IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Supreme Court of Appeal Case No: **033/2022**

In the matter between:

THE NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	First Appellant
JACOB GEDLEYIHLEKISA ZUMA	Second Appellant

and

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

FILING NOTICE

The First Respondent herewith serves and file the following documents:

Heads of Argument, List of Authorities; Chronology of Events and Certificate.

DATED at **BLOEMFONTEIN** on this **12th** day of **MAY 2022.**

MINDE SCHAPIRO & SMITH INC
First Respondent's Attorneys
CAPE TOWN
Ref: E Jonker/DEN16/0786

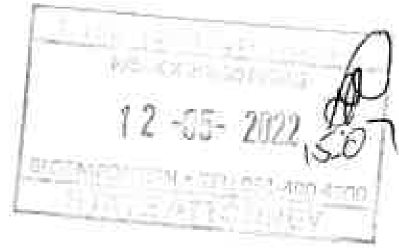
C/O SYMINGTON & DE KOK INC
Symington & De Kok Building
169B Nelson Mandela Drive, Westdene Bloemfontein
Tel 051 505 6600
Email: cslack@symok.co.za
Ref: L Venter/csl/FFD2127

TO:

THE REGISTRAR
SUPREME COURT OF APPEAL
BLOEMFONTEIN

AND TO:

THE STATE ATTORNEY: PRETORIA
Attorneys on behalf of First Appellant
PRETORIA
Ref: Reuben Sekgobela
C/O THE STATE ATTORNEY: BLOEMFONTEIN
11TH FLOOR, FEDSURE HOUSE
49 CHARLOTTE MAXEKE STREET
BLOEMFONTEIN
REF: MS ELISE KOCK



AND TO:

NTANGA NKUHLU INC
Attorneys on behalf of Second Appellant
Ref: M Ntanga/Z0017/21
C/O PEYPER LESSING ATTORNEYS INC
39C FIRST AVENUE
WESTDENE
BLOEMFONTEIN
REF: P PEYPER/re/XP0013

PEYPER • LESSING
ATTORNEYS INC
051 011 3352 058 307 8540
DATE: 12/05/22
TIME: 14:56
SIGNATURE:

AND TO:

WEBBER WENTZEL ATTORNEYS
Attorneys on behalf of Second Respondent
JOHANNESBURG
Ref: V MOVSHOVICH/3050264
C/O HONEY ATTORNEYS
HONEY CHAMBERS
NORTHRIDGE MALL
KENNETH KAUNDA
BLOEMFONTEIN
REF: J AKALLY/M04856

2022

14h40

AND TO:

HUNTER SPIES INC
Attorneys on behalf of Third Respondent
PRETORIA
Ref: WD Spies/MAT4215
C/O HENDRE CONRADIE INC
119 PRESIDENT REITZ AVENUE
WESTDENE
BLOEMFONTEIN
REF: MS A BOTHA

12 -05- 2022 14:28

ROSSOUWS ATTORNEYS
Received without prejudice of rights

IN THE SUPREME COURT OF APPEAL
(BLOEMFONTEIN)

SCA case number: 33/2022

HC case numbers: 45997/2021; 46468/2021; 46701/2021

In the appeal between:

THE NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	First appellant
JACOB GEDLEYIHLEKISA ZUMA	Second appellant

and

THE DEMOCRATIC ALLIANCE	First respondent (applicant in 45997/2021)
THE HELEN SUZMAN FOUNDATION	Second respondent (applicant in 46468/2021)
AFRIFORUM NPC	Third respondent (applicant in 46701/2021)

DEMOCRATIC ALLIANCE'S HEADS OF ARGUMENT

TABLE OF CONTENTS

I. INTRODUCTION 1

II. RELEVANT FACTS 4

III. THE HIGH COURT CORRECTLY FOUND THAT THE PAROLE DECISION WAS UNLAWFUL 7

(a) Ground 1: Parole decision precluded by Board's negative recommendation 8

(b) Ground 2: Mr Zuma does not satisfy section 79(1)(a) 14

(c) Ground 3: The parole decision is irrational / unreasonable 20

(d) Ground 4: The parole decision was made for an ulterior purpose / reliant on an irrelevant consideration 21

(e) Ground 5: The Commissioner was biased 23

IV. APPELLANTS' DEFENCES 24

(a) The proposition that Mr Zuma requires 24-hour medical attention 24

(b) The claim that doctors found that Mr Zuma has a terminal illness 28

(c) Standing 29

V. RELIEF 31

VI. CONCLUSION AND COSTS 34

ANNEXURE A – STATUTORY PROVISIONS 36

I. INTRODUCTION

1. On 8 July 2021 the second appellant, former President Jacob Gedleyihlekisa Zuma, was admitted to the Estcourt Correctional Centre as a prisoner, to serve a fifteen-month sentence for contempt of court handed down by the Constitutional Court.

2. Less than two months later, on Sunday, 5 September 2021, Mr Zuma was granted medical parole by the first appellant, the National Commissioner of Correctional Services, then Mr Arthur Fraser (**'the Commissioner'** and **'the parole decision'**).

3. Shortly thereafter, three urgent applications were launched to review and set aside the decision: one by the Democratic Alliance (**'the DA'**), another by the Helen Suzman Foundation (**'the HSF'**), and the third by AfriForum NPC (**'AfriForum'**).

4. On 15 December 2021, the High Court found in the applicants' favour:[1]

    4.1. It found that the parole decision was *'irrational, unlawful and unconstitutional'*;[2] and that the Commissioner had *'unlawfully mitigated the punishment imposed by the Constitutional Court'* and so *'undermine[d] the respect for the courts, for the rule of law and for the Constitution itself'*.[3]

    4.2. The High Court reviewed and set aside the parole decision with costs, and ordered that Mr Zuma be returned to the custody of the Department of Correctional Services (**'the Department'**). It also declared that Mr Zuma's time on medical parole would not count towards the fulfilment of his sentence.

---

[1] The High Court judgment is at vol 6 pp 1006 – 1038.

[2] High Court judgment vol 6 p 1026 para 61.

[3] High Court judgment vol 6 p 1035 para 94.

5. Now, with the leave of the High Court,[4] the Commissioner and Mr Zuma seek to overturn its order in this Court. They should not meet with success. The High Court's order was, with respect, entirely correct.

6. The parole decision is patently unlawful:

6.1. The Commissioner granted medical parole against the recommendation of the Medical Parole Advisory Board (**'the Board'**). He was not permitted to do so. The Board is a specialist body made up of doctors. If it recommends against medical parole, the Commissioner is not permitted to grant it.

6.2. Mr Zuma does not satisfy section 79(1)(*a*) of the Correctional Services Act[5] a requirement for the granting of medical parole. He was – on the facts before the Commissioner – neither terminally ill nor incapacitated.

6.3. Instead, the Commissioner claims to have granted medical parole for other reasons: that Mr Zuma is old, *'frail'*, that he has *'multiple comorbidities'*, that he might suddenly fall ill, or that there would be civil unrest were he to die in prison. But these are impermissible reasons. One can only receive medical parole if one is terminally ill or incapacitated.

6.4. On the reasons given by the Commissioner, the parole decision is irrational. The Commissioner claims that he made the parole decision because Mr Zuma needed to be close to tertiary medical care. But he then sent Mr Zuma to Nkandla, which is hundreds of kilometres away from the nearest tertiary hospital.

---

[4] Order granting leave to appeal vol 6 p 1075.

[5] Correctional Services Act 111 of 1998.

6.5. The only way in which the parole decision makes any sense is if it was granted for the reason that the public suspects: that Mr Zuma received favourable treatment because of his political standing. This was the DA's final ground of review – a reasonable apprehension of bias.

7. We structure the remainder of these heads of argument as follows:

7.1. first, we provide a brief overview of the relevant facts;

7.2. secondly, we explain why the parole decision was indisputably unlawful;

7.3. thirdly, we deal with some of the appellants' remaining arguments; and

7.4. fourthly, we explain why there is no justification for an Appellate to interfere with the High Court's exercise of its broad remedial discretion.

8. Some preliminary points:

8.1. Unless otherwise stated, all record references in these heads are to the affidavits in the DA's application.

8.2. In the High Court, the Commissioner produced a redacted Rule-53 record. For the sake of expediency, all of the applicants chose to proceed on the basis of this limited record.[6] Most of the primary documents in the core bundle are thus redacted.

8.3. On 10 May 2022, after the appeal record had been filed, President Maya granted the DA's and the HSF's requests for an expedited appeal hearing and ordered

---

[6] The DA has never conceded, however, that the production of only a limited record was lawful (DA supplementary founding affidavit vol 1 p 192 paras 40 – 42).

that heads of argument and related documents *'be filed immediately'*. Accordingly, these heads were prepared as quickly as possible and without sight of the appellants' heads. The DA reserves its right to respond to arguments in the appellants' heads at the hearing.

II. RELEVANT FACTS

9. In late June 2021, the Constitutional Court sentenced Mr Zuma to fifteen months' imprisonment for contempt of court; for failing to obey an earlier order of the Court requiring him to appear before the State Capture Commission[7] (**'the contempt judgment'**).

10. Mr Zuma had flouted the Constitutional Court's authority openly and without shame. In the words of the Court:

> '[I]t is becoming increasingly evident that the damage being caused by [Mr Zuma's] ongoing assaults on the integrity of the judicial process … must be stopped now. Indeed, if we do not intervene immediately to send a clear message to the public that this conduct stands to be rebuked in the strongest of terms, there is a real and imminent risk that a mockery will be made of this Court and the judicial process in the eyes of the public. The vigour with which Mr Zuma is peddling his disdain of this Court and the judicial process carries the further risk that he will inspire or incite others to similarly defy this Court, the judicial process and the rule of law.'[8]

11. In the early hours of Thursday, 8 July 2021, Mr Zuma was admitted to the Estcourt

---

[7] DA founding affidavit vol 1 p 25 para 46. The judgment is reported as *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* [2021] ZACC 18; 2021 (5) SA 327 (CC).

[8] Contempt judgment above n 7 para 30.

Correctional Centre as an inmate.[9] Mr Zuma was immediately admitted to the hospital wing of the Estcourt Prison. Throughout his time 'in prison', Mr Zuma did not spend a single day in an ordinary prison cell.[10]

12. From the moment of Mr Zuma's admission to prison, officials at the Department of Correctional Services (**'the Department'**) and the South African Military Health Service (**'SAMHS'**) began to agitate for Mr Zuma's release for medical reasons, often working on weekends.[11]

13. On 28 July 2021 Mr Zuma's physician, one Dr Mafa, applied for medical parole on Mr Zuma's behalf.[12]

14. On 5 August 2021, Mr Zuma complained of chest pains and coughing.[13] Later that day, he was transferred to the private Mediclinic Heart Hospital in Pretoria.[14] He stayed there until he was released on medical parole. He never returned to prison.[15]

15. On Thursday, 26 August 2021, and again on Saturday, 28 August 2021, the Board met, considered Mr Zuma's application for medical parole and the various medical reports that had been submitted, and on both occasions decided not to recommend the granting of medical parole as it did not have sufficient information to reach a decision. Both times,

---

[9] DA supplementary founding affidavit vol 1 p 193 paras 46 – 47.

[10] DA supplementary founding affidavit vol 1 p 204 para 74. Not denied at Fraser affidavit vol 2 p 323 para 95; not denied in Zuma answering affidavit.

[11] The relevant primary documents are at core bundle pp CB5 – CB26 & CB31. A full narrative account is at DA supplementary founding affidavit vol 1 pp 193 – 204 paras 43 – 76.

[12] Mr Zuma's parole application is at core bundle pp CB10 – CB14.

[13] DA supplementary founding affidavit vol 1 p 198 para 58.1.

[14] DA supplementary founding affidavit vol 1 p 198 para 59. Confirmed at Radebe affidavit vol 2 pp 411 – 412 para 13.

[15] Core bundle p CB2.

the Board requested additional information.[16]

16. On Thursday, 2 September 2021, the Board met once more, considered the additional information it had received, and decided to recommend against the granting of medical parole:

> **'DECISION**
>
> ~~Recommended~~ / Not recommended based on the following:
>
> The MPAB appreciates the assistance from all specialists with 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 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 other information, should it become available. The MPAB can only make its recommendations based on the Act.'[17]

17. Nevertheless, three days later on Sunday, 5 September 2021 the Commissioner granted medical parole to Mr Zuma.[18] The decision was announced the same day.[19] We deal in detail below with the parole decision and the reasons the Commissioner gave for it.

18. On Wednesday, 8 September 2021, Mr Zuma was released from the Pretoria Heart Hospital to *'a residence in Waterkloof'*.[20] A week later, he returned to his home in

---

[16] DA supplementary founding affidavit vol 1 p 200 paras 64 – 65. The Board's decisions and information requests are at core bundle pp CB27 – CB30.

[17] Core bundle p CB32.

[18] The reasons for the decision are at core bundle pp CB40 – CB43. The instrument containing the decision is at core bundle pp CB44 – CB57.

[19] Core bundle p CB1.

[20] Fraser answering affidavit vol 2 pp 290 – 291 para 35.

Nkandla.[21]

19. Since his release on medical parole, Mr Zuma has not been treated as a man who is terminally ill. In Nkandla, he is hours away from the nearest tertiary hospital.[22] He has been permitted to make the three-hour trip to Durban to meet political allies at the Sibaya Casino.[23]

III. THE HIGH COURT CORRECTLY FOUND THAT THE PAROLE DECISION WAS UNLAWFUL

20. The High Court found that the parole decision was unlawful.[24] It was, with respect, correct to do so. The parole decision is patently unlawful. In this section, we explain why.

21. As the High Court correctly found,[25] the parole decision constitutes *'administrative action'* as defined in the Promotion of Administrative Justice Act[26] (**'PAJA'**). It is a *'decision of an administrative nature made ... under an empowering provision [and] taken ... by an organ of State, when ... exercising a public power or performing a public function in terms of any legislation'*.[27] But even if it is not administrative action, the principle of legality applies and almost all grounds of review under PAJA are, broadly speaking, grounds of review under the principle of legality (with the exception of

[21] Fraser answering affidavit vol 2 p 291 para 36.

[22] DA supplementary affidavit vol 1 p 207 para 87. This averment is not denied. See Fraser answering affidavit vol 2 p 324 para 98.1.

[23] DA second supplementary founding affidavit vol 2 pp 263 – 264 paras 6 – 7. Not denied at acting Commissioner answering affidavit vol 2 p 402 para 16. Mr Zuma does not respond to the DA's second supplementary founding affidavit.

[24] High Court judgment vol 6 pp 1023 – 1033 paras 47 – 87.

[25] High Court judgment vol 6 pp 1022 – 1023 para 46.

[26] Promotion of Administrative Justice Act 3 of 2000.

[27] *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* [2005] ZASCA 43; 2005 (6) SA 313 (SCA) para 21; PAJA, s 1.

reasonableness).[28]

22. We emphasise that each of the following grounds of review are disjunctive. Even if only one of them is good, the parole decision would be unlawful.

(a) Ground 1: Parole decision precluded by Board's negative recommendation

23. Section 79 of the Correctional Services Act (also referred to below as **'the Act'**) and regulation 29A of the Correctional Services Regulations[29] together set out the procedure for the granting of medical parole. We do not quote these provisions but, for ease of reference, relevant portions are annexed to these heads marked **'A'**.

24. These provisions subject the Commissioner's power to grant medical parole to a substantive constraint and to various procedural constraints.

25. The substantive constraint is that the Commissioner may only grant medical parole if all three of the requirements in section 79(1) of the Act are satisfied, namely that —

    25.1. the 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'* (subsection 79(1)(*a*)); and

    25.2. *'the risk of re-offending is low'* (subsection 79(1)(*b*)); and

    25.3. *'there are appropriate arrangements for the inmate's supervision, care and treatment within the community to which the inmate is to be released'* (subsection 79(1)(*c*)).

---

[28] See Cora Hoexter & Glenn Penfold *Administrative Law in South Africa* 3 ed (2021) 157 – 161, 170 – 178, 350 – 351, 356 – 357, 483 – 493, 570 – 575, & 656 – 657.

[29] Correctional Services Regulations GN R914 in *GG* 26626 of 30 July 2004.

26. If one or more of the requirements in section 79(1) is not satisfied, the Commissioner is precluded from granting medical parole. They are objective jurisdictional facts. They must be objectively satisfied, and not merely exist in the opinion of the Commissioner.[30]

27. The procedural constraints are that medical-parole applications are (shorn of complication) processed according to the following procedure:[31]

27.1. An application for medical parole must first be lodged in the prescribed manner.[32] It must be accompanied by a medical report recommending medical parole.[33] The medical report must describe the terminal illness the offender is suffering from or how he is incapacitated (i.e., that the medical requirement in section 79(1)(*a*) is satisfied).[34]

27.2. The application must be considered by the medical practitioner attached to the prison in question. She must evaluate the application and make a recommendation as to whether it complies with section 79(1)(*a*).[35]

27.3. The prison's medical recommendation, together with the application, must then be referred to the Board.[36]

27.4. The Board must assess the application, the offender's medical report, and the

---

[30] *Kimberley Junior School v Head, Northern Cape Education Department* [2009] ZASCA 58; 2010 (1) SA 217 (SCA) para 12.

[31] Fully set out in the DA founding affidavit vol 1 pp 19 – 21 paras 34 – 34.9.

[32] Correctional Services Act, s 79(2).

[33] *Id* s 79(2)(*b*). While this section stipulates that a medical report is only required if the application for medical parole is submitted by the offender or a person acting on his behalf, it must be the case that it is also required if the application is submitted by a medical practitioner – the report would just be that of the medical practitioner submitting the report. It would be absurd if a report was not required if the application was submitted by a medical practitioner.

[34] *Id* s 79(2)(*c*).

[35] Correctional Services Regulations, reg 29A(3).

[36] *Id* reg 29A(4).

prison's medical recommendation.[37] In making the assessment, the Board must consider whether the offender suffers from one of the terminal diseases or conditions listed in regulation 29A(5), or any other terminal disease or condition.[38] The Board may obtain additional reports from medical specialists.[39]

27.5. Pursuant to this assessment, the Board must furnish the Commissioner with its own independent medical report[40] and a recommendation as to whether the first substantive requirement for medical parole in section 79(1)(*a*) is satisfied (i.e., whether the offender suffers from a terminal disease or is incapacitated).[41]

27.6. The Commissioner must then decide whether to grant medical parole or not.[42]

28. Of the various procedural constraints imposed on the Commissioner, one is relevant for present purposes, which is this: The Commissioner <u>may not</u> grant medical parole <u>if the Board recommends against it</u>.

29. There are at least four reasons for this.

30. The <u>first</u> is that this is what regulation 29A(7) expressly provides:

> 'The Medical Parole Advisory 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. <u>If the recommendation of the Medical Advisory Board is positive, then</u> the National Commissioner, … must consider whether the

---

[37] *Id.*

[38] *Id* regs 29A(5) and (6).

[39] Correctional Services Act, s 79(3)(*b*).

[40] *Id* s 79(3)(*a*).

[41] Correctional Services Regulations, reg 29A(7).

[42] Correctional Services Act, s 79(1); Correctional Services Regulations, reg 29A(7).

conditions stipulated in section 79(1)*(b)* and *(c)* are present.' (Emphasis supplied)

31. The implication of the regulation is clear. The Board decides if section 79(1)(*a*) of the Act is satisfied. Only if its recommendation in this respect is positive, does the Commissioner decide whether sections 79(1)*(b)* and *(c)* are satisfied. Without a positive finding by the Board, the Commissioner's ultimate power is not triggered.

32. The second reason is that this is a sensible division of labour:[43]

    32.1. The Board is a specialist body made up entirely of medical practitioners.[44] It thus makes sense for the Board to determine (after considering the offender's application for medical parole, his medical report and the prison's medical recommendation) whether medical parole is medically appropriate – whether the offender is ill enough to be released.

    32.2. The job of the Commissioner is to determine thereafter whether medical parole is appropriate from a correctional-services perspective. It may be, for example, that an offender suffers from a terminal illness but (a) is at a high risk of re-offending, or (b) he cannot be cared for properly outside of prison. The offender's medical condition would then not be sufficient for medical parole to be granted.

    32.3. Crucially, the job of the Commissioner is not to determine whether medical parole is medically appropriate. He does not have the relevant expertise.[45]

---

[43] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18, this Court held that when interpreting a statute, *'[a] sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document'.*

[44] Correctional Services Regulations, reg 29B(3).

[45] This is certainly true of Mr Fraser. His profile on the website of the Department describes his qualifications as follows (DA founding affidavit vol 1 pp 51 – 52 annexure FA2):

33. The third reason for this interpretation is historical. Section 79 as it exists today was introduced by section 14 of the Correctional Matters Amendment Act 5 of 2011, which came into effect on 1 March 2012. Prior to amendment, section 79 simply provided as follows:

> **'79 Correctional supervision or parole on medical grounds**
>
> Any person serving any sentence in a correctional centre 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 National Commissioner ... to die a consolatory and dignified death.'

34. So, prior to the Act's amendment in 2012, the Board did not exist. The only decision-maker was the Commissioner. The Board was clearly introduced in the 2012 amendment to constrain what had before been the relatively unfettered power of the Commissioner.

35. It also cannot be ignored that the 2012 amendment, which was enacted in 2011 and for which the drafting process began in late 2010,[46] followed hot on the heels of the controversial and widely publicised release of Mr Schabir Shaik on *'medical parole'* in 2009. At the time of the High Court proceedings (i.e., twelve years later), Mr Shaik remained alive and apparently healthy.[47]

36. The fourth reason for this interpretation is the principle in our law that the recommendations of specialist bodies should be respected and can be binding:

'In addition to holding a BA (Hons) degree in Film and Video Production from The London Institute and a Certificate of Attendance from the Institute of Directors in South Africa, Mr Fraser completed several training courses, including an executive management course in the United Kingdom'.

[46] Parliamentary Monitoring Group *Correctional Matters Amendment Bill (B41-2010)*, available at https://pmg.org.za/bill/244/, accessed on 11 May 2022.

[47] Founding affidavit vol 1 p 40 paras 79 – 81.

36.1. One example is in *Kimberley Junior School v Head, Northern Cape Education Department*, where this Court held that, under section 6(3)*(a)* of the Employment of Educators Act 76 of 1998, the Head of Department, which appointed teachers to schools, was nevertheless bound by the recommendation of the relevant school's governing body as to whom to appoint.[48]

36.2. In *Bato Star*, the Constitutional Court held that *'[a] Court should ... give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field'*.[49] This reasoning is of equal application to an administrator without special expertise considering the recommendation of a statutory body with such expertise, on a topic within the body's area of expertise.

37. In short, the Commissioner is not permitted to grant medical parole if the Board has recommended against it. In other words, the Board's positive recommendation is an objective jurisdictional fact for the granting of medical parole.[50]

38. So, the fact that the Board recommended against granting medical parole to Mr Zuma means that the Commissioner was not empowered to grant it. As such, the parole decision was reviewable and the High Court was correct to set it aside because —

38.1. a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;[51] and

---

[48] *Kimberley Junior School* above n 30 para 10.

[49] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC) para 48.

[50] *Kimberley Junior School* above n 30 para 12.

[51] PAJA, s 6(2)*(b)*, and the principle of legality.

38.2. the Commissioner was materially influenced by an error of law in believing that he was entitled to grant medical parole when the Board had concluded that Mr Zuma was not ill enough to warrant it.[52]

***(b) Ground 2: Mr Zuma does not satisfy section 79(1)*(a)**

39. Section 79(1)*(a)* sets out the medical requirements for medical parole: that the '*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*'. This creates two possible (medical) reasons to grant medical parole: terminal illness or incapacity. These are objective jurisdictional facts that must be present for medical parole to be granted.

40. A *'terminal disease or condition'* is not defined in the Correctional Services Act. The terms are, however, defined in the application form for medical parole: *'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'*.[53] The DA accepts this definition.

41. Accordingly, medical parole cannot be granted to an inmate who is merely sick, or has a condition that requires special medical care. In those instances, the Department must provide the inmate with appropriate care – either in the correctional centre or at a hospital. The statutory provisions that create this duty are set out in paragraphs 64.6 to 64.6.6 below.

---

[52] PAJA, s 6(2)*(d)* and the principle of legality.

[53] Core bundle p CB11.

42. Medical parole has a limited purpose. It is intended only for inmates who are likely to die, and should not be forced to die in prison, and for inmates who cannot care for themselves. It is not intended as a means to release inmates who are not likely to die in prison, can care for themselves, but whose health might improve if they were not in prison.

43. Mr Zuma does not have a terminal illness, and Mr Zuma is not incapacitated. This is not the DA's version. That is the version of both the Commissioner and Mr Zuma himself. Neither ever squarely allege that he has a terminal illness or that he is incapacitated.

44. First, the Commissioner's reasons do not state that Mr Zuma meets the section-79(1)*(a)* requirements. Instead, his reasons state that Mr Zuma is *'a frail old person'*,[54] has *'multiple comorbidities'*,[55] has *'unpredictable health conditions'*,[56] and that *'there is no guarantee that when returned back to Estcourt Correctional Centre Mr Zuma's "conditions" would remain under control'*.[57] But these are not the same as having a terminal illness or being incapacitated, which are the requirements.

45. It is not necessary for this Court to look beyond the Commissioner's reasons. He is bound by them. Even if there was an allegation in the affidavits that Mr Zuma had a terminal illness or was incapacitated, it would not matter because that is not why the Commissioner acted.[58] But even if the Court looks outside the Commissioner's reasons, there is no allegation Mr Zuma has a terminal illness or is incapacitated.

---

[54] Reasons core bundle p CB42 para 12.1.

[55] Reasons core bundle p CB42 para 12.2.

[56] Reasons core bundle p CB42 para 12.3.

[57] Reasons core bundle p CB42 para 12.5.

[58] *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another* [2017] ZASCA 146; [2017] 4 All SA 726 (SCA); 2018 (1) SA 200 (SCA); 2018 (1) SACR 123 (SCA) at para 24; *National Energy Regulator of South Africa v PG Group (Pty) Ltd* [2019]

46. Second, the various medical reports submitted in relation to Mr Zuma do not state that Mr Zuma meets the requirements of section 79(1)*(a)*:

46.1. In Mr Zuma's application for medical parole, in answer to the question whether Mr Zuma is incapacitated, it is stated only: *'Patient is under full time comprehensive care of medical team.'*[59] It states later – in response to question 6.1 – *'medical incapacity'*,[60] but this is never explained and is inconsistent with what is stated elsewhere. That is not a statement that he is incapacitated. We deal in paragraphs 67-70 below with the reliance on Dr Mafa's response to the question about whether Mr Zuma had a terminal illness.

46.2. The recommendation in the report of Dr Mphatswe never states that Mr Zuma has a terminal illness or is incapacitated. It states, instead, that he has *'a complex medical condition which predispose (sic) him to unpredictable medical fallouts or events of high-risk clinical picture'*. It talks about *'the unpredictability of his plausible life threatening cardiac and neurological events'*. Ultimately, Dr Mphatswe recommends medical parole because Mr Zuma's *'clinical picture presents unpredictable health conditions constituting a continuum of clinical conditions'*.[61] It is not clear what any of this means. But Dr Mphatswe never states – expressly or implicitly – that Mr Zuma has a terminal illness, or that he is incapacitated. He has conditions that require management, but that is not the standard for medical parole.

ZACC 28; 2020 (1) SA 450 (CC) at para 39 ('***NERSA v PG Group***').

[59] Core bundle p CB12.

[60] Core bundle p CB13.

[61] Core bundle p CB25.

46.3. The report of the Surgeon General, too, does not claim Mr Zuma's condition is terminal or incapacitating. It says only that the reports *'reflect a precarious medical situation'* and that he *'believes that the patient will be better managed and optimized under different circumstances than presently prevailing'.*[62] All that may be true; it still would not entitle Mr Zuma to medical parole.

46.4. It is for precisely those reasons that the Board – which considered all the unredacted reports – concluded that Mr Zuma's *'treatment has been optimised and all conditions have been brought under control'*; and that Mr Zuma did not meet the medical requirements for medical parole.[63]

47. So, the reason the Commissioner could not conclude that Mr Zuma complied with section 79(1)*(a)* is that none of the documents before him supported that conclusion.

48. Third, even in the answering affidavits there is no positive allegation that Mr Zuma meets the requirements for medical parole:

48.1. The DA directly asserted in its supplementary founding affidavit that Mr Zuma does not have a terminal illness and is not incapacitated.[64] The Commissioner's answer to these allegation is: *'I deny the contents of these paragraphs. I reiterate that the Applicant is harping on the provisions of section 79(1) of the CSA without reading the other provisions of the CSA and not having considered the parole policy.'*[65] This is not an allegation that Mr Zuma has a terminal illness or

[62] Core bundle p CB31.

[63] Core bundle p CB32.

[64] Supplementary founding affidavit vol 1 pp 205 – 206 paras 79 – 82.

[65] Fraser answering affidavit vol 2 p 324 para 96.1.

is incapacitated. It is an assumption that he does not, and that this is not a requirement. But – as pointed out above – it plainly is a requirement.

48.2. Mr Zuma simply does not answer this paragraph of the DA's supplementary affidavit at all. He never even denies the allegation that he does not meet the requirements of section 79(1)*(a)*.

48.3. The closest Mr Zuma comes is to assert that he suffers *'from a condition which carries significant risk to (my) life'*.[66] But a condition that poses a risk to life is not a terminal illness. Nor does it imply that the person is incapacitated.

48.4. The only time Mr Zuma uses the phrase *'terminal illness'* is in this sentence: *'The DA would gloat endlessly if it was in possession of written confirmation that its formidable political foe was sick with a terminal illness.'*[67] This is a hypothetical. Even here, Mr Zuma does not state that he does, in fact, have a terminal illness.

49. To get around his obvious non-compliance with s 79(1)(a) Mr Zuma argued in the High Court that the Commissioner could grant medical parole under section 75(7).[68] The argument seems to run like this:

49.1. Section 75(7)*(a)* of the Correctional Services Act reads: *'Despite subsections (1) to (6), the National Commissioner may ... place under correctional*

[66] Zuma answering affidavit vol 3 p 428 para 50.

[67] Zuma answering affidavit vol 3 pp 438 – 439 para 90.

[68] See, for example, Zuma answering affidavit vol 3 p 427 paras 46 – 7. See also Zuma application for leave to appeal vol 6 p 1042 para 1.4.

supervision or day parole, or grant parole or medical parole to, a sentenced offender serving a sentence of incarceration for 24 months or less'.

49.2. There are two sources of power for granting medical parole – section 79, and section 75(7). Under section 75(7), the Commissioner is unconstrained by the requirement that the inmate be incapacitated or terminally ill, because the section does not refer to those requirements.

49.3. Mr Zuma's application was determined under section 75(7), not under section 79, so the absence of a terminal illness is irrelevant.

50. This argument fails on the facts and on the law:

50.1. As a matter of fact, Mr Zuma applied under section 79. His application is headed: '*Medical Parole Application in terms of Section 79 of Act 111 of 1998 as amended*'.[69] The Commissioner acted in terms of section 79. His decision starts: '*In terms of s 75(7)(a) of the [Correctional Services Act] read together with sections 79 and regulation 29A of the CSA*'.[70] The Commissioner is bound by the source of power he selected when he took the decision (section 75(7) read with section 79). He cannot subsequently seek to rely on a different source of power – section 75(7) unburdened by the requirements of section 79.[71]

50.2. But in any event, as a matter of law, section 75(7) does not create a separate, self-standing power to grant medical parole even when the requirements of section 79(1) are not met. All it does is excuse compliance with subsections

---

[69] Core bundle p CB10 (our underlining).

[70] Core bundle p CB40 para 1.

[71] *Minister of Education v Harris* [2001] ZACC 25; 2001 (4) SA 1297 (CC) paras 18-19; *Zuma v Democratic Alliance* above n 58 at para 58.

75(1) – (6) if the offender was sentenced to less than 24 months' imprisonment. The effect is that the Correctional Supervision and Parole Board is not involved in medical-parole decisions in respect of prisoners with sentences of 24 months or less. The subsection does not create an alternative path to medical parole outside section 79. 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, if* ...' they satisfy the requirements in s 79(1)*(a)*-*(c)*. Section 75(7) just means that it was the Commissioner who had the power because Mr Zuma was sentenced to less than 24 months. But Mr Zuma still had to comply with the same medical requirements to qualify for medical parole.

51. Accordingly, the High Court was correct to set aside the parole decision. A mandatory and material condition – that Mr Zuma was terminally ill or incapacitated – was not present,[72] and the decision was not authorised by the empowering provision.[73]

(c) Ground 3: The parole decision is irrational / unreasonable

52. The primary asserted rationale for the parole decision was that Mr Zuma could not receive the medical care he required while incarcerated. This is not a basis to grant medical parole (as we explain below). But even if it was, the Commissioner's decision is irrational.

53. While he was incarcerated, Mr Zuma quite properly had access to all the medical care he required. He spent all of his time in either the hospital wing of the Estcourt Correctional

[72] PAJA, s 6(2)*(b)*.

[73] PAJA, s 6(2)*(f)*(i).

Centre, or in an external hospital. By contrast, he has now been released into the care of one of his wives, who has no medical training.[74] Despite the Commissioner concluding he needed tertiary medical care,[75] Mr Zuma's residence in Nkandla is hours away from the nearest tertiary hospital.[76]

54. If the Commissioner's real concern was to protect Mr Zuma's health, removing him from prison in Estcourt where he had access to excellent medical care and was close to tertiary hospitals, is likely to have the opposite effect.

55. Accordingly, the decision was reviewable because it was not rationally connected to the information before the Commissioner,[77] or the reasons the Commissioner gave for his decision.[78] It was also so unreasonable that no reasonable administrator would take it.[79] The High Court was correct to set it aside.

(d) Ground 4: The parole decision was made for an ulterior purpose / reliant on an irrelevant consideration

56. In truth, the real reason the Commissioner decided to release Mr Zuma had nothing to do with the requirements for medical parole.

57. In his answering affidavit, Mr Fraser justifies his decision for the following reasons:

---

[74] DA supplementary founding affidavit vol 1 p 203 para 73.3; core bundle p CB51.

[75] Core bundle p CB41 paras 5 – 6.

[76] DA supplementary founding affidavit vol 1 p 207 paras 85 – 87. This allegation is not denied: Fraser answering affidavit vol 2 p 324 para 98.1.

[77] PAJA s 6(2)*(f)*(ii)*(cc)*.

[78] PAJA s 6(2)*(f)*(ii)*(dd)*.

[79] PAJA s 6(2)*(h)*.

57.1. Mr Zuma is a former President and '*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*'.[80] But Mr Zuma could not be entitled to medical parole just because he used to be the President. To the contrary, the rule of law[81], and the right of all people to be treated equally before the law,[82] commanded that he be treated exactly the same as any other inmate. If an *'ordinary'* inmate with his medical condition would not be entitled to medical parole, neither would Mr Zuma. This was an irrelevant consideration.

57.2. The '*Estcourt Correctional Centre could not risk the life of an inmate*'.[83] That is of course true – no correctional centre should place the lives of inmates at risk. But the solution to the problem is not medical parole, but the provision of adequate healthcare services to incarcerated inmates. As explained above, medical parole serves a narrow function. It is not intended to relieve the burden of providing ordinary healthcare to sick inmates. The solution to that problem is increased investment in providing that healthcare.

57.3. If Mr Zuma did die while incarcerated it could have '*dire consequences*' and '*could have ignited events similar to that of July 2021.*'[84] The Commissioner is saying he released Mr Zuma on medical parole because of the threat of riots. That could never be a reason to grant medical parole (or any form of parole). It

---

[80] Fraser answering affidavit vol 2 p 292 para 39.2. Something like this justification appears in his formal reasons (core bundle p CB40 para 3 & p CB41 para 10).

[81] Constitution s 1*(d)*.

[82] Constitution s 9(1).

[83] Fraser answering affidavit vol 2 p 292 para 39.3. This justification also appears in the Commissioner's formal reasons (core bundle p CB41 para 6).

[84] Fraser answering affidavit vol 2 p 292 paras 39.4 – 5. Something like this justification also appears in the Commissioner's formal reasons (core bundle p CB40 para 3).

would reward inmates who have supporters who are willing to threaten violence. Nothing could more surely undermine the rule of law.

58. It is therefore apparent that the Commissioner considered irrelevant considerations in taking his decision,[85] and acted for reasons that were not authorised by the empowering provision.[86] The High Court was correct to set the decision aside.

(e) Ground 5: The Commissioner was biased

59. The only reasonable conclusion to draw from the above is that the former Commissioner, Mr Fraser, was biased. He acted against the binding recommendation of the Board. On his own version, he granted medical parole when Mr Zuma did not meet the basic requirements. He took a decision that was likely to decrease Mr Zuma's access to healthcare while proclaiming he was acting in Mr Zuma's interest. And he considered a range of irrelevant considerations – most notably that Mr Zuma is a former President whose supporters might riot if he died in prison.

60. The Commissioner was invited to provide an example of an inmate other than Mr Zuma who has received medical parole against the recommendation of the Board.[87] He failed to do so.[88]

61. The only reasonable conclusion to draw is that Mr Fraser was biased. He wrongly treated Mr Zuma's application differently from any other application, because of Mr Zuma's status. That is bias. Mr Fraser was required by law to treat Mr Zuma like any other inmate.

---

[85] PAJA s 6(2)*(e)*(iii).

[86] PAJA s 6(2)*(e)*(i).

[87] DA supplementary founding affidavit vol 1 p 209 para 94.3.

[88] Fraser answering affidavit vol 2 p 325 para 101.

His failure to do so is another reason that the High Court was correct to review and set aside the parole decision.[89]

IV. APPELLANTS' DEFENCES

62. In this section, we deal with some of the appellants' defences not dealt with above. They all fall to be rejected. Given space constraints, we do not deal with Mr Zuma's more risible procedural objections, such as mootness and non-joinder. If Mr Zuma persists with them in the hearing, they will be dealt with in reply.

(a) The proposition that Mr Zuma requires 24-hour medical attention

63. In the Commissioner's answering affidavits, he raised a new justification for the parole decision:

> 'It should be noted that [Mr Zuma] required a Medic to be with him twenty-four hours a day, a situation that was not possible in any DCS facility having regard that only sentenced offenders or remand detainees are housed in DCS facilities. Therefore, the Medic could not be allowed to spend twenty-four hours with [Mr Zuma] as the Medic did not fall under either … category of people that could be accommodated in a Correctional Facility.'[90]

64. This justification falls to be rejected both factually and legally. Factually, it is a patently absurd after-the-fact rationalisation:[91]

    64.1. The reason does not appear in any of the documents in the record nor in the

---

[89] PAJA s 6(2)*(a)*(iii).

[90] Fraser answering affidavit vol 2 p 291 para 37. Mr Zuma makes a similar point in his application for leave to appeal at vol 6 p 1043 para 1.9.

[91] As is permitted by the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635.

Commissioner's reasons. The reason the Commissioner gave was rather that Mr Zuma required tertiary care that the Department was incapable of giving[92] – not that he required a medic with him 24 hours a day.

64.2. Had Mr Zuma required a medic with him 24 hours a day, this would have appeared in his care plan. It does not:

64.2.1. The Case Management Committee, under the heading *'Care'* stated that *'Gloria Bongekile Ngema [one of Mr Zuma's wives, who is not a medic] has consented . . . to take care of the offender, if he is released on Medical Grounds'*.[93] No mention is made of a 24-hour medic.

64.2.2. Under the heading *'Medical Parole'*, no treatment programme is imposed.[94]

64.3. It is common cause that the Department permitted a medic – specifically, Mr GM Moloisi, a paramedic – to monitor Mr Zuma on a daily basis in the Estcourt prison from 9 July 2021 to when he left to go to the Pretoria Heart Hospital on 5 August.[95]

64.4. In Mr Zuma's application for medical parole, it was stated more than once that he is *'under full-time comprehensive medical care of medical team (sic)'*.[96] The application was lodged while he was in the hospital wing of the Estcourt Prison. The Commissioner cannot claim now that Mr Zuma could not obtain full-time

[92] Parole decision reasons core bundle p CB41 paras 5 – 6.

[93] Core bundle p CB51.

[94] Core bundle p CB55.

[95] DA supplementary founding affidavit vol 1 p 195 para 51; admitted at Fraser answering affidavit vol 2 p 286 para 21.

[96] Supplementary founding affidavit pp CB10 – CB12 (our underlining).

care in the Estcourt prison when Mr Zuma's application for medical parole was submitted on the basis that he had.

64.5. The Head of the Estcourt Prison, Ms Npumelelo Precious Radebe, admits that nursing staff are employed in the prison's hospital wing, where Mr Zuma was housed while he was in the prison.[97]

64.6. It is false that Mr Zuma would not be permitted 24-hour care by his medics in prison if he needed it:

64.6.1. Section 12(3) of the Correctional Services Act provides that *'[e]very inmate may be visited and examined by a medical practitioner of his or her choice and, subject to the permission of the Head of the Correctional Centre, may be treated by such practitioner, in which event the inmate is personally liable for the costs of any such consultation, examination, service or treatment'*.

64.6.2. Regulation 40(1)*(a)* of the Correctional Services Regulations requires the head of a prison to permit access to *'healthcare workers and their support staff'*.

64.6.3. Regulation 7(3) provides that a *'prison's correctional medical practitioner is responsible for the general medical treatment of inmates and must treat an inmate referred to him or her as often as may be necessary'*.

[97] Radebe confirmatory affidavit vol 2 p 410 para 7.

64.6.4. Regulation 7(4) provides that *'[a] registered nurse must attend to all sick offenders and remand detainees ... as often as is necessary, but at least once a day'*.

64.6.5. Regulation 7(5) permits an offender to be attended to by *'his or her medical practitioner of choice'*.

64.6.6. Section 12(1) of the Correctional Services 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 *'[e]very inmate has the right to adequate medical treatment'*.

65. So, both elements of the Commissioner's after-the-fact rationalisation are false: it is false that Mr Zuma did not have 24-hour-a-day medical monitoring in the Estcourt Prison (or at least something very close to it), and it is false that he was not capable of obtaining it in the prison.

66. But in any event, as a matter of <u>law</u>, this justification falls to be rejected:

66.1. A decision-maker cannot rely on a justification in his answering affidavit that does not appear in his Rule-53 reasons.[98] This is just such a justification.

66.2. And even if this Court were to accept that Mr Zuma required 24-hour medical supervision, that the Estcourt Prison could not provide or permit it, this motivated Mr Fraser, and that he is permitted to rely on this reason; this would

[98] *Zuma v ANDPP* above n 58 at para 24 and *NERSA v PG Group* above n 58 para 39.

not be a legitimate reason to grant medical parole. An offender who requires medical monitoring 24 hours a day is not necessarily one with a terminal illness or one who is incapacitated.

(b) The claim that doctors found that Mr Zuma has a terminal illness

67. Mr Zuma claims that Dr Mafa, who applied on Mr Zuma's behalf for medical parole, asserted in the application that Mr Zuma suffers from a terminal illness.[99]

68. This is not correct. We reproduce the portion of the parole application Mr Zuma refers to below:[100]

> (d) Is the offender suffering from a terminal disease OR condition which
> Is chronic : yes
> Is progressive: yes
> Has deteriorated permanently or reached and irreversible state: deteriorated significantly
>
> NB: "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 responable time."

69. This is not a clear assertion that Mr Zuma is suffering from a terminal illness. The definition of *'terminal disease or condition'* provided states clearly (and correctly) that it is a condition that is *'permanent'* and *'irremediable'*. But when asked whether Mr Zuma's condition had *'deteriorated <u>permanently</u> or reached [an] <u>irreversible</u> state'*, Dr Mafa writes that it has *'deteriorated <u>significantly</u>'* (our underlining). Thus, when directly asked whether Mr Zuma's condition has the attribute essential to being a terminal condition, Dr Mafa refuses to say that it does. He thus did not clearly assert that Mr Zuma suffers from a terminal illness.

---

[99] Zuma application for leave to appeal vol 6 p 1043 para 1.8.

[100] Core bundle p CB11.

70. In any event, it does not matter what Dr Mafa asserted Mr Zuma's condition to be. He is Mr Zuma's doctor and is not independent. None of the independent doctors who evaluated Mr Zuma's application concluded he had a terminal illness. Neither did the Commissioner.

71. Which brings us to the argument made by the Commissioner, which is that the Board did not find that Mr Zuma did not suffer from a terminal illness or that he is physically incapacitated.[101] This argument is incorrect. The Board made the following finding:

> '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.'[102]

72. The finding that Mr Zuma *'is stable'* and that he *'does not qualify for medical parole according to the Act'* amounts to a finding that he does not have a terminal illness and that he is not physically incapacitated. There is no other reasonable interpretation of the Board's conclusion.

(c) Standing

73. Mr Zuma disputes the DA's standing to bring the application. He claims that the DA's assertion that it is acting in the public interest[103] is insufficient.[104] He is wrong.

74. This Court considered and rejected a similar argument by Mr Zuma in *DA v Acting*

---

[101] Commissioner application for leave to appeal vol 6 pp 1055 – 1057 paras 1.5 – 1.5.7.

[102] Core bundle p CB32.

[103] DA founding affidavit vol 1 p 10 para 13; DA replying affidavit vol 3 p 514 paras 115 – 115.4.

[104] Zuma answering affidavit vol 3 p 421 para 23. See also Zuma application for leave to appeal vol 6 pp 1041 – 1042 paras 1.1 – 1.2.

National Director of Public Prosecutions.[105] There, the DA sought to review a decision by the acting National Director of Public Prosecutions to abandon the prosecution of Mr Zuma for corruption. Mr Zuma argued the DA lacked standing to pursue that application. This Court disagreed, holding that '*[a]ll political parties participating in Parliament must necessarily have an interest in ensuring that public power is exercised in accordance with constitutional and legal prescripts and that the rule of law is upheld.*'[106] That is all the DA sought to do in this litigation.

75. Mr Zuma seeks to cast aspersions on the DA's motives. He alleges that the application '*is a thinly-veiled political stunt aimed at cheap electioneering, racist hatred, opportunism and the unwanted attention of busybodies*'.[107] Indeed, his answering affidavit is mostly insults of this sort. No facts are alleged to support them. The DA denies the allegation,[108] and its version must be preferred under the *Plascon-Evans* rule.

76. But in any event, the DA's motives are irrelevant to its standing. This was made clear by the Constitutional Court in *Fuel Retailers*.[109] It held that the duty of a court when the decision of an organ of state '*is brought on review is to evaluate the soundness or otherwise of the objections raised. ... Neither the identity of the litigant who raises the objection nor the motive is relevant.*'

---

[105] *Democratic Alliance v Acting National Director of Public Prosecutions* [2012] ZASCA 15; 2012 (3) SA 486 (SCA).

[106] *Id* at para 44.

[107] Zuma answering affidavit vol 3 p 423 para 31.

[108] DA replying affidavit vol 3 p 514 paras 115 – 115.4.

[109] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* [2007] ZACC 13; 2007 (6) SA 4 (CC) para 101.

V. RELIEF

77. The High Court reviewed and set aside the parole decision with costs, and ordered that Mr Zuma be returned to the custody of the Department. It also declared that Mr Zuma's time on medical parole would not count towards the fulfilment of his sentence.

78. If the High Court's finding on lawfulness is confirmed, there is no basis for this Court to interfere with the High Court's exercise of its remedial discretion.

79. This Court may only interfere in the exercise of the High Court's remedial discretion if it is satisfied that the discretion *'was not exercised ... judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles'*. This Court may not interfere merely because it disagrees with how the court *a quo* exercised its discretion.[110] The Constitutional Court has, on more than one occasion, reversed decisions of appellate courts because they failed to afford sufficient deference to the remedial discretion of the trial court.[111]

80. It cannot seriously be argued that the High Court misdirected itself:

    80.1. If an administrative decision is found to be unlawful, the default remedy is for it to be set aside.[112] The applicants raised no cogent reason for this corrective

---

[110] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC) ('***Trencon***') paras 82 – 92. See also

[111] See *Trencon* above n 110; *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* [2019] ZACC 30; 2019 (11) BCLR 1358 (CC) ; 2019 (6) SA 597 (CC) at paras 67-70; *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC).

[112] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* [2014] ZACC 12; 2014 (4) SA 179 (CC) paras 29 – 30.

principle to be departed from.

80.2. In ordering substitution, the High Court did exactly what it was supposed to do. It applied section 8(1)*(c)*(ii)*(aa)* of PAJA as interpreted by the Constitutional Court in *Trencon*:[113] it considered whether exceptional circumstances existed that warranted substitution, with reference to whether it was in as good a position as the Commissioner to make the parole decision, and whether the correct decision is a foregone conclusion.[114] Here, both factors obtained, given that Mr Zuma does not qualify for medical parole procedurally (because the Board recommended against it) or substantively (because he is not terminally ill or physically incapacitated). The only decision the Commissioner could lawfully have taken on the application before him was to refuse it. As the specialist body – the Board – has made the substantive conclusion, the High Court was in as good a position to take the decision as the Commissioner.

80.3. In declaring that Mr Zuma's time on medical parole does not count towards the completion of his sentence, the High Court did no more than exercise the broad remedial discretion granted by section 8(1) of PAJA to make any order that is just and equitable, bearing in mind Mr Zuma's unrepentant contempt of court and the need to protect the administration of justice against it. Given the delays in the hearing of this appeal, the consequence if Mr Zuma's time on medical parole does not count as part of his sentence is that he will serve no further prison time. The Commissioner's unlawful decision would have facilitated Mr Zuma escaping punishment for his unlawful contempt. That would undermine

---

[113] *Trencon* above n 110.

[114] High Court judgment vol 6 pp 1036 – 1037 paras 97 – 99.

the integrity and authority of the Constitutional Court.

81. Mr Zuma argues in his application for leave to appeal that the High Court's order has *'life-threatening implications'* and *'is tantamount to the death sentence'*.[115] This is simply false. The order is most certainly not life-threatening:

81.1. First, there is no basis laid for it in the record. If Mr Zuma expects a court not to send him back to prison because it would kill him, then he must tell the Court in his affidavits (a) what the malady is that he suffers from and (b) how he is more likely to die of this malady in the Estcourt Correctional Centre, which has a hospital wing,[116] than in Nkandla, which does not. He has done neither.

81.2. Indeed, the record shows the opposite of what Mr Zuma's attorneys now claim in his application for leave to appeal: that he fell ill while he was incarcerated, but he that received treatment and that his condition has been stabilised.

81.3. The second problem is that even if it were so that Mr Zuma has now developed some malady that means that a return to ordinary prison would threaten his life, his remedy is not for this Court to uphold the patently unlawful parole decision at issue:

81.3.1. If Mr Zuma now requires medical care, he can be sent to the hospital wing of the Estcourt Correctional Centre (as he was on the day that he initially went to prison).

81.3.2. If he now requires medical care that the hospital wing of the Estcourt Correctional Centre cannot provide, he can be sent to an external

---

[115] Zuma application for leave to appeal vol 6 pp 1045 – 1046 paras 3 – 4.

[116] DA supplementary founding affidavit vol 1 p 207 para 86.

hospital (as he was a month into his prison sentence).

81.3.3. If he now has a terminal illness, he can again apply for medical parole. If he is eligible for it, he will doubtless get it.

VI. CONCLUSION AND COSTS

82. The parole decision was patently unlawful. There are two clear prerequisites for the grant of medical parole: the Board must recommend parole, and the inmate must be terminally ill or incapacitated. Mr Zuma satisfied neither.

83. When pressed to justify the decision, the Commissioner only revealed that he relied on a host of irrelevant considerations and that he acted irrationally. He showed his bias in favour of Mr Zuma – his willingness to grant him preferential treatment because he used to be the President.

84. There is no basis to interfere with the true remedial discretion exercised by the High Court. Setting aside the Commissioner's decision was inevitable. Substitution was fully justifies. And denying Mr Zuma the benefit of a biased and patently unlawful decision was essential to protect the integrity of the Judiciary.

85. The appeal falls to be dismissed with costs. If Mr Zuma and the Commissioner meet with any success in this Court, *Biowatch* immunises the DA from any costs order.[117]

[117] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC).

PP **ISMAIL JAMIE SC**
MICHAEL BISHOP
PP **PIET OLIVIER**

Democratic Alliance's counsel

Chambers, Cape Town
Thursday, 12 May 2022

ANNEXURE A – STATUTORY PROVISIONS

SECTION 79 OF THE CORRECTIONAL SERVICES ACT

79 Medical parole

(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.

(2) (a) An application for medical parole shall be lodged in the prescribed manner, by —

(i) a medical practitioner; or

(ii) a sentenced offender or a person acting on his or her behalf.

(b) An application lodged, by a sentenced offender or a person acting on his or her behalf, in accordance with paragraph (a)(ii), shall not be considered by the National Commissioner, the Correctional Supervision and Parole Board or the Minister, as the case may be, if such application is not supported by a written medical report recommending placement on medical parole.

(c) The written medical report must include, amongst others, the provision of —

(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.

(3) (a) The Minister must establish a medical advisory board to provide an independent medical report to the National Commissioner, Correctional Supervision and Parole Board or the Minister, as the case may be, in addition to the medical report referred to in subsection (2)(c).

(b) Nothing in this section prohibits a medical practitioner or medical advisory board from obtaining a written medical report from a specialist medical practitioner.

(4) (a) The placement of a sentenced offender on medical parole must take place in accordance with the provisions of Chapter VI and is subject to —

(i) the provision of informed consent by such offender to allow the disclosure of his or her medical information, to the extent necessary, in order to process an application for medical parole; and

(ii) the agreement by such offender to subject himself or herself to such monitoring conditions as set by the Correctional Supervision and Parole Board in terms of section 52, with an understanding that such conditions may be amended and or supplemented depending on the improved medical condition of such offender.

(b) An offender placed on medical parole may be requested to undergo periodical medical examinations by a medical practitioner in the employ of the Department.

(5) When making a determination as contemplated in subsection (1)(b), the following factors, amongst others, may be considered:

(a) Whether, at the time of sentencing, the presiding officer was aware of the medical condition for which medical parole is sought in terms of this section;

(b) any sentencing remarks of the trial judge or magistrate;

(c) the type of offence and the length of the sentence outstanding;

(d) the previous criminal record of such offender; or

(e) any of the factors listed in section 42(2)(d).

(6) Nothing in this section prohibits a complainant or relative from making representations in accordance with section 75(4).

(7) A decision to cancel medical parole must be dealt with in terms of section 75(2) and (3): Provided that no placement on medical parole may be cancelled merely on account of

the improved medical condition of an offender.

(8) (a) The Minister must make within six months after promulgation of this Act regulations regarding the processes and procedures to follow in the consideration and administration of medical parole.

...

Regulation 29A of the Correctional Services Regulations

29A Medical parole

...

(2) An application for medical parole in terms section 79(2) of the Act, shall be initiated by the completion of the applicable form as contained in Schedule B.

(3) When a Head of a Correctional Centre receives an application for medical 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 section 79 of the Act and make a recommendation in this regard.

(4) The recommendation must be submitted to the Medical Parole Advisory Board who must make a recommendation to the National Commissioner, Supervision and Parole Board or Minister as the case may be.

(5) In the assessment by the Medical Parole Advisory Board, the Board must consider whether the offender is suffering from:

(a) Infectious conditions —

(i) World Health Organisation Stage IV of Acquired Immune Deficiency Syndrome despite good compliance and optimal treatment with anti-retroviral therapy;

(ii) Severe cerebral malaria;

(iii) Methicilin resistance staph aurias despite optimal treatment;

(iv) MDR or XDR tuberculosis despite optimal treatment; or

(b) Non-infectious conditions —

(i) Malignant cancer stage IV with metastasis being inoperable or with both radiotherapy and chemotherapy failure;

(ii) Ischaemic heart disease with more than two ischaemic events in a period of one year with proven cardiac enzyme abnormalities;

(iii) Chronic obstructive airway disease grade III to IV dyspnoea;

(iv) Cor-pulmonale;

(v) Cardiac disease with multiple organ failure;

(vi) Diabetes mellitus with end organ failure;

(vii) Pancytopenia;

(viii) End stage renal failure;

(ix) Liver cirrhosis with evidence of liver failure;

(x) Space occupying lesion in the brain;

(xi) Severe head injury with altered level of consciousness;

(xii) Multisystem organ failure;

(xiii) Chronic inflammatory demyelinating Poliradiculoneur-opathy;

(xiv) Neurological sequelae of infectious diseases with a Karnofky score of 30 percent and less;

(xv) Tetanus;

(xvi) Dementia, and

(xvii) Severe disabling rheumatoid arthritis, and whether such condition constitutes a terminal disease or condition or the offender is rendered physically incapacitated as result of injury, disease or illness so as to severely limit daily activity or inmate self-care.

(6) The Medical Parole Advisory Board may consider any other condition not listed in subregulation (5)(a) and (b) if it complies with the principles contained in section 79 of the Act.

(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 Advisory Board is positive, then the National Commissioner, the Correctional Supervision and Parole Board or the Minister, as the case may be, must consider whether the conditions stipulated in section 79(1)(b) and (c) are present.

IN THE SUPREME COURT OF APPEAL
(BLOEMFONTEIN)

SCA case number: 33/2022

HC case numbers: 45997/2021; 46468/2021; 46701/2021

In the appeal between:

THE NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	First appellant
JACOB GEDLEYIHLEKISA ZUMA	Second appellant

and

THE DEMOCRATIC ALLIANCE	First respondent (applicant in 45997/2021)
THE HELEN SUZMAN FOUNDATION	Second respondent (applicant in 46468/2021)
AFRIFORUM NPC	Third respondent (applicant in 46701/2021)

DEMOCRATIC ALLIANCE'S TABLE OF AUTHORITIES

Statutes

1. Constitution of South Africa, 1996
2. Correctional Services Act 111 of 1998
3. Correctional Services Regulations GN R914 in *GG* 26626 of 30 July 2004
4. Promotion of Administrative Justice Act 3 of 2000

Case-law

5. *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* [2014] ZACC 12; 2014 (4) SA 179 (CC)

6. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC)

7. *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC)

8. *** *Democratic Alliance v Acting National Director of Public Prosecutions* [2012] ZASCA 15; 2012 (3) SA 486 (SCA)**

9. *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC)

10. *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* [2007] ZACC 13; 2007 (6) SA 4 (CC)

11. *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* [2005] ZASCA 43; 2005 (6) SA 313 (SCA)

12. *** *Kimberley Junior School v Head, Northern Cape Education Department* [2009] ZASCA 58; 2010 (1) SA 217 (SCA)**

13. *Minister of Education v Harris* [2001] ZACC 25; 2001 (4) SA 1297 (CC)

14. *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* [2019] ZACC 30; 2019 (11) BCLR 1358 (CC) ; 2019 (6) SA 597 (CC)

15. *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA)

16. *National Energy Regulator of South Africa v PG Group (Pty) Ltd* [2019] ZACC 28; 2020 (1) SA 450 (CC)

17. *National Lotteries Board v South African Education and Environment Project* [2011] ZASCA 154; 2012 (4) SA 504 (SCA)

18. *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

19. *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* [2021] ZACC 18; 2021 (5) SA 327 (CC)

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

21. * *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another* [2017] ZASCA 146; [2017] 4 All SA 726 (SCA); 2018 (1) SA 200 (SCA); 2018 (1) SACR 123 (SCA)

Books and articles

22. Cora Hoexter & Glenn Penfold *Administrative Law in South Africa* 3 ed (2021)

IN THE SUPREME COURT OF APPEAL
(BLOEMFONTEIN)

SCA case number: 33/2022
HC case numbers: 45997/2021; 46468/2021; 46701/2021

In the appeal between:

THE NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES — First appellant

JACOB GEDLEYIHLEKISA ZUMA — Second appellant

and

THE DEMOCRATIC ALLIANCE — First respondent (applicant in 45997/2021)

THE HELEN SUZMAN FOUNDATION — Second respondent (applicant in 46468/2021)

AFRIFORUM NPC — Third respondent (applicant in 46701/2021)

DEMOCRATIC ALLIANCE'S CHRONOLOGY

DATE	EVENT	REFERENCE
29 Jun 2021	Constitutional Court sentences Mr Zuma to fifteen months' imprisonment for contempt of court	DA founding affidavit vol 1 p 25 para 46.
8 Jul 2021	Mr Zuma admitted to Estcourt Correctional Centre as a prisoner	DA supplementary founding affidavit vol 1 p 193 paras 46 – 47
	South African Military Health Service (**'SAMHS'**) recommends that *'Mr Zuma be moved to a specialist medical facility high care unit to be assessed further'*.	Core bundle pp CB5 – CB6

DATE	EVENT	REFERENCE
28 Jul 2021	Mr Zuma applies for medical parole	Core bundle pp CB10 – CB14
	SAMHS again recommends that *'Mr Zuma be moved to a specialist medical facility to be assessed further'*	Core bundle pp CB8 – CB9
5 Aug 2021	Mr Zuma transferred out of the Estcourt Correctional Centre to the Mediclinic Heart Hospital in Pretoria	DA supplementary founding affidavit vol 1 p 198 para 59
23 Aug 2021	Dr LJ Mphatswe, member of the Medical Parole Advisory Board (**'the Board'**), recommends to the Board that Mr Zuma be granted medical parole	Core bundle pp CB19 – CB26
2 Sep 2021	The Board recommends against granting medical parole to Mr Zuma	Core bundle p CB32
5 Sep 2021	Commissioner grants medical parole to Mr Zuma against the Board's recommendation	Core bundle pp CB40 – CB57
	Commissioner issues press release announcing same	Core bundle p CB1
8 Sep 2021	Mr Zuma released from Mediclinic Heart Hospital to *'a residence in Waterkloof'*	Fraser answering affidavit vol 2 pp 290 – 291 para 35
The following week	Mr Zuma returns to Nkandla	Fraser answering affidavit vol 2 p 291 para 36
10 Sep 2021	DA launches urgent review application in Pretoria High Court under case number 45997/2021	DA notice of motion vol 1 p 1
14 Sep 2021	Helen Suzman Foundation (**'HSF'**) launches urgent review application in Pretoria High Court under case number 46468/2021	HSF notice of motion vol 3 p 542
15 Sep 2021	AfriForum NPC (**'AfriForum'**) launches urgent review application in Pretoria High Court under case number 46701/2021	AfriForum notice of motion vol 5 p 824
15 Oct 2021	Mr Zuma leaves Nkandla to meet with political allies Carl Niehaus (a former Luthuli House staffer) and Dudu Myeni (the former chair of South African Airways) at the Sibaya Casino in Durban	DA second supplementary founding affidavit vol 2 p 264 para 6.1

DATE	EVENT	REFERENCE
23 Nov 2021	Review applications heard in High Court before Matojane J	Vol 6 p 1038
15 Dec 2021	High Court grants review applications	Vol 6 pp 1006 – 1038
	Mr Zuma applies for leave to appeal	Vol 6 pp 1039 – 1049
17 Dec 2021	Commissioner applies for leave to appeal	Vol 6 pp 1050 – 1071
21 Dec 2021	High Court grants leave to appeal	Vol 6 pp 1081 – 1083
20 Apr 2022	Appellants file record in SCA	
10 May 2022	President Maya grants the DA's and the HSF's requests for an expedited hearing date, requests the parties to confirm availability for *'24/25/26/27 May 2022'* hearing dates, directs the parties to file heads and related documents *'immediately'*	
12 May 2022	DA files heads of argument in accordance with President Maya's directive	

COMPLIANCE CERTIFICATE

We, counsel for the Democratic Alliance, confirm that it has filed heads of argument in compliance with Rule 10 and has filed a practice note in compliance with Rule 10A*(a)*.

Dated at Cape Town on Thursday, 12 May 2022.

PP

ISMAIL JAMIE SC

MICHAEL BISHOP

PP

PIET OLIVIER