discovery of the Minister's lack of knowledge of the applications. The Court also finds it instructive that both previous contempt orders mandated that the Minister be personally served. There is nothing on the record to show this was complied with. The Court had an exchange with Mr Marweshe regarding personal service of the previous orders, and the Court was not informed that there had been personal service. It appears that the applicant's legal representatives did not comply with either of these court orders. This means that not only did Mr Moshoeshoe's legal representatives not comply with the service provisions of the State Liability Act, but they also did not comply with two court orders requiring personal service on the Minister. In these circumstances, I reserve the costs of this application.

Order

[35] As a result, the following order is granted:

- a) The application for the committal of the first respondent is dismissed. The costs of the application are reserved.
- b) All existing orders granted in this matter thus far, specifically the order granted on 11 August 2023 by Khumalo J, 12 September 2023 by Retief J and 31 October 2023 by Van der Westhuizen J, are suspended pending the outcome of the rescission application. The costs of the suspension application are also reserved.



I de Vos
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Representative of the applicant:	M Marweshe
Instructed by:	Marweshe Attorneys
Counsel for the first respondent:	M Raphahlelo
Instructed by:	The State Attorney
Date of the hearing:	14 December 2023
Date of judgment:	22 December 2023