IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 2021/46468

In the matter between

HELEN SUZMAN FOUNDATION	Applicant
and	
NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	First Respondent
DEPARTMENT OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
MEDICAL PAROLE ADVISORY BOARD	Third Respondent
JACOB GEDLEYIHLEKISA ZUMA	Fourth Respondent

FILING NOTICE

TAKE NOTICE THAT the applicant ("**the HSF**") presents the following for service and filing:

1. HSF's Heads of Argument dated 8 November 2021.

DATED AT JOHANNESBURG ON THIS 8th DAY OF NOVEMBER 2021.

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THE HSF'S HEADS OF ARGUMENT

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INTRODUCTION: MR ZUMA'S GET OUT OF JAIL CARD

1. The Constitutional Court sentenced Mr Zuma to 15 months in jail. Jail time was the only way to vindicate the Court, the judiciary, and "the Constitution itself."[1] The "extent and gravity" of Mr Zuma's contempt for the Court was "singularly unprecedented and absolutely inimitable"—so much so that he left the Court "with no real choice."[2] Imprisonment was "[t]he only appropriate sanction" and any alternative would be to "effectively sentence the legitimacy of the Judiciary to inevitable decay."[3]

2. That ink was barely dry before the former National Commissioner dealt Mr Zuma a Get Out of Jail card: at the start of September, the National Commissioner granted Mr Zuma medical parole—less than two months into his sentence; and despite the medical experts finding that he was not terminally ill or permanently incapacitated, but in a stable condition.

3. The country has seen this movie before: the politically powerful using the shiv of medical parole to get out of prison through the front door.[4] In 2011, a few years after Shabir Shaik was let free on his doctor's orders (after being convicted and sentenced for, amongst other things, "an overriding corrupt relationship that existed between [Mr] Zuma and Shaik"[5]), the Correctional Services Act was amended to stop the abuse of medical parole.[6] Before the

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[1] *Secretary, Judicial Commission of Inquiry Into Allegations of State Capture v Zuma* 2021 (5) SA 327 (CC) at para 62.

[2] *Zuma* (note 1) at para 102.

[3] *Zuma* (note 1) at para 102.

[4] Founding affidavit; p 002-13, para 30.8; annexure "FA5", p 002-48.

[5] *S v Shaik* 2007 (1) SA 240 (SCA) para 16.

[6] Act 111 of 1998, amended by the Correctional Matters Amendment Act 5 of 2011, which came into effect in 2012.

amendment, medical parole was for prisoners who were in the final phase of a terminal disease.[7] The prisoner's own doctor made that diagnosis.[8] The amendment brought critically needed independence: now, an independent panel of specialists—the Medical Parole Advisory Board—must compile an "independent medical report".[9]

4. The National Commissioner's decision to grant Mr Zuma medical parole is an end run around the Board and the vanguard role it plays in preventing abuses of medical parole and ensuring consistent treatment. The Board carefully considered Mr Zuma's application for medical parole. The Board did what good doctors should do: evidence-based medicine. The Board assessed the medical evidence and reached a conclusion. In the Board's expert determination, Mr Zuma's treatment had been "optimised" and he was in a "stable" condition.[10]

5. Mr Zuma's application for medical parole, on the law, should've ended there: someone whose treatment has been optimised and is "stable" is not, to use the gatekeeper language of section 79(1)(a), "suffering from a terminal disease or condition" or "rendered physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care".

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[7] Before 2012, section 79 read:

> "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, Correctional Supervision and Parole Board or the Minister, as the case may be, to die a consolatory and dignified death."

[8] See the pre-2012 version of section 79 (note 7) and, in particular, "…based on the written evidence of the medical practitioner treating that person".

[9] Section 79(3) of the Act, our emphasis.

[10] Supplementary founding affidavit; p 004-149.

6. The National Commissioner—a politician, not a doctor—decided he knew better. After going out of his way to rescind a previous delegation of authority for medical parole decisions so that he could decide Mr Zuma's application himself, he overruled the Board and approved medical parole.[11]

7. The National Commissioner gave six reasons for his decision.[12] He tries hard to pad his decision with new reasons in his answering affidavit. This is impermissible; the National Commissioner's decision stands or falls by the reasons he gave at the time of the decision.[13] SCA authority—in another case involving Mr Zuma—explains that the publicly given reasons (pre litigation, and as reflected in the record) are the only reasons the National Commissioner may permissibly rely on before this Court.[14] We will come to it and the other cases later.

8. None of the six reasons comes close to showing, as the Correctional Services Act requires, that Mr Zuma is "suffering from a terminal disease or condition" or is "rendered physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care". Instead, the National Commissioner based his decision on irrelevant and self-defeating considerations.

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[11] Supplementary founding affidavit; p 004-150.

[12] Supplementary founding affidavit; p 004-150.

[13] See the full discussion on ex post facto reasons further below under the heading of "Not permitted to retrofit".

[14] See *Zuma v Democratic Alliance* 2018 (1) SA 200 (SCA) at para 24 (emphasis added):

> "On 6 April 2009 Mr Mpshe announced publicly that he had made the decision to discontinue the prosecution of Mr Zuma and issued a detailed media statement providing the reasons for the decision. <u>It is against those reasons, and those reasons alone, that the legality of Mr Mpshe's decision to terminate the prosecution is to be determined</u>".

9. The National Commissioner's decision is unconstitutional and unlawful. It must be set aside. Mr Zuma should be made to serve his time. Any other result turns the Constitutional Court's vindication of the rule of law into a Maginot Line: strong on paper, but easily outflanked.[15] If the National Commissioner's decision were allowed to stand, executive fiat will have subverted our highest judicial authority.

10. In the rest of these heads of argument:

- We briefly discuss the facts.
- We then explain why the National Commissioner's decision was unconstitutional and unlawful: (a) he did not have the power to overrule the Board's expert medical determination; and (b) given his reasons for the decision it was patently unlawful and irrational.
- We discuss the appropriate remedy given that unconstitutionality and unlawfulness.
- We deal with the meritless technical arguments raised by the National Commissioner and Mr Zuma.

[15] As the Oxford English Dictionary, 3rd ed, 2000 (2021, online update) explains, the Maginot Line was "a line of fortifications along the frontier of France from Switzerland to Luxembourg, begun in the 1920s as a defence against German invasion and widely considered impregnable, but outflanked [by the Germans] in 1940."

THE FACTS

11. The parties' joint chronology tracks the full timeline.[16]

12. At the end of June, the Constitutional Court found Mr Zuma guilty of contempt. The Court sentenced him to 15 months in jail.

13. Mr Zuma started his sentence on 8 July—after holding out until (quite literally) the eleventh hour at his home in Nkandla, through a nationally televised face-off with the authorities. A dedicated team from the South African Military Health Service was waiting.[17] After a summary examination, his medical team recommended that he be "moved to a specialist medical high care unit".[18] The South African Military Health Service team monitored Mr Zuma "on a daily basis" while he was at the Estcourt Correctional Centre. Ordinary prisoners are not so fortunate.[19]

14. At the end of July, Mr Zuma's medical team from the South African Military Health Service applied for his temporary release to a "specialist medical facility to be assessed further by specialists … for proper investigations and to optimize therapy for a better outcome".[20]

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[16] Chronology; p 007-3.

[17] Supplementary founding affidavit; p 004-13, paras 32 to 33.

[18] Supplementary founding affidavit; p 004-13, paras 32 to 33.

[19] Supplementary founding affidavit; p 004-13, para 34. Compare: the 2019/2020 annual report of the Judicial Inspectorate for Correctional Services at p 59 (noting that "[m]ost" complaints to independent correctional centre visitors "are about access to medication and medical treatment.").

[20] Supplementary founding affidavit; p 004-13, para 35.

15. Twenty days into his 15-month sentence, Mr Zuma applied for medical parole. One of Mr Zuma's doctors in his South African Military Health Service team, Dr Mafa, submitted the application.[21]

16. One of the members of the Board, Dr Mphatswe, examined Mr Zuma in the middle of August. He produced a report that recommended Mr Zuma be placed on medical parole.[22] A few days later, the rest of the Board convened, deliberated, and produced a report on Mr Zuma's application.[23]

17. The full Board did not accept Dr Mphatswe's recommendation. It decided *not* to recommend Mr Zuma for medical parole because it "did not have sufficient information to reach a decision".[24] It called for further medical reports, including reports from several independent medical experts (a cardiologist, a surgeon, and a physician). Shortly thereafter, the Board called for reports from specialists within the South African Military Health Service.[25]

18. After receiving specialist reports, at the beginning of September, the Board produced another report.[26] The Board, now armed with the expert information it thought necessary to come to a proper decision, again decided *not* to recommend medical parole. The Board decided that while Mr Zuma suffers from multiple comorbidities, "[h]is treatment has been optimized and all conditions have been brought under control". In the Board's expert assessment,

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[21] Supplementary founding affidavit; p 004-14, para 39; p 004-110.

[22] Supplementary founding affidavit; p 004-134.

[23] Supplementary founding affidavit; p 004-142.

[24] Supplementary founding affidavit; p 004-146.

[25] Supplementary founding affidavit; p 004-148.

[26] Supplementary founding affidavit; p 004-149.

Mr. Zuma "is stable and does not qualify for medical parole according to the Act". In full, the Board's decision reads:[27]

> "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**."

19. On 5 September, three days after the Board decided not to recommend medical parole, the National Commissioner inserted himself into the picture. He summarily overruled the Board and granted Mr Zuma medical parole.[28] These were the sum total of the National Commissioner's reasons, set out in paragraph 12 of the National Commissioner's decision:[29]

> "12.1 Mr Zuma is 79 years old and undeniably a frail old person.
>
> 12.2 That the various reports from the [South African Military Health Service] all indicated that Mr Zuma has multiple

[27] Supplementary founding affidavit; p 004-149 (emphasis added).

[28] Supplementary founding affidavit; p 004-150.

[29] Supplementary founding affidavit; p 004-152 - 153.

comorbidities which required him to secure specialised treatment outside the Department of Correctional Services (DCS).

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

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

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

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

20. Mr Zuma was released on medical parole less than 2 months into his 15-month sentence.

THE NATIONAL COMMISSIONER'S DECISION IS UNCONSTITUTIONAL AND UNLAWFUL

21. The National Commissioner's decision to grant Mr Zuma medical parole is an administrative exercise of a public power in terms of legislation (the Correctional Services Act). As such, the decision must be lawful, rational, reasonable, and procedurally fair.[30] In any event, as with all exercises of public power, the National Commissioner's decision must also comply with the principle of legality,[31] and must, therefore, be lawful and procedurally and substantively rational.[32]

22. As we show below, the National Commissioner's decision was unlawful and irrational.

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[30] See section 33 of the Constitution, as given effect to by section 6 of the Promotion of Administrative Justice Act 3 of 2000. In *Derby-Lewis v Minister of Justice and Correctional Services* 2015 JDR 1119 (GP), this Court reviewed the decision of the Minister of Justice and Correctional Services refusing an offender medical parole under PAJA.

[31] This flows from section 1(c) of the Constitution. See e.g. *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 40.

[32] See, for example, *Mansingh v General Council of the Bar* 2014 (2) SA 26 (CC) at para 25; *Pharmaceutical Manufacturers* (note 31) at para 85; *Minister of Home Affairs v Scalabrini Centre, Cape Town* 2013 (6) SA 421 (SCA) at para 68; *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC) at para 34.

The National Commissioner does not have power to overrule the Board

23. Section 75(7) of the Correctional Services Act gives the National Commissioner power to grant "medical parole" to a "sentenced offender serving a sentence of incarceration for 24 months or less".

24. Mr Zuma says you should stop reading there. He argues that section 75(7) of the Act confers "self-standing powers" on the National Commissioner; the Board plays no role when the National Commissioner grants medical parole under section 75(7).[33]

25. Even the National Commissioner doesn't read the statute in that freezeframe way. Section 79 deals with "[m]edical parole". It sets the guardrails for *any* medical parole decision under the Act; there's no special species of medical parole reserved for the National Commissioner under section 75. Mr Zuma's attempt to get this special treatment from the National Commissioner is not only at odds with the purpose of the statute, it's also contrary to the well-established rule of statutory interpretation that "every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute".[34] It's also belied by the views of our courts, which have held that "an offender cannot expect to escape punishment or seek adjustment of his term of incarceration because of ill health unless his/her circumstances are justified by section 79(1)(a), (b) and (c) of the Act".[35]

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[33] Mr Zuma's answering affidavit; p 005-105, para 47.

[34] See *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society* 2020 (2) SA 325 (CC) at para 38 (Justice Theron, concurring).

[35] *Paddock v Correctional Medical Practitioner, St Albans Medium B Correctional Centre* 2014 JDR 1804 (ECP) at para 17.

26. In any event, Mr Zuma's attempt to silo section 75 goes nowhere because the National Commissioner himself relied on "section 75(7)(a) … read together with sectio[n] 79".[36] Because the National Commissioner "deliberately chos[e]" to rely on section 79, he cannot fallback on some other source of power.[37]

27. Section 79 requires three things for medical parole:

- The inmate must be "suffering from a terminal disease or condition" or must be "physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care".

- The "risk of re-offending" must be "low".

- There must be "appropriate arrangements" in place for the inmate's supervision, care, and treatment.

28. The first jurisdictional fact—a terminal disease or condition or physical incapacitation that severely limits daily activity or self-care—requires an expert medical determination. It's a high bar to meet: a disease is "terminal" if it is "in its final stage; fatal; incurable".[38]

29. The National Commissioner and Mr Zuma try to paint this as a "polycentric" decision that deserves deference.[39] It isn't and it doesn't. It's a medical

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[36] Supplementary founding affidavit; p 004-150.

[37] *Minister of Education v Harris* 2001 (4) SA 1297 (CC) at paras 16 to 18; *Langa v Premier, Limpopo* [2021] ZACC 38 at paras 45 to 46.

[38] Oxford English Dictionary (online) ("terminal"). The medical meaning sets an even higher bar: the "terminal" stage of a disease "occurs when inevitable and irreversible decline in normal function sets in just prior to death" and "[d]eath usually occurs within 48 hours." See Hospice Palliative Care Association of South Africa Clinical Guidelines (2012) at p 104 (available at: https://tinyurl.com/HPCAClinicalGuidelines).

[39] National Commissioner's answering affidavit; p 005-26, para 32. See also Mr Zuma's answering affidavit; p 005-97, para 11; p 005-98, para 19.

diagnosis that requires medical expertise. The National Commissioner has no medical expertise. If there's *any* deference to be had, it should be *the National Commissioner* deferring to *the Board*.

30. But deference doesn't even enter the statutory picture. The National Commissioner has no authority to overrule the Board's determination of the first jurisdictional fact.

31. Whether an inmate has a terminal disease or a severely limiting physical incapacitation is an expert medical determination. Section 79(2) and (3) of the Correctional Services Act read with Regulation 29A of the Correctional Services Regulations[40] establish a three stage process in accordance with which that expert determination is made:[41]

- First, an application for medical parole must either be made by a medical professional or by a sentenced offender or a person acting on their behalf. An application by a sentenced offender or a person acting on their behalf may only be considered if it is supported by a written medical report recommending medical parole. That medical report must detail the matters set out in section 79(2)(c) which include a medical diagnosis and prognosis of the terminal illness or physical incapacity from which the offender suffers.

- Second, under Regulation 29A(3), the application for medical parole must be referred "to the correctional medical practitioner who must

[40] Published in Government Notice No. 35277, No. R323 dated 25 April 2012.

[41] The Regulations are published pursuant to section 79(8) which required the Minister to publish regarding the processes and procedures to follow in the consideration and administration of medical parole.

make an evaluation of the application in accordance with the provisions of section 79 of the Act and make a recommendation".

- Third, Regulation 29A(4) then requires the correctional medical practitioner's recommendation be submitted to the Board. In terms of Regulation 29A(4) to (7), read with section 79(3), the Board, as the independent medical experts, must then consider the application and the recommendation from the correctional medical practitioner and provide an independent medical report to the National Commissioner recommending whether it is appropriate to grant medical parole in terms of section 79(1)(a). And it is only if the recommendation of the Board is *positive* that the National Commissioner can then consider the non-medical grounds in section 79(1)(b) and (c).

32. In this way, Parliament intentionally removed the decision on the first jurisdictional fact *away* from the National Commissioner and left it to the Board to make that expert medical determination. And for good reason: the National Commissioner isn't a doctor; the Board, in contrast, has up to 10 doctors.

33. To be sure, this doesn't mean that the Board *decides medical parole*. Its role is to be responsible for determining the critical jurisdictional facts for medical parole (and the only jurisdictional fact that requires medical expertise). The Board doesn't even weigh in on, let alone determine, the other two jurisdictional facts. Section 79 leaves those to the National Commissioner because, unlike the first jurisdictional fact, they fall within his expertise as a politician responsible for correctional services.

34. In this way, the Board remains, as its name says, "advisory" even though it's responsible for finally determining whether an inmate has a terminal disease or a severely limiting physical incapacitation. But if, for example, the Board determines that an inmate *does* have a terminal disease, that does *not* mean the inmate gets medical parole. It would still be for the National Commissioner to determine the other two jurisdictional facts. The Board "advis[es]" the National Commissioner on just one requirement of a medical parole application—that being the part that the National Commissioner has no training or expertise in: the medical part. The Board might advise the National Commissioner that the inmate has a terminal disease or a severely limiting physical incapacitation, or it might advise the National Commissioner that the inmate does not. Whatever its advice, the National Commissioner cannot overrule the Board because the National Commissioner has no medical expertise.

35. The takeaway is that while the National Commissioner ultimately decides to grant medical parole, section 79 strips out just one of the jurisdictional facts for expert determination. In this way, section 79 strikes the right balance between jurisdictional facts that require medical determination and jurisdictional facts that require correctional-services determination.

36. Here, the Board determined, in its expert medical opinion, that Mr Zuma is "stable".[42] The Board did not decide that Mr Zuma is "suffering from a terminal disease or condition" or that an "injury, disease or illness" rendered him "physically incapacitated … so as to severely limit daily activity or inmate self-

[42] Supplementary founding affidavit; p 004-149.

care". This means that the first jurisdictional fact for the National Commissioner's power to grant medical parole was missing, and so the National Commissioner's decision was unlawful.

37. Despite the legislature having placed the determination of the first jurisdictional fact firmly within the purview of the medical parole advisory board, the National Commissioner impermissibly usurped the Board's statutory role. He was not permitted to become a law unto himself in this way. His arrogation of power was stillborn as a fundamental matter of *vires* and his decision thus does not, as a matter of law, get out of the starting gates.

38. But even if the Court needed to go further, the National Commissioner's arrogation of power to decide this first jurisdictional fact is riddled with four errors. The errors demonstrate just how dangerous it is in practice to allow such a power to the National Commissioner (with not a jot of medical experience) in this case, or in any case.

39. *First*, *the National Commissioner's approach subverts the regulatory scheme and fails the test to be applied.*

40. The National Commissioner considered "various reports from the [South African Military Health Service]".[43] These reports "indicated that Mr Zuma has multiple comorbidities which required him to secure specialised treatment outside the Department of Correctional Services".[44] The National Commissioner also considered the lone dissenting voice on the Board, Dr Mphatswe, who recommended parole because Mr Zuma's "clinical health present[s]

[43] Supplementary founding affidavit; p 004-152.

[44] Supplementary founding affidavit; p 004-152

unp[re]dictable health conditions".[45] The Regulations do not permit the National Commissioner to consider the report in terms of section 79(2)(c) (where one is required) or the report of the correctional medical practitioner in terms of Regulation 29A(3), both of which are regulated to be provided to the medical parole advisory board.

41. For starters, "multiple comorbidities", "unp[re]dictable health conditions", and a need for "specialised treatment outside the Department of Correctional Services" are not nearly the right test for the jurisdictional fact in section 79(1)(a) of the Act.

- A "comorbidity" is not the same as a "terminal disease or condition". The National Commissioner considered the existence of the *first* even though the statute requires existence of the *second*. The ordinary meaning of a "terminal disease"—the high bar that the statute sets—is a disease or condition that results in a short life expectancy of the prisoner where his demise is imminent.[46]

- A "comorbidity"—a much lower bar that is nowhere in the statute—is something *completely different*: all it means is the "coexistence of two or more diseases, disorders, or pathological processes in one individual, esp. as a complicating factor affecting the prognosis or treatment of a patient".[47]

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[45] Supplementary founding affidavit; p 004-152.

[46] Oxford English Dictionary (online) ("terminal"). The medical definition requires an "irreversible decline in normal function" that sets in "just prior to death", with death "usually occur[ing] within 48 hours. See HPCA Clinical Guidelines (note 38) at p 104.

[47] Oxford English Dictionary (online) ("comorbidity"). See also *Dorland's Illustrated Medical Dictionary*

- It isn't clear what Dr Mphatswe meant by "unp[re]dictable health conditions", but it's no basis for medical parole.

- Nor is a need for "specialised treatment" the test for medical parole. Section 44 of the Act provides a tailored mechanism of "[t]emporary leave" from jail if an inmate needs "treatment". And in any event, Mr Zuma was not released to a "specialised" facility; he went back home.

42. *Second, the National Commissioner's approach is a haphazard second-guessing of the experts, by a selective reading of the reports.*

43. The National Commissioner's decision to release Mr Zuma flowed from his privileging of the very reports that the expert Board *had already dealt with in its decision-making*. It was not open to the Commissioner to cherry pick the reports he liked. The Board in its expert assessment had already considered them in its decision-making process. It weighed all the evidence, including the reports from the South African Military Health Service and Dr Mphatswe's report.[48] The Board recommended against medical parole *despite* these reports. Said another way, these reports were already included as part of the Board's recommendation. It was arbitrary and procedurally irrational for the National Commissioner, who has no medical expertise, to then effectively discount that Board's recommendation based on reports that the Board already considered.

(32nd ed.) at p 392 ("comorbid") ("pertaining to a disease or other pathologic process that occurs simultaneously with another") and ("comorbidity") ("a comorbid disease or condition").

[48] Supplementary founding affidavit; p 004-149.

44. The statutory purpose confirms that the National Commissioner has no power to second-guess the Board's determination about whether an inmate has a terminal disease or a severely limiting physical incapacitation.

- Parliament enacted the current, amended version of section 79 in 2011. Before the amendment, a diagnosis of a "terminal disease or condition" was "based on the written evidence of the medical practitioner treating [the inmate]".

- The amendment was a sea change in medical parole. Instead of an inmate's own trusted doctor making the diagnosis, Parliament introduced an independent, specialist, and multi-member body. Why? The legislative history makes clear that a need for independence—actual and perceived—drove the amendment.[49]

[49] The release, in 2009, of Mr Shaik on medical parole after serving less than 3 years of his 15-year sentence brought public attention to the issues in the medical parole system. In response to the controversy surrounding medical parole, in 2009, the incumbent Minister of Correctional Services, Mapisa-Nqakula, ordered the review of South Africa's medical parole policy. The National Council on Correctional Services completed the review in January 2010. The Council recommended, in a report titled "*Brief notes on the proposed amendments to section 79 of Correctional Services Act 1998*":

> "The processes and procedures to be followed in the consideration of medical parole must be spelled out in regulations. It is proposed that the medical diagnosis of the medical practitioner, which puts the process in motion, be certified by a Medical Advisory Board to be established in each region. The role of the National Commissioner, Parole Board or Minister (as the case may be) will therefore be to establish the other two criteria for eligibility, namely the risk posed to society and whether there is adequate placement for the offender, since the medical leg of the three-pronged decision would have been established." (emphasis added)

(available at: https://tinyurl.com/Section79history).

See also Albertus C "Protecting inmates' dignity and the public's safety: A critical analysis of the new law on medical parole in South Africa" (2012) 16 *Law, Democracy & Development* 185; Mujuzi J "Releasing terminally ill prisoners on medical parole in South Africa" (2009) 2 *South African Journal on Bioethics and Law* 60; and Institute for Security Studies "Shaik's Prison Release Accelerates a Review of Medical Parole Legislation" (10 February 2010) *Polity* (available at https://tinyurl.com/PolityShaik).

45. The National Commissioner's interpretation of section 79 makes a mockery of that amendment and sounds an impermissible retreat from that purpose. The Board is an independent body of specialists. Parliament put it there for a reason: to ensure that the medical fact of a terminal disease or a severely limiting physical incapacitation is determined by independent experts. The Board's role, and the purpose of the amendment to section 79, is undermined if a politician can overrule the Board's specialist and independent determination. It's especially perverse, as happened here, when the Board is overruled based on a recommendation of the inmate's own doctors (here, the South African Military Health Service). That is precisely what the amendment to section 79 sought to avoid.

46. *Third, the National Commissioner's approach introduces ad hoc arbitrariness into the process.*

47. The National Commissioner's interpretation also undermines another important purpose behind Parliament's introduction of an independent body to decide whether an inmate has a terminal disease or a severely limiting physical incapacitation: consistency. The Board considers every application for medical parole in the country. This brings consistency to medical parole decisions, specifically the jurisdictional fact of whether an inmate has a terminal disease or a severely limiting physical incapacitation. As the SCA has made clear, "[c]onsistency, predictability and reliability are intrinsic to the rule of law."[50] Consistency is undermined if the National Commissioner is able to overrule the

[50] *NK v MEC for Health, Gauteng* 2018 (4) SA 454 (SCA) at para 13.

Board on an arbitrary, case-by-case basis after selectively taking into account the views of the inmate's own doctor as a basis to override other reports.

48. *Fourth, the National Commissioner's approach torpedoes the statute's purpose of actual and perceived independence in the decision-making.*

49. The National Commissioner isn't the Medical Commissioner. He has no medical expertise. The Board does. It is meant to serve the statute's purpose of ensuring independence in the process. The National Commissioner's efforts to interpret section 79 to allow himself the power to second-guess a multi-member expert body are anathema to the statute's purpose. To permit that arrogation of power in this or any other case would be fatal to the real and perceived independence that was meant to be the amendment's headline feature. The Board would know that its expert decisions and its independence are not worth the paper they are written on. Those seeking medical parole would know that the way out of prison, is through influence with a politician, the National Commissioner. And the public, and other prisoners who would be watching this process, would know or at least reasonably apprehend that the idea of an independent Board ensuring an objectively expert outcome in medical parole cases, is a fiction at best, and a sham at worst.

50. That is why the obvious textual and contextual interpretation is that section 79 strips out the one jurisdictional fact for medical parole that requires an expert medical determination.

- The National Commissioner's lack of medical expertise betrays his plea for deference. Boilerplate at the ready, the National Commissioner argues that section 79 gives him a "discretion that is dependent on the

consideration of a range of competing factors".[51] Mr. Zuma would prefer the power to be even wider: his lawyers tell this Court that the National Commissioner's powers are "unfettered".[52]

- Both the National Commissioner and Mr. Zuma are doubly wrong. First, because whether an inmate has a terminal disease or a severely limiting physical incapacitation isn't a discretionary decision. It's a question of medical fact; it doesn't depend on competing considerations or the striking of polycentric balances. And because it turns on medical fact, section 79 leaves it to the expert doctors on the Board, not to the lay politician.

- They are wrong, second, because, as the Constitutional Court has made clear, separation of powers and deference play no role in legality and rationality reviews.[53] If the National Commissioner does not have the power to second-guess the Board, then no amount of alleged deference can give him that power. Our courts have neither the duty nor the power —out of some misplaced fealty to deference—to gift the National Commissioner any powers that Parliament has denied him.

- The National Commissioner and Mr Zuma get the deference argument precisely backwards. Under our statutory and constitutional scheme, in the first place, it is the National Commissioner that owes deference to the Board (who is the expert body who independently performs the

[51] National Commissioner's answering affidavit; p 005-26, para 32.1.

[52] See Mr Zuma's answering affidavit para 249.

[53] *Democratic Alliance* (note 32) at para 44.

medical assessment); in the second place, it is this Court that owes deference not to the National Commissioner, but to Parliament (who has bestowed the power of medical assessment on the Board).

51. For these reasons, the National Commissioner doesn't have power to overrule the Board's determination on whether an inmate has a terminal disease or a severely limiting physical incapacitation. Because the National Commissioner tried to do just that here, his decision is unlawful and should be set aside for that reason alone.

The National Commissioner's decision was unlawful and irrational

52. In the previous section, we showed that the National Commissioner doesn't have the power to overrule the Board's determination on whether an inmate has a terminal disease or a severely limiting physical incapacitation. That conclusion makes it unnecessary for this Court to get into the weeds of the decision to grant *Mr Zuma* medical parole. Said another way, if the HSF is right that the National Commissioner doesn't have the power to overrule the Board, then since the National Commissioner *did* overrule the Board to grant *Mr Zuma* medical parole, the National Commissioner's decision is unlawful for that reason alone. The merits or demerits of Mr Zuma's candidacy for medical parole then don't matter.

53. But even if the National Commissioner does, somehow, have the power to overrule the Board, then the National Commissioner's decision here was unlawful and irrational.

Not permitted to retrofit

54. The National Commissioner gave his reasons in his decision.[54] His attempt to renovate some new reasons in his answering affidavit is impermissible: a decision-maker stands or falls by the reasons given at the time of the decision.

55. We shall later show that those after-the-fact reasons just make matters worse for the National Commissioner.

56. But it's important to stress that the National Commissioner's efforts to invoke those new reasons is both not allowed, and also evidence that he (or his lawyers) think his first reasons don't cut it.

57. Our courts have consistently set their faces against a decision-maker, in a review, providing *post hoc* rationalisations – it's an impermissible practice, and this has been said by High Courts,[55] the Full Court in this Division in rejecting Mr Abrahams' (the former NDPP) reasons for allowing Ms Jiba to stay on at the

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[54] Supplementary founding affidavit; p 004-150.

[55] *Commissioner, South African Police Service v Maimela* 2003 (5) SA 480 (T) at 486F-H. See also *Mobile Telephone Networks (Pty) Ltd v Chairperson of the Independent Communications Authority of South, In Re: Vodacom (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa* [2014] ZAGPJHC 51; [2014] 3 All SA 171 (GJ). And see *Jicama 17 (Pty) Ltd v West Coast District Municipality* 2006 (1) SA 116 (C) at para 11, citing with approval the following dictum in *R v Westminster City Council* [1996] 2 All ER 302 (CA) at 315h to 316d (also cited in *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at fn 18) (emphasis added):

> "… The cases emphasise that the purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have any ground for challenging an adverse decision. **To permit wholesale amendment or reversal of the stated reasons is inimical to this purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but it gives rise to potential practical difficulties. In the present case it was not, but in many cases it might be, suggested that the alleged true reasons were in fact second thoughts designed to remedy an otherwise fatal error exposed by the judicial review proceedings**. That would lead to applications to cross-examine and possibly for further discovery, both of which are, while permissible in judicial review proceedings, generally regarded as inappropriate. Hearings would be made longer and more expensive."

NPA,[56] and the SCA in rejecting the NPA's revisionist efforts to justify withdrawal of charges against Mr Zuma.[57] The Constitutional Court has also twice so held,[58] most recently affirming that: "*It is true that reasons formulated after a decision has been made cannot be relied upon to render a decision rational, reasonable and lawful*".[59]

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[56] See the Full Court (per Mothle J and Thlapi J) in *Freedom Under Law (RF) NPC v National Director of Public Prosecutions* [2017] ZAGPPHC 791; 2018 (1) SACR 436 (GP) at paras 46 to 57 (emphasis added):

> "As FUL correctly contends, these defences have no merit. In the first instance, in a review application the decision maker is bound by the reasons it advanced for its decision and is barred from relying on additional reasons. In the matter of *National Lotteries*, Cachalia JA writing for the SCA upheld the English Law principle that a decision that is invalid for want of adequate reasons cannot be validated by different reasons given later. The Learned Appeal Court Judge wrote :
>
> > 'The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly and the failure to give reasons, which includes proper or adequate reasons, should ordinary render the disputed decision reviewable. In England, the Courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards - even if they show the original decision may have been justified.
> >
> > For in truth the latter reasons are not the true reasons for the decision, but rather an ex post facto realisation of a bad decision.'
>
> **The after-the-fact efforts to provide a lengthy explanation in the affidavit in an attempt to justify the decision, results in new reasons being advanced, which were not stated in the record. Abrahams and Mokgatlhe are confined to the reasons stated in the record and nothing further**."

[57] See *Zuma v Democratic Alliance* (note 14) at para 24 (emphasis added):

> "On 6 April 2009 Mr Mpshe announced publicly that he had made the decision to discontinue the prosecution of Mr Zuma and issued a detailed media statement providing the reasons for the decision. **It is against those reasons, and those reasons alone, that the legality of Mr Mpshe's decision to terminate the prosecution is to be determined**".

[58] See *Minister of Defense and Military Veterans v Motau* 2014 (5) SA 69 (CC) at para 55 (fn 85) (emphasis added):

> "I believe that the reasons cited by the Minister in her correspondence to General Motau and Ms Mokoena were sufficient to demonstrate good cause, I do not consider it necessary to deal with the further reasons cited by the Minister for her decision in her papers in this Court and the High Court. **In any event, I have reservations about whether it would be permissible for her to rely on these reasons as they were not relied on or disclosed when she took her decision (see in this regard Cachalia JA's judgment in National Lotteries Board … at paras 27-8**)."

[59] *National Energy Regulator of South Africa v PG Group (Pty) Limited* 2020 (1) SA 450 (CC) at para 39 (emphasis added). The Constitutional Court cited the SCA's decision in *National Lotteries Board* (note 55).

58. Our courts are not alone in this regard. Helpfully, the Supreme Court of the United States recently affirmed this rule in respect of efforts by President Trump's officials to "improve" their decisions by giving reasons after the fact. It has explained its rationale in two cases.[60]

59. The National Commissioner cannot rely on his after the fact, reasons. They are impermissible under our law. And the reasons for not allowing them are powerfully explained by courts here and abroad.

The National Commissioner's original reasons—and the *Simelane* test

60. We turn now to consider the reasons as they were originally given by the National Commissioner. The reasons furnished by the National Commissioner appear as Item 18 of the record attached as "SFA11" to the HSF's supplementary founding affidavit. They are palpably bad.

61. The law here is clear. The decision-making process adopted can render the decision irrational, unconstitutional, and invalid if it categorically ignores information that is materially relevant to the fulfilment of the legitimate government purpose. The Constitutional Court clarified in *Democratic Alliance*

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[60] In *Department of Commerce v New York* 588 U.S. 23 (2019) the Court stressed (at 28) that "a Court cannot ignore the disconnect between the decision made and the explanation given". The Court would thus consider this post hoc effort at justification closely, "to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise". Similarly, in *Department of Homeland Security v Regents of the University of California* 591 U.S. 13 (2020) (at 13 to 17), the Court held that it is a foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action. These are the takeaways from the Court's judgment:

- Considering only contemporaneous explanations for agency action instils confidence that the reasons given are not simply convenient litigating positions.
- Permitting agencies to invoke belated justifications can upset the orderly functioning of the process of review, forcing both litigants and courts to chase a moving target.
- Any reasons provided after a decision is taken must be viewed critically to ensure that the decision is not upheld on the basis of impermissible post hoc rationalisation.

(the Simelane case) that rationality demands that the means chosen to achieve a legitimate government purpose includes the process leading up to the decision.[61] Yacoob J held:

> "The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done *in the process of taking that decision*, constitutes means towards the attainment of the purpose for which the power was conferred."[62]

62. In the *Simelane* case, the Constitutional Court stressed that President Zuma's decision to appoint Mr. Simelane as NDPP was irrational, when there were serious questions raised about his integrity, including because material had been ignored without a proper explanation and irrelevant considerations had instead been taken into account.[63] The takeaways from the Constitutional Court's jurisprudence are these:

- Lesson 1: material that is relevant to the purpose of the power exercised, must be properly considered—if not, it colours the process irrational. And grounding a decision on material that is irrelevant to the power's purpose, is similarly irrational.

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[61] *Democratic Alliance* (note 32) at para 37. See most recently *NERSA* (note 59) at para 49.

[62] *Democratic Alliance* (note 32) at para 36.

[63] *Democratic Alliance* (note 32) at para 89: "The absence of a rational relationship between means and ends in this case is a significant factor precisely because ignoring prima facie indications of dishonesty is wholly inconsistent with the end sought to be achieved, namely the appointment of a National Director who is sufficiently conscientious and has enough credibility to do this important job effectively. The means employed accordingly colour the entire decision which falls to be set aside."

- Lesson 2: material that shows inconsistency in the decision-maker's process renders the decision irrational.

- Lesson 3: if relevant material (for example opinions or reports) is overlooked or ignored, the process is irrational without a proper explanation for overlooking or ignoring.

63. Those lessons appear to have been lost on the National Commissioner.

64. To start, the National Commissioner took into account the irrelevant considerations of Mr Zuma's position as the former President and the countrywide unrest in July.

- The National Commissioner says he "t[ook] into consideration the events that occurred during the month of July 2021 (public unrests and destruction of property) following the incarceration of [Mr Zuma] as well as the heightened public interest in any matter that relates to Mr Zuma".[64] The clear message is that Mr Zuma gets special treatment—a violation of the bedrock principle of equality before the law. The "public unrests and destruction of property" in July were also irrelevant to whether Mr Zuma met the statutory requirements for medical parole.

- The National Commissioner then notes that "this situation occasioned a unique moment within the history of Correctional Services, where a former Head of State of the Republic of South Africa is incarcerated whilst still entitled to privileges as bestowed by the Constitution."[65] But

[64] Supplementary founding affidavit; p 004-150.

[65] Supplementary founding affidavit; p 004-151.

the "privileges" that former presidents get, such as they are, don't include a fast-track lane for medical parole applications and diluted requirements. Mr Zuma either met the statutory jurisdictional facts for medical parole or he didn't; the office he once occupied is irrelevant.

- The National Commissioner's consideration of these facts is especially galling because the Constitutional Court was at pains to make clear in its judgment that "no person is above the law".[66] The message did not reach the National Commissioner.

- Nor did the message reach Dr Mphatswe. He too took into account that Mr Zuma is "a high-profile figure, a former President of the Republic" and that the Estcourt jail "does not cope with the nature of the demand not withstanding [Mr Zuma's] position in society."[67] Dr Mphatswe's reasoning is jarring; it amounts to saying that Mr Zuma should get special treatment. The rule of law demands just the opposite.

65. There's no dispute that the National Commissioner considered these irrelevant facts. The National Commissioner's response to this allegation in his answering affidavit is so threadbare it amounts to a bare denial.[68] This is, of course, unsurprising: the National Commissioner's consideration of Mr Zuma's former office is clear from the decision. For his part, Mr Zuma goes even further to argue that "[t]he factors taken into account by the Commissioner", which

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[66] *Zuma* (note 1) at para 140.

[67] Supplementary founding affidavit; p 004-135 and 004-137.

[68] Compare: supplementary founding affidavit; pp 004-34 to 004-35, paras 125 to 129 with the *ad seriatim* response in the National Commissioner's answering affidavit (pp 005-72 to 005-73, paras 132 to 134) and the *ad seriatim* response in Mr Zuma's answering affidavit (p 005-162, paras 267 to 269).

presumably includes Mr Zuma's former office, "are relevant and necessary to consider." Mr Zuma is bold enough to argue that had the National Commissioner "not considered them", which, again, presumably includes Mr Zuma's former office, the National Commissioner "would have committed a reviewable irregularity."[69] In short: give me special treatment, or else.

66. There's accordingly no dispute that the National Commissioner considered Mr Zuma's former office in deciding whether to grant him medical parole. Mr Zuma's former office is an irrelevant consideration. Medical parole is a compassionate safety valve for inmates suffering terminal illness or severe physical incapacitation. Medical parole has nothing to do with the high office or low status that an inmate occupied before jail; it has nothing to do with rewarding people for their public service; and it has nothing to do with how the public reacts to the inmate's incarceration. Medical parole isn't some back-door device for political pardon; and it's not in the gift of the National Commissioner.

67. For this reason alone, the National Commissioner's decision is unlawful and should be set aside. It's long been the law that if a decision-maker takes into account *any* reason for its decision that is bad or irrelevant, then the whole decision falls even if there are other good reasons for the decision.[70] Said

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[69] Mr Zuma's answering affidavit; p 005-162, paras 267 to 269.

[70] *Patel v Witbank Town Council* 1931 TPD 284 at 290:

> "[W]hat is the effect upon the refusal of holding that, while it has not been shown that grounds 1, 2, 4 and 5 are assailable, it has been shown that ground 3 is a bad ground for a refusal? Now it seems to me, if I am correct in holding that ground 3 put forward by the council is bad, that the result is that the whole decision goes by the board; for this is not a ground of no importance, it is a ground which substantially influenced the council in its decision … This ground having substantially influenced the decision of the committee, it follows that the committee allowed its decision to be influenced by a consideration which ought not to have weighed with it".

See also *Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd* 2016 (3) SA 1 (SCA) at

another way, if this Court finds that the National Commissioner's consideration of Mr Zuma's former office and the public unrest in July were irrelevant considerations, then the National Commissioner's decision is unlawful and should be set aside regardless of any other reasons that the National Commission gives for the decision.

68. In any event, the National Commissioner's other reasons are irrational and stray from the statutory jurisdictional fact of whether Mr Zuma suffers from a terminal illness or a severe physical incapacitation.

69. *First, the National Commissioner does not give reasons why he overruled the Board.*

70. The Constitutional Court's decision in *Simelane* explains that he had to. The Board concluded that Mr Zuma is "stable and does not qualify for medical parole".[71] The National Commissioner doesn't explain in his decision why he

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paras 44 to 46 (the decision was reversed on appeal but only due to a lack of standing: *Areva NP Incorporated In France v Eskom Holdings SOC Ltd* 2017 (6) SA 621 (CC)). See also *Absa Bank Limited v Judge Thomas D Cloete* (35640/2019) [2021] ZAGPJHC (21 March 2021) at para 42 ("[I]n law, if a decision-maker takes into account any reason for the decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated."). The SCA put this principle best in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) at para 8 (emphasis added):

> "Given that the commissioner took four bad reasons into account in reinstating the employee, but that other legitimate reasons existed that were capable of sustaining the outcome, can it be said that the employee's reinstatement was 'rationally connected' to the information before the commissioner, or the reasons given for it, as PAJA requires? **In my view, it cannot. It can certainly not be said that the outcome was 'rationally connected' to the commissioner's reasons as a whole, for those reasons were preponderantly bad and bad reasons cannot provide a rational connection to a sustainable outcome. Nor does PAJA oblige us to pick and choose between the commissioner's reasons to try to find sustenance for the decision despite the bad reasons. Once the bad reasons played an appreciable or significant role in the outcome, it is, in my view, impossible to say that the reasons given provide a rational connection to it**. This dimension of rationality in decision-making predates its constitutional formulation. In Patel v Witbank town Council, Tindall J set aside a decision which had been 'substantially influenced' by a bad reason. … **The same applies where it is impossible to distinguish between the reasons that substantially influenced the decision, and those that did not**."

[71] Supplementary founding affidavit; p 004-149.

overruled the Board. At most, the National Commissioner refers to reports from the South African Military Health Service and the dissenting member of the Board (Dr Mphatswe). But the Board already considered those reports in making its determination. There was no rational basis for the National Commissioner to prefer them over the Board's considered expert determination.

71. *Second*, the National Commissioner didn't even bother to apply the right test for medical parole. The first jurisdictional fact is that the inmate has a terminal illness or a severe physical incapacitation. The National Commissioner doesn't make that finding in his decision. These are the only facts that the National Commissioner relies on:

71.1 Mr Zuma is "79 years old and undeniably a frail old person".[72] Old age and fragility are not terminal illnesses or severe physical incapacitations. If they were, there would be no pensioners in prison.

71.2 The South African Military Health Service reports indicated that Mr Zuma has "multiple comorbidities which required him to secure specialised treatment outside the Department of Correctional Services".[73] A comorbidity has nothing to do with a terminal illness, and a need for "specialised treatment" is catered for in an entirely different section of the Correctional Services Act (section 44, dealing with temporary leave for "treatment"). Dr Mphatswe's report indicated

[72] Supplementary founding affidavit; p 004-152.

[73] Supplementary founding affidavit; p 004-152.

that Mr Zuma should be released on medical parole because he has "un[pre]dictable health conditions". That too is not the test.

71.3 The National Commissioner mentions the Board's recommendation in passing but omits the most important part: the Board recommended *against* medical parole. Instead, the National Commissioner noted that the Board "agreed that Mr Zuma suffers from multiple comorbidities."

71.4 To make things worse, the National Commissioner misquoted the Board—deliberately, we submit, so that the National Commissioner could build then attack a straw man.

- The National Commissioner said this in his decision:[74]

> "The [Board] further stated that his treatment had been optimised and his conditions have been brought under control <u>because of the care that he is receiving from a specialised hospital</u>, therefore they did not recommend medical parole."

- Wrong. The Board did not "stat[e]" the underlined sentence; it is nowhere to be found in the Board's decision.[75] The National Commissioner added it. This is what the Board actually said:[76]

[74] Supplementary founding affidavit; p 004-152 (emphasis added).

[75] Supplementary founding affidavit; p 004-149.

[76] Supplementary founding affidavit; p 004-149.

> "[Mr Zuma's] treatment has been optimised and all conditions have been brought under control. From the available information in the reports, the conclusion reached by the [Board] is that [Mr Zuma] is stable and does not qualify for medical parole according to the Act."

- The Board says *nothing* about Mr Zuma's "stable" condition being "because of the care that he is receiving from a specialised hospital".

- Having rewritten the Board's decision with that sentence, the National Commissioner proceeds to use it as the premise for the rest of his reasoning. He notes that the "care" that Mr Zuma is receiving from a "specialised hospital" is the "type of specialised care that cannot be provided by the Department of Correctional Services".[77] He then speculates that "there is no guarantee that when returned back to Estcourt Correctional Centre Mr Zuma's 'conditions' would remain under control" because "[the Department of Correctional Services] does not have medical facilities that provide the same standard of care as that of a specialised hospital or general hospital."[78]

[77] Supplementary founding affidavit; p 004-152.

[78] Supplementary founding affidavit; p 004-152.

- Again, that's not the test. It's not even the concern of medical parole to begin with (but instead something catered for through "[t]emporary leave" under section 44 of the Act).[79]

- The National Commissioner's speculation is, in any event, irrational because Mr Zuma is back home, not at a "specialised hospital or general hospital". But, perhaps most fundamentally, this reasoning is premised on a finding about Mr Zuma's "specialised care" that the Board simply didn't make.

71.5 The National Commissioner's decision doesn't even mention the second jurisdictional fact—that the risk of re-offending must be low. Mr Zuma's answering affidavit shows reoffending is much more than a mere risk: his contempt of the Constitutional Court continues unabated.[80] In short, Mr Zuma is and remains a brazenly unrepentant contemnor.

72. *Third*, the reports that the National Commissioner relies on—the South African Military Health Service and Dr Mphatswe—don't even support medical parole. None of the SAMHS medical reports recommend medical parole.[81] They were not even prepared for an application for medical parole: the SAMHS report dated 28 July 2021, for example, states that it is not final but that a report would be prepared by the "Specialist Medical Panel" to assist with a future application

[79] Section 44, headed "temporary leave", provides that the National Commissioner may grant permission for an offender to leave a correctional centre temporarily for certain listed purposes, including to receive treatment.

[80] Replying affidavit; p 008-7, para 19.

[81] Supplementary founding affidavit; p 004-31, para 110.

for medical parole.[82] At most, the SAMHS reports recommended that Mr Zuma be released to a specialised medical facility for further assessment.[83]

73. *Fourth*, there is obvious irrationality in the National Commissioner's reasons.

- The National Commissioner reasoned that Mr Zuma needs "care … from a specialised hospital" and medical parole was justified because this type of "specialised care … cannot be provided by the Department of Correctional Services"[84].

- The National Commissioner then reasoned that while Mr Zuma is on medical parole, the South African Military Health Service would "provid[e] the necessary health care and closely monito[r] his condition."[85]

- But that was no different from the medical care that Mr Zuma received during his short stint in jail where, according to his application for medical parole, he was already under the "full time medical care of the [South African Military Health Service]".[86]

- And so, the National Commissioner's reasoning reduces to this perfect circle of irrationality:

    - in jail, Mr Zuma had only the "full time medical care of the [South African Military Health Service]";

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[82] Supplementary founding affidavit; p 004-31, para 109.

[83] Supplementary founding affidavit; p 004-31, para 111.

[84] Supplementary founding affidavit; p 004-152.

[85] Supplementary founding affidavit; p 004-153.

[86] Supplementary founding affidavit; p 004-33, para 121; p 004-89.

- jail is inadequate because Mr Zuma needs "care … from a specialised hospital";

- medical parole is the answer because while Mr Zuma is on medical parole at home, and not at a specialised hospital, he will be under the "full time medical care of the [South African Military Health Service]".

- The reasoning makes no sense. It was irrational for the National Commissioner to grant Mr Zuma medical parole on the basis that the "full time medical care of the [South African Military Health Service]" *in jail* was inadequate, only for the solution *out of jail* to be the very same "full time medical care of the [South African Military Health Service]".

74. *Fifth*, Mr Zuma's application did not comply with Regulation 29A(3) of the Correctional Services Regulations.

- Regulation 29A(3) states that an application for medical parole must be referred "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".

- Dr Mafa completed Mr Zuma's application for medical parole, including the section of the application, Addendum C, that is meant to be completed by the correctional medical practitioner.[87] In his (impermissible) after-the-fact reasons for his decision in his answering

[87] Supplementary founding affidavit; p 004-88.

affidavit, the National Commissioner relies extensively on Dr Mafa's findings in Addendum C.

- There's no dispute that Dr Mafa is one of the medical practitioners from the South African Military Health Service's team assigned to Mr Zuma's care.[88] Dr Mafa is not a "correctional medical practitioner". For this reason alone, Mr Zuma's medical parole application was unlawful because it did not comply with Regulation 29A(3). The National Commissioner's after-the-fact reliance on Dr Mafa's findings are similarly impermissible and unlawful.

The post hoc efforts to rationalise the decision

75. No doubt realising that the actual reasons for his decision skate thin, the National Commissioner rummages around in his answering affidavit for some new reasons.

76. As we have said, this is impermissible. The National Commissioner catalogued his reasons in his decision.[89] He doesn't get a do-over.

77. But these "ex post facto rationalisations for a bad decision" actually make things *worse* for the National Commissioner's decision.

77.1 First, there are Dr Mafa's findings in Addendum C to the parole application. The National Commissioner relies extensively on them in his answering affidavit. But quite apart from Dr Mafa not being a "correctional medical practitioner" as Regulation 29A(3) requires,

[88] National Commissioner's answering affidavit; p 005-23, para 26.

[89] Supplementary founding affidavit; p 004-152.

Dr Mafa's answers in Addendum C flunk the first jurisdictional fact for medical parole: a terminal disease or a severely limiting physical incapacitation.

- Dr Mafa did not confirm that Mr Zuma is suffering from a terminal illness. Question 5(d) of Addendum C asks a straightforward question: does Mr Zuma have a terminal disease or condition that "has deteriorated permanently or reached an irreversible state".[90] It's a yes-or-no question. Dr Mafa didn't give a straight answer. Instead, Dr Mafa stated that Mr Zuma's condition has "deteriorated significantly". Significant deterioration is not the test for medical parole.

- Dr Mafa's answer is yet another feature of this case which is dispositively against the National Commissioner and Zuma. The fact that Mr Zuma's condition has not, *according to his own doctor*, deteriorated permanently or reached an irreversible state means that he is necessarily not eligible for medical parole. After all, a "terminal" illness is, by definition, an illness that is "incurable". It follows that if an inmate's condition is treatable or reversible, he does not meet the first jurisdictional fact for medical parole.

- Next, in response to question 5(f) of the Addendum, which asks whether the offender is "able / unable to perform activities of

[90] Supplementary founding affidavit; p 004-88.

daily living or self care", Dr Mafa did *not* select "unable".[91] He merely stated that "patient is under full time comprehensive medical care of medical team".[92] Dr Mafa didn't answer the question, and so Mr Zuma's application didn't, even on its own terms, meet either of the statutory requirements for the first jurisdictional fact (a terminal disease or a severely limiting physical incapacitation).

- To question 6, which asks why medical parole should be considered, Dr Mafa answered, vaguely, "medical incapacity".[93] Tellingly, he did *not* select the "physical incapacity" option.

77.2 Second, the National Commissioner points to the Surgeon General's report. But like Dr Mafa, the Surgeon General did *not* confirm that Mr Zuma has a terminal illness or is physically incapacitated. This is the Surgeon General's more lukewarm assessment: Mr Zuma "will be better managed and optimised under different circumstances than presently prevailing". Whatever that means, it's nowhere near the statutory requirement for medical parole.

77.3 Third, the National Commissioner's new reasons in his answering affidavit contain still more irrelevant considerations.

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[91] Supplementary founding affidavit; p 004-89.

[92] Supplementary founding affidavit; p 004-89.

[93] Supplementary founding affidavit; p 004-91.

- *Placing Mr Zuma on medical parole would "relieve the Department of the costs of keeping him in incarceration"*.[94] Medical parole isn't some austerity measure to help the Department meet its budget; cutting costs has no relationship at all to the requirements in section 79.

- *Mr Zuma "would, in any event, have become eligible for consideration for placement on parole within the next seven (7) weeks"*.[95] So what? Medical parole is for inmates with a terminal disease or a severely limiting physical incapacitation. The remaining length of their sentences is irrelevant. In any event: (a) whatever the time-frame within which Mr Zuma would have become *eligible* for ordinary parole, Mr Zuma would still have had to *apply* for (which he didn't) and be *granted* (which he hasn't) that ordinary parole; (b) courts have emphatically rejected this no-difference approach to reviews: it is impermissible for the National Commissioner to try shrug off the defects in his decision with an argument that the lawfulness of his decision on medical parole makes no difference because Mr Zuma would have been eligible for ordinary parole anyway.[96]

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[94] National Commissioner's answering affidavit; p 005-32, para 34.7.

[95] National Commissioner's answering affidavit; p 005-33, para 34.9.

[96] See, for example:

- *Van der Walt v S* 2020 (2) SACR 371 (CC); 2020 (11) BCLR 1337 (CC) at paras 28-30;
- *Psychological Society of South Africa v Qwelane* 2017 (8) BCLR 1039 (CC) at paras 32 to 35;
- *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC) at para 176;
- *Motau* (note 58) at para 85;

- *The Department would suffer "significant reputational damage" if Mr Zuma died in detention*.[97] This is irrelevant at best and, at worst, shows that the National Commissioner put Mr Zuma above the law. In any event, none of the medical reports confirm that Mr Zuma has a terminal disease or a severely limiting physical incapacitation.

77.4 Fourth, the National Commissioner tries to paper over his failure to explain in his decision why he preferred the reports of the South African Military Health Service, Dr Mphatswe, and Dr Mafa over the Board. The Board made its own independent determination based on the specialist reports which it received after calling for further information. The Board also considered the changed circumstances: Mr Zuma was temporarily released on 5 August to receive treatment. The Board concluded in its report of 2 September that "his treatment ha[d] been optimised and all conditions ha[d] been brought under control". The National Commissioner ignores the timeline: the reports of the South African Military Health Service and Dr Mafa were produced *before* Mr Zuma's temporary release to receive treatment. And, similarly, Dr Mphatswe's report was produced *before* the specialist reports that were provided to the Board to assist it in making its decision.

- *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) at para 26; and
- *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) at paras 152 to 154.

[97] National Commissioner's answering affidavit; p 005-63, para 104.2.

THE TECHNICAL ARGUMENTS ABOUT URGENCY, MOOTNESS, STANDING, AND JOINDER

78. The National Commissioner and Mr Zuma roll out the worn technical arguments of respondents with their backs against the wall. They are distractions, and, predictably, meritless.

79. First, urgency. Urgency has been overtaken by events. This application is under case management with a specially allocated and expedited hearing date. There's been a full exchange of affidavits, including extensive argument from the National Commissioner and Mr Zuma on the merits. With respect, it wastes judicial resources for this application to be left for the ordinary course.

80. It's sensible and convenient for this application to be heard now. It's also necessary because the HSF won't obtain substantial redress at a hearing in the ordinary course.

81. Delaying this review until a hearing in the ordinary course risks irreparable harm to the rule of law. If the National Commissioner's decision to grant medical parole is unlawful, Mr Zuma shouldn't benefit from an unlawful effluxion of time. An urgent review of the National Commissioner's decision is the only way to guard against de facto erosion.

82. Mr Zuma's mootness argument gives the game away on urgency. He argues that "[w]hatever decision is reached by the court, if appealed, the final outcome of this application is unlikely to be determined before October 2022, when the full term of [his] sentence will expire."[98] Well, exactly. Mr Zuma can't have it

[98] Mr Zuma's answering affidavit; p 005-103, para 38.

both ways: he can't argue that this review must wait for the ordinary course but then use the ordinary course to filibuster his time in jail—and, on his own (erroneous) telling, render the case moot.

83. Similarly, the National Commissioner argues that Mr Zuma's release on medical parole doesn't affect the expiry date of his term in October 2022. If the National Commissioner and Mr Zuma are right, then waiting for a hearing in the ordinary course risks robbing this Court of its ability to grant an effective remedy.

84. This is also no ordinary review. It deserves urgent adjudication.

- The Constitutional Court found that there was "no doubt that Mr Zuma is in contempt of court."[99] The Court previously ordered him to appear before the Zondo Commission—a mechanism designed precisely to uncover the extent of state capture *under Mr Zuma's watch while he was President*. Mr Zuma ignored the Court's order. He defied the Zondo Commission; he defied the judiciary; he defied the rule of law. He showed a "marked disregard for the authority of [the] Court and is resolute in his refusal to participate in the Commission's proceedings."[100] The Court described his conduct as "unbecoming and irresponsible" given the highest office that he once occupied; he chose "time and time again, to publicly reject and vilify the Judiciary entirely"; he "insult[ed]" our constitutional dispensation".[101]

[99] *Zuma* (note 1) at para 38.

[100] *Zuma* (note 1) at para 50.

[101] *Zuma* (note 1) at para 73.

- Imprisonment was both vindication and constitutionally necessary. It was, in the Court's view, the only way for the Court to rebuild broken confidence in the judiciary that Mr Zuma engineered. Mr Zuma "attack[ed]" the judiciary. His attacks were "egregious".[102] And they were "unique[ly]" bad given that Mr Zuma "is no ordinary litigant", but "remains a public figure and continues to wield significant public influence".[103]

- The Court imposed imprisonment precisely because Mr Zuma "owes this sentence in respect of violating not only this Court, nor even just the sanctity of the Judiciary, but to the nation he once promised to lead and to the Constitution he once vowed to uphold."[104] He got his just deserts.

- The National Commissioner's decision to grant Mr Zuma's medical parole draws a line through most of the Constitutional Court's judgment. Mr Zuma was in prison for little over a tenth of his sentence.

85. The National Commissioner's main argument in response is that Mr. Zuma is still serving his sentence "albeit under medical parole in the community corrections systems".[105] And because Mr Zuma is still serving his sentence, so the argument goes, there is no harm to the rule of law.

86. The argument conflates imprisonment and medical parole. They are both part of the correctional services machinery, but they are not the same type of punishment—just ask any inmate whether they would prefer to be in a jail cell

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[102] *Zuma* (note 1) at para 90.

[103] *Zuma* (note 1) at para 97.

[104] *Zuma* (note 1) at para 128.

[105] National Commissioner's answering affidavit; p 005-8, para 13.1.2.1.

or secure in comfort in Nkandla. And this is by design: imprisonment intentionally entails a more severe curtailment of an inmate's liberty and other rights compared to less invasive forms of punishment.[106] While in jail, an inmate cannot, for example, enjoy a day out at the local casino, but a medical parolee with a terminal illness apparently can.[107] Similarly, a round of golf isn't on the daily schedule for most convicted criminals still serving their time, but it's apparently par for the course for high-profile medical parolees.[108]

87. The National Commissioner's argument also ignores that the Constitutional Court chose imprisonment, not one of the other, less severe forms of punishment. It didn't suggest house arrest as an appropriate sentence, for example. The Constitutional Court sentenced Mr Zuma to imprisonment for a reason: it was the "only appropriate sanction" for his contempt.[109] The Court considered and rejected lesser forms of punishment like a fine or a suspended sentence.[110]

88. By unlawful diktat, the National Commissioner replaced an appropriately severe form of punishment with another, inappropriately lenient form of punishment. In this way, Mr Zuma has benefitted from an unlawful reprieve to his sentence.

89. Second, mootness. Just a few paragraphs after arguing that this review should wait for the ordinary course because there is no urgency, Mr Zuma argues that

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[106] In *Phaahla v Minister of Justice and Correctional Services* [2019] ZACC 18; 2019 (2) SACR 88 (CC); 2019 (7) BCLR 795 (CC) at paras 35 and 39, the Constitutional Court, in holding that parole is a form of punishment, stated that parole is "a distinct form of punishment" from imprisonment and is a "lesser" punishment than imprisonment, and that parole "mitigates a sentence of imprisonment".

[107] Replying affidavit; annexure "RA1", p 008-57.

[108] Founding affidavit; p 002-13, para 30.8; annexure "FA5", p 002-48.

[109] *Zuma* (note 1) at para 102.

[110] *Zuma* (note 1) at paras 86 to 87.

the review is moot because by the time it is heard, his sentence is likely to have run its course.

90. Quite apart from defeating his own argument against urgency, Mr Zuma's mootness argument is wrong. For starters, Mr Zuma doesn't argue that this review is moot *now* because his sentence *has* run its course. Rather, he argues that this review *may become moot* because, depending how things play out, his sentence may have run its course before the litigation (after an appeal, which has effectively already been threatened) comes to an end. But a case is either moot now or isn't moot at all. There's no doctrine of anticipatory mootness.

91. To be sure, Mr Zuma does argue that this review is moot *now* because he is eligible for normal parole. But the fact that Mr Zuma may be *eligible* to *apply* for discretionary parole, which has not been applied for much less granted, does not render moot a review of a decision to *grant* an entirely different form of parole.

92. There is, in any event, a very live controversy with very practical results if this review succeeds. If the National Commissioner's decision is set aside, then the "corrective principle" will mean that Mr Zuma must go back to jail.[111] There also remains a live controversy even if Mr Zuma somehow escapes that result because this review relates to the lawfulness of the National Commissioner's extant decision.[112] The review also raises a fundamental question as to whether the statutory scheme may be upended by the National Commissioner's

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[111] *Allpay Consolidated Investments Holdings (Pty) Ltd v CEO, SASSA* 2014 (4) SA 179 (CC) at paras 29 to 33

[112] *Pheko v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) para 32; *Mohamed* 2001 (3) SA 893 (CC) at para 70.

usurpation of power. Is the National Commissioner entitled, as he claims, to grant medical parole even when the Board has found that the inmate does not meet the statutory medical requirements? For this and other cases of medical parole, this is a matter of public importance that has practical implication for prisoners across the country. In any event, all of the facts and law at issue in this matter make clear that it is in the interest of justice for it to be heard.[113] The National Commissioner's decision was an unlawful attempt to outflank and undo the Constitutional Court's vindication of the rule of law when it ordered Mr Zuma's imprisonment. To allow that decision to stand unreviewed is anathema to our foundational constitutional values. For these and other reasons canvassed in the replying affidavit, Mr Zuma's mootness argument goes nowhere.

93. Third, standing. Awkwardly, Mr Zuma argues that the HSF doesn't have standing despite Mr Zuma himself citing the HSF as *a party* in his application to rescind the Constitutional Court's order.[114] He cannot now claim a lack of standing. That aside, what Mr Zuma criticises as "busybodies",[115] the Constitution calls public-interest standing and the HSF more than meets its "generous" approach.[116]

94. Fourth, joinder. The National Commissioner and Mr Zuma argue that the South African Military Health Service should be joined. The test is whether the South

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[113] See e.g. *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC) paras 8 to 10 ("mootness is no absolute bar to determining an issue: the question is whether the interests of justice require that it be decided." Para 9).

[114] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State* 2021 JDR 2069 (CC).

[115] Mr Zuma's answering affidavit; p 005-100, para 31.

[116] *Hunter v FSCA* 2018 (6) SA 348 (CC) at para 30.

African Military Health Service has a "legal interest in the subject-matter of the litigation, which may be affected prejudicially" by this Court's judgment.[117] The National Commissioner and Mr Zuma never quite explain how this Court's order could prejudicially affect the South African Military Health Service. No decision of the South African Military Health Service is being reviewed, and no order is sought against it.

THE REMEDY

95. For remedy, the starting point is that invalid administrative decisions must be declared unlawful.[118] The "default" next step is the "corrective principle": just and equitable relief must ordinarily aim to correct or reverse the consequences of the unlawful decision.[119]

96. The National Commissioner's decision must be declared unlawful. The only way to give effect to the "corrective principle" is to set aside the decision.

97. The practical result is that Mr Zuma must go back to jail to do his time. It isn't necessary to substitute the National Commissioner's decision; setting the decision aside is enough.

98. But substitution is, in any event, justified. The Board's decision that Mr Zuma doesn't have a terminal illness or severe physical incapacitation makes a rejection of his application for medical parole a "foregone conclusion".[120] In this

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[117] See, for example, *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) at para 21.

[118] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) at para 84; *Allpay I* (note 96) at para 25. See also section 172(1)(a) of the Constitution.

[119] Allpay II (note 111) at paras 29 to 33.

[120] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC) at para 59. See also *Gijima Holdings (Pty) Ltd v State Information Technology Agency SOC Limited* (11686/2021) [2021] ZAGPJHC 584 (21 October 2021) at paras 73 to 83.

way, this would be the rare case where substitution asks this Court to align with, not second-guess, the expert decision-maker. Substitution here also doesn't have the usual finality that may ordinarily call for pause, unlike, for example, substituting a decision to award a tender. Once back in jail, Mr Zuma will remain free to apply for ordinary parole or even apply again for medical parole.

99. The HSF also asks for an order that Mr Zuma's time on medical parole shouldn't count towards fulfilment of his sentence. An order along these lines falls well within this Court's "wide remedial powe[r]" under section 172 of the Constitution.[121] More importantly, this is the just and equitable relief required to give full and proper effect to the corrective principle and the Constitutional Court's contempt judgment: the order will reverse the unlawful consequences of the decision, which allowed Mr Zuma to "serve" his sentence at his home rather than in prison, as required by the Constitutional Court.

100. Without that order, Mr Zuma will unlawfully benefit from a lesser punishment than what the Constitutional Court imposed. By the time this review is heard, Mr Zuma will have enjoyed nearly three months of his sentence at home in Nkandla. If the National Commissioner's decision is unlawful, then Mr Zuma shouldn't get the benefit of the reprieve. The Constitutional Court stressed that 15-months imprisonment was the only just and equitable order, and hence that also answers the question of what a just and equitable order is in this case: Mr Zuma must serve his time.

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[121] See, for example, *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) at paras 95 to 97.

CONCLUSION

101. The HSF asks for an order in terms of the notice of motion.

102. Costs should follow. Mr Zuma's unfortunate slurs in his answering affidavit are wrong, irrelevant, and offensive. He also doubles down on his contempt and disrespect for the Constitutional Court. Once again, with respect, he leaves this Court "with no real choice" but to order punitive costs.[122] The HSF seeks those costs and which should include the costs of three counsel.

103. If the HSF isn't substantially successful, it should get *Biowatch* protection from costs.[123]

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[122] *Zuma* (note 1) at para 102.

[123] *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 323 (CC) para 29 to 31.