**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

CASE NO: 46468/21

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** |

**AND**

CASE NO: 46701/21

In the matter between:

| | |
|---|---|
| **AFRIFORUM NPC** | **Applicant** |
| **And** | |
| **NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES** | **First Respondent** |
| **THE MEDICAL PAROLE ADVISORY BOARD** | **Second Respondent** |
| **JACOB GEDLEYIHLEKISA ZUMA** | **Third Respondent** |

**THE SECRETARY GENERAL OF THE JUDICIAL COMMISSION OF ENQUIRY INTO ALLEGATIONS OF STATE CAPTURE AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE** **Fourth Respondent**

**THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES** **Fifth Respondent**

**THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA** **Sixth Respondent**

**AND**

CASE NO: 45997/21

In the matter between:

**DEMOCRATIC ALLIANCE** **Applicant**

**And**

**THE NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES** **First Respondent**

**THE MEDICAL PAROLE ADVISORY BOARD** **Second Respondent**

**JACOB GEDLEYIHLEKISA ZUMA** **Third Respondent**

**THE SECRETARY OF THE JUDICIAL COMMSSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE,**

**CORRUPTION, AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE** **Fourth Respondent**

**THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES** **Fifth Respondent**

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**NOTICE OF APPLICATION FOR LEAVE TO APPEAL IN TERMS OF SECTION 17(1)(a)(i) AND/OR 17(1)(a)(ii) OF THE SUPERIOR COURTS ACT 10 OF 2013**

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**PLEASE TAKE NOTICE THAT** the former President JG Zuma (cited as the 4th respondent under case No 2021/45997 in the above heading and the applicant herein) hereby applies for leave to appeal, in terms of sections 17(1)(a)(i) and/or 17(1)(a)(ii) of the Superior Courts Act 10 of 2013 ("the Act"), against the whole of the judgment and order granted by His Lordship Matojane J, dated 15 December 2021, to the Supreme Court of Appeal, alternatively to the Full Court of this Division, upon the grounds set out immediately below.

**A: Section 17(1)(a)(i) grounds: Reasonable prospects of success on appeal**

1. The Learned Judge, with respect, erred and/or committed gross misdirections of fact and/or law:

1.1. in finding that the three applicants have the requisite *locus standi in judicio* to bring the application, more particularly in that the court failed to

give a proper interpretation to the provisions of section 38 of the Constitution;

1.2. in failing to apply the principle that rule-of-law *locus standi* is ousted by bad faith, ulterior and/or improper motives, such as those harboured by the applicants, who are pursuing a political rather than a legal agenda;

1.3. in failing to apply or develop the test for mootness in such a way that the interests of justice are properly served and to avoid answering academic questions;

1.4. in failing to distinguish between medical parole granted in terms of section 75(7) of the Correctional Services Act in respect of offenders serving sentences of 24 months or less and those serving longer-term sentences who fall under section 79;

1.5. in second-guessing and/or overruling the expert and professional opinions of qualified medical experts, when:

1.5.1. the applicants presented zero contrary medical expert evidence; and

1.5.2. the court does not possess any medical expertise sufficient to make any contrary finding;

1.6. in failing to apply the most basic and time-tested rules of statutory interpretation, including but not limited to:

1.6.1. the maxim or *generalia specialibus non derogant*; and

1.6.2. the rule that regulations cannot be used to interpret the statute which gave rise to them without causing the tail to wag the dog, or other absurdities;

1.7. in failing to apply the provisions of section 39(2) of the Constitution, which dictates that where two interpretations of a statute are possible, the court must prefer the one which is more consistent with the protection of individual fundamental constitutional rights contained n the Bill of Rights.

1.8. in not giving any effect to the explicit findings of Dr Mafa, who answered "yes" to the simple question whether Mr Zuma was "*suffering from a terminal disease or condition ...*", words taken verbatim from section 79(1)(a) of the Act. In spite of this, the Learned Judge held at paragraph [62] of the judgment that "*none of the expert reports relied on by the Commissioner asserts that (Mr Zuma) is terminally ill or is physically incapacitated*". This is factually and plainly incorrect, if the objective evidence is taken into account;

1.9. in failing to acknowledge or take into account the overwhelming evidence that no correctional facility in South Africa is capable of accommodating the undisputed medical needs of the patient, who is entitled to 24-hour medical care from the South African Medical Health Services. In this regard, the substitution order amounts to cruel and degrading punishment with no due regard to the patient's healthcare, dignity and other human rights. It is the antithesis of ubuntu;

1.10. in taking into account and basing a court judgment on irrelevant and inadmissible evidence of a Sunday Times article, which article was in

turn based on the absurd notion that a terminally ill person cannot meet other people or address a prayer meeting. The court grossly misdirected itself in making an unqualified diagnosis that, *inter alia*, because he can pray, Mr Zuma "*is not terminally ill or severely incapacitated and seems to be living a normal life*". Such a conclusion flies in the face of all the objective medical evidence by trained and professional doctors;

1.11. in taking into account the irrelevant offence for which Mr Zuma was sentenced, ie that "*he defied the Zondo Commission, the judiciary and the rule of law and is resolute in his refusal to participate in the Commission's proceedings*" and that "*there is no suggestion that he is an innocent man*". All prisoners are, by definition, not innocent men or women. Yet they have a right to medical parole. Innocent men cannot be placed on parole;

1.12. in failing to order the remission of the decision to the Acting National Commissioner, more particularly in view of the common-cause fact that the original decision-maker has since left the position of National Commissioner;

1.13. in failing to apply the law of substitution as articulated by Khampepe J in the well-known Constitutional Court case of *Trencon Construction (Pty) Ltd v IDC of SA Ltd* 2015 (10) BCLR 1199 (CC);

1.14. in granting an order, especially the substitution order which is disturbingly inappropriate, induces a sense of shock and amounts to cruelly punishing Mr Zuma twice or eternally for the same offences for which the Constitutional Court ordered his imprisonment. This is a total

breach of section 35 of the Constitution and the *residuum* principle, which was correctly articulated as follows by Theron J in the very recent Constitutional Court case of *Sonke Gender Justice NEC v President of the RSA* 2021 (3) BCLR 269 (CC), where she said at paragraph [38]:

> *"Section 35(2) of the Constitution addresses the general rights of detained and incarcerated persons, including the right to living conditions consistent with human dignity. This entails, among other things, adequate medical treatment, and the right to communicate with their spouses, next of kin, religious counsellors and medical practitioners."*

1.15. in failing to apply the section 36 limitation of rights test in spite of another clear pronouncement of the Constitutional Court that:

> "All *the rights* in the Bill of Rights apply to inmates, *save where justifiably limited in terms of section 36 of the Constitution*" (emphasis added).

2. There are accordingly good and reasonable prospects that another court would come to a different conclusion.

B: **Section 17(1)(a)(ii): Other compelling reasons**

3. In addition to the overwhelmingly good prospects of success and given the nature of the case, the life-threatening implications of the judgment and the public interest in equality before the law, ubuntu and other values of the new era, there are other compelling reasons for the appeal to be heard. It is also in the public interest that the clear provisions of the law should not be rewritten simply to mete out perpetual punishment to one individual and sacrificing him

and his rights at the altar of political enmity and inhumane hatred and racism on the part of his heartless persecutors.

4. It is particularly gross misdirection to order the return of Mr Zuma to jail and to conditions which are far worse than the hospital ward from which his medical parole was granted on the basis that no prison could adequately cater for his constitutional rights. This is tantamount to the death sentence which was abolished in 1995 in South Africa.

5. Other relevant considerations include the undesirability of having entertained such an important and complex application under the unusual conditions of an "urgent final review application", the erroneous assertion that urgency automatically follows a special allocation even when the respondents had specifically otherwise informed the Deputy Judge President and the misapplication, with the greatest respect, of the *Apleni* case in completely distinguishable legal circumstances.

**C: Reservation of rights in respect of supplementary grounds and adducing further medical evidence**

**PLEASE TAKE NOTICE FURTHER THAT** the applicant reserves his right to supplement the grounds of appeal set out above and to apply to lead fresh and relevant further evidence of his worsening terminal medical illness identified since the medical parole decision was taken more than three months ago. Such an application will be brought in terms of section 19(b) of the Superior Courts Act 10 of 2013.

**KINDLY SET THE MATTER DOWN ACCORDINGLY**

**DATED AT HONEYDEW ON THIS THE 15th DECEMBER 2021.**

**NTANGA NKUHLU INCORPORATED**
**3RD and 4TH RESPONDENT'S**
**ATTORNEYS**
**UNIT 24**
**WILD FIG BUSINESS PARK**
**1492 CRANBERRY STREET**
**HONEYDEW**
**C/O MABUELA INC.**
**179 BOSMAN STREET**
**PRETORIA**
**TEL: 010 595 1055**
**Mobile: 0721377104**
**EMAIL: mongezi@ntanga.co.za**
**REF: M Ntanga/Z0017/21**

**TO: THE REGISTRAR OF THE HIGH COURT**
**PRETORIA**

**AND TO: WEBBER WENTZEL**
**APPLICANT'S ATTORNEYS (CASE NO: 46488/21)**
**90 RIVONIA ROAD, SANDTON**
**JOHANNESBURG**
**2196**
**TEL: 011 530 5867**
**FAX: 011 530 6867**
**EMAIL: vlad.movshovich@webberwentzel.com**
**pooja.dela@webberwentzel.com**

dylan.cron@webberwentzel.com
daniel.rafferty@webberwentzel.com
dee-dee.golohle@webberwentzel.com
REF: V Movshovich/ P Dela/ D Cron/ D Rafferty/
D Qolohle/ 3050264

AND TO: HURTER SPIES INC.
APPLICANT'S ATTORNEYS (CASE NO: 46701/21)
2ND FLOOR, BLOCK A
LOFTUS PARK
416 KIRKNESS STREET
ARCADIA
PRETORIA
TEL: 012 941 9239
EMAIL: spies@hurterspies.co.za
ck@hurterspies.co.za
REF: WD Spies/ MAT4215

AND TO: MINDE SCHAPIRO AND SMITH
APPLICANT'S ATTORNEYS (CASE NO:45997/21)
elzanne@mindes.co.za
C/O KLAGSBRUN EDELSTEIN
BOSMAN DU PLESSIS INC.
220 LANGE STREET
NIEUW MUCKLENEUK
TEL: 012 452 8984
REF: R Nyama / MD / HM001035

AND TO: NATIONAL COMMISSIONER FOR CORRECTIONAL SERVICES
1ST RESPONDENT

124 WF NKOMO STREET
POYNTONS BUILDING (WEST BLOCK)
PRETORIA
EMAIL: Arthur.Fraser@dcs.gov.za
Singabakho.Nxumalo@dcs.gov.za
C/O PRETORIA STATE ATTORNEY, ISAAC CHOWE
EMAIL: IChowe@justice.gov.za
reubensekgobela@gmail.com

AND TO: DEPARTMENT OF JUSTICE AND CORRECTIONAL SERVICES
2ND RESPONDENT
SALU BUILDING
28TH FLOOR, 316 THABO SEHUME STREET
PRETORIA
EMAIL: ZaneNdlovu@justice.gov.za
C/O PRETORIA STATE ATTORNEY, ISAAC CHOWE
EMAIL: IChowe@justice.gov.za
reubensekgobela@gmail.com

AND TO: THE MEDICAL PAROLE ADVISORY BOARD
3RD RESPONDENT
124 WF NKOMO STREET
POYNTONS BUILDING (WEST BLOCK)
PRETORIA
EMAIL: mmulem@dcspwv.gov.za
Winnie.phalane@dcs.gov.za
C/O PRETORIA STATE ATTORNEY, ISAAC CHOWE
EMAIL: IChowe@justice.gov.za
reubensekgobela@gmail.com