IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case Number: CCT __________
SCA Case Number: 33/2022

In the matter between: -

NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	**First Applicant**

and

DEMOCRATIC ALLIANCE	**First Respondent**
HELEN SUZMAN FOUNDATION	**Second Respondent**
AFRIFORUM NPC	**Third Respondent**

NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE that the abovenamed Applicant hereby applies to the above Honourable Court for an order in the following terms:

1. Granting the Applicant leave to appeal to the above Honourable Court against the judgment and order of the Supreme Court of Appeal under Case Number 33/2022 delivered on 21 November 2022;

2. If leave to appeal is granted, the appeal be upheld with costs;

3. Judgement and order of the Supreme Court of Appeal in the above mentioned case number be set aside and replace it with the following order:

    3.1 the judgement and order of His Lordship, Matojane J of the Gauteng Division of the High Court under Case Numbers 45997/2021, 46468/2021 and 46701/2021 which was delivered on 15 December 2021, is set aside and the application is dismissed with costs;

    3.2 the Respondents be ordered to pay the Applicant's costs in this Court; and

    3.3 further and or alternative relief as this Honourable Court may deem fit.

4 Copies of the judgment of the Supreme Court of Appeal and High Court are annexed to the Founding Affidavit in support of this application marked Annexure "**A**" and "**B**", respectively.

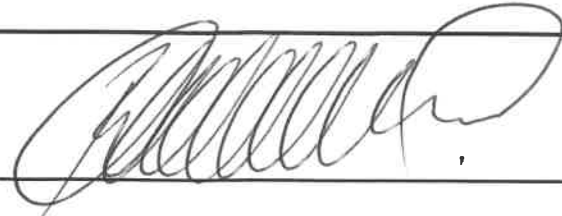
TAKE NOTICE FURTHER that the affidavit of the National Commissioner of Correctional Services, **MAKGOTHI SAMUEL THOBAKGALE**, together with the annexures thereto, will be used in support of the application.

TAKE NOTICE FURTHER that the First Applicant has appointed the Office of the State Attorney, Pretoria at the address set out below as the address at which service of all documents in these proceedings will be accepted.

TAKE NOTICE FURTHER that any party wishing to oppose this application is required, subject to the directions issued by this Court, within 10 days from the date on which this application is lodged, to respond thereto in writing, indicating whether or not the application for leave to appeal is being opposed and if so, the grounds for such opposition (if any).

TAKE NOTICE FURTHER that if no such notice of intention to oppose is given, the Applicant will request the Registrar to place the matter before the Chief Justice to be dealt with in terms of Rule 11(4).

SIGNED AT **PRETORIA** ON THIS THE ___________ DAY OF **DECEMBER 2022**



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JOHANNESBURG

AND TO: **THE REGISTRAR**

SUPREME COURT OF APPEAL

BLOEMFONTEIN

AND TO: **MINDE SCHAPIRO AND SMITH INC.**

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case Number: CCT ________
SCA Case Number: 33/2022

In the matter between: -

NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	**First Applicant**

and

DEMOCRATIC ALLIANCE	**First Respondent**
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AFRIFORUM NPC	**Third Respondent**

FOUNDING AFFIDAVIT: APPLICATION FOR LEAVE TO APPEAL

I, the undersigned,

MAKGOTHI SAMUEL THOBAKGALE

do hereby declare the following under oath and state that:

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1. I am an adult male holding the position of National Commissioner of Correctional Services with offices situated at number 124 WF Nkomo Street, Poyntons Building, Pretoria, Gauteng Province.

2. The facts set out in this affidavit are, save where otherwise indicated, within my personal knowledge, and are true and correct. To the extent that I rely on the facts which are not within my personal knowledge, I verily believe them to be true and correct.

3. Any legal submissions made herein, are based on the guidance and advice provided by my legal representatives, which advice I believe and accept.

4. By virtue of my position, I am duly authorised to depose to this affidavit with a view seeking relief as set out in the Notice of Motion in respect of this matter.

5. This application for leave to appeal to the above Honourable Court against the judgment and order of the Supreme Court of Appeal under Case Number 33/2022 delivered on 21 November 2022[1], which is attached hereto marked Annexure "**A**".

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[1] The Supreme Court of Appeal ("the SCA") Judgment.

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6. The Supreme Court of Appeal dismissed the First Applicant's appeal against the judgment of His Lordship, Matojane J of the Gauteng Division of the High Court under Case Numbers 45997/2021, 46468/2021 and 46701/2021 which was delivered on 15 December 2021[2], which is attached hereto marked Annexure "**B**".

PRINCIPLES UNDERPINNING THIS COURT'S JURISDICTION.

7. **A Constitutional issue and interests of justice**

7.1 I am advised that section 167 of the Constitution of the Republic of South Africa ("the Constitution") regulates jurisdiction in relation to matters that may be adjudicated upon by this Honourable Court. Applications for leave to appeal to this Court are regulated by section 167(6) of the Constitution read with Rule 19 of the Rules of this Honourable Court.

7.2 Section 167(6) provides for direct appeals from another court, with leave of this Court, when it is in the interests of justice to do so. In terms of Rule 19(6)(a) this Court shall decide whether or not to grant an appellant leave to appeal.

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2 The High Court Judgement.

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7.3 I am further advised that it is trite that this Court will exercise its discretion to grant leave to appeal when the application for leave to appeal raises a constitutional issue and when granting leave to appeal is in the interests of justice.

7.4 This Court determines whether it is in the interests of justice to grant leave to appeal through a careful and balanced weighing up of all relevant factors. I am advised that the considerations, in this regard, could be varied and are often case-specific but informed by the broad requirement of whether by hearing the case the interests of justice will be advanced[3].

7.5 In considering the interests of justice, prospects of success, although not the only factor, are obviously an important aspect of the enquiry. An applicant who seeks leave to appeal must ordinarily show that there are reasonable prospects that this Court will reverse or materially alter the decision of the SCA[4].

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3 **Magajane v Chairperson, North West Gambling Board and Others** 2006 (5) SA 250 (CC) at para [29]; **Radio Pretoria v Chairperson, Independent Communications Authority of South Africa and Another** 2005 (4) SA 319 (CC) at para [19].

4 **S v Boesak** 2001 (1) 912 (CC) at para [12].

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7.6 It is respectfully submitted that this matter and/or application for leave to appeal raises a constitutional issue by reason of the following:

7.6.1 The Supreme Court of Appeal found that the National Commissioner's decision is unlawful and unconstitutional[5]. It should further, be noted that the SCA found that the impugned decision is invalid in terms of section 6(2)(b) of the Promotion of Administrative Justice Act[6], because a mandatory and material condition prescribed by the empowering legislation was not met.

7.6.2 The National Commissioner's decision entails the exercise of public power in terms of legislation as envisaged in the definition of administrative action in the provisions of PAJA, which draws its reason for existence from section 33 of the Constitution.

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5 **SCA Judgment** p 24 at paras [53] and [56].

6 Act 3 of 2000 ("PAJA") 6 **S v Boesak** 2001 (1) 912 (CC) at para [12].

6 **SCA Judgment** p 24 at paras [53] and [56].

6 Act 3 of 2000 ("PAJA").

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7.6.3 There is authority to the effect that under our new constitutional order the control of public power is always a constitutional matter. The court's power to review administrative action no longer flows directly from common law but from PAJA and the Constitution itself[7].

7.6.4 This matter also involves the interpretation and application of section 79 of the Correctional Services Act[8] ("the Correctional Services Act") together with regulations promulgated thereunder, in particular, Correctional Services Regulation 29A(7).

7.6.5 The object of the enactment of the current Correctional Services Act which replaced the old Correctional Services Act No. 8 of 1959 was to change the law governing the correctional system with a view to giving effect to the Bill of Rights in the Constitution, in particular, the provisions with regard to inmates[9].

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7 **Bator Sta Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others** 2004 (7) BCLR 687 (CC) at para [22].

8 Act 111 of 1998.

9 Preamble to the **Correctional Services Act**.

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7.6.6 The purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society by, amongst others, detaining inmates in safe custody whilst ensuring their human dignity[10]. To this end, the primary purpose of the Act is to ensure that all inmates are detained in safe custody under conditions of human dignity[11]. The right to human dignity is regulated by section 10 of the Constitution. This right is further entrenched in terms of section 35(2)(e) of the Constitution in relation to inmates.

7.6.7 I am advised that questions arising from the interpretation and application of legislation that has been enacted to give effect to constitutional rights or in compliance with the legislature's constitutional obligations are constitutional matters[12].

7.6.8 The medical parole also relates to a sentenced which is being served for contempt of a Constitutional Court order,

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[10] Section 2(b) of the **Correctional Services Act.**

[11] **Sonke Gender Justice NPC v President of the Republic of South Africa and Others** [2020] ZACC 26 at paras [1] and [16]; see Long title to the Act as referred to in foot note 14 in para [16] of this case.

[12] **Iain Currie and Johan de Waal, The Bill of Rights Handbook,** 6th Ed at p 99 para 5.3; **NEHAWU v University of Cape Town** 2003 (3) SA 1 (CC) at para [14]

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for which the *amicus curiae* submits that an offender serving a sentence for such an order, is not a sentenced offender for the purpose of the Correctional Services Act.

8 **An arguable point of law of general public importance.**

8.1 In addition to the above, this matter raises an arguable point of law of general public importance which ought to be considered by this Court, as envisaged in section 167(3)(b)(ii) of the Constitution. This contention is based on the fact that this matter raises the following arguable points of law which are of general public importance:

8.1.1 Whether the National Commissioner is entitled or has power to place an inmate on medical parole without a positive recommendation by the Medical Parole Advisory Board ("the MPAB or the Board")[13], and

8.1.2 Whether it was legally correct for the SCA including the Court *a quo* to make use of Correctional Services

[13] SCA Judgment p 20 para [43].

GB M.S

Regulation 29A(7) to interpret the provisions of section 79 of the Act[14].

8.2 The fact that an arguable point of law is of public importance does not mean that the requirement will be met only if the interests of society as a whole are implicated. As was found by the above Honourable Court, English courts have found that an issue is of general public importance when it is likely to arise again in other cases and where its determination would affect a large class of persons rather than merely the litigants[15].

8.3 Furthermore, such issue does not have to be of importance to all citizens or the whole nation in order to be of general public importance, it is enough to be of importance to a sufficiently large section of the public.

8.4 In summary, for a matter to be of general public importance, it must transcend the narrow interests of the litigants and implicate the interest of a significant part of the general public[16].

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[14] **SCA Judgment** p 17 para [36].

[15] **Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd** 2015 (3) SA 479 (CC) at para [26].

[16] *Id* at para [26].

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8.5 The above questions of law transcend the narrow interests of the litigants before this Honourable Court and affect the interest of a significant part of the general public, in particular, inmates and their families including and the rest of the public who do not even have incarcerated family members. This may also include practising legal practitioners to whom certainty on the determination of these issues is of importance.

8.6 It is my contention that it is an arguable point of law of general public importance, whether medical parole constitutes a lesser punishment than that imposed by the Constitutional Court.

8.7 It is, therefore, my contention that the issues raised by this application for leave to appeal fall within the purview of the provisions of section 167(3)(b) of the Constitution read with Rule 19(6)(a) of this Honourable Court.

8.8 Leave to appeal should, accordingly, be granted for the aforesaid reasons.

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GROUNDS OF APPEAL.

9 **MISDIRECTIONS OF THE HIGH COURT.**

The High Court, erred in fact and law:

9.1 in finding and/or making a ruling, in paragraph [13] of the High Court judgment, that the Applicant cannot allege that the matter is not urgent when they conceded the urgency of Part A and when the application was treated as urgent all along.

9.1.1 It is not correct that the Applicant conceded the urgency. The Applicant, in particular, did not oppose Part A of the application only with specific reference to the production of the Rule 53 record.

9.1.2 Urgency was never conceded to at any stage and this is very clear from the minutes of the Judicial Case

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Management Meeting that was held with the Deputy Judge President on 8 October 2021.

9.2 in finding and/or making a ruling, in paragraph [25] of the judgment, that on the same day, Dr Mafa produced a report that Mr JG Zuma "*be moved to a specialist medical high care unit to be assessed further to ensure that his health is not prejudiced during this period and that a further specialist medical investigation be done to verify and rule out other challenges that could have been missed during the examination.*"

9.2.1 This report was issued by Brigadier-General Mdutywa (Dr). Dr Mafa was only referred to in the said report for enquiry purposes.

9.2.2 This fact is supported by the fact that the said report was signed by Brigadier-General Mdutywa.

9.3 in finding and/or making a ruling, in paragraph [27] of the judgment, that on 28 July 2021, Dr Mafa made an application for Mr JG Zuma's medical release to a specialist medical facility.

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9.3.1 This report was issued by Brigadier-General Mdutywa (Dr). Dr Mafa was only referred to in the said report for enquiry purposes.

9.3.2 This fact is supported by the fact that the said report was signed by Brigadier-General Mdutywa.

9.4 in finding and/or making a ruling, in paragraph [28] of the judgment, that the recommendation that Mr JG Zuma be moved to a high-care unit was not because he was found to be terminally ill or physically incapacitated as required by the Act.

9.4.1 This finding is in contradiction of the court's own finding in paragraph [29] of the judgment to the effect that, on same day (28 July 2021), in the application for medical parole, *"Dr Mafa stated that the Third Respondent was suffering from a* ***terminal*** *disease or condition that is chronic and progressive and that he further stated that the Third Respondent's condition has progressively deteriorated since 2018, and is unable to perform the activities of daily living or self-care..."*

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9.5 in finding and/or making a ruling, in paragraph [37] of the judgment, that "*the Board produced a report that concluded that while the Third Respondent suffers from multiple comorbidities, he is not terminally ill and it's (sic) not physically incapacitated as required by the Act.*"

9.5.1 The Board made no mention of the fact that Mr JG Zuma is not terminally ill or not physically incapacitated.

9.5.2 The Board, amongst others, merely stated that:

> "*From the information received, the applicant suffers from multiple comorbidities. His treatment has been optimized and all conditions have been brought under control. From the available information in the reports, the conclusion reached by the MPAB is that the applicant is stable and does not qualify for medical parole according to the Act ...*"

9.5.3 The fact that a patient's treatment has been optimized and that his or her condition has been brought under control does not imply that he or she has been cured from a

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terminal disease or condition. This contention was part of the Applicant's argument and, in its judgment, the court did not engage with the Applicant's submission in this regard at all.

9.5.4 The statement by the MPAB to the effect that Mr JG Zuma was stable and does not qualify for medical parole according to the Act, is misguided.

9.5.5 The jurisdictional factors, in terms of Section 79(1)(a) of the Act, are that an offender is suffering from a terminal disease or condition or that such offender is physically incapacitated as to severely limit daily activity or inmate self-care. Being stable does not appear anywhere in the text of the provisions of the Correctional Services Act.

9.5.6 An offender may be stable but not cured from a terminal condition and it was not for the MPAB to read or insert the words "*stable*" into the wording of the Correctional Services Act. The High Court misdirected itself in accepting this interpretation of the provisions of the Correctional Services Act.

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9.5.7 There is nowhere, in its recommendation where the MPAB states that Mr JG Zuma is not terminally ill or that he is not physically incapacitated as stated in paragraph 37 of the judgment.

9.6 in finding and/or making a ruling, in paragraph [39] of the judgment, that it is not disputed that the Commissioner did not consider the other grounds in section 79(1)(b) and (c) of the Act.

9.6.1 The fact that the National Commissioner did consider the said grounds of the Act is abundantly clear form the National Commissioner's Answering Affidavit on the Hellen Suzman Foundation and the Afriforum applications.

9.6.2 This was also included in the National Commissioner's Heads of Argument. The Court did not engage with this argument or submission at all.

9.7 In relying and/or making reference to the repealed Correctional Services Act 8 of 1959 ("the repealed or old Correctional Services Act") in paragraph [41] of the judgment.

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9.7.1 The repealed Correctional Services Act had no relevance in the matter before court.

9.7.2 The matter before court was regulated by the provisions of the new Correctional Services Act 111 of 1998.

9.8 in finding and/or making a ruling, in paragraph [44] of the judgment, that the offenders' trusted medical practitioners no longer make a diagnosis of the medical illness or physical incapacity.

9.8.1 In terms of section 79(2)(a) of the Correctional Services Act an application for medical parole shall be lodged in the prescribed manner by a medical practitioner or a sentenced offender or person acting on his behalf. This application may be lodged by any medical practitioner. An offender's trusted medical practitioner is not forbidden to do so.

9.8.2 Section 79(2)(b) of the Correctional Services Act provides that an application lodged by a sentenced offender or a person acting on his behalf, in accordance with subsection (2)(a)(ii) shall not be considered by the National Commissioner, the Correctional Supervision and Parole

GB M.S

Board or the Minister, as the case may be, if such an application is not supported by a written medical report recommending placement on medical parole. The Correctional Services Act does not place any prohibition in relation to the offender's trusted medical practitioner in this regard.

9.8.3 According to the provisions of Section 79(3)(a) of the Correctional Services Act, the report of the MBAB, is an additional report to the medical report referred to in subsection 2(c), which must be taken into consideration by the National Commissioner in the exercise of his discretion on whether to grant medical parole or not. The report referred to in subsection 2(b) and (c) may be produced by any doctor including the offender's trusted medical practitioner.

9.9 in finding and/or making a ruling, in paragraph [49] of the judgment that the Legislature took the responsibility to diagnose terminal illness or severe physical incapacity away from the treating physician and left it to an independent Board to make an expert medical diagnosis.

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9.9.1 The Board does not make a medical diagnosis of the offender. It only considers the reports of the medical experts submitted and make a recommendation to the National Commissioner on whether the diagnosis made in the reports satisfy the requirements of Section 79 of the Act.

9.9.2 Medical diagnosis is done by the medical practitioner examining the offender and not the Board.

9.10 in finding and/or making a ruling, in paragraph [57] of the judgment that if the recommendation of the Board is positive, the Commissioner must then decide whether Section 79 (1) (b) and (c) are satisfied.

9.10.1 Even if the recommendation of the Board is positive, the National Commissioner must, over and above determining whether Section 79 (1) (b) and (c) are satisfied, determine whether the recommendation of the Board satisfies the requirements of Section 79 (1) (a) of the Correctiona Services Act.

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9.10.2 The National Commissioner must not just assume from the mere fact that there is a positive recommendation of the Board that the requirements of Section 79 (1) (a) of the Act have been satisfied.

9.10.3 The finding of the High Court in paragraph [57] of the judgment is based on its interpretation of the Regulations to give meaning to the provisions of the Correctional Services Act. The High Court did not engage the submissions of the National Commissioner that it was not entitled to use the Regulations to interpret the Act.

9.11 in finding and/or making a ruling, in paragraph [58] of the judgment that the recommendation of the Board is ordinarily decisive and binding on the Commissioner.

9.11.1 Whilst the recommendation of the Board is important it is not binding on the National Commissioner as the Act confers a discretion on the National Commissioner in the consideration of the application for the placement of an offender on medical parole.

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9.11.2 If the Legislature intended that the recommendation of the Board to be decisive and binding, it would have stated so and not accord the National Commissioner with the discretion on whether to grant medical parole or not.

9.11.3 National Commissioner must consider all the available information, including the medical records and reports together with the recommendation of the Board, before taking a decision on the application for medical parole.

9.12 in finding and/or making a ruling, in paragraph [60] of the judgment, that the National Commissioner has impermissibly usurped the statutory functions of the Board by considering the reports of Dr Mafa and Dr Mphatswe and in finding, in paragraph [61] that the decision by the National Commissioner to rely on the reports of Dr Mafa and Dr Mphatswe to overturn the recommendation of the Board is irrational, unlawful and unconstitutional.

9.12.1 The Board is not the decision maker, it only makes a recommendation to the National Commissioner and it is the National commissioner who must make the decision.

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9.12.2 As the decision maker, the National Commissioner was reasonably expected to consider all the information that was placed at his disposal to enable him to make a sound, rational and reasonable decision.

9.13 in finding and/or making a ruling, in paragraph [62] of the judgment, that Dr Mafa, in completing the medical parole application form does not state that Mr JG Zuma suffers from a terminal disease or condition which is irreversible with poor prognosis and irremediable by available medical treatment and requires continuous palliative care and will lead to imminent death within a reasonable time.

9.13.1 This finding is in contradiction of the court's own finding in paragraph [29] where the court states that Dr Mafa stated that Mr JG Zuma is suffering from a terminal disease or condition that is chronic and progressive.

9.13.2 The Correctional Services Act does not prescribe or require from a medical practitioner to state that the condition is irremediable by available medical treatment and that it requires continuous palliative care and will lead to imminent death within a reasonable time.

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9.13.3 The High Court has also not considered the contents of the medical reports and made its own determination on the medical condition of Mr JG Zuma. It only considered what was not stated by the Reports of Dr Mafa and Dr Mphatswe in coming to its conclusion that Mr JG Zuma's application did not qualify for medical parable.

9.13.4 The requirement for filing of a Record of the decision maker in review applications is to enable the Court to make its own assessment of the decision taking the Record into consideration, which the Court did not do.

9.14 in finding and/or making a ruling, in paragraph [67] of the judgment, that Dr Mafa's response to question 6 of the addendum to the medical parole application form, which refers to medical incapacity does not refer to physical incapacity.

9.14.1 In accordance with the formulation of question 6 of the addendum to the medical parole application form, the phrase medical incapacity may be used interchangeably with physical incapacity.

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9.14.2 The High Court should have also made its own determination based on the medical information and records on whether Mr JG Zuma is terminally ill or is rendered physically incapacitated as a result of an injury, disease or illness more so that it substituted the decision of the National Commissioner with its own decision.

9.15 in finding and/or making a ruling, in paragraph [71] of the judgment, that the reasons given by the National Commissioner are not connected with the requirements for medical parole and are not authorized by the empowering provision and that the National Commissioner acted irrationally and considered irrelevant considerations.

9.15.1 In making this finding, the high Court completely ignored paragraph 13 of the reasons of the National Commissioner where the National Commissioner states that having considered all the relevant information and he was satisfied that Mr JG Zuma meets the criteria in section 79(1) of the Correctional Services Act to be placed on medical parole.

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9.15.2 The aforesaid statement by the National Commissioner, is in any event, supported by the Rule 53 record as amplified in the National Commissioner's Answering Affidavit.

9.16 in finding and/or making a ruling, in paragraph [74] of the judgment, that the National Commissioner failed to consider other jurisdictional requirements of section 79 of the Correctional Services Act, that the risk of re-offending is low.

9.16.1 The mere fact that Mr JG Zuma is not happy with way he was incarcerated does not presupposes that he will reoffend.

9.16.2 Whether the offender will reoffend or not must be based on evidence and not be assumed based on a statement uttered displaying his dissatisfaction.

9.17 in finding and/or making a ruling, in paragraph [74] of the judgment, that the National Commissioner failed to comply with a mandatory and material condition that Mr JG Zuma is terminally ill or physically incapacitated and that the National Commissioner was influenced by an error of law in believing that he was entitled to

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grant medical parole when the Board has concluded that Mr JG Zuma did not meet the requirements for release on parole.

9.17.1 This finding is in contradiction of the High Court's own finding in paragraph [29] of the judgment as stated above.

9.17.2 The finding is also not based on an assessment of the medical evidence which were considered by the National Commissioner.

9.18 in finding and/or making a ruling, in paragraphs [91] of the judgment, that the kind of challenge presented in this matter is that the Constitutional Court has already determined that 15-month direct imprisonment was the only just and equitable order to make under the circumstances and has rejected other lesser forms of punishment. The fact that a court has sentenced an offender to direct imprisonment does not preclude the offender concerned from being considered for parole (in this instance medical parole).

9.19 in finding and/or making a ruling, in paragraph [93] of the judgment, that the National Commissioner's intervention has resulted in Mr JG Zuma enjoying nearly three months of his

GB M.S

sentence sitting at home in Nkandla not serving his sentence in any meaningful sense and that the fact that Mr JG Zuma addressed his supporters at a virtual prayer meeting implies that he is not terminally ill or severely incapacitated and he seems to be enjoying normal life.

9.19.1 Mr JG Zuma has not been released to enjoy staying at home. He is still serving his sentence that was duly imposed by the Constitutional Court albeit under medical parole in the community corrections system.

9.19.2 Parole is a form of punishment which is served by an inmate within the system of community corrections in terms of Chapter VI of the Act.

9.19.3 Suffering from a terminal disease does not imply that a person cannot talk.

9.20 in finding and/or making a ruling, in paragraphs [95] and [96] of the judgment that the consequential relief, sending Mr JG Zuma back to prison to do time and order that the time spent on medical parole should not count towards fulfilling his sentence, will not

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impact him negatively and that Mr JG Zuma will unduly benefit from a lesser punishment than that imposed by the Constitutional Court.

9.20.1 Mr JG Zuma was not a party to the decision to grant him medical parole and as a result of the decision he was released to the care of his wife.

9.20.2 The just and equitable remedy requires the High Court to take this into consideration. The Respondents in their application were seeking a public law remedy for administrative justice of advancing efficient and effective public administration based on the Constitution.

9.20.3 When the High Court ordered the reincarceration of Mr JG Zuma, it utilized public law to impose a private law remedy but failed to justify why it had to do so.

9.21 in finding and/or making a ruling that the court was in a good position and qualified as the National Commissioner to make a decision and that it would be just and equitable to make a substitution order.

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9.21.1 The High Court failed to recognize that the law itself placed the administrative action of determining medical parole in the hands of the National Commissioner.

9.21.2 It has no expertise of determining medical parole hence it did not consider the relevant medical evidence which was before the National Commissioner and as a result, it misconstrued the provisions of the Correctional Services Act.

9.22 Lastly. in issuing a declaratory order in terms of section 71(1)(a) of the Correctional Services Act 111 of 1998 ("the Act") read with regulation 29A and 29B promulgated in terms of the Correctional Services Act. Section 71(1)(a) of the Act has no relevance in this matter.

10 **MISDIRECTIONS OF THE SUPREME COURT OF APPEAL**.

10.1 Firstly, the SCA erred in failing to accord section 79 of the Act its rightful and correct interpretation. It is common cause that the decision of the National Commissioner to approve the placement of Mr JG Zuma on medical parole was taken in terms of section

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75(7)(a) read with section 79 of the Correctional Services Act. The provisions of both the aforesaid sections of the Correctional Services Act confer a discretion on the National Commissioner whether or not to approve placement of an inmate serving a sentence of incarceration for 24 months or less on medical parole.

10.2 Section 79(1) of the Correctional Services Act sets out three substantive requirements or jurisdictional factors which have to be considered by the decision-maker during the process of the consideration of the application for the placement of an inmate on medical parole, namely:

(a) A terminal disease or physically incapacity;

(b) low risk of re-offending; and

(c) appropriate arrangements for treatment and supervision after release.

10.3 The National Commissioner exercised the discretion conferred upon him in terms of the Correctional Services Act judiciously, by

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amongst others, considering the following positive factors that were in favour of Mr JG Zuma's placement on medical parole, namely that:

10.3.1 A medical finding by Dr Mafa which was accompanying the application for medical parole, as referred to in paragraph [7] of the SCA judgment, in which the following is stated, namely, that:

10.3.1.1 Mr JG Zuma is suffering from a terminal disease or condition that is chronic and progressive in nature which has deteriorated significantly;

10.3.1.2 Mr JG Zuma was unable to perform daily activities and self-care and was under full-time comprehensive medical care of the medical team; and

10.3.1.3 Medical parole was recommended on the basis of medical/ physical incapacity.

10.3.2 On the basis of the above medical findings, the National Commissioner reasonably believed that Mr JG Zuma's

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application squarely fell within the provisions of section 79(1)(a) of the Correctional Services Act.

10.3.3 The fact that Mr JG Zuma was ill and rendered physically incapacitated was also confirmed by the Affidavits of the Head of the Estcourt Correctional Centre and the Acting Regional Commissioner: Kwazulu-Natal with whom the National Commissioner had held a meeting before making the decision.

10.3.4 Evidence in support of the above submissions is part of the record that served before the SCA and the High Court. However, just like what the High Court did, the SCA decided to only briefly refer to Dr Mafa's finding without even elaborating on it and its legal implications.

10.3.5 It is, therefore, my contention that the finding of the SCA to the effect that the decision of the National Commissioner is invalid in terms of section 6(2)(b) of PAJA, because a mandatory and material condition prescribed by the

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empowering legislation was not met[17], is incorrect and stands to be set aside by this Honourable Court.

10.3.6 This finding is also relevant to further grounds of appeal that are dealt with herein below.

10.4 Secondly, the SCA erred in answering the question as to whether the National Commissioner is entitled or has the power to approve the placement of an inmate on medical parole, without the Board's positive recommendation, by elevating the role of the Board above that of the decision-maker (the National Commissioner) on whom the statute confers the discretion whether or not to place an inmate on medical parole. This error of judgment by the SCA, is patently evident from the from the following findings, namely:

10.4.1 That the decision of the National Commissioner was unlawful and unconstitutional on the basis that if the Board's recommendation is negative, that is the end of the matter, and the National Commissioner cannot lawfully grant parole[18]. Having made this conclusion, the Court

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17 **SCA Judgment** p 24 para [53].

18 **SCA Judgment** p 24 para [53].

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proceeded to state that the decision was invalid in terms of section 6(2)(b) of PAJA because a mandatory and material condition prescribed by the empowering legislation was not met;

10.4.2 That the Board's recommendation holds sway[19] (*over the National Commissioner's decision-making power*); Emphasis added.

10.4.3 That the National Commissioner's discretion to release an inmate on medical parole is not triggered unless the Board makes a positive recommendation on the appropriateness to grant medical parole which is based on a determination in terms of section 79(1)(a) as to the inmate's terminal illness or physical condition[20];

10.4.4 That once the Board has properly applied its mind and concluded that an inmate does not suffer from a terminal

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[19] **SCA Judgment** p 22 para [47].

[20] **SCA Judgment** p 23 para [50].

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illness or physical incapacity or physical incapacity, the Commissioner is not entitled to grant medical parole[21];

10.4.5 That it is not within the National Commissioner's remit to go beyond the Board's recommendation and analyse the various medical reports himself[22].

10.5 In elevating the Board's recommendation above the discretion conferred on the National Commissioner by the Correctional Services Act, the SCA relies on the provisions of the Correctional Services Regulation 29A(7) which provides as follows:

"(7) *The Medical Parole Advisory Board must make a recommendation to the National Commissioner, the Correctional Supervision and Parole Board or the Minister as the case may be, on the appropriateness to grant medical parole in accordance with section 79(1)(a) of the Act. If the recommendation of the Medical Parole Advisory Board is positive, then the National Commissioner, the Correctional Supervision and Parole Board or the Minister, as the case may*

[21] **SCA Judgment** p 23 para [51].

[22] **SCA Judgment** p 24 para [52]

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be, must consider whether the conditions stipulated in section 79(1)(b) and (c) are present. " [Emphasis added]

10.6 I am advised that the above findings and reliance by the SCA on the provisions of Regulation 29A(7) to interpret section 79 of the Correctional Services Act, are fatally flawed by reason of the following:

10.6.1 Section 79(1) of the Correctional Services Act, the power to consider the placement of a sentenced offender on medical parole lies with the National Commissioner.

10.6.2 However, section 75(7)(a) of the Correctional Services Act confers a discretion to place a sentenced offender on medical parole lies with the National Commissioner.

10.6.3 In other words, it is the National Commissioner who not only considers to place a sentenced offender on medical parole but also who must approve an offender's placement on medical parole.

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10.6.4 However, on the interpretation of the provisions of Regulation 29A(7), once the Medical Parole Advisory Board, has made a positive recommendation, the decision-maker, cannot exercise any discretion. The decision-maker must merely consider the remaining requirements. i.e. whether the conditions stipulated in sub-section (1)(b) and (c) of section 79 of the Correctional Services Act are present or complied with, whereafter he must grant parole[23]. As such, Regulation 29A(7) restricts or takes away the decision-maker's discretion. In so doing it enlarges the interpretation of section 79(1) by adding a substantive requirement which is not prescribed by the original statute. The SCA contends that this is not the case[24].

10.6.5 In terms of Regulation 29A(7) the National Commissioner, when considering the placement of an offender on medical parole, does not have to consider whether "*the offender is indeed suffering from a terminal disease or condition or if such offender is rendered physically incapacitated".* The SCA refers to the Board as the ultimate "decision-maker" on

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23 **SCA Judgment** p 23 para [50].

24 **SCA Judgment** p 17 para [36].

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this issue[25], which is legally incorrect as the Board must only make a recommendation.

10.6.6 The Board cannot be regarded as a decision-maker. It is well understood and correct that the Board is an expert body, even though the nature of its expertise have never been properly considered by both the High Court and the SCA. Both Courts assumed that the Board's expertise extends to the nature of the terminal illness suffered by Mr JG Zuma and as such qualified to make a definite determination of the whether the illness is terminal or not.

10.6.7 Such an approach is not just superficial but completely wrong and based on false assumptions.

10.6.8 On the interpretation of both the High Court and the SCA, the National Commissioner has no say on whether the offender is terminally ill or not. It is undesirable that the decision-maker must simply rubber stamp the Board's recommendation[26].

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[25] **SCA Judgment** p 24 para [52].

[26] **Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)** 2006 (2) SA 311 (CC) at para [542]

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10.6.9 The National Commissioner as the decision-maker is required to apply his mind and decide whether to accept such a recommendation regard being had to all the information placed before him. He must satisfy himself that the recommendation is appropriate within the meaning of section 79(1) of the Correctional Services Act. This submission is reinforced by the fact that in terms of section 79(3)(a) of the Correctional Services Act, the Board must provide its report to the National Commissioner, in addition to the medical report referred to in section 79(2)(c) of the Correctional Services Act. In other words, section 79(3)(a) of the Correctional Services Act empowers the National Commissioner to consider the Board's report as an additional report. He cannot, therefore, accept the recommendation of the Board simply because it was made by an expert body[27].

10.6.10 Without providing any details in relation to the entire record that was placed before the National Commission, it would suffice to refer only to Dr Mafa's medical finding as correctly referred to in paragraph [7] of the judgment of

[27] *Ibid.*

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the SCA[28]. It is important to note that Dr Mafa made a medical finding which is in line with the requirements of section 79(1)(a) of the Correctional Services Act and the National Commissioner could not simply ignore such a finding and rubber stamp the recommendation of the Board. It is strange that the Board simply ignored the said finding and did not even comment on it in its recommendation to the National Commissioner. This evidence was laid bare before the SCA.

10.6.11 The SCA acknowledges that Dr Mafa who completed the application for the placement of Mr Zuma on medical parole stated that Mr Zuma suffers from a terminal disease or condition. The SCA then states that Dr Mafa's answer to the question whether the condition has deteriorated permanently or reached an irreversible state, is to the effect that the condition has deteriorated significantly[29]. After the acknowledgment of this fact, the SCA failed to engage further with the implications of Dr Mafa's medical finding. Dr Mafa's finding placed Mr Zuma's medical condition within the scope of the provisions of section

[28] **SCA Judgment** p 5-6 at para [7]
[29] **SCA Judgment** p 6 para [7]

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79(1)(a) of the Correctional Services Act and could not simply be ignored by the decision-maker.

10.6.12 In terms of section 79(8)(a) of the Correctional Services Act, the Minister must make regulations regarding the processes and procedures to follow in the consideration and administration of medical parole. The Correctional Services Regulations 29A and 29B are subordinate legislation and they were promulgated in terms of the provisions of section 79(8) of the Correctional Services Act. The said Regulations were only meant to regulate the processes and procedures to be followed. They were not meant to add any substantive requirement to the provisions of section 79 of the Act. The addition of a substantive requirement to Regulation 29A(7) makes the said Regulation *ultra vires* and invalid.

10.6.13 The provisions of Regulation 29A(7) do not accord the necessary legislative deference to the provisions of section 79(1) in terms of ensuring that the decision-maker retains the discretion conferred upon him or her in accordance with section 79(1). This is not consistent with the principle that

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subordinate legislation may not conflict with original legislation. It conflicts with section 79(1)(a) in the sense that it adds a substantive requirement contrary to the provisions of section 79(8)(a) which only allows for regulations to make provision for processes and procedures.

10.6.14 The interpretation of section 79(1) of the Correctional Services Act through the provisions of Regulation 29A(7), as was done by the SCA and the High Court, completely obliterates the exercise of the discretion conferred on the decision-maker by the original or enabling statute (the Correctional Services Act).

10.6.15 It is trite that it is not permissible to treat the Act and regulations made thereunder as a single piece of legislation and to use the latter as an aid to the interpretation of the former. A regulation cannot be used to enlarge or restrict the meaning of a section of an Act[30]. Both the High Court and the SCA fell into the trap of using Regulation 29A(7) to

[30] Moodley and Others v Minister of Education and Culture, House of Delegates and Another 1989 (3) SA 221 (A) at p233E-F, Freedom of Expression v Chair Complaints and Compliance Committee 2011 JDR 0036 (GSJ) at para [95], Amalgamated Engineering Union of South Africa v Minister of Labour 1965 (4) SA 94 (W) at p. 96D and Hamilton Brown v Chief Registrar of Deeds 1968 (4) SA 735 (T) at 737C-D.

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enlarge, alternatively, to restrict the interpretation of section 79(1) of the Act.

10.6.16 I am advised that it is not legitimate to treat the Act and the regulation made thereunder as a single piece of legislation and to use the latter as an aid to the interpretation of the former. The section in the Act <u>must be interpreted before</u> the regulation is looked at and, if the regulation purports to vary the section as so interpreted, it is *ultra vires* and void. It cannot be used to cut down or enlarge the meaning of the section.[31]

10.6.17 Subordinate legislation may not be in conflict with original legislation. The persons or bodies authorised to issue delegated legislation may do so only within the framework of the authority specifically bestowed on them by the enabling legislation. If not, they have acted *ultra vires* and the subordinate legislation in question could be invalidated by a court of law.[32]

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31 **Hamilton Brown**, note 29 above at 737C-D

32 **Christo Botha, Statutory Interpretation** 5th Ed at p 28.

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10.6.18 Although subordinate legislation must be read and interpreted together with its enabling Act, the enabling Act may not be interpreted on the basis of the subordinate legislation made under it.[33]

10.6.19 Furthermore, in the proper reading of paragraph [53] of the judgment, it would seem like the SCA regarded a positive recommendation by the Board as a mandatory and material condition prescribed by the empowering legislation. This conclusion too, is fatally flawed and incorrect. Only the Act (section 79(1)(a)) and not the Regulation (Regulation 29A(7)) may be regarded as an empowering legislation. Dr Mafa's finding falls within the scope of section 79(1)(a) and cannot be simply ignored. Accordingly, it was incorrect for the SCA, to conclude that a mandatory and/or material condition prescribed by the empowering legislation was not met.

10.6.20 It is, accordingly, my submission that the basis upon which the SCA answered the question as to whether the National Commissioner is entitled or empowered to approve the placement of an offender on medical parole, without the

33 Ibid at p 31

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Board's positive recommendation, is legally flawed and incorrect.

10.7 Thirdly, the SCA erred in making the finding that even if it could be accepted that the National Commissioner was empowered to override the Board's decision, his decision does not pass muster, as he took into account factors which are totally irrelevant[34]. The Court then went on to list such factors. This finding is incorrect and misleading by reason of the following:

10.7.1 The material information and documents (evidential information) that served before the National Commissioner were part of the record that served before the SCA. Some of such documents include Dr Mafa's medical finding as already referred to above. However, for some inexplicable reason both the SCA and the High Court decided to shun and completely ignore such evidence without even properly engaging with it.

10.7.2 Both the SCA and the High Court preferred to zoom on the information listed in paragraph [54] of the judgment. In doing so, both Courts completely ignored paragraph 13 of

[34] SCA Judgment p 24 para [54].

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the reasons of the National Commissioner where it is stated that "*having considered all the relevant information, I am satisfied that Mr Zuma meets the criteria in section 79(1) of the Act to be placed on medical parole*". Dr Mafa's report formed part of the profile report which accompanied the application for placement on medical parole and it cannot, for instance, be suspected to be an after-thought reason.

10.7.3 It is, accordingly, my contention that the factors that are listed as irrelevant in paragraph [54] of the SCA judgment, were conveniently selected, for reasons only known by both Courts, in effort to unfairly label the Commissioner's decision as irrational.

10.7.4 The finding of the SCA to the effect that the impugned decision was based on irrelevant factors, is therefore, incorrect and stands to be set aside by this Honourable Court.

10.8 Fourthly, the SCA erred in making the finding that the National Commissioner acted irrationally and that, in the National Commissioner's decision, there was no mention of the requirement

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in section 79(1)(b), i.e the risk of re-offending[35]. This finding is incorrect by reason of the following:

10.8.1 In his reasons the National Commissioner mentioned that Mr Zuma was 79 years old and undeniably a frail old person. In his Answering Affidavit the National Commissioner stated very clearly that the Mr Zuma was regarded as a low-risk inmate in terms of re-offending as envisaged in section 79(1)(b) of the Act. He further mentioned that it was common cause that he is a first-time offender who did not pose any security risk to the community into which he was going to be released.

10.8.2 The SCA's finding must, therefore, be rejected by this Honourable Court.

10.9 Fifthly, the SCA erred in making the finding that the High Court was in as good a position and qualified as the National Commissioner to make a decision and that it was correct for the Court to substitute its decision for that of the National Commissioner, as he

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[35] **SCA Judgment** p 25 para [55]

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(Commissioner) had no discretion to exercise[36]. This finding is incorrect for the following reasons:

10.9.1 The SCA bases the above finding on the that fact that without the Board's positive recommendation, the National Commissioner had no discretion to exercise. The incorrectness of the reasoning of the SCA in this regard has been dealt with quite extensively above. I repeat the submission made above to the effect that this conclusion is based on the incorrect utilisation of Regulation 29A(7) as aid to the interpretation of section 79 of the Act.

10.9.2 The Court failed to interpret and appropriately apply the test for exceptional circumstances espoused by this Honourable Court in **Trencon**[37]. Whether a Court is in as good a position as the administrator to make a decision must be decided cumulatively together with the fact whether the decision of an administrator is a foregone conclusion. The High Court concluded that it was in as good a position as the National Commissioner and yet it did not have all the information that was before the National Commissioner. Most of the medical reports that were

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[36] **SCA Judgment** p 26 para [58]

[37] **Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another** 2015 (5) SA 245 (CC) at para [47]

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before court were redacted and did not reflect the exact medical conditions of Mr JG Zuma.

10.9.3 The High Court had in fact also concluded without any evidence that the decision was a foregone conclusion. This conclusion was endorsed as correct by the SCA. This was despite the fact that, at the time when the matter was heard the position of National Commissioner was occupied by a new incumbent who was not privy to the impugned decision.

10.9.4 The SCA also failed to recognize that the law itself placed the administrative action of determining medical parole in the hands of the National Commissioner and that the High Court had no expertise in the correctional environment. Failure by the High Court to recognise this fact is inconsistent with the principle of separation of powers which is entrenched in the Constitution.

10.10 Lastly, the SCA erred in making the finding that in law Mr Zuma has not finished serving his sentence and that he must return to the

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Estcourt Correctional Centre to do so[38]. This finding is not consistent with the existing jurisprudential precedents as briefly set out herein below. It is furthermore, alarmingly inhumane and insensitive by reason of the following:

10.10.1 Parole is a form of punishment which is served by an inmate within the system of community corrections in terms of Chapter VI of the Act[39]. When Mr Zuma left prison and was placed on medical parole, he was continuously under community corrections to serve his sentence. He was never a free man with effect from 8 July 2021 up until the expiry of the period of 15 months (7 October 2022).

10.10.2 It is inconceivable that a court, in a constitutional dispensation, can send an inmate who has served his sentence under the system of community corrections, back to prison without considering the fact that he has already served time under the community corrections system. This amounts to double-jeopardy and a complete travesty of justice. This is inconsistent with the right not to be treated or punished in a cruel, inhuman or degrading manner and

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[38] SCA Judgment p 27 para [60].

[39] Phaahla v Minister of Justice and Correctional Services and Another 2019 (7) BCLR 795 (CC) at [34].

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the spirit of *ubuntu*[40] which is entrenched in the Constitution.

10.10.3 Mr JG Zuma was not a party to the decision to grant him medical parole and, if his placement on medical parole is unlawful (which is, in any event not conceded), there is no evidence that he in any way, illegally, influenced the National Commissioner in making the impugned decision. The just and equitable remedy principle required the Court to take this into consideration.

10.10.4 In **Director of Public Prosecutions, Gauteng v Oscar Pistorius**[41], the SCA, in resentencing Pistorius, ruled that a sentence of seven months correctional supervision already served under community corrections must be taken into consideration and be subtracted from the new sentence as sentence already served. This was in recognition of the fact that a sentence served under community corrections, in South Africa, is legally regarded as punishment.

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40 Section 12(1) (e) of the Constitution; S v Makwanyane and Another 1995 (6) BCLR 665 (CC) at para [308].

41 [2017] ZASCA 158 (950/2016) at para [25].

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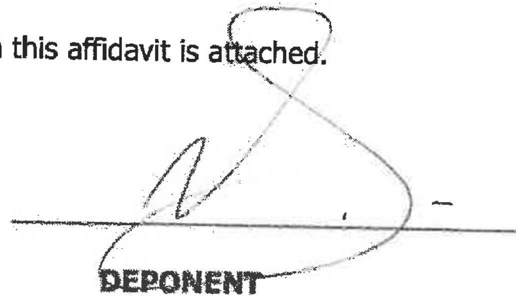
10.10.5 The SCA erred in not considering and applying these jurisprudential precedents.

11 CONCLUSION AND APPROPRIATE RELIEF.

11.1 For the reasons set out above, I contend that I have made out a proper case for an order in terms of the Notice of Motion.

11.2 In the premise, I respectfully pray for an order in terms of the Notice of Motion for which this affidavit is attached.



DEPONENT

I certify that the Deponent acknowledged that he knows and understands the contents of this affidavit, that he has no objection to the making of the prescribed oath and that he considers this oath to be binding on his conscience. I also certify that this affidavit was signed in my presence at PRETORIA Central on this the 21 day of **DECEMBER 2022** and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended by Government Notice R1648 of 19 August 1977, have been complied with.

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[initials]

COMMISSIONER OF OATHS

FULL NAMES: Gontse Bernice

STREET ADDRESS: 137 Pretorious

CAPACITY: Constable

AREA: VISPOL

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"A"

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 33/2022

In the matter between:

NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	**FIRST APPELLANT**
JACOB GEDLEYIHLEKISA ZUMA	**SECOND APPELLANT**
and	
DEMOCRATIC ALLIANCE	**FIRST RESPONDENT**
HELEN SUZMAN FOUNDATION	**SECOND RESPONDENT**
AFRIFORUM NPC	**THIRD RESPONDENT**
SECRETARY OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE INCLUDING ORGANS OF STATE	**FOURTH RESPONDENT**
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**FIFTH RESPONDENT**
MEDICAL PAROLE ADVISORY BOARD	**SIXTH RESPONDENT**
SOUTH AFRICAN INSTITUTE OF RACE RELATIONS	***AMICUS CURIAE***

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Neutral citation: *National Commissioner of Correctional Services and Another v Democratic Alliance and Others (with South African Institute of Race Relations intervening as Amicus Curiae)* (33/2022) [2022] ZASCA 159 (21 November 2022)

Bench: DAMBUZA, MAKGOKA, PLASKET and MABINDLA-BOQWANA JJA and GOOSEN AJA

Heard: 15 August 2022

Delivered: 21 November 2022

Summary: Correctional Services Act 111 of 1998 – medical parole – s 79(1) – role of the Medical Parole Advisory Board (the Board) – powers of the National Commissioner of Correctional Services (the Commissioner) – whether the Commissioner entitled to release an inmate on parole despite the absence of a positive recommendation of the Board.

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ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Matojane J, sitting as a court of first instance): judgment reported *sub nom Democratic Alliance v National Commissioner of Correctional Services and Others and Two Similar Cases* [2022] 2 All SA 134 (GP).[1]

1. Paragraphs 5 and 6 of the order of the high court are set aside.
2. Save for the above, the appeal is dismissed with costs.
3. The first and second appellants are ordered to pay the costs of the first, second and third respondents, jointly and severally, the one paying the other to be absolved.
4. The costs shall include the costs of two counsel where so employed.

JUDGMENT

Makgoka JA (Dambuza, Plasket and Mabindla-Boqwana JJA and Goosen AJA concurring):

[1] On 29 June 2021, the second appellant, Mr J G Zuma (Mr Zuma), the former President and Head of State of the Republic of South Africa, was sentenced to 15 months' imprisonment by the Constitutional Court for failing to obey that court's order to appear before a Judicial Commission of Inquiry[2] (the Commission of Inquiry). The circumstances which led to the sentence are fully

[1] *Democratic Alliance v National Commissioner of Correctional Services and Others; Helen Suzman Foundation v National Commissioner of Correctional Services and Others; Afriforum NPC v National Commissioner of Correctional Services and Others* [2022] 2 All SA 134 (GP).
[2] The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State.

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set out in *Judicial Commission of Inquiry into Allegations of State Capture v Zuma*.[3]

[2] Mr Zuma started serving his sentence on 8 July 2021. On 5 September 2021, the first appellant, the National Commissioner of Correctional Services (the Commissioner), released him on medical parole. Shortly thereafter, the first respondent, the Democratic Alliance, the second respondent, the Helen Suzman Foundation, and the third respondent, Afriforum NPC (Afriforum), launched separate applications in the Gauteng Division of the High Court, Pretoria (the high court), challenging the Commissioner's decision on various grounds in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA). Their applications were consolidated and heard together by the high court.

The order of the high court

[3] On 15 December 2021, the high court reviewed the decision of the Commissioner, set it aside, and substituted it with one rejecting Mr Zuma's application for medical parole. It consequently directed that Mr Zuma be returned to the custody of the Department of Correctional Services (the Department) to serve out the remainder of his sentence of imprisonment. The high court also ordered that the time Mr Zuma was out of jail on medical parole should not be considered for the fulfilment of the sentence of 15 months imposed by the Constitutional Court. This order was sought by the Helen Suzman Foundation.

[4] In addition, the high court issued a declaratory order, at the instance of Afriforum, that in terms of s 79(1)*(a)* of the Correctional Services Act 111 of 1998 (the Act), read with regulations 29A and 29B promulgated in terms thereof,

[3] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) (*Judicial Commission of Inquiry v Zuma*).

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the statutory body to recommend whether medical parole should be granted or not is the Medical Parole Advisory Board (the Board). With the leave of the high court, the Commissioner and Mr Zuma appeal against the whole order.

Factual background

[5] Mr Zuma was admitted to the Estcourt Correctional Centre in KwaZulu-Natal on 8 July 2021 to commence serving his sentence of imprisonment. He was immediately transferred to the hospital wing of the Estcourt Correctional Centre. There, he was examined by Dr Q S M Mafa from the South African Military Health Services (Military Health Services).[4] Upon examination, Dr Mafa compiled a report in which he recommended that Mr Zuma be moved to a 'specialist medical high care unit' for further assessment, and 'to ensure his health is not prejudiced during this period and that a further specialist medical investigation [is] done to verify and rule out other challenges that could have been missed during the examination'. He further alluded to the possible release of Mr Zuma on medical parole.

[6] The following day, 9 July 2021, Brigadier General Dr M Z Mdutywa from the Military Health Services requested the Head of the Estcourt Correctional Centre to allow a paramedic to monitor Mr Zuma daily and alert the doctors and specialists immediately of any changes, should there be any. He stated that the reason for his request was that the Military Health Services has 'the sole mandate and responsibility of assuring and giving medical support and services' to Mr Zuma.

[7] On 28 July 2021, Dr Mafa made an application on behalf of Mr Zuma for his release on medical parole, on the prescribed form. Section 'C' of the form

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[4] As former President and Head of State, Mr Zuma's health services are provided by the South African Military Health Services.

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relates to whether an offender suffers from a terminal disease or condition. The following explanatory note appears at the foot of the page:

'A terminal disease or condition is a condition or illness which is irreversible with poor prognosis and irremediable by available medical treatment but requires continuous palliative care and will lead to imminent death within a reasonable time.'

Question 5(d) of section 'C' is as follows: 'Is the offender suffering from a terminal disease OR condition' which is 'chronic', 'progressive', and 'has deteriorated permanently or reached [an] irreversible state?'. Dr Mafa answered 'Yes' to the first two questions. As to the third, he answered that the condition had 'deteriorated significantly'.

[8] On 29 July 2021, the Operational Manager at the Estcourt Correctional Centre recommended to the Correctional Supervision and Parole Board that Mr Zuma be released on medical parole, based on the following: (a) Dr Mafa's report that Mr Zuma has a number of comorbidities; (b) Mr Zuma needs tertiary health care services that Correctional Services was not providing, and (c) that Mr Zuma's medical condition needed to be closely monitored by a specialist, and 'should his condition complicate during the night, it will take time for him to access relevant health services'.

[9] On 5 August 2021, Mr Zuma was transferred to a private hospital in Pretoria at the request of his medical team for him to be treated in 'a specialist medical facility' based on his 'medical conditions' and 'a fear that his condition [was] deteriorating'. In terms of regulation 29B(8) of the Correctional Services Regulations (the regulations), the Board designated one of its own, Dr L J Mphatswe, to examine Mr Zuma, which he did on 13 and 17 August 2021, at the private hospital. Dr Mphatswe submitted a report to the Board on 23 August 2021, in which he recommended that Mr Zuma be released on medical parole with immediate effect. In his report, Dr Mphatswe took into account that Mr

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Zuma was 79 years of age, and generally, looked 'unwell and lethargic' with a 'complex medical condition which predisposes him to unpredictable medical fallouts or events of high-risk clinical picture'.

[10] He further noted:

'The total outlook of his complex medical conditions and associated factors in an environment limited to support his optimum care is of extreme concern. More worrisome is the unpredictability of his plausible life-threatening cardiac and neurological events. The risk for potential surgery has become in my assessment a personal one albeit a potentially development of a malignant condition arising from a high-grade ileocecal and colon lesion exists. In the main and primarily in summation of the total clinical assessment motivated by high-risk factors. I wish to recommend that the applicant be released on Medical Parole with immediate effect, because his clinical picture presents unpredictable health conditions constituting a continuum of clinical conditions. Sufficient evidence has also arisen from the detailed clinical reports submitted by the treating Specialists to support the above-stated recommendation.'

[11] The Board met on 26 and 28 August 2021 to consider Mr Zuma's medical parole application. On both occasions, it took the view that it did not have sufficient information to reach a decision, and accordingly, requested further medical reports from independent medical specialists who had treated Mr Zuma. These were furnished by the Surgeon-General on 30 August 2021 on behalf of the Military Health Services. In his cover letter accompanying the reports, the Surgeon-General pointed out the following:

'It is the view of the Surgeon General that these reports taken individually may paint a picture of a patient whose condition is under control, but all together reflect a precarious medical situation, especially for the optimization of each one of them.

We will remember that the patient was fairly optimized prior to his incarceration, and it took only four weeks for his condition to deteriorate such that his glucose, blood pressure and kidney function went completely out of kilter. The Surgeon General believes that the patient will be better managed and optimized under different circumstances than presently prevailing.'

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[12] On 2 September 2021, the Board reconvened, and decided against recommending medical parole for Mr Zuma. It stated the following reasons for its decision:

'From the information received, the applicant suffers from multiple comorbidities. His treatment has been optimised, and all conditions have been brought under control. From the available information in the reports, the conclusion reached by the MPAB is that the applicant is stable and does not qualify for medical parole according to the Act. The MPAB is open to consider[ing] other information, should it become available. The MPAB can only make its recommendations based on the Act.'

The National Commissioner's decision

[13] As mentioned already, the Commissioner released Mr Zuma on medical parole on 5 September 2021 with immediate effect, three days after the Board had made its decision not to recommend his release. In a lengthy statement, the Commissioner explained the reasons for his decision. He correctly referred to the legislative scheme of ss 75(7)*(a)*, 79(1), and regulation 29A as the empowering provisions in respect of medical parole. Although he had delegated his powers to consider parole to Heads of Correctional Centres, he revoked that delegation in respect of Mr Zuma, and had given an instruction that he should be consulted in all decisions in respect of Mr Zuma. This was because of the public unrest and destruction of property in July 2021 following Mr Zuma's incarceration. He also viewed Mr Zuma's incarceration to have 'occasioned a unique moment within the history of Correctional Services, where a former Head of State of the Republic of South Africa is incarcerated whilst still entitled to privileges as bestowed by the Constitution'.

[14] He had accordingly been kept abreast of Mr Zuma's reportedly deteriorating health condition. On 4 September 2021, he met with the KwaZulu-Natal Regional Commissioner and the Head of the Estcourt Correctional Centre, at their request. They expressed concern to him about the Board's decision not to

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recommend the release of Mr Zuma on medical parole. The main concern for the Head of the Estcourt Correctional Centre was that the centre did not have the capacity to provide the type of tertiary health care required for Mr Zuma's medical conditions. As such, the centre could not risk Mr Zuma's life, and he shuddered at the consequences were Mr Zuma to die in the centre.

[15] After that meeting, the Commissioner requested that the relevant documents be placed before him. The following documents were presented to him: (a) three medical reports by the Military Health Services dated 8 July 2021, 28 July 2021 and 5 August 2021; (b) Dr Mphatswe's report; and (c) the Board's decision of 2 September 2021. As to the latter, the Commissioner pointed out that although the Board made the recommendation, he was 'the authority to make the decision'. The Commissioner stated that, in arriving at his decision, he considered the following:

'12.1 Mr Zuma is 79 years old and undeniably a frail old person.

12.2 That the various reports from the SAMHS all indicated that Mr Zuma has multiple comorbidities which required him to secure specialised treatment outside the Department of Correctional Services (DCS).

12.3 That Dr LJ Mphatswe (member of MPAB) in his report dated 23 August 2021 recommended that the applicant, Mr JG Zuma be released on medical parole because his "clinical health present unpredictable health conditions" and that sufficient evidence has also arisen from the detailed clinical reports submitted by the treating specialists to support the above read recommendation.

12.4 The [Board] recommendation agreed that Mr Zuma suffers from multiple comorbidities. The [Board] further stated that his treatment had been optimised and his conditions have been brought under control because of the care that he is receiving from a specialised hospital, therefore they did not recommend medical parole. It is the type of specialised care that cannot be provided by the Department of Correctional Services in any of its facilities.

12.5 As a result, there is no guarantee that when returned back to Estcourt Correctional Centre Mr Zuma's "conditions" would remain under control. It is not disputed that DCS does

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not have medical facilities that provide the same standard of care as that of a specialised hospital or general hospital.

12.6 Mr Zuma's wife, Mrs Ngema, has undertaken to take care [of] him if released, as Mr Zuma will be aided by SAMHS as a former Head of State, providing the necessary health care and closely monitoring his condition.'

[16] It is this decision that is the subject of the appeal. Both the Commissioner and Mr Zuma contend that the high court erred in setting it aside and in making the order in the terms already set out. The Democratic Alliance, the Helen Suzman Foundation and Afriforum support the judgment of the high court and its order. The fourth to sixth respondents, respectively the Commission of Inquiry, the Minister of Justice and Correctional Services and the Board, did not take part in the appeal. The Commission of Inquiry filed a notice to abide by the decision of this Court. The South African Institute of Race Relations was admitted as *amicus curiae* (*amicus*) in this Court.

***Amicus*' submissions**

[17] The gravamen of the submissions is this. A person detained for contempt of court is not a 'sentenced offender' within the contemplation of the Act, and can therefore never be released by a person or body other than the court that committed the person. Expressed differently, the parole provisions in the Act do not apply to persons incarcerated for contempt of court, like in Mr Zuma's case. This is because the process of committing a person to prison for contempt of court cannot be regarded as criminal proceedings and does not result in the person being convicted of any offence.

[18] Therefore, submitted the *amicus*, the Commissioner enjoyed neither the power nor competence to release Mr Zuma from custody ahead of the expiry of his period of detention, and only the Constitutional Court has the power to order

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such a release. Consequently, the Commissioner's purported exercise of the power to grant Mr Zuma medical parole was a nullity, and Mr Zuma must accordingly be re-detained in custody until he has served the full term of his sentence, or released earlier in terms of a court order.

[19] The starting point is s 1 of the Act, which defines a 'sentenced offender' simply as a 'convicted person sentenced to incarceration or correctional supervision'. It makes no distinction in respect of offenders based on the nature of proceedings from which the sentence flows, nor whether the sentence is coercive or punitive. Offenders sentenced for contempt of court are not excluded from this definition. There is nothing in the text or context of the section that suggests that the Legislature intended to make a distinction between offenders based on the nature of proceedings that gave rise to the sentence. That should be the end of the matter in respect of the *amicus'* submissions.

[20] However, for the sake of completeness, I will consider the *amicus'* submissions with reference to the order of the Constitutional Court. The established test on the interpretation of court orders was summarised in *Eke v Parsons*[5] as follows:

'. . . "The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention".'(footnotes omitted.)

[21] To establish the 'manifest purpose' of the Constitutional Court's order, one has to consider what the court said when it imposed the sentence on Mr Zuma. The Constitutional Court described the proceedings as neither purely civil nor

[5] *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) para 29.

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criminal, but a unique amalgamation of the two (*sui generis*).[6] The Constitutional Court proceeded to distinguish between coercive and punitive orders.[7] The court pointed out that a coercive order allows the respondent to avoid imprisonment by complying with the original order and desisting from the offensive conduct. As regards a punitive order, 'a sentence of imprisonment cannot be avoided by any action on the part of the respondent to comply with the original order; the sentence is unsuspended; it is related both to the seriousness of the default and the contumacy of the respondent; and the order is influenced by the need to assert the authority and dignity of the court, to set an example for others'.[8]

[22] The Constitutional Court then considered the appropriateness of each order in the circumstances. It decided that a punitive order was the only appropriate order, and explained:

'A coercive order would be both futile and inappropriate in these circumstances. Coercive committal, through a suspended sentence, uses the threat of imprisonment to compel compliance. Yet, it is incontrovertible that Mr Zuma has no intention of attending the Commission, having repeatedly reiterated that he would rather be committed to imprisonment than co-operate with the Commission or comply with the order of this Court. Accordingly, a suspended sentence, being a coercive order, would yield nothing. In *CCT 295/20*, this Court was at pains to point out how Mr Zuma had been afforded, perhaps too generously at times, ample opportunities to submit to the authority of the Commission. Notwithstanding that I recognise the importance of the work of the Commission, being guided by what this Court said in *CCT 295/20*, I do not think this Court should be so naïve as to hope for his compliance with that order. Indeed, it defies logic to believe that a suspended sentence, which affords Mr Zuma the option to attend, would have any effect other than to prolong his defiance and to signal dangerously that impunity is to be enjoyed by those who defy court orders.'[9] (footnote omitted.)

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[6] *Judicial Commission of Inquiry v Zuma* para 21.
[7] *Ibid* para 47.
[8] *Ibid*.
[9] *Ibid* para 48.

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[23] These remarks unambiguously manifest the Constitutional Court's clear intent: to punish Mr Zuma for defying its earlier order and to have him serve a prison sentence for that. This also takes care of the *amicus'* submission that persons convicted of contempt of court 'carry the keys of their prison in their own pockets', in that they can reverse their contempt by complying with the order, upon which they would be released. The *amicus* relied on the orbiter remarks in *De Lange v Smuts*[10] for that submission. That case concerned s 66(3) of the Insolvency Act 24 of 1936, in terms of which a person summoned to be examined at a meeting of creditors may be imprisoned if they, among other things, refuse to answer questions at such a meeting. The presiding officer 'may issue a warrant committing the said person to prison'. The proviso to such imprisonment is that the examinee 'shall be detained until he has undertaken to do what is required of him'. It is in that context that the court remarked that '[t]he examinees under s 66(3) also "carry the keys of their prison in their own pockets"', for the effect of the concluding part of the subsection is that the detention of an examinee comes to an end when the examinee "has undertaken to do what is required of him"'.[11]

[24] In the present case, the Constitutional Court had moved beyond the coercion point. It was no longer interested in trying to coerce Mr Zuma to mend his ways by appearing before the Commission. Therefore, Mr Zuma no longer 'carried the keys of his prison in his own pocket'. The keys were undoubtedly held by the Department. The Warrant of Committal issued by the Constitutional Court could not have made it clearer. It commanded the Department 'to receive' Mr Zuma 'into custody' and 'deal with him in accordance with the laws relating to prisons', as he had been 'found guilty . . . of the crime of contempt of court'. Indeed, Mr Zuma was dealt with as such. Like any other inmate, he was 'processed'; orientated with regard to prison life; given prison clothes and

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[10] *De Lange v Smuts N O and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC).
[11] *Ibid* para 36.

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sanitary material; and was expected to clean his cell and make his bed. Mr Zuma was therefore 'a sentenced offender' and had to be incarcerated in terms of the Act.

[25] As would be the case with any matter finalised before it, once it imposes a sentence, a court ordinarily has no further role in how a sentenced person serves his or her sentence. That is the responsibility of the Department. The Constitutional Court was in no different position with regard to Mr Zuma. Specifically, with regard to his release, the Constitutional Court consequently retained no power to deal with the matter again.

[26] I accordingly conclude that a person convicted and sentenced for contempt of court ordinarily falls to be dealt with in terms of the laws relating to prisons, including the privilege to be released on parole if they so qualify. It is immaterial: (a) that the proceedings which culminated in the sentence were criminal or civil, and (b) whether the order for their imprisonment is coercive or punitive.

[27] In any event, in this case, the Constitutional Court order culminated from *sui generis* proceedings, and it is indubitably punitive in nature, thus, making Mr Zuma 'a sentenced offender' as envisaged in s 1 of the Act. It follows that there is no merit in the *amicus'* submissions. Mr Zuma was entitled to apply for his release on medical parole, and the Commissioner was empowered to consider that application, in terms of the relevant provisions of the Act, to which I turn.

The medical parole legislative scheme

[28] I commence with s 75(1) of the Act, which is titled 'Powers, functions and duties of Correctional Supervision and Parole Boards'. Section 75(1) gives the Correctional Supervision and Parole Board the discretion to place under correctional supervision or day parole, or grant parole or medical parole, to a

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sentenced offender serving a sentence of incarceration for more than 24 months. This it does upon consideration of a report on such a prisoner, submitted to it by the Case Management Committee in terms of s 42 of the Act, and in the light of any other information or argument submitted to it.

[29] The next relevant provision is s 75(7), which gives the Commissioner the power, among other things, to release a sentenced offender serving a sentence of incarceration for 24 months or less on medical parole. It reads as follows:

'Despite subsections (1) to (6), the National Commissioner may—

(a) place under correctional supervision or day parole, or grant parole or medical parole to a sentenced offender serving a sentence of incarceration for 24 months or less and prescribe conditions in terms of section 52; or

(b) cancel correctional supervision or day parole or parole or medical parole and alter the conditions for community corrections applicable to such person.'

[30] Section 79 specifically concerns the substantive and procedural requirements for medical parole. The substantive requirements are set out in subsection 1, which reads:

'(1) Any sentenced offender may be considered for placement on medical parole, by the National Commissioner, the Correctional Supervision and Parole Board or the Minister, as the case may be, if—

(a) such offender is suffering from a terminal disease or condition or if such offender is rendered physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care;

(b) the risk of re-offending is low; and

(c) there are appropriate arrangements for the inmate's supervision, care and treatment within the community to which the inmate is to be released.'

[31] The procedural requirements are prescribed in s 79(2). Section 79(2)*(a)* provides that an application for medical parole shall be lodged in the 'prescribed manner', by either: (a) a medical practitioner; or (b) a sentenced offender in

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person; or (c) a person acting on the offender's behalf. In the latter two instances, s 79(2)*(b)* requires the application to be supported by a written medical report recommending placement on medical parole. The section precludes the relevant authority (either the Commissioner, the Correctional Supervision and Parole Board, or the Minister of Justice and Correctional Services (the Minister)) from considering an application lodged by the offender in person or on his or her behalf, if not accompanied by a written medical report.

[32] In terms of s 79(2)*(c)* the written medical report must include, amongst others—

'(i) a complete medical diagnosis and prognosis of the terminal illness or physical incapacity from which the sentenced offender suffers;

(ii) a statement by the medical practitioner indicating whether the offender is so physically incapacitated as to limit daily activity or inmate self-care; and

(iii) reasons as to why the placement on medical parole should be considered.'

[33] Pursuant to s 79(3)*(a)*, the Minister established a Medical Parole Advisory Board (the Board). Its function is 'to provide an independent medical report' to the Commissioner, the Correctional Supervision and Parole Board, or the Minister, as the case may be, in addition to the medical report referred to in subsection s 79(2)*(c)*. The Board consists of ten members, all of whom are medical doctors.

The regulations

[34] Section 79 must be read together with regulation 29A of the regulations. Regulation 29A(2)-(4) complements the procedural requirements of s 79(2). In terms of regulation 29A(2) an application for medical parole in terms s 79(2) of the Act, shall be initiated by the completion of a prescribed application form. When the Head of a Correctional Centre receives an application for medical

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parole, he or she must refer the application to the correctional medical practitioner who must make an evaluation of the application in accordance with the provisions of s 79 and make a recommendation in this regard (regulation 29A(3). In terms of regulation 29A(4) the recommendation must be submitted to the Board, which must make a recommendation to the relevant decision-maker, the Commissioner in this instance.

[35] The substantive requirements of s 79(1)*(a)* are given effect by regulation 29A(5)-(7). Regulation 29A(5) guides the Board on the procedure to be followed in determining whether an inmate suffers from a terminal illness or physical incapacity as required in s 79(1)*(a)*. It must first determine whether an offender's stated medical condition is one of the non-infectious and infectious conditions set out in regulation 29A(5). If it is not, the Board may, in terms of regulation 29A(6) consider 'any other condition', 'if it complies with the principles contained in section 79'. Needless to say, in this exercise, the Board would be guided by various medical reports serving before it.

[36] After undertaking the exercise set out in regulation 29A(5) (and possibly in regulation 29A(6)), the Board is enjoined to make a recommendation in terms of regulation 29A(7) on the appropriateness to grant medical parole. That regulation reads:

'The [Board] must make a recommendation to the National Commissioner . . . on the appropriateness to grant medical parole in accordance with section 79(1)*(a)* of the Act. If the recommendation of the [Board] is positive, then the National Commissioner . . . must consider whether the conditions stipulated in section 79(1)*(b)* and *(c)* are present.'

Viewed in this light, regulation 29A(7) does no more than confirm the purpose of s 79(1)*(a)*. It does not in any manner 'enlarge' its meaning, as contended on behalf of the Commissioner. It merely makes explicit what is implicit in s 79(1)*(a)*.

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[37] To summarise the above provisions, s 75(7) empowers the Commissioner to release on medical parole an inmate serving a sentence of incarceration for 24 months or less. It must be read with s 79(1), which sets out three substantive requirements for medical parole, namely: (a) terminal disease or physically incapacity; (b) low risk of re-offending; and (c) appropriate arrangements post-release. The second and third requirements involve typical correctional services considerations and, therefore, fall within the Commissioner's remit. The first requirement is a medical one, and the Commissioner must be guided by the Board.

[38] Thus, the requirements set out in s 79(1) constitute jurisdictional facts that must be met for medical parole to be granted. If any of them is not present, an offender does not qualify for parole. These provisions apply to Mr Zuma (despite his status as former President and Head of State) as they would to any other inmate. That is the content and reach of the constitutional value and promise of equality before the law.[12]

[39] Before I step off the legislative scheme, there are two related interpretative aspects that need to be resolved. The first relates to the interrelation between ss 75(7)*(a)* and 79, and in particular, whether s 75(7) creates an alternative pathway to medical parole. The second is whether the Commissioner is entitled to release an inmate on parole without the Board's positive recommendation. I consider these, in turn.

Whether s 75(7) creates an alternative pathway to medical parole

[40] It was common ground among the parties that ss 75(7) and 79(1) must be read together. However, a submission was advanced on behalf of Mr Zuma that

[12] Section 9(1) of the Constitution provides;
'Everyone is equal before the law and has the right to equal protection and benefit of the law.'

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s 75(7)*(a)* created an alternative 'pathway' to medical parole without the need to comply with the substantive and procedural requirements of s 79. The contention was that the general provisions of s 79 cannot limit the provisions of s 75(7) in terms of which, the Commissioner is empowered to grant medical parole to an inmate serving a sentence of incarceration for 24 months or less. As Mr Zuma's sentence fell into that category, the Commissioner was entitled to release him on medical parole, and, in fact, granted him medical parole based on that provision.

[41] I disagree. The upshot of s 75(7)*(a)* is that inmates serving sentences of incarceration for 24 months or less are excused from complying with s 75(1)-(6). The latter subsections deal mainly with the medical parole of inmates serving lengthy imprisonment terms, including life imprisonment. In respect of that category of inmates, their applications have to go through a Case Management Committee and the Correctional Supervision and Parole Board. Section 75(7)*(a)* removes the involvement of these two bodies in respect of applications of inmates serving sentences of incarceration for 24 months or less. Their applications are considered directly by the Commissioner. But, in respect of both categories of inmates, there must be compliance with the substantive and procedural requirements of s 79.

[42] Read on its own, s 75(7) would give power to the Commissioner to release on medical parole any offender serving a sentence of incarceration for 24 months or less, without any explicit substantive or procedural constraints. On this construction, an inmate would be entitled to be released on medical parole despite not being terminally ill or physically incapacitated. The reading of s 75(7) as being capable of an independent application from s 79 would result in an absurdity, as it would allow an inmate to be released on 'medical' parole without

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any 'medical' basis. An interpretation resulting in absurdity is to be avoided.[13] For a sensible result, ss 75(7)(*a*) and 79 must be read together. As stated in this Court more than a century ago in *Chotabhai v Union Government*,[14] 'every part of a Statute should be so construed as to be consistent, so far as possible, with every other part of that Statute'.[15]

Whether the Commissioner is entitled to release an inmate on parole without the Board's positive recommendation

[43] On behalf of the Commissioner, the following submissions were made. Despite its importance, the recommendation of the Board is not binding on him, as the Act confers a discretion on the Commissioner whether or not to release an inmate on medical parole. If the Legislature intended the recommendation of the Board to be binding, it would have made that clear in s 79. The Board's recommendation, according to the Commissioner, is merely one of the relevant factors to be taken into account, including the inmate's medical records and reports.

[44] Section 79(1) should be construed using the conventional process of statutory interpretation, which is now well-settled. The words in the section must be given their ordinary grammatical meaning, unless doing so would result in an absurdity. This is subject to three interrelated riders, namely that the provision: (a) should be interpreted purposively; (b) be properly contextualized; and (c) must be construed consistently with the Constitution.[16] In line with *Natal Joint Municipal Pension Fund v Endumeni*,[17] regard must be had, among others, to the

[13] *Minister of Police and Others v Fidelity Security Services (Pty) Ltd* [2022] ZACC 16; 2022 (2) SACR 519 (CC) para 34.
[14] *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 AD 13.
[15] *Ibid* at 24.
[16] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (8) BCLR 869; 2014 (4) SA 474 (CC) para 28.
[17] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

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apparent purpose to which s 79(1) was directed, and the material known to those responsible for the enactment of the provision. It is also permissible to consider the general factual background within which the current section was enacted.[18]

[45] As to the latter consideration, it is useful to have regard to the Correctional Matters Amendment Act 5 of 2011, which brought about the amendment to s 79, and which came into effect on 1 March 2012. It interposed the Board in a professional and advisory role to the decision-maker, in this instance the Commissioner. Prior thereto, the Commissioner was entitled to release an inmate on medical parole based on the written evidence of the medical practitioner treating such inmate that the latter was diagnosed as being in the final phase of any terminal disease or condition.

[46] There was no Board, and the Commissioner thus had the sole power to decide whether a medical condition was one that qualified in terms of the Act for the granting of medical parole. This was open to abuse, as there was no provision for an independent medical opinion to verify the diagnosis by the inmate's treating doctor. The Board was introduced in the 2012 amendment clearly to remedy this concern. As mentioned already, the Board consists of ten members, all of whom are registered medical doctors (regulation 29B(3). The Board is thus a specialist body.

[47] The interposition of the Board in the medical parole process in terms of s 79(1)(*a*) was thus for a good reason, namely, to allow for an independent and expert determination as to the medical aspect of the process, ie a professional judgment as to whether an inmate suffers from a terminal illness or physical incapacity. Therefore, the Legislature evidently intended the Board's advice,

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[18] *Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16; 2020 (4) SA 428 (SCA) para 17.

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opinion and recommendation to the Commissioner to be crucial to his or her decision on whether to release an inmate on medical parole. Thus, given the context referred to above, and its specialist and professional composition, the Board's recommendation holds sway.

[48] This must be so, as the recommendation by the Board is clearly to furnish the Commissioner with a basis for his or her opinion as to whether an inmate has a terminal illness or physical incapacity. The Commissioner cannot simply ignore it because he or she holds a different view. This is because the Board is an expert body on the 'medical' part of the medical parole process. Ordinarily, the Commissioner does not have that expertise. It follows that the Commissioner's role is not to determine whether medical parole is *medically* appropriate. That role is statutorily reserved for the Board.

[49] In my view, the Board's recommendation is akin to that considered in *Walele v City of Cape Town.*[19] There, the relevant legislation[20] required a Building Control Officer to make recommendations to the City of Cape Town for approval of, among others, building plans. Writing for the majority, Jafta AJ characterised the nature of the recommendation as follows:

'If the purpose of the recommendation is merely to inform the decision-maker of the Building Control Officer's attitude or view on the approval, as argued by the City's counsel, it is difficult to imagine why the recommendation is made a jurisdictional fact, when the decision-maker can investigate on his or her own, matters relating to compliance with requirements and the disqualifying factors. It is equally difficult to find the reason why the legislature would oblige the decision-maker to consider the recommendation before forming an opinion as to whether he or she was satisfied about a particular state of affairs, if the recommendation was not intended to be the primary source of information leading to being satisfied. The facts of the present case demonstrate that the Building Control Officer had information concerning the very

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[19] *Walele v City of Cape Town and Others* [2008] ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC) (*Walele*).

[20] National Building Regulations and Building Standards Act 103 of 1977.

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issues which the decision-maker was required to consider, but this information was not placed before the decision-maker. As a specialist, the Building Control Officer is best suited to advise the decision-maker about disqualifying factors. . . .

The recommendation therefore is the proper means by which information on disqualifying factors can be placed before the decision-maker.'[21]

[50] To my mind, the nature of the recommendation discussed above fits neatly with the one envisaged to be made by the Board in terms of regulation 29A(7). It must follow then that the Commissioner's discretion to release an inmate on medical parole is not triggered unless the Board makes a positive recommendation on the appropriateness to grant medical parole, which is based on a determination in terms of s 79(1)*(a)* as to the inmate's terminal illness or physical condition. In other words, it is only once the Board makes a positive recommendation that the Commissioner may enquire whether the inmate meets the requirements of s 79(1)*(b)* and *(c)*. This is fortified by the wording of regulation 29A(7):

'. . . If the recommendation of the [Board] is positive, *then* the . . . Commissioner . . . must consider whether the conditions stipulated in section 79(1)*(b)* and *(c)* are present.' (Emphasis added.)

[51] Furthermore, an interpretation that allows the Commissioner to grant medical parole to an inmate without the recommendation of the Board to that effect would give the Commissioner the same power he or she had prior to the 2012 amendment. This would undermine the very purpose for which the Board was created, and would render the provisions of s 79(1)*(a)* nugatory. The upshot of the above is that, once the Board has properly applied its mind and concluded that an inmate does not suffer from a terminal illness or physical incapacity so as

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[21] *Walele* paras 70-71.

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to severely limit daily activity or inmate self-care, the Commissioner is not entitled to grant medical parole.

[52] Since the Board is made up of skilled experts, the Commissioner has no discretion on the question of whether an inmate suffers from a terminal illness. Effectively, therefore, the Board is the ultimate decision-maker on this aspect. Thus, in the absence of a positive recommendation by the Board, the Commissioner had no power to release Mr Zuma on medical parole. Flowing from the interpretation of s 79(1)*(a)*, it must be emphasised that it is not within the Commissioner's remit to go beyond the Board's recommendation and analyse the various medical reports himself or herself. That task would have been undertaken by the Board, and it is not for the Commissioner to second-guess its determination and recommendation.

[53] If the Board's recommendation is negative, that is the end of the matter – the Commissioner cannot lawfully grant medical parole. It is only in the event of the Board's positive recommendation that the Commissioner can consider whether the requirements of s 79(1)*(b)* and *(c)* have been met, and if so, grant medical parole. In the present case, there was no positive recommendation by the Board. The Commissioner's decision was therefore unlawful and unconstitutional. It was invalid, in terms of s 6(2)(*b*) of the PAJA, because a mandatory and material condition prescribed by the empowering legislation was not met.

[54] But even if the argument on behalf of the Commissioner was accepted that he, as the ultimate decision-maker, is empowered to override the Board's decision, his decision does not pass muster. First, he took into account factors which are totally irrelevant in the enquiry of whether Mr Zuma qualified for medical parole. These are: (a) the fact that Mr Zuma is 79 years; (b) Mr Zuma's

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status as former Head of State; (c) the riots which occurred in parts of KwaZulu-Natal and Gauteng in July 2021, allegedly as a result of Mr Zuma's incarceration; and (d) the fact that the Department of Correctional Services has no capacity to give Mr Zuma specialised care that he requires.

[55] While these factors may well be taken into consideration in an application for normal parole, they have no bearing at all in an application for medical parole. To that extent, the Commissioner acted irrationally. What is more, there was no mention of the requirement in s 79(1)*(b)*, ie the risk of re-offending in his decision. His decision was therefore also invalid in terms of s 6(2)(*e*)(iii) of the PAJA – the taking into account of irrelevant considerations and the failure to consider relevant ones.

[56] Thus, on any conceivable basis, the Commissioner's decision was unlawful and unconstitutional. The high court was correct to set it aside.

Remedy

[57] Having set aside the Commissioner's decision, the high court substituted its own decision for that of the Commissioner, ie it refused Mr Zuma's application for medical parole. In terms of s 8(*c*)(ii)(*aa*) of the PAJA, a court may substitute its own decision for that of an administrator in 'exceptional cases.' The lodestar in the enquiry whether there are exceptional circumstances, remains *Trencon v Industrial Development Corporation*[22] where the Constitutional Court identified the following factors:

'. . . The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator.

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[22] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC).

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The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.'[23]

[58] In the present case, in making the substitution order, the high court reasoned that remission would not serve any purpose 'as the Commissioner will have no discretion to exercise.' This conclusion is undoubtedly correct. As explained already, without the Board's positive recommendation, the Commissioner has no discretion but to refuse medical parole. The Board has decided that Mr Zuma does not qualify for medical parole. Viewed in this light, the high court was in as good a position as the Commissioner to make a decision, which is a foregone conclusion as the Board's decision stands and remains unchallenged.

[59] In addition, the high court made two declaratory orders which warrant comment. In the first one, at para 5 of its order, the high court declared that the time Mr Zuma was out on medical parole should not be considered for the fulfilment of his sentence of 15 months imposed by the Constitutional Court. This issue implicates the doctrine of separation of powers. Matters concerning how an inmate serves his or her sentence; when and how he or she qualifies for and is to be released on parole, quintessentially reside in the province of the executive – the Department in this instance. Counsel for the Helen Suzman Foundation, at whose instance the declaratory order was granted, fairly conceded that the order was inappropriate. It should be set aside.

[60] The effect of the setting aside of this declarator is that once the order in this appeal is handed down Mr Zuma's position as it was prior to his release on

[23] *Ibid* para 47.

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medical parole will be reinstated. In other words, Mr Zuma, in law, has not finished serving his sentence. He must return to the Escourt Correctional Centre to do so. Whether the time spent by Mr Zuma on unlawfully granted medical parole should be taken into account in determining the remaining period of his incarceration, is not a matter for this Court to decide. It is a matter to be considered by the Commissioner. If he is empowered by law to do so, the Commissioner might take that period into account in determining any application or grounds for release.

[61] Related to this, I feel constrained to express this Court's disquiet about one aspect. While this judgment was pending, we became aware that the Department released a media statement to the effect that Mr Zuma had completed his sentence. Such a pronouncement was premature given that the determination of the very issue was still pending before this Court. A decision as to whether Mr Zuma's prison term had lawfully expired, could not be validly made until this Court had determined the appeal by the Commissioner and Mr Zuma. This Court has now determined that Mr Zuma's release on medical parole was unlawful. The Department's statement was unfortunate, and potentially undermines the judicial process, particularly since the Department is an appellant in this matter.

[62] In the second declaratory order, at para 6, the high court declared, at the instance of Afriforum, that:

'In terms of s 79(1)(a) read with regulations 29A, and 29B the [Board] is the statutory body to recommend in respect of the appropriateness of medical parole to be granted or not in accordance with section 79(1)(a) (the terminal condition and incapacity requirements).'

[63] The high court said that the declaration was pursuant to s 8(1)(*d*) and section 8(2)(*b*) to (*d*) of the PAJA. With respect, it appears that the high court misconstrued the remedial powers set out in s 8 of the PAJA. The section is titled 'Remedies in proceedings for judicial review.' Section 8(1)(*d*) provides that as

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part of its power to grant a just and equitable order, a court may grant any order, including 'declaring the *rights* of the parties in respect of any further matter to which the administrative action relates. Section 8(2)(*b*)-(*d*) provides:

'The court or tribunal, in proceedings for judicial review in terms of section 6(3), may grant any order that is just and equitable, including orders—

. . .

(*b*) declaring the *rights* of the parties in relation to the taking of the decision;
(*c*) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or
(*d*) as to costs.'

[64] The order granted by the high court was not one envisaged in either ss 8(1)(*d*) or 8(2)(*b*) of the PAJA. It was not a declaration of rights, but a re-statement of the law. The latter does not constitute a 'remedy' for any of the parties. It is clear therefore that the declaratory order granted by the high court does not fall within the purview of s 8 of the PAJA. It should not have been granted. It was in any event not necessary as the correct legal position was articulated in the body of the judgment.

Costs

[65] There remains the issue of costs. The limited interference with the order of the high court is not sufficient to affect the general principle that costs should follow the result. The respondents remain overwhelmingly successful. There should not be any costs order consequent upon the participation of the *amicus*.

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Order

[66] In the result I make the following order:

1. Paragraphs 5 and 6 of the order of the high court are set aside.
2. Save for the above, the appeal is dismissed with costs.
3. The first and second appellants are ordered to pay the costs of the first, second and third respondents, jointly and severally, the one paying the other to be absolved.
4. The costs shall include the costs of two counsel where so employed.

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JUDGE OF APPEAL

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APPEARANCES:

For first appellant:	M S Mphahlele SC (with him E B Ndebele)
Instructed by:	State Attorney, Pretoria
	State Attorney, Bloemfontein
For second appellant:	D C Mpofu SC (with him T Masuku SC, M Qofa, B Buthelezi and N Xulu)
Instructed by:	Ntanga Nkuhlu Inc., Johannesburg
	Peyper Lessing Attorneys Inc., Bloemfontein
For first respondent:	I Jamie SC (with him M Bishop and P Olivier)
Instructed by:	Minde Schapiro & Smith Inc., Cape Town
	Symington De Kok Attorneys, Bloemfontein
For second respondent:	M du Plessis SC (with him A Coutsoudis, J Mitchell, J Thobela-Mkhulisi and C Kruyer)
Instructed by:	Webber Wentzel, Johannesburg
	Honey Attorneys, Bloemfontein
For third respondent:	F J Labuschagne (with him A K Kekana)
Instructed by:	Hurter Spies Inc., Pretoria
	Rossouws Attorneys, Bloemfontein
For *amicus curiae*:	M Engelbrecht SC (with her C F Avidon)
Instructed by:	Cilliers & Gildenhuys Inc., Pretoria
	Badenhorst Attorneys, Bloemfontein

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

....
K.E. MATOJANE 15 DECEMBER 2021

CASE NUMBER: 2021/45997

In the matter between:

THE DEMOCRATIC ALLIANCE	Applicant
and	
THE NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	First Respondent
THE MEDICAL PAROLE ADVISORY BOARD	Second Respondent
JACOB GEDLEYIHLEKISA ZUMA	Third Respondent
THE SECRETARY OF THE JUDICIAL COMMISSIONER OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR, INCLUDING ORGANS OF STATE	Fourth Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fifth Respondent

CASE NUMBER: 2021/46468

In the matter between:

HELEN SUZMAN FOUNDATION	Applicant

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and

THE NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	First Respondent
THE DEPARTMENT OF JUSTICE AND CORRECTIONAL SERVICE	Second Respondent
THE MEDICAL PAROLE ADVISORY BOARD	Third Respondent
JACOB GEDLEYIHLEKISA ZUMA	Fourth Respondent

CASE NUMBER: 2021/46701

In the matter between:

THE DEMOCRATIC ALLIANCE	Applicant

and

THE NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	First Respondent
THE MEDICAL PAROLE ADVISORY BOARD	Second Respondent
JACOB GEDLEYIHLEKISA ZUMA	Third Respondent
THE SECRETARY OF THE JUDICIAL COMMISSIONER OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR, INCLUDING ORGANS OF STATE	Fourth Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fifth Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Sixth Respondent

Delivered: *This judgment was handed down electronically by circulation to the parties and/or their legal representatives by email and by uploading the same onto CaseLines. The date and time for hand-down are deemed to be on 15 December 2021.*

JUDGMENT

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MATOJANE J:

Introduction

[1] This matter concerns an alleged unlawful exercise of public power that undermines the Constitutional Court's order granted to vindicate the rule of law and protect the administration of justice. It also raises important legal issues concerning the nature of the power to consider and determine applications for medical parole and the role of the Medical Parole Advisory Board.

[2] On 29 June 2021, the Constitutional Court handed down its judgement and order in the matter of Secretary of the Judicial Commissioner of Enquiry into allegations of a State Capture, Corruption and Fraud in the public sector, including organs of State v Zuma.[1] The Third Respondent, the former President of the Republic, was sentenced to 15 months' imprisonment for contempt of Court for failing to obey an earlier order of the Court requiring him to appear before the Zondo Commissioner.

[3] Less than two months into his sentence, the then National Commissioner of Correctional Services, Mr Arthur Fraser, decided to grant the Third Respondent medical parole ("the parole decision") under section 75(5) of the Correctional Services Act 111 of 1998 ("the Act").

[4] On 10 September 2021, the Democratic Alliance ("DA") brought an urgent application seeking, amongst others, that the parole decision is declared unlawful, reviewed and set aside, and to substitute it with a decision refusing medical Parole and directing that the Third Respondent be returned to the custody of the Department of Correctional Services to serve out the remainder of the sentence imposed by the Constitutional Court.

[5] Subsequently, similar urgent applications were launched by the Helen Suzman Foundation ('the HSF') on 13 September 2021 under case number 46468/2021

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[1] [2021] ZACC 18.

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('the HSF application') and AfriForum NPC ('AfriForum') on 15 September 2021 under case number 46701/21 ('the AfriForum application').

[6] The HSF, in addition, seeks an order that the time the Third Respondent was out of jail on medical Parole should not be counted for the fulfilment of the Third Respondent's sentence of 15 months imposed by the Constitutional Court.

[7] AfriForum, in addition, seeks a declarator that the Medical Parole Advisory Board is the statutory body to recommend in respect of the appropriateness of medical Parole to be granted or not granted in accordance with section 79(1)(a). That the National Commissioner is unable to make the aforesaid determination and should refrain from doing so.

[8] The case for the applicants is that the Third Respondent does not satisfy the requirement for medical Parole as set out in section 79(1) of the Correctional Services Act 111 of 1998 ("the Act") in that, to use the words of the subsection, the Third Respondent is not "suffering from a terminal disease or condition" or is not "rendered physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care."

[9] As the three applications share the same factual background and the same issues of law and fact arise, it was agreed that it would be convenient for all three applications to be heard together.

[10] The urgent applications are opposed by the National Commissioner of Correctional Services ('the Commissioner") and the Third Respondent, Mr Zuma. The two Respondents took the point that the applications are not urgent; the applicants have no standing and mootness. As explained in more detail below, the three preliminary points fall to be dismissed.

Urgency

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[11] The applicants assert that the application is urgent because they would not obtain substantial redress in due course[2] if the application is brought in the ordinary course as the Third Respondent's sentence would have expired in October 2022. The Third Respondent contends in paragraph 38 of his answering affidavit that even if the matter is heard on an urgent basis, the outcome of the review application is unlikely to be determined before the term of his sentence expires, given the likelihood of an appeal of this Court's decision.

[12] In *Apleni*,[3] it was held that where allegations are made relating to abuse of power by a Minister or other public officials, which may impact the Rule of Law and have a detrimental impact upon the public purse, the relevant relief sought ought normally to be urgently considered. The alleged abuse of power in the present proceedings, if proven, would impact the rule of law, and the matter is accordingly urgent.

[13] In any event, the State Attorney representing the National Commissioner addressed a letter to the attorneys acting for the applicants in which the State attorney indicated that it held instructions not to oppose the urgent relief sought by the parties in their respective Part A applications. The Deputy Judge President managed the case to ensure an expedited hearing in consultation with all the legal teams involved. Comprehensive affidavits have been filed, including heads of argument on the merits, and the matter is ripe for hearing. The Respondents cannot now allege that the matter is not urgent when they conceded the urgency of Part A and when the application was treated as urgent all along. The alleged lack of urgency fails to be dismissed on this ground alone.

Standing

[14] The law of standing answers the question of who is entitled to bring a case to a Court for a decision. Limitations on standing are necessary to screen out the

[2] Luna Meubels Vervaardigers (Edms) Bpk v Makin 1977(4) SA 135 (W) at 137 F.
[3] Apleni v President of the Republic of South Africa 2018 SA 728 (GP) para 10.

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mere "busybody" litigants and ensure that courts benefit from contending points of view of those most directly affected.

[15] The applicants claim to be acting in the public interest in terms of section 38(1)(d) of the Constitution. This provision confers legal standing on a party that seeks to enforce rights in the Bill of Rights by asking for appropriate relief for the breach of those rights.

[16] In *Giant Concerts*,[4] Cameron J stated that:

> "PAJA, which was enacted to realise section 33, confers a right to challenge a decision in the exercise of a public power or the performance of a public function that "adversely affects the rights of any person and which has a direct, external legal effect". PAJA provides that "any person" may institute proceedings for the judicial review of an administrative action. The wide standing provisions of section 38 were not expressly enacted as part of PAJA. Hoexter suggests that nothing much turns on this because "it seems clear that the provisions of section 38 ought to be read into the statute." This is correct.

[17] In *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*,[5] the Court said the following regarding the public interest element:

> "The issue is always whether a person or organisation acts genuinely in the public interest. A distinction must, however, be made between the subjective position of the person or organisation claiming to act in the public interest on the one hand, and whether it is, objectively speaking, in the public interest for the particular proceedings to be brought. It is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. The factors set out by O'Regan J help to determine this question. The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important in the analysis."

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[4] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* (CCT 25/12) [2012] ZACC 28; 2013 (3) BCLR 251 (CC) (29 November 2012) par 29.
[5] Lawyers for Human Rights and Other v Minister of Home Affairs and other (CCT 18/03) [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) (9 March 2004) par 18.

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[18] The factors set out by O'Regan J in *Ferreira v Levin*[6] that needs to be shown in order to establish whether a person or entity is acting in the public interest are:

> "whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These factors will need to be considered in the light of the facts and circumstances of each case.

[19] In exercising my discretion to dismiss the point on standing, I have taken into account that the case raises a serious constitutionally justiciable issue, namely, whether the Commissioner exercised public power unlawfully to place the Third Respondent on medical Parole contrary to the Constitutional Courts order; that the parties bringing the applications have a genuine interest in its outcome and that the proposed action is a reasonable and effective means to bring the case to Court.

Mootness

[20] The Third Respondent contends that this matter is moot because he is now eligible for ordinary Parole. He contends that as the decision to place him on Parole lies with the Head of the Correctional Centre and that the latter "approached the National Commissioner because he disagreed with the recommendation to deny him medical parole", the decision to place him on parole, which is taken by Head is *fait accompli* and that the outcome of this application will be academic.

[21] The Constitutional Court has laid down the proper approach to mootness in *POPCRU*[7] it held that:

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[6] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995) at par 234.
[7] *POPCRU v SACOSWU and Others* 2019 (1) SA 73 (CC) at par 43-44

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> "This Court's jurisprudence regarding mootness is well settled. As a starting point, this Court will not adjudicate an appeal if it no longer presents an existing or live controversy. This is because this Court will generally refrain from giving advisory opinions on legal questions, no matter how interesting, which are academic and have no immediate practical effect or result. Courts exist to determine concrete legal disputes, and their scarce resources should not be frittered away entertaining abstract propositions of law.
>
> But mootness is not an absolute bar to the justiciability of an issue. The Court may entertain an appeal, even if moot, where the interests of justice so require. In making this determination, the Court exercises judicial discretion based upon a number of factors. These include, but are not limited to, considering whether any order may have some practical effect, and if so its nature or importance to the parties or to others."

[22] This matter presents a live controversy as to whether the National Commissioner's decision was unlawful and unconstitutional and therefore whether it unlawfully undermined the order of the Constitutional Court and the rule of law.

[23] The HSF wants the Court to disregard the period the Third Respondent served on medical parole from the calculation of his total sentence. The interest of justice requires that the issues raised by the review application should be determined. The application is therefore not moot.

<u>The Material Background Facts</u>

[24] The Third Respondent turned himself in for internment on 8 July 2021 at the Estcourt Correctional Services Centre to serve his sentence under the threat of arrest. He was, upon his arrival, admitted to the hospital wing of the Escort Correctional Services Centre, where he was examined by Dr QSM Mafa from the South African Military Health Services ("SAMHS").

[25] On the same day, Dr Mafa produced a report recommending that the Third Respondent *"be moved to a specialist medical high care unit to be assessed further "to ensure his health is not prejudiced during this period and that a*

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further specialist medical investigation be done to verify and rule out other challenges that could have been missed during the examination."

[26] The following day on 9 July 2021, Brigadier General M.Z Mdutywa wrote to the Head of the Estcourt Correctional Centre requesting that a paramedic be granted permission to monitor the Third Respondent on a daily basis and alert the doctors and specialists immediately of any changes should there be any. He stated that the reason for his request was that the SAMHS has "the sole mandate and responsibility of assuring and giving medical support Services to the Third Respondent."

[27] On 28 July 2021, Dr Mafa made an application for the Third Respondent's medical release to a specialist medical facility stating that:

> "Taking the abovementioned medical conditions into consideration, there is a fear that [Mr Zuma's] condition may further deteriorate if intervention is delayed. As a result of this report, it is hereby recommended that Mr Zuma be moved to a specialist medical facility to be assessed further by specialists under presidential medical team [sic[for proper investigations and to optimise therapy for better outcome [sic].
>
> ...
>
> This is not a final report; the comprehensive medical report will follow once all the investigations have been conducted by the specialist. The specialists will also determine other investigations as necessary. The final report by the Specialist Medical Panel will assist towards further interventions; prognosis and application for Medical Parole."

[28] It bears mentioning that the recommendation that the Third Respondent be moved to a high-care unit was not because he was found to be terminally ill or physically incapacitated as required by the Act. It was for further medical assessment.

[29] On the same day, twenty days after the Third Respondent was taken into custody, Dr Mafa applied for medical Parole on behalf of the Third Respondent. In the application, Dr Mafa stated that the Third Respondent was suffering from a terminal disease or condition that is chronic and progressive. He stated further

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that Third Respondent's condition has progressively deteriorated since 2018, and is unable to perform the activities of daily living or self-care. He recommended medical Parole as a result of "medical incapacity".

[30] On 29 July 2021, the Operational Manager at the Estcourt Correctional Centre provided a profile report on Third Respondent's application for medical parole to the Correctional Supervision and Parole Board ("the Board"). The Operations Manager recommended Third Respondent for release on medical parole. The recommendation was based on the following:

> "The report written by his medical team stating that Mr Zuma has a number of comorbidities including [REDACTEDJ [sic].
> [REDACTED]
> Mr Zuma needs tertiary health care Services that Correctional Services is not providing.
> His conditions need to be closely monitored by Specialist, and should his condition complicate during the night, it will take time for him to access relevant health Services."

[31] On 23 August 2021, the Third Respondent's spouse, Ms Sizakele Zuma, signed an undertaking of care form to accommodate the Third Respondent at her residential address in Kwanxamalala, Nkadla. It was anticipated at that stage that the Third Respondent would be released to Nkandla.

[32] On 5 August 2021, Mr Zuma's medical team wrote to the National Commissioner requesting that Mr Zuma be moved to a specialist medical facility on the following basis:

> "Taking the abovementioned medical conditions into consideration, there is a fear that his condition is deteriorating. As a result of this, it is hereby recommended that Mr Zuma be moved to a specialist medical facility as a matter of urgency to be assessed and managed further by specialists under the presidential medical team in order to avert a crisis coming if his medical condition is attended to. Proper investigations are urgently required to determine the therapy required for better management and outcome."

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[33] On the same day, 5 August 2021, the Third Respondent was transferred to a private hospital in Pretoria on medical release. He was discharged from hospital on the 8 September 2021 and was taken to a residence in Waterkloof, where he was cared for by his wife, MaNgema and was provided with medical support and Supervision. A week later, the Third Respondent returned to his home in Nkandla, where a similar arrangement was put in place.

[34] On 13 August 2021, the Third Respondent was examined by Dr LJ Mphatswe, a member of the Medical Parole Advisory Board ("Board"). On 23 August 2021, Dr Mphatswe produced a medical report in which he recommended to the Board that the Third Respondent be released on medical Parole with immediate effect. He reported that:

> 'The Applicant being Mr JG Zuma, 79 years of age present as stated herein above a complex medical condition which predispose him to unpredictable medical fallouts or events of high-risk clinical picture (sic). He is of old age and generally looks unwell and lethargic. The total outlook of his complex medical conditions and associated factors in an environment limited to support his optimum care is of extreme concern. More worrisome is the unpredictability of his plausible life-threatening cardiac and neurological events. The risk for potential surgery has become in my assessment a personal one albeit a potentially development of a malignant condition arising from a high grade ileocecal and colon lesion exists. In the main and primarily in summation of the total clinical assessment motivated by high-risk factors. I wish to recommend that the applicant be released on Medical Parole with immediate effect because his clinical picture presents unpredictable health conditions constituting a continuum of clinical conditions. Sufficient evidence has also arisen from the detailed clinical reports submitted by the treating Specialists to support the above-stated recommendation.

[35] On the 26 August 2021 and 28 August 2021, the Board met to consider the Third Respondent's application for medical Parole. The Board did not recommend the Third Respondent for release on medical Parole as it did not have sufficient information to reach a decision. The Board requested further medical reports from an independent medical specialist (Cardiologist, Surgeon, Physician and histopathologist).

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[36] On 30 August 2021, the Surgeon General, on behalf of SAMHS, submitted a number of medical reports to the Board under a covering letter which stated that:

> 'It is the view of the Surgeon General that these reports taken individually may paint a picture of a patient whose condition is under control, but all together reflect a precarious medical situation, especially for the optimization of each one of them.
>
> We will remember that the patient was fairly optimized prior to his incarceration, and it took only four weeks for his condition to deteriorate such that his glucose, blood pressure and kidney function went completely out of kilter. The Surgeon General believes that the patient will be better managed and optimized under different circumstances than presently prevailing.

[37] The Board reconvened on 2 September 2021 after receipt of the medical reports from specialists it requested, including the report by its own member, Dr Mphatswe. The Board did not accept Mr Mphatswe's recommendation[8] and decided not to recommend medical Parole. The Board produced a report that concluded that while the Third Respondent suffers from multiple comorbidities, he is not terminally ill and it's not physically incapacitated as required by the Act. I quote below the Boards decision for not recommending medical Parole dated 26 August 2021 in full; it reads:

> **"DECISION**
>
> ~~Recommended~~ / Not recommended based on the following:
>
> The MPAB appreciates the assistance from all specialists with the provision of the requested reports. The Board also notes and appreciates the use of aliases and has treated all submitted reports as those pertaining to the applicant. From the information received, the applicant suffers from multiple comorbidities. His treatment has been optimised, and all conditions have been brought under control. From the information received, the applicant suffers from multiple comorbidities. His treatment has been optimised and all conditions have been brought under control. From the available information in the reports, the conclusion reached by the MPAB is that the applicant is stable and does not qualify for medical Parole according to the Act. The MPAB is open to

[8] Regulations 29(6) permits a member of the Board to examine an applicant for medical parole, a decision of the majority of the Board shall be the decision of the board Regulation 29(6).

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> considering other information, should it become available. The MPAB can only make its recommendations based on the Act."

[38] On 4 September 2021 the National Commissioner was approached by the KwaZulu Natal Regional Commissioner and the Head of the Estcourt Correctional Centre who indicated that "*they were concerned that the Medical Parole Board had not recommended (sic) for the placement of Mr Zuma on medical parole.*"

[39] On 5 September 2021, three days after the Board decided not to recommend medical Parole, the Commissioner took the decision to place the Third Respondent on medical Parole. It is not disputed that the Commissioner did not consider the other grounds in sections 79(1)(b) and (c).

The Reasons for the Impugned Decision

[40] The additional relevant background facts can be derived from the reasons the Commissioner advanced for the parole decision. They are reproduced in full for ease of reference:

> "Decision: Application to be Released on Medical Parole: Mr JG Zuma: 221673598
>
> 1. In terms of section 75(7)(a) of the Correctional Services Act 111 of 1998, (CSA) as amended, read together with sections 79 and regulation 29A of the CSA, I, Arthur Fraser, National Commissioner: Department of Correctional Services must make a decision whether or not to approve an application for medical Parole of a sentenced offender.
>
> 2. I must first hasten to indicate that as the National Commissioner, I delegated the empowering authority in terms of section 75(7)(a) to Heads of Correctional Centres as promulgated in government gazette no. 43834 dated 23 October 2020 in terms of section 97(3) of the Act. However, the introduction of the delegation it indicates that "any delegation does not prohibit the National Commissioner from exercising power or duty assigned:...

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3. Taking into consideration the events that occurred during the month of July 2021 (public unrests and destruction of property) following the incarceration of Mr JG Zuma (Mr Zuma), as well as the ongoing heightened public interest in any matter that relates to Mr Zuma, I instructed that all matters surrounding the incarceration and care of Mr Zuma where decisions are required, that such be done in consultation with myself (as the National Commissioner).

4. Prior to 6 August 2021, I was briefed by both the acting Regional Commissioner for the KwaZulu-Natal Region and the Estcourt Head of Correctional Centre on their concerns with regard to the deteriorating health and wellbeing of Mr Zuma. They informed me that his physical appearance (discolouration of his face) was a matter of concern and further thereto that he had a sudden and visible loss of weight within a short period. Such a report was of great concern to me.

5. On 4 September 2021, the KZN Regional Commissioner and Estcourt Head of Correctional Centre requested an audience indicating that they were concerned that the Medical Parole Advisory Board (MPAB) had not recommended for the placement of Mr Zuma on medical Parole as he had been hospitalised for an extended period of time. A legitimate concern for the Estcourt Head of Correctional Centre was that the facility (although new) would not be able provide the type of tertiary health care required for Mr Zuma.

6. The Estcourt Correctional Centre could not risk the life of an inmate being fully aware that it has no capacity to render the required tertiary health care and such will amount to major consequences should Mr Zuma perish within our facility.

7. As a result of this engagement, I requested that relevant documents be availed for my consideration.

8. The following documents were presented to me for consideration:

   8.1 Three medical reports by the South African Military Health Service (SAMHS) dated 8 July 2021, 28 July 2021 and 5 August 2021.

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8.2 Report Dr LJ Mphatswe, a member of the MPAB Commissionered to do a physical examination of Mr Zuma and gathered evidence in support thereof

8.3 Recommendation by the MPAB on the condition of Mr Zuma.

9. I am advised by the Acting Chief Director Legal Services that the MPAB makes recommendations to the authority that must make a decision.

10. In my view, this situation occasioned a unique moment within the history of Correctional Services, where a former Head of State of the Republic of South Africa is incarcerated whilst still entitled to privileges as bestowed by the Constitution.

11. Having regard for the aforementioned and knowing that the Estcourt Head of Correctional Centre is at the level of an Assistant Director, it is within this context that I decided to rescind the delegation as confirmed in section 75(7)(a) of the Correctional Services Act 111 of 1998, as amended.

12. I therefore requested that all relevant and available information be at my disposal for consideration as the legal authority to arrive at a decision. I inter alia considered the following in coming to a decision:

12.1 Mr Zuma is 79 years old and undeniably a frail old person.

12.2 That the various reports from the SAMHS all indicated that Mr Zuma has multiple comorbidities which required him to secure specialised treatment outside the Department of Correctional Services (DCS).

12.3 That Dr LJ Mphatswe (member of MPAB) in his report dated 23 August 2021 recommended that the applicant, Mr JG Zuma be released on medical Parole because his "clinical health present unpredictable health conditions" and that sufficient evidence has also arisen from the detailed clinical reports

12.4 The Medical Parole Advisory Board recommendation agreed that Mr Zuma suffers from multiple comorbidities. The MPAB

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further stated that his treatment had been optimised and his conditions have been brought under control because of the care that he is receiving from a specialised hospital, therefore they did not recommend medical Parole. It is the type of specialised care that cannot be provided by the Department of Correctional Services in any of its facilities.

12.5 As a result, there is no guarantee that when returned back to Estcourt Correctional Centre Mr Zuma's "conditions" would remain under control. It is not disputed that DCS does not have medical facilities that provide the same standard of care as that of a specialised hospital or general hospital.

12.6 Mr Zuma's wife, Mrs Ngema, has undertaken to take care for him if released, as Mr Zuma will be aided by SAMHS as a former Head of State, providing the necessary health care and closely monitoring his condition.

13. Having considered all the relevant information, I am satisfied that Mr Zuma meets the criteria in section 79(1) to be placed on medical Parole. I hereby approve his release on medical Parole immediately (5 September 2021) on the following conditions:"

Legislative Framework and Policies Relevant to Medical Parole

[41] The Correctional Services Act 8 of 1959 has been amended many times before, most recently by the Correctional Matters Amendment Act 5 of 2011, which came into effect 1 March 2012.

[42] The parole regime that applied before 2012 limited parole consideration to offenders in the final phase of a terminal disease or condition[9]. The medical practitioner treating the offender had to produce written evidence of their diagnosis of terminal disease or condition, and the Commissioner was the decision-maker.

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[9] Before the amendment section 79 read: "Any person serving any sentence in a prison and who, based on the written evidence of the medical practitioner treating that person, is diagnosed as being in the final phase of any terminal disease or condition may be considered for placement under Correctional supervision or on parole, by the Commissioner, Correctional Supervision and Parole Board or the court, as the case may be, to die a consolatory and dignified death."

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[43] The 2012 amendment differs in significant respects from the previous regime. An offender or someone acting on the offender's behalf is now able to bring an application for release on an offender on medical Parole. The placement on medical Parole is extended to physically incapacitated offenders and those suffering from an illness that severely limits their daily activity or self-care.

[44] The offenders trusted medical practitioners no longer make a diagnosis of medical illness or physical incapacity. In terms of the new regime, the Medical Parole Advisory Board ("the Board"), an independent expert body, comprised of 10 medical practitioners appointed by the Minister, [10] has to impartially and independently make a medical determination whether or not an offender is terminally ill or is suffering from an illness that severely limits their daily activity or self-care.

[45] The Board must provide independent reports on each and every application for medical Parole throughout the country. It has special expertise related to medical parole requirements in section 79(1)(a). Each member of the Board applies his or her independent mind as to whether it is appropriate to grant medical Parole in accordance with section 79(1). Its decision is taken by a majority vote of members present.[11] The Board was introduced to prevent abuses of the medical parole system and ensure that there is consistency and transparency in the granting of medical Parole.[12]

Issues and Standard of Review

[46] There is no dispute that the National Commissioner's decision to grant Third Respondent medical parole is an administrative exercise of public power in terms of legislation. As such the decision must be lawful, rational, reasonable

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[10] Section 79(3)(a).
[11] Regulation 29B(6).
[12] Section 14 of the Correctional Matters Amendment Act 5 of 2011 was introduced following the widely publicized release of Mr Shabir Shaik on medical parole after serving 3 years of his 15 year sentence.

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and procedurally fair. In *Fedsure Life Assurance Ltd*[13] the Constitutional Court said that:

> '[I]t is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law — to the extent at least that it expresses this principle of legality — is generally understood to be a fundamental principle of constitutional law.'

[47] The applicants seek to review the parole decision on three grounds. Firstly, the Commissioner failed to comply with a mandatory material procedure or condition prescribed by the Act. Secondly, in releasing the Third Respondent on Parole the Commissioner took into account irrelevant considerations and failed to consider relevant considerations (subsection 6(2)(e)(iii)). Thirdly, the decision by the Commissioner is otherwise unconstitutional and therefore unlawful (subsection 6(2)(i)).

[48] Section 79 of the Act and regulation 29A [14] of the Correctional Services Regulations sets out the requirements and the processes and procedures for release on medical Parole. It subjects the Commissioner's power to grant medical Parole to substantive and procedural constraints. The section is headed Medical Parole and reads:

> (1) Any sentenced offender may be considered for placement on medical Parole, by the National Commissioner, the Correctional Supervision and Parole Board or the Minister, as the case may be, if (own underlining)
>
> *(a)* such offender is suffering from a terminal disease or condition or if such offender is rendered physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care;
>
> *(b)* the risk of re-offending is low; and
>
> *(c)* there are appropriate arrangements for the inmate's Supervision, care and treatment within the community to which the inmate is to be released.

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[13] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA374 (CC); 1998 (12) BCLR 1458 (CC) at para 56.
[14] Correctional Services Regulations GN R914 in GG26626 of 30 July 2004.

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[49] It is generally accepted that an offender cannot expect to escape punishment or seek an adjustment of his term of imprisonment because of ill health[15]. The Legislature deliberately took the responsibility to diagnose terminal illness or severe physical incapacity away from the treating physician and left it to an independent Board to make an expert medical diagnosis.

[50] Section 79(2) and (3) of the Act read with regulation 29A sets out a procedure to be followed before the Board can make its expert medical determination and recommendations to the Commissioner.

[51] First, an application for medical Parole must either be made by a medical professional or by a sentenced offender or a person acting on his behalf.[16] When an application is made by a sentenced offender or a person acting on their behalf, the application "shall not be considered by the National Commissioner, the Correctional Supervision and Parole Board or the Minister, as the case may be", unless it is accompanied by a written medical report justifying the recommendation for placement on medical Parole.[17]

[52] When the Head of a Correctional Centre in which the offender is incarcerated receive an application for medical Parole, he or she must refer the application to the <u>Correctional medical practitioner</u>[18] assigned to that Correctional Centre who must evaluate the application in accordance with the substantive requirements of section 79 of the Act and make a recommendation to the Board.[19] (my emphasis)

[53] The recommendation must be submitted to the Medical Parole Advisory Board, who must assess the application, the offender's medical report and the Correctional medical practitioner's recommendations. In assessing the

[15] See Du Plooy v Minister of Correctional Services and Others [2004] JOL 12650 T, Paddock v Correctional Medical Practitioner, St Albans Medium B Correctional Centre 2014 JDR 1804 (ECP) at para 38.
[16] Section 79(2)(a) and regulation 29A(2) of the Regulations.
[17] Section 79(2)(b), section C of the prescribed form).
[18] Dr Mafa is not a correctional medical practitioner. He is in the employ of SAMHS. He evaluated his own application for the Third Respondent to be place on medical parole which is incompetent.
[19] Regulation 29A(3).

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application, the Board must consider whether the offender suffers from one of the terminal diseases listed in regulation 29A (5) or any other terminal disease.

[54] The Board may obtain additional reports from other medical specialists.[20] Pursuant to this assessment, the Board must furnish the National Commissioner with an independent medical report and a recommendation as to whether the offender suffers from a terminal disease or is physically incapacitated as provided for in section 79(1)(a) of the Act.[21]

[55] Suppose the recommendation of the Medical Advisory Board is positive. In that case, the National Commissioner must, from a Correctional Services perspective, decide whether, despite being found to be terminally ill, there is still a high risk of re-offending or that the offender cannot be cared for properly outside the prison as stipulated in section 79(1)(b) and (c).

[56] It may not be in the interest of justice to grant Parole to a terminally ill offender who poses a serious risk to society or cannot be cared for outside prison, in these circumstances, the National Commissioner, in the exercise of his discretion, may refuse to grant Parole to such a terminally ill offender.

[57] In summary, the Board and not the doctors treating the offender, as it was the case previously, decides if an offender is terminally ill or severely incapacitated, if its recommendation is positive, the Commissioner must then decide whether section 79(1)(b) and (c) are satisfied.

[58] The recommendations of the Board as the expert body established to provide an independent medical report on whether an offender is terminally ill or physically incapacitated is ordinarily decisive and binding on the Commissioner. The Commissioner does not have the medical expertise to overrule the recommendation of the Board. A similar issue arose for decision in *Kimberly Junior School*[22] where Supreme Court of Appeal reviewed and set aside the

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[21] Regulation 29A(7).
[22] *Kimberly Junior School v Head Northern Cape Education department* 2010 (1) SA 217.

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decision taken by Head of Education Department to appoint a candidate other than that recommended by the school governing body as the applicable legislation, section 6(3)(a) of the Employment of Educators Act 76 of 1998 provided that any appointment, promotion or transfer of an educator by the Head of the department to post at the public school may only be made on the recommendation of the governing body of the public school.

[59] The Commissioner says that he considered the various reports from the SAMHS, which indicated that the Third Respondent has multiple comorbidities which required him to secure specialised treatment outside the Department of Correctional Services. He also considered the report of Dr LJ Mphatswe, a member of the Board. In his minority report, the latter recommended that the Third Respondent be released on medical Parole because his "clinical health present unpredictable health conditions" and sufficient evidence has also arisen from the detailed clinical reports.

[60] In terms of regulation 29A (3), the report of the correctional medical practitioner, which in this case was compiled by Dr Mafa and the report of Dr Mphatswe and other reports are regulated to be provided to the Board in terms of section 79(2)(c) and not to be considered by the Commissioner. The Commissioner has impermissibly usurped the statutory functions of the Board.

[61] In its expert assessment, the Board has already considered the reports from the South African Military Health Services and in particular the report by Dr Mphatswe and has recommended against medical parole. The decision by the Commissioner to now rely on these reports to overturn the recommendation of the Board is irrational, unlawful and unconstitutional.[23]

[62] In any event, none of the expert reports relied upon by the Commissioner asserts that the Third Respondent is terminally ill or is physically incapacitated. Dr Mafa, in completing the medical parole application form, does not state that the Third Respondent *"suffers from a terminal disease or condition which is*

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[23] subsection 6(2)(i) PAJA.

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irreversible with poor prognosis and irremediable by available medical treatment and requires continuous palliative care and will lead to imminent death within a reasonable time.[24]"

[63] In answer to question 5(d), in which it is asked whether the offender is suffering from a terminal disease or condition that has deteriorated permanently or reached an irreversible state – he stated that the *"condition has deteriorated significantly"*. He does not state that the Third Respondent's condition has deteriorated permanently or had reached an irreversible state.

[64] To the question of whether the Third Respondent is incapacitated, he answered that *"Patient is under full-time comprehensive care medical team."*

[65] To question 5(f) on page 2 of the addendum, which asks whether the offender is "able/unable to perform activities of daily living or self-care" – Dr Mafa merely states that *"patient is under full time comprehensive medical care of the medical team."*

[66] It is indicated in the addendum to the application form that an occupational therapist report should be attached if it is averred that the patient is unable to perform the activities of daily living or self-care, no such occupational therapist report is attached.

[67] To question 6, which asks why medical Parole should be considered -Dr Mafa answers *"medical incapacity"* he doesn't say that medical parole should be considered on the basis of physical incapacity, which is a listed option.

[68] Dr Mphatswe recommended that Third Respondent should be released on medical Parole with immediate effect because *"his clinical picture presents unpredictable health conditions constituting a continuum of clinical conditions"* and that prison limited support for the Third Respondent's optimum care. He

[24] This is a definition of a terminal disease or condition mentioned below paragraph 5(d) of the addendum to the medical parole application form that Dr Mafa completed.

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does not say that the Third Respondent is terminally ill or is rendered physically incapacitated as a result of an injury, disease or illness.

[69] The Surgeon General also does not claim that the Third Respondent is terminally ill or incapacitated. His report only state that the reports "*reflect a precarious medical situation* and he believes that *the patient will be better managed and optimized under different circumstances that presently prevailing.*

[70] The Third Respondent claim that he suffers "*from a condition which carries significant risk to his life*" nowhere does he claim to be terminally ill or physically incapacitated.

[71] The reasons given by the Commissioner to release the Third Respondent on medical Parole are not connected with the requirements for medical parole and are not authorised by the empowering provision.[25] The Commissioner acted irrationally and considered irrelevant considerations and acted for an impermissible purpose. He justified his decision as follows:

70.1 There has never been a situation where a former Head of State has been incarcerated, and we will all agree this was an unprecedented situation'. This negates the Constitutional right of all people to be treated equally before the law.

70.2 The *'Estcourt Correctional Centre could not risk the life of an inmate'*. This is not a reason for granting medical Parole. Section 12(1) of the Act provides that the Department' must provide, within its available resources, adequate health care services, based on the principles of primary health care, in order to allow every inmate to lead a healthy life and section 12(2)(a) provides that every inmate has the right to adequate medical treatment'.

[25] PAJA section 6(2)(e)(i).

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70.3 If Mr Zuma did die while incarcerated, it could have "dire consequences" and "could have ignited events similar to that of July 2022". Threats of riots is not a ground for releasing an offender on medical Parole.

70.4 *Significant reputational damage that will be suffered by the department in the event of the Third Respondent dying in detention.* None of the medical experts has contended that the Third Respondent condition has deteriorated permanently or reached an irreversible state.

70.5 That placing the Third Respondent on medical Parole was *"going to relieve the department of the costs of keeping him in incarceration"*. This is an irrelevant consideration.

70.6 That Third Respondent "would, in any event, become eligible for consideration for placement on parole within the next seven weeks". This is not a requirement for release on medical parole.

[72] The Commissioner states that he overrode the recommendation of the Board because it was clear to him from other medical reports that Respondent's conditions "*were only brought under control through optimized care that he was receiving at an advanced health care facility*". This decision is irrational because if there was no longer a need for the Third Respondent to receive the standard of care provided by the hospital, Third Respondent should have been returned to the Correction Centre where he had access to all the medical care he required instead of being released to the care of his wife who has no medical training.

[73] Having released the Third Respondent on Parole, the Commissioner failed to consider the other jurisdictional requirement in section 79, namely, that the risk of re-offending must be low. The Third Respondent continues to attack the Constitutional Court while on medical Parole. He states in the answering affidavit that he considers himself "a prisoner of the Constitutional Court and alleges that "he was incarcerated without trial despite the Court dismissing his rescission application.

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[74] The parole decision is accordingly reviewable as the Commissioner failed to comply with a mandatory and material condition - that the Third Respondent is terminally ill or physically incapacitated.[26] The Commissioner was influenced by an error of law in believing that he was entitled to grant medical Parole when the Board has concluded that the Third Respondent did not meet the requirements for release on Parole.[27]

[75] Counsel for the Third Respondent relying upon section 75(7) of the Act submit that the National Commissioner has "self-standing powers" to grant medical Parole to a sentenced offender serving a sentence of incarceration for 24 months or less and accordingly, so the argument goes, there is no need for recommendation by the Board on the appropriateness of granting medical Parole as the parole decision was determined under section 75(7) and not under section 79 of the Act.

[76] Section 75(7)(a) reads:

> Despite subsections (1) to (6), the National Commissioner may-
>
> (a) place under Correctional Supervision or day parole, or grant parole or medical Parole to a sentenced offender serving a sentence of incarceration for 24 months or less.

[77] A similar argument was advanced on behalf of the Commissioner that section 75(7)(a) Act empowers the National Commissioner to place a sentenced offender serving a sentence of incarceration for 24 months or less on Parole, and if the sentenced offender is serving a sentence of more than 24 months, the authority to place such a sentenced offender on medical Parole lies with the Correctional Supervision and Parole Board in terms of section 75(1) of the Act.

[78] When interpreting a provision of the Act, any reasonable interpretation which is consistent with the objects of the Act must be preferred to one that is

[26] PAJA Section 6(2)(d)
[27] PAJA, section 6(2)(d)

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inconsistent with the objects of the Act.[28] The argument that a distinction must be drawn between terminally ill offenders serving a sentence of incarceration of fewer than 24 months and those serving more has no merit. This differentiation may amount to unfair discrimination between offenders on death's doors purely by reasons of the period of incarceration they have to serve.

[79] Section 75 deals with the powers, functions, and duties of Correctional Supervision and Parole Boards, whose responsibility is to consider offenders for Parole or medical Parole. Section 75(7)(a) merely excuses them from their responsibilities if the offender is serving a sentence of incarceration of less than 24 months. Section 75(7)(a) must be read with section 79 of the Act, which is the only section that deals with medical Parole and no other kind of Parole are reserved for the National Commissioner.

[80] The aim of the interpretation of the statute is to discover the intention of the Legislature by examining the language used in its general context.[29] Section 79(1) reads, "*Any sentenced offender may be considered for placement on medical Parole by the National Commissioner, the Correctional Supervision and Parole Board or the Minister, as the case may be…*

[81] Section 79 applies irrespective of who the decision-maker is. It is presumed that the Legislature is consistent with itself. The Constitutional Court decision *Independent Institute of Education (Pty) Limited*[30] is particularly instructive. The Court held:

> It is a well-established canon of statutory construction that "every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute, and with every other unrepealed statute enacted by the Legislature". Statutes dealing with the same subject matter, or which are *in pari materia*, should be construed together and harmoniously. This imperative has the effect of harmonising conflicts and

[28] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (CCT 39/10) [2010] ZACC 26; 2011 (4) SA 113 (CC) ; 2011 (3) BCLR 229 (CC) (30 November 2010).
[29] *President Insurance Co. Ltd v Kruger* 1994 (3) 789 A ..
[30] *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society and Others* (CCT68/19) [2019] ZACC 47; 2020 (2) SA 325 (CC); (2020 (4) at par 38.

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> differences between statutes. The canon derives its force from the presumption that the Legislature is consistent with itself. In other words, that the Legislature knows and has in mind the existing law when it passes new legislation and frames new legislation with reference to the existing law. Statutes relating to the same subject matter should be read together because they should be seen as part of a single harmonious legal system.

[82] The argument by Respondents is also not sustainable on the facts. Both Dr Mafa and the National Commissioner did not, by oversight or administrative error, rely on the provisions of section 79(1).[31]

[83] Dr Mafa applied for medical Parole under section 79 of the Act. The application form is headed "*Medical Parole Application in terms of section 79 of Act 111 of 1998 as amended*".

[84] In the first paragraph of the reasons provided by the Commissioner for his decision, the Commissioner starts by saying that he understood the decision to be taken in terms of section 75(7) read with section 79 of the Act and Regulation 29A.

[85] In paragraph 47 of the answering affidavit, the Commissioner confirms that the application was lodged in terms of section 79(1) of the Act and regulation 29A (3). He states that:

> ..." A medical practitioner who deals with the application for medical Parole in terms of the provisions of Regulation 29A (3) of the Act must make an evaluation of the said application for medical Parole in accordance with the provisions of section 79 of the Act and make a recommendation. Dr Mafa dealt with the application for medical Parole and made a positive recommendation for the fourth Respondent's placement on medical Parole".

[86] The Third Respondent states in paragraph 229 of his answering affidavit that the Medical Parole Advisory Board was not entitled to override the view of his specialist medical doctors that he should be released on Parole. It is argued on

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[31] See Minister of Education v Harris (CCT13/01) [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC) (5 October 2001) at paragraph 45 to 46.

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behalf of the Third Respondent that has made a pronouncement on the Third Respondents comorbidities, the Board failed to make any comment on the findings and recommendations of Dr Mafa and Dr Mphatswe, who the Board assigned to conduct a medical assessment on the Third Respondent.

[87] As indicated above, the Board has to impartially and independently make a medical determination whether the Third Respondent does suffer from a terminal illness and that he is physically incapacitated. It conducts its investigations and has considered all the reports, including the unredacted reports by both Dr Mafa and Dr Mphatswe. It concluded in its expert opinion that though the Third Respondent has comorbidities, he does not meet the requirements for release on medical Parole.

The Remedy

[88] Section 8 of PAJA confers on a court in proceedings for judicial review a generous jurisdiction to make orders that are 'just and equitable.

[89] Moseneke DCJ in *Steenkamp NO*[32] explained that the aim of a just and equitable remedy is to correct or reverse the results of the unlawful decision. He stated that:

> "It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case, the remedy must fit the injury. The remedy *must be fair* to those affected by it and yet vindicate effectively the right violated. It must be *just and equitable in the light of the facts, the implicated constitutional principles*, if any, and the controlling law... . The purpose of a public law remedy is to pre-empt or *correct* or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision .... Ultimately the purpose of a public law remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law".

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[32] *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16, 2007 (3) SA 121 (CC).

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Examples of public remedies suited to vindicate breaches of administrative justice are to be found in s 8 of the PAJA ... [which] confers on a court in proceedings for judicial review a generous jurisdiction to make orders that are 'just and equitable.

[90] *Bengwenyama Minerals*[33] provides a useful guide to assist the Court in the exercise of its remedial discretion. Froneman J stated that:

> "The apparent anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions. But then, the law often is a pragmatic blend of logic and experience. The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake. I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented - direct or collateral; the interests involved, and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case. "

[91] The kind of challenge presented in this matter is that the Constitutional Court has already determined that 15-month direct imprisonment was the only 'just and equitable' order to make under the circumstances and has rejected other lesser forms of punishment.

[92] In determining the length of sentence to be imposed on the Third Respondent, the Constitutional Court held that it was enjoined to consider the circumstances, the nature of the breach; and the extent to which the breach was ongoing. In doing so, it held that quantifying the egregiousness of Mr Zuma's conduct was an impossible task, but "that the focus had to be on what kind of sentence would demonstrate, generally, that orders made by a court must be obeyed", and, to

[33] *Bengwenyama Minerals v Genorah Resources* 2011(4) SA 113 at para 85.

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the Third Respondent specifically, "that his contumacy stood to be rebuked in the strongest of terms". The Constitutional Court concluded that "if with impunity, litigants, especially those in positions like that of Mr Zuma, are allowed to decide which orders they wish to obey and those they wish to ignore, a constitutional crisis will be precipitated". The Court ordered an unsuspended sentence of imprisonment for a period of 15 months.

[93] The Commissioner's unlawful intervention has resulted in the Third Respondent enjoying nearly three months of his sentence sitting at home in Nkandla, not serving his sentence in any meaningful sense. The DA, in support of their review application, refers to a Sunday Times article of 17 October 2021 reporting that the Third Respondent met with his political allies Carl Niehaus (a former staffer at Luthuli house) and Dudu Myeni (the former chair of SAA) at the Sibaya Casino on the 15 October 2021. The Third Respondent also addressed his supporters at a virtual prayer meeting on 14 October 2021. As determined by the Board the Third Respondent is not terminally ill or severely incapacitated and seems to be living a normal life.

[94] The Commissioner has unlawfully mitigated the punishment imposed by the Constitutional Court, thereby rendering the Constitutional order ineffective, which undermines the respect for the courts, for the rule of law and for the Constitution itself.

[95] The consequential relief sought, sending the Third Respondent back to prison to do his time and order that the time spent on medical parole should not count towards fulfilling his sentence, will not impact him unfairly as there is no suggestion that he is an innocent party. The Third respondent defied the Zondo Commission, the judiciary and the rule of law and is resolute in his refusal to participate in the Commission's proceedings. He continues to attack the Constitutional Court while unlawfully benefitting from a lesser punishment than what the Constitutional Court has imposed. He states in his answering affidavit that he considers himself "a prisoner of the Constitutional Court" and claim that he was "incarcerated without trial".

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[96] I agree with the submission by HSF that without the order that the Third Respondent's time on medical parole not counting toward the fulfilment of his sentence, the Third Respondent will unduly benefit from a lesser punishment than that imposed by the Constitutional Court.

[97] In the relevant part, s 8(1)(c) of the PAJA reads:

> The Court or tribunal, in proceedings for judicial review ... 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.

[98] On the question of substitution Khampepe J in *Trencon Construction (Pty) Ltd*[34] formulated the test for exceptional circumstances as follows:

> To my mind, given the doctrine of separation of powers, in conducting this enquiry there are *certain factors that should inevitably hold greater weight.* The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors *must* be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.

[99] Remitting the decision to the Commissioner will not serve any purpose as the Commissioner will have no discretion to exercise. There is no pending parole

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[34] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22, 2015 (5) SA 245 (CC), 2015 (10) BCLR 1199 (CC)('*Trencon*') at para 47.

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application, whether ordinary or medical. The Board has finally determined that the Third Respondent is stable and does not qualify for Parole. Regarding the requisite information required to make a decision, the Court has the benefit of the record with all information and recommendations that would have been before the Commissioner. No administrative expertise is required from the Commissioner, and there is no basis upon which the Commissioner could again overrule the recommendation of the Board. This Court is in as good a position and thus as well qualified as the Commissioner to make a decision. It will accordingly be just and equitable to make a substitution order.

Order

[100] In the result, the following order is made:

1. The applicants' non-compliance with the usual forms, time periods, and service rules is condoned.

2. The decision of the first Respondent (Mr Arthur Fraser at the time) to place the third Respondent on medical parole, taken on 5 September 2021, is reviewed, declared unlawful, and set aside;

3. The medical parole decision is substituted with a decision rejecting the third Respondent's application for medical parole;

4. It is hereby directed that the third Respondent be returned to the custody of the Department of Correctional Services to serve out the remainder of his sentence of imprisonment;

5. It is declared that the time the Third Respondent was out of jail on medical Parole should not be counted for the fulfilment of the Third Respondent's sentence of 15 months imposed by the Constitutional Court.

6. In terms of section 8(1)(d) and section 8(2)(b) to (d) of the Promotion of Administrative Justice Act 3 of 200 (PAJA):

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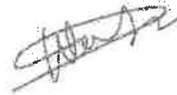
It is declared that in terms of section 71(1) (a) of the Correctional Services Act 111 of 1998 (CSA) read with regulations 29A, and 29B promulgated in terms of CSA, the Medical Parole Advisory Board (MPAB) is the statutory body to recommend in respect of the appropriateness of medical parole to be granted or not in accordance with section 79(1)(a) (the terminal condition and incapacity requirements).

7. The National Commissioner and Mr Zuma are ordered to pay the costs of the applicants, jointly and severally, such costs to include the costs of two counsel where so employed.



K.E. MATOJANE
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: **Judgment:**	23 November 2021 15 December 2021
For the Democratic Alliance: **Instructed by:**	I. Jamie SC (with M. Bishop and P. Olivier) Minde Schapiro & Smith
For the Helen Suzman Foundation: **Instructed by:**	M. du Plessis SC (with A. Coutsoudis, J Thobela-Mkhulisi, J. Mitchell, and C. Kruyer) Webber Wentzel
For Afriforum NPC: **Instructed by:**	F.J. Labuchagne Hurter Spies Inc.
For National Commissioner of Correctional Services: **Instructed by:**	S.Y. Mphahlele SC (with E. Baloyi-Mere SC and B. Ndebele) State Attorney
For Jacob Gedleyihlekisa Zuma: **Instructed by:**	D. Mpofu SC (with T. Masuku SC and M. Lebakeng) Ntanga Nkuhlu Incorporated

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