IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT case no: 360/22
SCA case no: 33/2022
High Court case nos: 45997/2021, 46468/2021, 46701/2021

In the application between:

NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	First Applicant
JACOB GEDLEYIHLEKISA ZUMA	Intervening Party / Second Applicant

And

THE DEMOCRATIC ALLIANCE	First Respondent
HELEN SUZMAN FOUNDATION	Second Respondent
AFRIFORUM NPC	Third Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fourth Respondent
MEDICAL PAROLE ADVISORY BOARD	Fifth Respondent

In the matter between:

THE NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	First Applicant

And

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

NLF

SECOND RESPONDENT'S ANSWERING AFFIDAVIT OPPOSING APPLICATION FOR LEAVE TO INTERVENE

I, the undersigned,

NICOLE LOUISE FRITZ

do hereby make oath and state that:

1. I am an adult female director of the second respondent, the Helen Suzman Foundation ("**HSF**"). I deposed to the HSF's answering affidavit in the application for leave to appeal brought by the National Commissioner of Correctional Services ("**National Commissioner**"). I remain duly authorised to depose to this affidavit on behalf of the HSF.

2. The facts contained in this affidavit are, to the best of my knowledge, both true and correct and, unless otherwise stated or indicated by the context, are within my personal knowledge. Where I make legal submissions, I do so on the strength of the advice of the HSF's legal representatives.

INTRODUCTION

3. On 21 November 2022, the SCA delivered its judgment and order under case number 33/2022 ("**the SCA decision**") in which it held that the National Commissioner's decision to grant medical parole to Mr Jacob Gedleyihlekisa Zuma ("**Mr Zuma**") was unlawful and unconstitutional. While the National Commissioner applied to this Court for leave to appeal the SCA decision in December 2022, Mr Zuma did not apply for leave to appeal.

4. The HSF opposed the National Commissioner's application for leave to appeal. In its answering affidavit, delivered on 20 January 2023, the HSF set out the reasons why the appeal lacks any prospects of success.

5. More than two months after the SCA decision was delivered on 30 January 2023:

5.1 Mr Zuma filed an application in which he asked this Court for leave to intervene as an applicant in the National Commissioner's application for leave to appeal in terms of Rule 8(1) of the rules of the Constitutional Court ("**intervention application**"). In the intervention application, Mr Zuma states that he wishes this Court to determine the intervention only if the National Commissioner is granted leave to appeal the decision of the SCA. Thus, the intervention application is conditional upon the National Commissioner's application for leave to appeal being granted.

5.2 If granted leave to intervene, Mr Zuma seeks leave to appeal against the SCA judgment (prayer 2). Accordingly, Mr Zuma is still required to meet the requirements for an application for leave to appeal.

6. Mr Zuma now seeks impermissibly – through the backdoor of an intervention application – to raise three new grounds of appeal on the basis of which is sought the setting aside of the SCA decision that held that the National Commissioner's medical parole decision was unlawful. In the event that this Court does not set aside the SCA decision, Mr Zuma asks this Court for novel relief raised for the first time before this Court. He asks that this Court declare that he has served his sentence in full in terms of the Correctional Services Act.

NLF

7. The HSF delivers this affidavit in opposition to Mr Zuma's intervention application. The HSF set out the background to the matter in the answering affidavit in the application for leave to appeal filed by the National Commissioner. I, therefore, do not repeat the background in this answering affidavit, nor do I repeat the submissions made in response to the National Commissioner's application for leave to appeal. In what follows in this affidavit, I:

7.1 set out why the intervention application – which in effect amounts to an application for leave to appeal under the guise of an intervention application – amounts to an abuse of process and ought to be dismissed; and

7.2 address Mr Zuma's three new "specific grounds of appeal" thematically.

8. To the extent that any of Mr Zuma's averments are not specifically addressed, they should be taken to be denied.

THIS APPLICATION IS AN ABUSE OF PROCESS

9. Mr Zuma participated in the proceedings before the High Court and the SCA. He is entitled to apply to this Court for leave to appeal against the SCA decision. He has elected not to do so.

10. While an application for leave to appeal should have been lodged by 12 December 2022 and Mr Zuma is thus out of time to apply for leave to appeal, it is nonetheless still open to Mr Zuma to apply for leave to appeal and seek condonation for his late filing. However, condonation is not to be had merely for the asking. Mr Zuma will need to explain the reason for his delay.

NLF

11. Instead of applying for leave to appeal together with condonation, Mr Zuma has effectively sought leave to appeal against the SCA's decision through the backdoor of an intervention application – thereby obviating the need to apply for condonation and to offer any explanation for his delay. This is impermissible and abusive.

12. An intervention application may be brought at any stage of proceedings – even at the final hour before the hearing – without any need to apply for condonation and without consideration being given to:

12.1 The extent and cause of the delay and the reasonableness of the explanation provided for the delay; and

12.2 The impact of the delay on the administration of justice and on other litigants.

13. For a party to bring an application for leave to appeal disguised as an intervention application after the time for launching an application for leave to appeal has passed plainly undermines the rules of this Court and the important reasons for requiring timely filing of an application for leave to appeal. Moreover, it has the potential to undermine the administration of justice and to cause significant prejudice to the other litigants.

14. It is clear that what Mr Zuma actually seeks is that he be permitted to appeal against the decision of the SCA, without satisfying this Court why leave to appeal ought to be granted and without making out a case on the basis of s 167(3)(b) of the Constitution.

NLF

15. Mr Zuma's second prayer in his notice of motion is that he be granted leave to appeal to this Court against the SCA decision. Mr Zuma says in his founding affidavit that should he be permitted to intervene, he has three "*specific grounds of appeal*" to raise, although the "*clear contours of [his] intervention will be further clarified in the replying affidavit and also in [his] written and/or oral argument...*".[1]

16. Since Mr Zuma clearly seeks leave to appeal the SCA decision in his notice of motion and wishes to raise new grounds of appeal, the only way open to him is through an application for leave to appeal together with an appropriate condonation application fully explaining the reasons for his delay.

17. Further, Mr Zuma does not proffer any or adequate justification for seeking to intervene and leave to appeal only conditionally on the National Commissioner being granted leave to appeal. Either Mr Zuma is aggrieved and has a case to pursue which is worthy of this Court's attention, or he does not. It is an abuse to style his application as conditional on the (irrelevant) happenstance of leave being granted to the National Commissioner. Mr Zuma does not explain what will change about his case as a result of that condition being fulfilled. If Mr Zuma's proposed intervention and leave to appeal are not worthy of this Court's consideration at this stage, which is Mr Zuma's principal submission, then they are likewise not worthy of it after leave is granted to the National Commissioner.

18. Mr Zuma does not have a right to intervene to be exercised by him at his election and whim. Rule 8(1) of the rules of the Constitutional Court makes intervention

[1] FA para 8.

NJF

by any person entitled to intervene subject to the discretion of the Court. Mr Zuma either applies to intervene on the ground that he is entitled to do so because he has a direct and substantial interest, or he does not. He may not in one breath, assert an entitlement to intervene on the basis of a direct and substantial interest and in the same breath, hang his entitlement to intervene on whether the Constitutional Court grants the application by the National Commissioner leave to appeal.

19. For these reasons, this Court should dismiss Mr Zuma's intervention application as an abuse of process.

20. In any event, as explained fully in my answer to the National Commissioner's application for leave to appeal – the application for leave to appeal in which Mr Zuma seeks to intervene – falls to be dismissed because it bears no prospects of success. Nothing in Mr Zuma's intervention application changes this:

20.1 Mr Zuma is not permitted in an intervention application to raise new grounds of appeal. Mr Zuma's new grounds should accordingly not be considered by this Court.

20.2 But, in any event, Mr Zuma's "specific grounds of appeal" are entirely meritless for the reasons I deal with more fully below.

NKF

THE PROPER INTERPRETATION OF SECTION 75(7) OF THE CSA AND THE NATIONAL COMMISSIONER'S ALLEGED DISCRETION

21. Mr Zuma contends that the SCA's finding that the Medical Parole Advisory Board's ("**the Board**") recommendations to the National Commissioner are binding fails to take into account what the status should be where the recommendations are not unanimous. Mr Zuma submits that if the Board's recommendations are not unanimous, then the National Commissioner "*must take a decision – not bound by the majority or minority view, but informed by their varying views on a medical situation*".[2] However, Mr Zuma accepts that "*a Commissioner acting responsibly would not exercise a discretion against accepting unanimous medical assessments and conclusion*".[3]

22. Mr Zuma thus contends that the National Commissioner exercises a discretion only where the decision of the Board is not unanimous.

23. Mr Zuma is wrong on the law. The non-unanimity of the recommendation made by the Board makes no difference to the powers of the National Commissioner.

24. The Board comprises ten medical doctors appointed by the Minister of Justice and Correctional Services. The Board is tasked with determining whether an applicant for medical parole is terminally ill or is rendered physically incapacitated by disease or illness so as to severely limit daily activity or self-care.

25. Regulation 29B(6) provides that "[a] decision of the majority of the members of the Board present shall be a decision of the Board".

[2] FA para 26.

NLF

26. In other words, there is no requirement that in order for a Board to make a decision it requires unanimous consent. Quite the opposite. It is the decision of the majority of Board members that is binding upon the National Commissioner. It accordingly makes no difference whether there are dissenting views on the Board or not.

27. Thus, the National Commissioner is bound by the decision of the Board – that is the decision taken by the majority of the Board members. The National Commissioner has no discretion to exercise. This does not change simply because there may be a dissenting view on the Board. This is, on its own, dispositive of this ground of appeal.

28. But Mr Zuma is also wrong on the facts. There is simply no indication that the decision of the Board was not unanimous.

29. The decision of the Board does not record any minority view. There were accordingly no "majority" or "minority" decisions for the National Commissioner to consider. Since it is the decision of the Board that binds the National Commissioner, to try and pick at how that decision was arrived at is to waste this Court's time by directing attention to matters that have never been contentious in the lower courts.

30. Mr Zuma's contention that the Board was not unanimous presumably arises from the report made by Dr Mphatswe – a member of the Board – recommending Mr Zuma for medical parole.

31. Regulation 29B(8)(a) permits a member of the Board to examine a sentenced offender who applies for medical parole. The report of a member of the Board

D NJS

who examines the offender is made to the Board, which then takes the decision on whether or not the offender is terminally ill or physically incapacitated so as to qualify for medical parole by a majority of Board members present. The report is for consideration by the Board and not by the National Commissioner.

32. Dr Mphatswe examined Mr Zuma and made his recommendation to the Board. The Board thereafter took its decision on Mr Zuma's application. There is no indication that Dr Mphatswe held a dissenting view at the time that the Board took its decision:

32.1 There is no indication that Dr Mphatswe was present when the Board took its decision.

32.2 Even if he was present, he may have subsequently changed his mind. Since his examination of Mr Zuma on 13 and 17 August, the Board had called for and received additional specialist reports, which factored into its decision making. Mr Zuma had also in the intervening time been receiving specialist medical care and, as concluded by the Board, his treatment had been optimised, his conditions brought under control and his condition was stable.

33. Quite simply, there is no way of knowing whether Dr Mphatswe or any other member dissented from the decision of the Board or not. It makes no difference since the decision of the Board is taken by majority, but this too is entirely dispositive of this ground of appeal.

34. In any event, Mr Zuma's submission that the National Commissioner has a discretion to exercise in the determination of whether an offender suffers from a

terminal disease or condition is entirely contrary to the provisions of the CSA. I do not intend to rehearse the detailed facts or legal submissions pertaining to this matter which are set forth extensively in the High Court judgment and SCA decision. Nor do I repeat the detailed submissions the HSF made in the answering affidavit in the application for leave to appeal. However, I point out the following which indicates that Mr Zuma's interpretation of section 75(7) of the CSA is incorrect:

34.1 The High Court and the SCA correctly held that the National Commissioner may only grant medical parole once the Board has established that the offender is suffering from a terminal disease or physical incapacity.[4] Plainly, the first jurisdictional fact – whether an offender has a terminal disease or incapacity – requires an expert medical determination.

34.2 Because this determination is ordinarily outside the expertise and knowledge of the National Commissioner, the CSA establishes the Board which comprises ten medical doctors whose role is to provide an independent medical report on applications for medical parole. This does not mean that the Board decides medical parole. Rather, the Board's role is to determine but one of the three substantive requirements. The HSF submits that on a textual, purpose-driven, and contextualised interpretation of section 75(7) read with section 79 and understood in the context of 'objective recommendations' in law, it is clear that a positive recommendation by the Board about whether the sentenced offender is suffering from a terminal disease or physical incapacity is a jurisdictional

[4] High Court decision at para 58; SCA judgment at paras [50] to [52].

NHF

requirement for the National Commissioner's power to grant medical parole. In other words, it is for the Board to determine first that the offender is suffering from a terminal disease or physical incapacity.

34.3 If the Board makes a positive recommendation – that is to say, if the Board finds that the offender is indeed eligible for medical parole (because he suffers from a terminal illness or physical incapacity) – *then* (and only then) is the National Commissioner empowered to grant medical parole if the other requirements in sections 79(1)(b) and (c) of the CSA – the risk of reoffending and arrangements for supervision – are met. That this is the only correct interpretation is apparent from the words used, the careful structure and allocation of functions set forth by the CSA, the history of the amendment of the CSA and the respective expertise of the Board and the National Commissioner.

34.4 Any other interpretation, or an interpretation that allows the National Commissioner to grant medical parole to an inmate without the recommendation of the Board to that effect, would undermine the very purpose for which the Board was created. Once the Board has properly applied its mind and concluded that an inmate does not suffer from a terminal illness or physical incapacity so as to severely limit daily activity or inmate self-care, the National Commissioner is not entitled to grant medical parole. The Board is the body possessing the requisite expertise and knowledge to make such a determination and is, in respect of the first jurisdictional requirement, the ultimate decision maker.

34.5 This in itself is dispositive of this ground. The National Commissioner does not have the power to overrule the recommendation of the Board. The Board determined that Mr Zuma "*is stable and does not qualify for medical parole*". The National Commissioner's decision to grant Mr Zuma medical parole against the recommendation of the Board is accordingly unlawful. The decision was correctly set aside for that reason alone.

34.6 Moreover, section 79(1) of the CSA sets out objective jurisdictional facts that must be present for medical parole to be granted. If any of the jurisdictional facts are not present, the National Commissioner may not grant medical parole. Even if the National Commissioner has the power to overrule the Board, he did not find that Mr Zuma satisfies the requirement in section 79(1)(a). Nowhere in the National Commissioner's reasons for his decision is it stated that Mr Zuma suffers from a terminal illness or disease or that Mr Zuma is physically incapacitated as a result of illness or disease so as to severely limit his ability to engage in daily activity or self-care. Even if the National Commissioner "*considered all medical evidence*" (which the HSF submits he is not qualified to do) or if he "*had a 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*", the National Commissioner did not actually conclude that section 79(1)(a) was satisfied. Medical parole cannot be granted in the absence of a terminal illness or disease or physical incapacity. This, too, is dispositive of this ground.

NJF

THE ALLEGED GAPS IN THE RECORD

35. Mr Zuma advances an argument that it was improper for the respondents to "*go on what was disclosed to them in the Rule 53 record*". On this score, Mr Zuma avers that:

35.1 the National Commissioner's decision cannot be challenged in the absence of Mr Zuma's full medical records; and

35.2 it cannot be held that the National Commissioner acted irrationally or unreasonably in relation to the jurisdictional requirement on which it is lawful for him to consider and grant medical parole without a full medical record.

36. Notwithstanding that the default position in our law is full disclosure, the HSF proposed (referencing the type of strict confidentiality regime endorsed by this Court in the *Helen Suzman Foundation v JSC* judgment)[5] that the portions of record pertaining to Mr Zuma's medical condition be provided only to the parties' attorneys of record, counsel and any independent experts – all of whom would sign a confidentiality undertaking.

37. It was Mr Zuma who decided not to consent to his medical records – that ought to have formed part of the rule 53 record – being made available to the respondents' legal representatives and any independent experts. One of the reasons he did so, so he says, is because the respondents in this matter are "*political organisations whose main interests was to cause stressful controversy on [his] medical information*".[6] Mr Zuma cannot contrive a defence on the basis

[5] *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC).

[6] FA para 12.2.

NLF

of his own failures. I emphasise that the HSF is not a political organisation and its interests are not to "*cause stressful controversy*" to Mr Zuma. Moreover, the confidentiality regime HSF proposed would have meant that only HSF's attorneys of record, counsel and any independent experts would have been granted access to medical records (not the HSF itself). But in any event, this is irrelevant. Mr Zuma ultimately rejected the HSF's proposed confidentiality regime. Having made that election, Mr Zuma must now live with the consequences.

38. Similarly, the National Commissioner elected to proceed without providing evidence of Mr Zuma's medical condition to justify his decision to grant Mr Zuma medical parole. The National Commissioner was obliged to provide the full record. The National Commissioner elected not to do so – kowtowing to Mr Zuma's insistence that his medical information not be disclosed even under a confidentiality regime. The consequences of the National Commissioner's election are plain. The onus rests on the National Commissioner – as the decision-maker – to show that there was good reason for the decision. The medical parole decision cannot be justified on the basis of information that does not form part of the reasons and record provided by the National Commissioner.

39. The burden does not fall on the applicants reviewing the impugned decision to insist on the production of the full record. Rule 53 is designed to aid the applicants, not to shackle them. The applicants were perfectly entitled to proceed with their review applications on the basis that the limited and redacted record that had been provided by the National Commissioner was the only record availed in justification of the medical parole decision. Similarly, the courts below

NLS

were entitled to review the decision on this basis. The contrary view would entail that the applicants can be hamstrung in prosecuting their review applications – and the courts in exercising their review jurisdiction – through the strategic filibuster by the decision-maker not to make the full record available. Effectively rendering the impugned decision immune from review unless the applicants waste time and go to the expense of bringing an application to compel disclosure of the full record.

40. In any event, although Mr Zuma's full medical records did not form part of the rule 53 record, we know that the Board concluded – based on those records which it had full access to – that Mr Zuma did not qualify for medical parole. It was therefore of the view that he did not suffer from a terminal disease or condition. Nothing which Mr Zuma says impugns that view by reference to the records, and nothing turns on their self-engineered absence.

41. Moreover, it is entirely irrelevant what the medical records revealed to the National Commissioner:

41.1 First, as I have set out above, the National Commissioner was obliged to accept the finding of the Board as to whether or not Mr Zuma suffered from a terminal disease or physical incapacity. As correctly held by the SCA, since the Board decided not to recommend Mr Zuma for medical parole,

NKF

the National Commissioner's decision to grant Mr Zuma medical parole was unlawful.[7]

41.2 Second, the National Commissioner could not take into account irrelevant factors or fail to take into account relevant factors. As correctly held by the SCA, the National Commissioner did both.[8] This has already been addressed in HSF's answering affidavit to the National Commission's leave to appeal application. In summary:

41.2.1 The National Commissioner took into account the irrelevant considerations of Mr Zuma's former office (as President) and the July 2021 unrest in coming to his decision as well as Mr Zuma's age and frailty. These are, again, legally irrelevant considerations, tailor-made to Mr Zuma (and to shape the decision in only one possible manner).

41.2.2 Nowhere does the National Commissioner take into account the statutorily required factors for medical parole. The National Commissioner's decision makes no mention of the risk of reoffending, which has its own set of jurisdictional factors necessary for the National Commissioner to consider, such as (i) whether, at the time of sentencing, the court was aware of the inmate's medical condition for which he is seeking parole; (ii) the presiding officer's sentencing remarks; (iii) the type of offence for which the inmate seeking parole has been convicted; (iv) the length of the sentence served and still to be served; and (v) the previous criminal record of the offender. As the

[7] Supreme Court of Appeal judgment at para 53.

[8] Supreme Court of Appeal judgment at paras 54 and 55.

NLF

HSF has previously detailed, not only was Mr Zuma's risk of re-offending significant, but this risk has subsequently materialised, with Mr Zuma re-offending after his release.

42. Evidence about Mr Zuma's medical condition is irrelevant to these key findings of the SCA. The 'missing evidence' would accordingly not have made any difference to the outcome in the SCA's decision.

43. For these reasons, this ground of appeal is without merit.

MR ZUMA HAS NOT SERVED HIS ENTIRE SENTENCE

44. The claim that the SCA was wrong to find that Mr Zuma did not complete his sentence does not give rise to any issue on appeal. The SCA was considering whether the High Court judgment in 2021 was correct or should be overturned. The SCA correctly ruled that the High Court properly upheld the review application and granted the default remedy of retrospective invalidation. What might or might not properly be taken into account by the National Commissioner in due course in respect of further parole applications by Mr Zuma (including the time Mr Zuma spent on unlawful medical parole) is a matter for another day.

45. This ground is, therefore, without merit.

CONCLUSION

46. For the reasons outlined above, the HSF submits that the intervention application should be dismissed with costs, including the costs of two counsel.

DEPONENT

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at Johannesburg on this the 6th day of March 2023, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS
Full names:
Address:
Capacity:

PHELISA PHELOKAZI JWAJWA
8 Sherborne Road
Parktown
Johannesburg
Commissioner Of Oaths
Ex Officio Practising Attorney R.S.A