IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO. CCT: 360/22
SCA Case NO:33/2022
GP CASE NO: 46468/21
46701/21
45997/21

NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	First Applicant
JACOB GEDLEYIHLEKISA ZUMA	Intervening Party/Second Applicant
AND	
DEMOCRATIC ALLIANCE	First Respondent
THE HELEN SUZMAN FOUNDATION	Second Respondent
AFRIFORUM NPC	Third Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fourth Respondent
MEDICAL PAROLE ADVISORY BOARD	Fifth Respondent

NOTICE IN TERMS OF RULE 8 OF THE CONSTITUTIONAL COURT RULES FOR LEAVE TO INTERVENE AS SECOND APPLICANT

TAKE NOTICE THAT the Applicant hereby applies to the Constitutional Court of South Africa for directions under Rule 8 of the Constitutional Court Rules for relief in the following terms:

1. **JACOB GEDLEYIHLEKISA ZUMA** is granted leave to intervene in the application to Constitutional Court under case number 360/22 as the Second Applicant/Appellant.

2. Granting the Second Applicant leave to appeal to the Constitutional Court against the judgment and order of the Supreme Court of Appeal under case number 33/2022 delivered on 21 November 2022; alternatively

3. An order setting aside the judgement and orders in paragraphs 66.2 and 66.3 of the Supreme Court of Appeal, alternatively and only in the event of the Constitutional Court upholding orders no 66.2 and 66.3 of the judgment, declaring under section 172(1)(b) of the Constitution an order that the Second Applicant has served his sentence in full in terms of the Correctional Services Act and accordingly no longer a prisoner as defined.

4. Further and/or alternative relief as the Honourable Court may deem fit or to be just and equitable.

TAKE FURTHER NOTICE THAT the founding affidavit, together with annexures will be deposed to by **JACOB GEDLEYIHLEKISA ZUMA**.

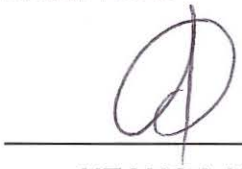
PLEASE TAKE NOTICE FURTHER that the Intervening Party/Second applicant has appointed the offices of his attorneys, as set out herein below, as the address at which he will accept all notices and processes in these proceedings.

PLEASE TAKE NOTICE FURTHER that any party may, within ten days from the date that the application is lodged, respond in writing indicating whether or not this application is being opposed, and if so, the grounds for such opposition.

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

KINDLY SET THE MATTER DOWN ACCORDINGLY.

SIGNED at **JOHANNESBURG** on this the **25TH** day of **JANUARY 2023**



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AFFIDAVIT IN SUPPORT OF LEAVE TO INTERVENE AS SECOND APPLICANT IN APPLICATION

I, the undersigned,

JACOB GEDLEYIHLEKISA ZUMA

H.L.D.

do hereby declare under oath and state that

1. I am the former President of the Republic of South Africa and the subject of the judgments of the SCA and the High Court attached in the notice of motion to which this affidavit is annexed. The judgements have far-reaching direct implications for my constitutional rights. I am accordingly entitled to bring this application and to seek an order under section 172 of the Constitutional Court that is just and equitable even if the Honourable Court were to confirm the SCA order regarding the lawfulness of the decision granting me medical parole. I am the Intervening Party and/or prospective Second Applicant in this matter.

2. The facts contained in this affidavit are to the best of my belief both true and correct. They fall within my personal knowledge or are apparent from the documentation on record and within my control. Where I rely on others, I have sought confirmatory affidavits and believe their views to be correct and truthful.

INTRODUCTION

3. In principle and for the reasons set out in that application, I generally support the application for leave to appeal lodged by the Commissioner of Correctional Services under case number **CCT 360/22**. In that application, I am surprisingly not cited either as as a co-applicant or a respondent even though clearly I have a direct and substantial interest in the factual and legal disputes under consideration in that application. To the extent that my omission as a party may well amount to non-joinder, this application will also serve to cure that glaring defect and to regularise the situation. It is therefore in the interests of justice for this Honourable Court to grant this application.

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4. I am advised that although not cited in the application under case number CCT 360/22, I am personally entitled to join as a party or liable to be joined as a party in the proceedings in terms of Rule 8 of the Constitutional Court Rules. To the extent that my omission as a party may well amount to non-joinder, this application will also serve to cure that glaring defect.

5. It must however be stated upfront that my intervention is conditional upon leave being granted to the First Applicant. Although I hold the very firm view that the decision of the SCA is completely way off the mark in its findings against the appeallants, I do not independently seek leave to appeal because I am advised that the main thrust of the judgment does not concern me, save to the narrow extent that is the basis of this intervention application as more specifically defined below.

6. My application is therefore quite narrow and conditional upon leave to appeal having been granted to the First Applicant, failing which, I am advised that if the decision of the SCA remains in place, either because leave to appeal or the appeal itself having been unsuccessful then in any event the issues relevant to me will be dealt with administratively, in respect of which all my rights are reserved.

7 The narrow basis for this application is my direct interest in the following issues or specific grounds of appeal raised in respect of:-

7.1. the proper interpretation of section 75(7) of the Correctional Services Act;

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7.2. the failure to recognise that the gaps in the record cannot work to the benefit of the respondents; and

7.3. the finding that I may conceivably not have served my entire sentence (and that there is accordingly something to be "*considered*" by the First Applicant in relation thereto.

8. Any other issues which I raised below are introduced purely for the sake of context and not necessarily as stand-alone grounds of appeal outside what is defined in the preceding paragraph. I am advised that the clear contours of my intervention will be further clarified in the replying affidavit and also in my written and/or oral argument should that stage materialise.

9. To the extent that I was admittedly in two minds as to whether to take part in these proceedings given my non-citation, and if so how and my taking of legal advice in that regard and the December court break also contributed to the delay in making a final decision, I apologise to the Court or any other party if the delay caused any unintended inconvenience. Should it be ruled that I need to make a separate application for condonation, despite the absence of prescribed timeframes for intervention, I will happily do so before the date of hearing. In this regard I will be guided by the Directions of the Honourable Chief Justice.

10. This application will be served on all the parties as required under Rule 8(1) of the Constitutional Court Rules afterwhich I am advised that the Court or the Chief Justice may make such order including any order as to costs, and give such directions as to further procedure in the proceedings as may be necessary.

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LEGAL CONTEXT

11. There are compelling reasons why my application for leave to intervene in the aforementioned application. First, I have been a party to the dispute since its urgent inception. Second, the orders granted by the SCA have a direct effect on my constitutional rights in sections 9(1) of the Constitution which guarantees my right to equality before the law and equal protection and benefit of the law; section 10 of the Constitution which guarantees my right to inherent dignity; section 12 of the Constitution which guarantees my right to freedom and security; my right in section 14 of the Constitution which guarantees my right to privacy including medical privacy; section 35(1)(f) of the Constitution which guarantees my right to be released from detention if the interests of justice permits and subject to reasonable conditions; section 35(3)(o) of the Constitution which gurantees my right to appeal to or review by a higher court.

12. The factual issues are not in dispute and relate to whether I suffered a medical condition for which it was justified that I should be granted medical parole by the Commissioner of the Correctional Services. On the factual question of my medical condition, the following important facts were not considered by the Court.

    12.1. The Applicants bear the obligation to place before the Courts all the relevant information on which they sought to review and set aside the decision of the Commissioner. They failed to do so and insisted on arguing that I did not suffer any medical condition on which it was reasonable and justified for the Commissioner to grant me medical parole and unduly reversing the onus which applies in all other administrative reviews in South Africa.

N.L.D

12.2. A Rule 53 record was given by the Commissioner who made it clear to the parties that I had objected to my medical information being given to political organisations whose main interests was to cause stressful controversy on my medical information.

12.3. I had been advised that I was entitled to refuse to grant these political organisations access to my medical information which advice I accepted as correct in light of the many laws promulgated to protect the right of every citizen to the privacy of their medical or personal information. In any event it is not the correctness of my refusal to grant access which is at issue but the mere undisputed fact that I did deny access on the basis of confidentiality. This was accepted by all by their conduct of failing to challenge my decision.

12.4. I was also advised that only a Court could, on a proper application by the parties access to protected medical information, pierce the veil of protection given to my medical information.

12.5. The political organisations specifically refused to challenge my right to assert medical privilege over my medical records and elected to go on what was disclosed to them in the Rule 53 record.

12.6. Despite having specifically elected not to challenge my assertion of medical privacy, they continue to contend that there was no medical basis on which it was rational or reasonable for the Commissioner to grant me medical parole. This is a legal absurdity which no court ought to countenance.

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13. In the absence of a full medical record, the political organisations seeking to challenge the Commissioner's decision on the basis that he did not have a reasonable medical basis to grant me medical parole was simply wrong. The Courts should have held that the applicants in the High Court had failed to meet the requirements of a review application in so far as they sought to impugn the decision of the Commissioner on the basis that it was unreasonable or irrational. Without a full medical record it cannot be held that the Commissioner acted irrationally or unreasonably in relation to the jurisdictional requirement on which it is lawful for him to consider and grant medical parole. In such a situation, the onus-bearing party cannot conceivably succeed.

14. Had the Courts accepted that I correctly exercised my right to refuse to disclose my medical record to the parties seeking to challenge my medical parole on the basis that I did not suffer any medical condition to justify the granting of medical parole, the reasonableness and rationality challenges should have failed. No aspersions would be cast on the Commissioner's bona fides in relation to his consideration of the relevant factors necessary for the granting of medical parole. For example, it would be irrelevant that the Commissioner considered non-medical issues for his decision to grant me medical parole if the medical issues were settled or uncontested.

15. In paragraph 54 of the judgment, the SCA found that even if the Commissioner could override the decision of the Board, the decision failed on a number of grounds. The first (and only) is that he took into account irrelevant factors in the inquiry. The irrelevant facts set out are the following:

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15.1. I was 79 years of age and would be 80 by the scheduled date of my release;

15.2. I was a former President of the Republic of South Africa;

15.3. There was massive unrest and related public violence in which over 300 people were tragically killed allegedly following my incarceration in July 2021; and

15.4. The lack of capacity or facilities on the part of the Department to give me the medical services necessary for my medical situation.

16. The SCA found that these factors were relevant only in relation to a consideration of normal medical parole but "*have no bearing at all in an application for medical parole*".

17. This finding was clearly erroneous at many levels because if the Court accepted that the Commissioner considered my medical condition and on that alone would have qualified for medical parole, it was irrelevant that the Commissioner went further to described who I am. I was indeed 79 years of age and a former head of State. Those are facts that do not ground a basis for the granting of medical parole but are correct relevant information in describing who it is the Commissioner was considering for medical parole. It was not the basis for granting medical parole that I was 79 years of age and a former head of state. Those factors alone would be neutral for they would be relevant facts to who I am. In any event, it is not correct that advanced age and frailty are "*irrelevant*" to a person's medical status.

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18. The fact that there was public violence following my arrest and incarceration may equally be "*irrelevant*" to the granting of medical parole but a responsible reflection of what the public could believe if, for instance, I died in prison in circumstances where the Commissioner had information about my medical condition. To point this out is not to support or condone wanton violence. My point is simply that it is not an irrelevant consideration if the proper context of this matter is taken into account. I stand by this view.

19. The SCA and the High Court failed to properly consider why the Commissioner was concerned about the serious implications any possible death of a prisoner has but more so the potential death of a former President of the Republic of South Africa in circumstances where that could be prevented by a responsible approach. I am quite aware that to some specific sections of our society, including the parties seeking to have me reincarcerated, the possibility of my death may well be an "*irrelevant*" or even joyous occasion. However, it is not unreasonable or irrational for the Commissioner faced with my medical facts to consider the implications of my death while in prison where that could be prevented by appropriate and lawful medical and/or administrative interventions.

20. The SCA failed to properly assess the reasons given by the Commissioner within the <u>context</u> of uncontested medical information that the Commissioner was aware of. It is often said, with respect correctly, that in law context is everything.

21. More importantly, the SCA failed to appreciate that there was medical unanimity on my medical conditions and its severity. The problem for the Commisioner was that the Board did not have a unanimous view on the granting of medical parole. This means that doctors were divided over whether the medical condition justified

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the granting of medical parole. Faced with differences between doctors 'over whether the nature of the medical condition justified the granting of medical parole, the Commissioner was entitled to exercise his discretion in favour of granting medical parole. He was entitled to do so. The only question is whether he exercised that discretion lawfully and/or rationally.

22. The discretion in favour of granting medical parole was consistent with his constitutional duties as a Commissioner. The Commissioner faced with conflicting medical views acted lawfully, reasonably and rationally, when he granted medical praole. This is because if he erred he had to do so on the side that would comply with the constitutional obligations set out in section 7 and 8 of the Constitution. Medical parole is a dispensation that must be employed in a manner that is consistent with the state's constitutional obligations under section 8 and 9 read with the founding values of the Constitution. Faced with a possibility that I faced death itself while in prison, it could never be unreasonable or irrational for the Commissioner to have granted me medical parole. Bearing in mind that my incarceration was in the middle of a deadly pandemic in which people in my age and medical condition faced a certain death, the Commissioner's decision, in our constitutional context, should have been applauded as exemplary leadership that is required under our Constitution.

23. While my death in prison would have given many some relief, it is something that is undesirable to be achieved through the state whose weighty constitutional obligation enjoins it to "*respect, protect, promote and fulfil the rights in the Bill of Rights*". While my death in prison would be understandably celebrated by the parties seeking my reincarceration and their sympathisers, it would cause

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unnecessary national stress, to my family and other sections of our society which should be prevented by a sober reflection on the constitutional duties attaching to those in prison. Simply put, it was neither unlawful, unreasonable or irrational for the Commissioner to prevent my death in prison. I am grateful for it. Without such intervention I may well not having been alive to depose to this affidavit. How that should have been allowed or risked, in the name of "*rationality*", is clearly absurd.

THE ROLE OF THE BOARD

24. Similarly, the Board is enjoined in conducting its affairs to act in a manner that reflects our constitutional values and must "respect, protect, promote and fulfil the rights in the Bill of Rights." The Board does not make decisions on medical parole as found by the Courts. It is the Commissioner who does so. The Board's role is advisory and where its recommendations are unanimous, a Commissioner acting responsibly would not exercise a disrection against accepting unanimous medical assessements and conclusion.

25. To find, as the SCA did, that the Board's recommendations to the Commissioner are binding fails to take into account what the status should be where the recommendations are not unanimous. Where the recommendations of the Board are unanimous, it is reasonable and rational for the Commissioner to adopt such recommendations tailoring his administrative decision with other relevant considerations.

26. Where the Board's recommendations are not unanimous, even where there is a single dissenting view, the Commissioner must take a decision – not bound by the majority or minority view, but informed by their varying views on a medical

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situation. What the Courts failed to do was to accept the following incontrovertible relevant evidence:

26.1. The Commissioner considered all the relevant medical evidence;

26.2. The medical evidence was incontrovertibly the only basis on which the medical parole decision rested; and

26.3. The Board's recommendations was not unanimous and therefore left the Commissioner in a position reflective of his experience of the purpose of medical parole, the duty to avoid a situation where a former President of the Republic of South Africa died in prison while he felt trapped by the conflicting medical views of the Board.

26.4. The constitutional obligations of the Board and the Commissioner all converged at ensuring that a decision was taken that reflected the constitutional values, promoted and protected my constitutional rights.

26.5. The plain meaning of recommendation meant that the Board could only recommend to the Commissioner but the decision lay squarely with the Commissioner to consider the recommendations and to make a decision based on those recommendations.

26.6. The difference between the recommended view of the majority of the Board members and that of the Commissioner was whether medical parole was appropriate – not whether there was a medical condition on which a decision on medical parole was to be considered.

H.L.D.

27. For reasons set out above, I pray for my application to intervene as the Second Applicant be granted and to the extent necessary for the disposal of this application, orders be made and directions be issued on the further conduct of the matter. More importantly, once admitted as a party, I intend to file a full replying affidavit addressing the various issues reflected in the founding and answering affidavit of the parties to the extent necessary for the relief that I seek.

Completion of term of sentence

28. I specifically seek an order that the Constitutional Court decide the question of whether the time that I served my sentence under medical parole should be considered as compliance with my sentence of fifteen months. That is important because it will clear the uncertainty that the SCA has left by its decision directing the Commissioner to make that decision even after I am out of the prison system for over two months.

29. In my respectful submission such a finding is erroneous in the extreme and constitutes a gross misdirection. There is nothing for the Commissioner to consider. My official release date of 7 October 2022 has come and gone. No party has reviewed and set aside the well-publicised decision of the First Applicant to that effect. Involved criticism of that decision does not amount to a *mero motu* review. It is therefore presumed to be valid, unless legitimately and regularly set aside by a competent court of law upon an application by any party which has the requisite *locus standi* to do so.

30. To be more direct neither the Commissioner, who is *functus officio*, nor the SCA, can ever have the powers to change or wish away the fact that, legally speaking, my entire sentence has been served. Any court which seeks to "*sentence*" me,

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again without a trial, to a further period of imprisonment ought properly to pronounce the new sentence and the reasons behind it in the usual manner in which sentences are imposed in criminal trials, and not in the context of civil review proceedings.

31. In this regard I am advised that reliance will be placed on the following dictum of the Constitutional Court, which is binding on the SCA and this Honourable Court, as matters currently stand and which was clearly and improperly disregarded by the court *a quo*:-

> ***"... parole is still a manner of serving out one's sentence. It is therefore still a punishment although a lesser one than imprisonment. It still amounts to a deprivation of liberty for a set period, albeit outside of prison."***[1]

32. In the circumstances, my application for intervention should be granted with necessary directions as to the filing of further affidavits.

[1] Phaahla v Minister of Justice and Correctional Services 2019 (7) BCLR 795 (2019 (2) SACR 88) (CC), per Dlodlo AJ, at paragraph [35]

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WHEREFORE I pray that it may please this Honourable Court to grant leave to appeal and dismiss all three High Court applications, with punitive costs.

DEPONENT

I HEREBY CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Durban on this the 26 day of January **2023**, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

SOUTH AFRICAN POLICE SERVICE
PRESIDENTIAL PROTECTION SERVICE
2023 -01- 26
KWAZULU - NATAL
SOUTH AFRICAN POLICE SERVICE

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