IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA case no: 033/2022

GP case no: 45997/2021, 46468/2021, 46701/2021

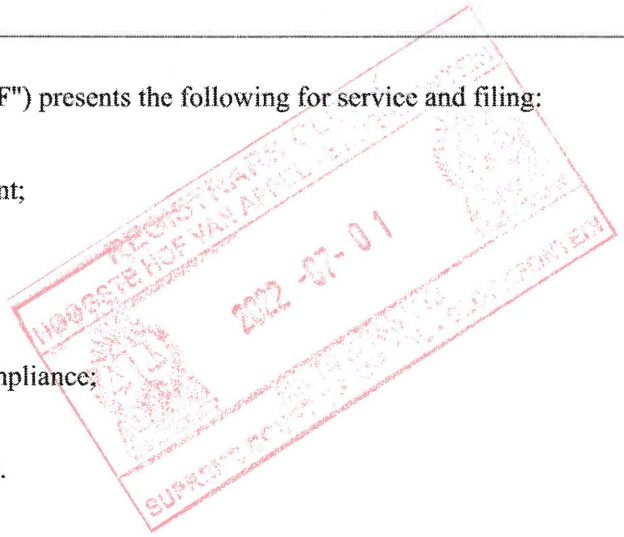
In the matter between

THE NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	First Appellant
JACOB GEDLEYIHLEKISA ZUMA	Second Appellant
and	
THE DEMOCRATIC ALLIANCE	First Respondent
HELEN SUZMAN FOUNDATION	Second Respondent
AFRIFORUM NPC	Third Respondent

FILING SHEET

The second respondent ("**HSF**") presents the following for service and filing:

1. HSF's heads of argument;
2. HSF's chronology;
3. HSF's certificate of compliance;
4. HSF's list of authorities.



Dated at Bloemfontein on 1 July 2022.

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Subject: THE NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES & OTHER // THE DEMOCRATIC ALLIANCE AND TWO OTHERS
Attachments: Message from KM_958; Message from KM_958

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Dear All,

Kindly find attached hereto the Second Respondent's Heads of Argument, Chronology, List of Authorities, Practice Note and Rule 10 Certificate, for your attention and record purposes.

We trust the above to be in order and request that you will acknowledge receipt by return email.

Yours faithfully,

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

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In the appeal between

NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	First Appellant
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THE SECOND RESPONDENT'S HEADS OF ARGUMENT

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INTRODUCTION

1. As this Court will know, the Constitutional Court sentenced former President, Jacob Gedleyihlekisa Zuma ("**Mr Zuma**"), to 15 months in jail for his contempt and deliberate, repeated and flagrant disregard of that Court's order. This was in the context of the sad chapter in our Constitutional project that is State Capture. Jail time was the only way to vindicate the authority and dignity of the Constitutional Court, the only way to vindicate the judiciary, and the only way to vindicate "*the Constitution itself*."[1] So serious was Mr Zuma's conduct that the Court was left "*with no real choice*" other than imprisonment; with it being held that anything less would spell the judiciary's "*inevitable decay*."[2]

2. Mr Zuma started serving his time on 8 July 2021. Just eight weeks later, on 5 September 2021, the then-National Commissioner of Correctional Services ("**the National Commissioner**"), Arthur Fraser, dealt Mr Zuma a get-out-of-jail free card: medical parole. Mr Zuma was sent home to see out the rest of his sentence—not in a jail cell at the Estcourt Correctional Centre, nor at a specialised medical facility, but "*[s]ecure in [c]omfort*" at his home in Nkandla.[3]

3. The Medical Parole Advisory Board ("**the Board**"), a panel of doctors whose job it is to give independent medical advice on medical parole applications, recommended *against* medical parole (emphasis added). In the Board's expert determination, Mr Zuma is "*stable and does not qualify for medical parole*".[4] A "*stable*" diagnosis is a far cry from what medical parole is meant for: a "*terminal disease*" that, as the application form makes clear, is "*irreversible*", "*irremediable by available medical*

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1 *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma* 2021 (5) SA 327 (CC) ("*Zuma*") at para 62.
2 *Zuma* (note 1) at para 102.
3 *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC) at note 6.
4 Core bundle; p CB32.

treatment", requires "*continuous palliative care*" and will "*lead to imminent death within a reasonable time*."[5]

4. The High Court, correctly it is submitted, set aside the National Commissioner's decision. The Court held that a jurisdictional fact was missing: Mr Zuma suffers from neither a "*terminal disease or condition*" nor a "*physical incapacit[y]" that "severely limit[s] daily activity*".[6] The National Commissioner has no power to overrule the Board's expert determination on this score. Worse, the medical reports that supposedly support Mr Zuma's application for parole do not even assert a terminal illness or physical incapacity.

5. The High Court got it right.

- Section 79(1) of the Correctional Services Act ("**the Correctional Services Act**" or "**the Act**") prescribes three jurisdictional facts for medical parole. The first, in sub-section (a), is the most obvious: to be eligible for medical parole, an inmate must suffer from a terminal disease or condition or a physical incapacity that severely limits daily activity or self-care. Medical parole centres on this medical diagnosis. And Parliament trusts the medical experts on the Board to make the medical diagnosis. Here, the Board recommended *against* medical parole because, in the Board's expert determination, Mr Zuma was "*stable*" and "*d[id] not qualify for medical parole*".[7] That should have been the end of Mr Zuma's parole application: the expert medical body tasked with making the requisite medical assessment has held that Mr Zuma falls at the first hurdle. The National Commissioner has no power to overturn the Board's determination of

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5 Core bundle; p CB11.
6 Section 79(1)(a) of the Correctional Services Act 111 of 1998.
7 Core bundle; p CB32.

this jurisdictional fact. Moreover, the National Commissioner himself has no medical expertise in any event – he thus lacks the statutory power he purported to exercise, as well as any expert or factual basis to reach the conclusion he did in fact reach.

- Even if the statute lets the National Commissioner second-guess or veto the experts, he needs a rational reason. Mr Fraser's reasons for thinking he knew better fall short. At best, Mr Fraser's reasons are circular and irrational; at worst, he created and applied a special set of rules not provided for in the Correctional Services Act and tailor-made for Mr Zuma. Moreover, it appears that much of this reasoning is a belated attempt, *ex post facto*, to try to improve the thinking behind his unlawful decision. It is settled law that *ex post facto* reasons are irrelevant to the review.

6. As for remedy, the High Court exercised its "*very wide*" remedial discretion to substitute the National Commissioner's decision for a decision dismissing Mr Zuma's parole application. The High Court also declared that his time out of jail should not count towards his 15-month sentence. This remedy makes perfect sense: an offender in respect of whom incarceration has been ordered cannot escape such incarceration through an unlawful decision, and justice dictates that the sentence, as ordered, must lawfully be served. This is particularly so where the offender applied and motivated for the unlawful medical parole and then doggedly defended it even where it was plain that it was without legal foundation, both in the court *a quo* and on appeal.

7. On appeal, the National Commissioner continues to misread, misquote and redraft Mr Zuma's parole application. The National Commissioner also continues to defend an indefensible interpretation of the statute, arguing that the National Commissioner—a

politician, not a doctor—was entitled to overrule the Board, an expert medical body. On remedy, the National Commissioner says the High Court's order is "*incorrect*", a tell-tale sign that the National Commissioner applies the wrong test for an appeal against a lower court's discretionary remedy.[8] On the correct test, there is no reason for this Court to interfere.

8. For his part, Mr Zuma continues to read the statute as giving the National Commissioner a king's pardon power. His interpretation turns the statute into a maze of "*alternative pathways*" that makes medical parole *less* independent and *more* susceptible to abuse—the exact opposite to what Parliament set out to do when it overhauled how medical parole works but a few years ago.[9] And on remedy, Mr Zuma, like the National Commissioner, applies the wrong test for an appeal against a discretionary remedy. Neither he nor the National Commissioner offers any reason for this Court to interfere with the High Court's exercise of its "*true discretion*".[10]

9. The National Commissioner's decision is unlawful. Mr Zuma must, therefore, serve the sentence imposed by the Constitutional Court. Any other result turns the Constitutional Court's vindication of the rule of law into a Maginot Line: strong on paper, but easily outflanked.

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8 National Commissioner's heads of argument; p 37, para 10.1.
9 Mr Zuma's heads of argument; p 18, para 70.2.
10 *Central Energy Fund Soc Ltd v Venus Rays Trade (Pty) Ltd* [2022] 2 All SA 626 (SCA) at para 43.

THE FACTS

10. The Constitutional Court found Mr Zuma guilty of contempt of court. He was sentenced to 15 months in jail.

11. Mr Zuma started his sentence at the beginning of July last year. A dedicated team from the South African Military Health Service was waiting.[11] They monitored him "*on a daily basis*" during his short stay at the Estcourt Correctional Centre.[12] Ordinary prisoners are not so fortunate.[13]

12. By the end of the month, just 20 days into his 15-month sentence, one of Mr Zuma's doctors in his South African Military Health Service team, Dr Mafa, applied for medical parole for Mr Zuma in terms of section 79(2)(a)(i) of the Act.[14]

13. Out of the ten doctors on the Board, Dr Mphatswe was the lone voice who supported the application.[15]

14. The rest of the Board determined that Mr Zuma "*is stable and does not qualify for medical parole according to the Act*". In full, the Board's decision reads:[16]

> "*The MPAB [Medical Parole Advisory Board] 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*

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11 Supplementary founding affidavit; Record vol 4 p 609, paras 32 to 33.
12 Supplementary founding affidavit; Record vol 4 p 609, para 34.
13 The 2019/2020 annual report of the Judicial Inspectorate for Correctional Services notes at p 59 that most complaints *to* independent correctional centre visitors "*are about access to medication and medical treatment.*"
14 Supplementary founding affidavit; Record vol 4 p 610, para 39. The application for medical parole is at Core Bundle pp CB10 to CB14.
15 Supplementary founding affidavit; Record vol 4 pp 613 to 614, paras 55 to 58. The report of Dr Mphatswe is at Core Bundle pp CB19 to CB26.
16 The decision of the Board of 2 September 2021 is at Core Bundle p CB32 (emphasis added).

information, should it become available. The MPAB can only make its recommendations based on the Act."

15. A few days after the Board's decision, the National Commissioner summarily overruled the Board and granted Mr Zuma medical parole.[17] These were the National Commissioner's reasons for second-guessing the medical experts:[18]

> "*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 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.*

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[17] Supplementary founding affidavit; Record vol 4 pp 616 to 618, paras 70 to 76. The decision of the National Commissioner is at Core Bundle pp CB40 to CB43.

[18] Core Bundle; p CB43.

> *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.*"

16. All told, due to the National Commissioner's intervention, Mr Zuma spent less than two months of his 15-month sentence in jail.

THE HIGH COURT IS RIGHT: THE NATIONAL COMMISSIONER'S DECISION IS UNLAWFUL

The statutory scheme

17. The National Commissioner's decision is reviewable as administrative action under the Promotion of Administrative Justice Act ("**PAJA**").[19] It must also comply with the principle of legality.

18. The National Commissioner granted Mr Zuma parole "*[i]n terms of section 75(7)(a) of the Correctional Services Act … read together with section 79 and Regulation 29A*".[20]

19. Section 79, titled "*[m]edical parole*", provides for three requirements:

- The sentenced offender 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*".[21]

- The "*risk of re-offending*" must be "*low*".[22]

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19 *Derby-Lewis v Minister of Justice and Correctional Services* 2015 JDR 1119 (GP) (reviewing a refusal of medical parole as administrative action under PAJA). See also *Metcash v Commissioner, SARS* 2001 (1) SA 1109 (CC) at para 40.

20 Core Bundle; p CB40.

21 s79(1)(a).

22 s79(1)(b).

- There must be "*appropriate arrangements*" in place for the inmate's supervision, care, and treatment within the community to which the inmate is to be released.[23]

20. The High Court correctly held that the first jurisdictional fact—in short, a terminal disease or physical incapacity—calls for an expert medical determination.[24] And it's a high bar: on its ordinary meaning, a disease is "*terminal*" if it is "*in its final stage; fatal; incurable*", ie untreatable and predicted ultimately and imminently to lead to death.[25] That is why the medical parole application form makes clear that a "*terminal disease*" is one that is "*irreversible*", "*irremediable by available medical treatment*", and will "*lead to imminent death within a reasonable time*."[26]

21. If, like here, a medical practitioner applies for medical parole for an inmate, the application must be sent 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*".[27] The recommendation is then sent to the Board.

22. The statute reserves the diagnosis of a terminal illness or physical incapacity for the Board to make. The legislative history shows why. The current version of section 79 was enacted in 2011. Before then, a diagnosis of a "*terminal disease or condition*" was "*based on the written evidence of the medical practitioner treating [the inmate]*".[28] In

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23 s79(1)(c).

24 High Court judgment; Record vol 6 p 1025, paras 57 to 58.

25 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).

26 Core bundle; p CB11.

27 Regulation 29A(3) of the Correctional Services Regulations published under GN R914 in GG 26626 of 30 July 2004.

28 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*."

other words, the inmate's own doctor made the diagnosis. The amendment in 2011 was a sea change in medical parole, with Parliament introducing the independent, specialist, and multi-member Board into the equation. A need for independence—actual and perceived—drove the amendment.[29] As the High Court put it, Parliament "*deliberately took the responsibility to diagnose terminal illness or severe physical incapacity away from the treating physician and left it to an independent Board to make an expert medical diagnosis.*"[30]

23. To be sure, this does not mean the Board *decides* medical parole. Rather, the Board's role is more modest and focused: it decides just one of the three jurisdictional facts that section 79(1) sets—and the only one that requires medical expertise. The Board does not even weigh in on, let alone determine, the other two jurisdictional facts. Those are left to the National Commissioner to consider because, unlike the first, the second and third jurisdictional facts are best left to someone with expertise in prisons and punishment. So even if the Board determines that an inmate indeed does have a terminal illness or physical incapacity, the National Commissioner may still decline medical parole if, in his view, the second or third jurisdictional facts are not met, for example because the terminally-ill inmate poses a risk to society by re-offending.

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[29] 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 under the "*Documents*" menu, titled "*Reviewing Medical Parole: Notes on proposed amendment of s79 of the Correctional Services Act*", or directly at this link: https://tinyurl.com/NotesOnMedicalParole).

[30] High Court judgment; Record vol 6 p 1024, para 49.

24. In this way, the Board remains, as its name says, "*[a]dvisory*" even though it is responsible for determining the critically important jurisdictional fact of whether an inmate has a terminal disease or a physical incapacity. The Board advises 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 an inmate has a terminal disease or a physical incapacity, or it might advise the National Commissioner that the inmate does not. Whatever its advice, it is that type of fact or state of affairs that must exist or be observed in an objective sense before the power can validly be exercised.[31] That means that without the Board's decision, the National Commissioner is not permitted to grant medical parole. But it also means that the National Commissioner cannot overrule or ignore the Board on that particular medical issue. That is not only most obviously because on the medical question the National Commissioner has no medical expertise. It is also because our courts have held that to allow administrators (such as the National Commissioner here) to act in this way, is to permit them to "*arrogate powers to themselves or inflate their jurisdiction*".[32] The power to grant medical parole does not in law exist in the absence of the necessary jurisdictional facts, the critical medical fact depending on the recommendation of the Board.[33] To use the words of PAJA: judicial review is grounded where "*a mandatory and material procedure or condition prescribed by an empowering provision was not complied with*".[34]

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[31] See *Kimberly Junior School v Head, Northern Cape Education Department* 2010 (1) SA 217 (SCA), at para 12.
[32] See Hoexter and Penfold, *Administrative Law in South Africa*, 3rd Edition, 2021, at p 402.
[33] See generally Hoexter and Penfold, *Administrative Law in South Africa*, 3rd Edition, 2021, at p 402 to 403, and the cases there cited, including the decision of this Court in *Paola v Jeeva NO* 2004 (1) SA 396 (SCA).
[34] Section 6(2)(b) of the Promotion of Administrative Justice Act 3 of 2000.

25. Section 79 strikes the right balance between the one jurisdictional fact that requires a medical determination and the other two jurisdictional facts that require a correctional-services determination. The High Court summed it up well: "*the National Commissioner must, from a Correctional Services perspective, decide whether, despite being found to be terminally ill, there is still a high risk of reoffending or that the offender cannot be cared for properly outside the prison as stipulated in section 79(1)(b) and (c)*".[35]

The National Commissioner's interpretation is incorrect and contrary to the Act's purpose

26. The National Commissioner's interpretation is remarkable as it would permit medical parole to be afforded to any person whom he (with no medical expertise) deemed to meet exacting medial requirements, even where experts have expressly determined otherwise.

27. The Board determined, in its expert medical opinion, that Mr Zuma is "*stable*".[36] The Board did not determine that Mr Zuma has a terminal disease or a physical incapacity. This means that the Board found that the first jurisdictional fact for medical parole was not satisfied. That is why it determined that Mr Zuma "*does not qualify for medical parole under the Act*."[37] Despite the premium that Parliament places on an independent body of experts making that medical determination, the National Commissioner chose to overrule the Board.

28. The National Commissioner suggests that he could do so because the Board "*makes a recommendation*" to the National Commissioner who "*plays a decision-making role*."[38]

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35 High Court judgment; Record vol 6 p 1025, at para 55.
36 Core Bundle; p CB32.
37 Core Bundle; p CB32.
38 National Commissioner's heads of argument; p 23, para 4.38.3.

Of course, on the High Court's interpretation of section 79, the National Commissioner still plays the "*decision-making role*". All that happens is that one of the jurisdictional facts, which of necessity requires a medical determination to be made, is left for an expert panel of doctors to determine.

29. The Board is an independent body of specialists. Parliament put it there for a reason: to ensure that the medical fact of a terminal illness or physical incapacity is determined by expert doctors, not politicians. It is 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.

30. The National Commissioner is not 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 medical parole 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. In addition, if the National Commissioner did not rationally consider section 79, it means that he has paid insufficient attention to an

empowering provision and his decision is thus unlawful. If the act is not sanctioned by the empowering statute, it is unlawful.[39]

31. That is why text, context, and purpose[40] all side with the High Court's interpretation of section 79 and against a medical veto in the hands of the National Commissioner.

32. The High Court correctly held that the National Commissioner impermissibly usurped the Board's statutory role.[41] The Board's role, and the purpose of the amendment to section 79, is undermined if a politician can second-guess the Board's specialist and independent determination.

33. The National Commissioner's interpretation undermines another important purpose of the Board's role in medical parole: consistency. The Board considers every application for medical parole in the country. As this Court has made clear, "*[c]onsistency, predictability and reliability are intrinsic to the rule of law.*"[42] Consistency is undermined if the National Commissioner is able to overrule the Board on a case-by-case basis after arbitrarily preferring the views of the inmate's own doctor over the Board. As the High Court correctly held, the Board was introduced to ensure "*consistency and transparency in the granting of medical parole*".[43]

34. As a last resort, the National Commissioner falls back on deference, warning this Court to stay in its lane.[44] The National Commissioner and Mr Zuma's approach to deference is inconsistent: sometimes they shun deference (the National Commissioner apparently owes the Board no deference), other times they embrace it (but this Court should defer

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39 *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) at para 144.
40 *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) para 25
41 High Court judgment; Record vol 6 p 1026, para 60.
42 *NK v MEC for Health, Gauteng* 2018 (4) SA 454 (SCA) at para 13.
43 High Court judgment; Record vol 6 p 1022, para 45.
44 National Commissioner's heads of argument; p 23, para 4.41.

to the National Commissioner). Inconsistency aside, deference does not arise on these facts. Whether an inmate has a terminal disease, or a physical incapacity is not a discretionary decision. It is a question of medical fact. And because it turns on medical fact, section 79 leaves it to the expert doctors on the Board. The Constitutional Court has, in any event, made clear that deference plays no role in legality.[45] If the National Commissioner does not have the power to second-guess the Board's medical determination, then no extension of deference by a court can grant him that power. In any event, if anyone should be deferring to anyone else, then surely the National Commissioner, who is not a medical expert, must defer to the experts on the Board on medical determinations.

35. The National Commissioner tries to downplay the Board's determination that Mr Zuma is "*stable*" as "*[t]he only negative factor that militated against his placement on medical parole*".[46] It was not a mere "*negative factor*"; it was dispositive. The National Commissioner does not have the power to overrule the Board's determination on whether an inmate has a terminal disease or a severely limiting physical incapacity. Because the National Commissioner tried to do just that here, his decision is unlawful. It was correctly set aside for that reason alone.

<u>Mr Zuma's interpretation is incorrect: section 75 is not a second path to freedom</u>

36. Mr Zuma argues that section 75 and section 79 of the Correctional Services Act are "*alternative pathways*" for medical parole.[47] On Mr Zuma's interpretation, the National

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45 *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC) at para 44.
46 National Commissioner's heads of argument; p 14, para 4.21.
47 Mr Zuma's heads of argument; p 18, para 70.2.

Commissioner may somehow use section 75 of the Act to embrace a wide power to pardon even if the requirements in section 79 are not met.[48]

37. The text of the statute does not support this disjointed reading of the statute. Mr Zuma's interpretation requires "*medical parole*" in section 75 to mean something different to "*medical parole*" in section 79. Statutes are not permissibly read like that. The usual rule—and the usual way words work—is just the opposite: "*every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute*".[49]

38. The interplay between section 75 and section 79 is more modest than Mr Zuma's interpretation lets on. All that section 75 does is confer power on the National Commissioner to grant medical parole for a particular category of inmates. Those inmates get the benefit of an expedited application process (other inmates must go through a case management committee and then a correctional supervision and parole board). And while the decision-maker changes, what is being granted does not: medical parole is medical parole, and section 79 prescribes its requirements. There is no special type of medical parole "*reserved for the National Commissioner*."[50] Rather, as the High Court held, "*[s]ection 75(7)(a) must be read with section 79 of the Act, which is the only section that deals with medical parole*".

39. Mr Zuma's interpretation would also lead to an absurd conclusion: there would be strict substantive requirements for medical parole for one category of prisoners (those serving sentences of more than 24 months), but it would all be up to the National Commissioner to decide medical parole for another category (those serving less than 24 months).

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48 Mr Zuma's heads of argument; p 18, para 70.2.

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

50 High Court judgment; Record vol 6 p 1031, para 79.

Nothing in the statute's text, context, or purpose suggests that the length of a sentence removes the requirement to comply with the statute's substantive requirements for medical parole.[51]

40. In the end, though, Mr Zuma's splintered reading of the statute does not get out of the starting blocks. His own application for medical parole was made in terms of **section 79** of the Act[52] and the National Commissioner himself relied on "*section 75(7)(a) … read together with sectio[n] 79*".[53] Because the National Commissioner "*deliberately chos[e]*" to rely on section 79, he cannot fall back on some other source of power.[54]

The reasons for the parole decision are unlawful and irrational

41. Even if the National Commissioner did somehow have the power to second-guess a medical determination made by a panel of medical experts (and he does not), his decision to grant Mr Zuma medical parole is still subject to review for lawfulness, rationality, and reasonableness.

42. For starters, the National Commissioner does not explain why he overruled the Board. Without a rational reason to do so, his decision is unlawful. 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

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51 High Court judgment; Record vol 6 pp 1030 to 1031, para 78.
52 The medical parole application form states that it is in terms of section 79 of the Correctional Services Act: Core Bundle; pp CB10 to CB14.
53 Core Bundle; p CB40. See also High Court judgment; Record vol 6 p 1032, paras 82 to 85.
54 *Minister of Education v Harris* 2001 (4) SA 1297 (CC) at paras 16 to 18; *Langa v Premier, Limpopo* 2022 (3) BCLR 367 (CC) at paras 45 to 46.

irrelevant considerations had instead been taken into account.[55] As per the Constitutional Court's jurisprudence on this score:

- 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.

- 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.

- Lesson 4: the statutory standard which is to be met is an objective one, not subject simply to the whims of the decision-maker.

43. Those lessons were not heeded by the National Commissioner. The medical experts on the Board concluded that Mr Zuma is "*stable and does not qualify for medical parole*".[56] The National Commissioner does not explain in his decision why he overruled the Board and why he chose to rely on a report by a lone member of the Board, Dr Mphatswe, over the collective and majority decision of 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

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55 *Democratic Alliance* (note 45) 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."

56 Core Bundle; p CB32.

the National Commissioner to prefer them over the Board's considered expert determination.

44. Second, the National Commissioner did not apply the right test for medical parole.[57] The first jurisdictional fact is that the inmate has a terminal illness or a physical incapacity. The National Commissioner doesn't make that finding in his decision. These are the only facts that the National Commissioner relies on:

44.1 Mr Zuma is "*79 years old and undeniably a frail old person*".[58] Old age is not a terminal disease or a physical incapacity. If they were, there would be no pensioners in prison.

44.2 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*".[59] 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] unp[re]dictable health conditions*".[60]

- A comorbidity has nothing to do with a terminal disease or physical incapacity. The ordinary meaning of a "*terminal disease*" is an incurable disease or condition that makes death imminent.[61] Or, as the medical parole application form defines it, a "*condition or illness which is irreversible with poor prognosis and irremediable*

57 High Court judgment; Record vol 6 p 1030, para 74.
58 Core Bundle; p CB42, para 12.1.
59 Core Bundle; p CB42, para 12.2.
60 Core Bundle; p CB42, para 12.3.
61 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 25) at p 104.

by available medical treatment but requires continuous palliative care and will lead to <u>imminent death</u> within a reasonable time."[62] In contrast, a "*comorbidity*", which is nowhere in the statute, simply means 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*".[63] It has nothing to do with a terminal disease and it is nowhere to be found in the statute.

- It is not clear what Dr Mphatswe meant by "*unp[re]dictable health conditions*", but it is no basis for medical parole.

- Nor is a need for "*specialised treatment*". Section 44 of the Act already 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.

44.3 The South African Military Health Service reports and Dr Mphatswe's report do not even support the National Commissioner's case for medical parole.[64] None of the South African Military Health Service reports recommends medical parole.[65] They were not even prepared for an application for medical parole: the 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 for medical parole.[66] At most, the reports

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62 Core bundle; p CB11.
63 Oxford English Dictionary (online) ("*comorbidity*"). See also *Dorland's Illustrated Medical Dictionary* (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*").
64 High Court judgment; Record vol 6 pp 1026 to 1027, paras 62 to 68.
65 Supplementary founding affidavit; Record vol 4 p 627, para 110.
66 Supplementary founding affidavit; Record vol 4 p 627, para 109.

recommended that Mr Zuma be released to a specialised medical facility for further assessment.[67]

44.4 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*."[68] But again, "*comorbidities*" has nothing to do with the statutory test.

44.5 To make things worse, the National Commissioner then misquotes the Board. Whether this was deliberate or not, it further demonstrates the irrationality of the National Commissioner's decision.

- The National Commissioner said this in his decision:[69]

> "*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*."

- But that is not correct. The Board did not "*stat[e]*" the underlined sentence; it is nowhere to be found in the Board's decision. The National Commissioner added it. This is what the Board actually said:[70]

> "*[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*."

[67] Supplementary founding affidavit; Record vol 4 p 627, para 111.
[68] Core Bundle; p CB42, para 12.4.
[69] Core Bundle; p CB42, para 12.4 (emphasis added).
[70] Core Bundle; p CB32.

- *Nowhere* in its report does the Board put Mr Zuma's "*stable*" condition down to "*the care that he is receiving from a specialised hospital*".

- Having rewritten the Board's decision by adding 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*".[71] 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*."[72] These speculations are made without any factual basis therefor.

- Where in all of this does the National Commissioner apply the actual statutory test for medical parole? *Nowhere*. A need for specialised care is 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).[73] But, perhaps most fundamentally, the premise of this reasoning is a finding about Mr Zuma's "*specialised care*" that the Board simply didn't make.

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[71] Core Bundle CB42, para 12.4.

[72] Core Bundle CB42, para 12.5. In a footnote-free sentence, Mr Zuma claims that this direct quote from the National Commissioner's decision is somehow a "*material concession which was correctly made by the HSF before the court a quo*" (see Mr Zuma's heads of argument; p 9, para 43). Mr Zuma does not bother to say where the HSF is said to have made this "*material concession*". The HSF did not concede it.

[73] 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.

- In any event, as correctly held by the High Court, the National Commissioner's speculation is irrational because Mr Zuma is back home in the "*care of his wife who has no medical training*".[74] And Nkandla is not "*specialised*" care facility.[75]

44.6 Despite an appeal record of over a thousand pages, there is not a single diagnosis of a terminal illness or physical incapacity. [76] Even in his affidavits, Mr Zuma declines to say what terminal illness or physical incapacity he suffers from. Other litigants in his position have been more transparent.[77] Not being able to point to anything in the actual documents, the National Commissioner resorts to mischaracterising the HSF's affidavits and the High Court's judgment.[78] The HSF never "*acknowledged and explicitly noted*" that Mr Zuma suffers from a terminal disease or physical incapacity. Nor did the High Court.

44.7 The National Commissioner's decision does not even mention the second jurisdictional fact—that the risk of re-offending must be low. Tellingly, in its heads of argument, the National Commissioner does not point to where this jurisdictional fact is to be found in the National Commissioner's decision.[79] Instead, the National Commissioner is left to search his answering affidavit. That comes far too late. There is no evidence that the National Commissioner considered this jurisdictional fact at the time of the decision. And the second jurisdictional fact is by no means a given: even in this litigation, Mr Zuma's

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74 High Court judgment; Record vol 6 p 1029, para 72.
75 High Court judgment; Record vol 6 p 1029, para 72.
76 High Court judgment; Record vol 6 pp 1026 to 1027, para 62; pp 1027 to 1028, paras 63 to 70.
77 See, for example, *Derby-Lewis* (note 19).
78 National Commissioner's heads of argument; p 8, para 4.7.
79 National Commissioner's heads of argument; pp 25 to 27, para 5.

contempt of the Constitutional Court continues unabated.[80] As the High Court recognised, Mr Zuma "*continues to attack the Constitutional Court while on medical parole*".[81]

45. Third, the National Commissioner took into account the irrelevant considerations of Mr Zuma's former office (as President) and the countrywide unrest in July 2021.[82]

45.1 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*".[83] The clear message is that Mr Zuma gets special treatment—a violation of the bedrock principle of equality before the law.[84]

45.2 Last year's "*public unrests and destruction of property*" were irrelevant to whether Mr Zuma met the statutory requirements for medical parole.

45.3 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*."[85] But the "*privileges*" that a former president gets, such as they are, don't include a fast-track lane for medical parole applications with diluted requirements. The statute's jurisdictional facts apply to Mr Zuma as they do to any other inmate.

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80 Replying affidavit; Record vol 4 p 769, para 19.
81 High Court judgment; Record vol 6 p 1029, para 73.
82 High Court judgment; Record vol 6 p 1028, para 70.1.
83 Core Bundle p CB 40, para 3.
84 High Court judgment; Record vol 6 p 1028, para 70.1.
85 Core Bundle; p CB 41, para 10.

45.4 The National Commissioner's consideration of these facts is especially inappropriate because the Constitutional Court was at pains to make clear in its judgment that "*no person is above the law*".[86] Impermissibly, the National Commissioner ignored this.

45.5 So did 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*."[87] Dr Mphatswe may revere past presidents, but the rule of law does not. It demands equal treatment. That is why the Correctional Services Act creates no special dispensation for past presidents, or any other former office holders, when they apply for medical parole.

46. There was no dispute before the High Court that the National Commissioner considered these irrelevant facts.[88] This is, of course, unsurprising: the National Commissioner's consideration of Mr Zuma's former office is clear from the decision.

47. Mr Zuma was bold enough to argue in the High Court that had the National Commissioner "*not considered them*", the National Commissioner "*would have committed a reviewable irregularity*."[89] Without any legal basis, he suggests that he was entitled to special treatment. He asks this Court to take "*judicial notice*" of what happened in July 2021, describing it as "*a legitimate and very relevant consideration*".[90] Mr Zuma never explains what any of this has to do with medical parole.

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86 *Zuma* (note 1) at para 140.
87 Core Bundle; CB20, CB22.
88 Compare: supplementary founding affidavit; record vol 4 pp 630 to 631, paras 125 to 129 with the *ad seriatim* response in the National Commissioner's answering affidavit; Record vol 4 pp 752 to 753, paras 132 to 134).
89 Mr Zuma's composite answering affidavit; Record vol 3 p 484, paras 267 to 269.
90 Mr Zuma's heads of argument; p 19, para 73.

48. Mr Zuma's former office is an irrelevant consideration. Medical parole is a compassionate safety valve for inmates suffering terminal illness or severe physical incapacity. 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.

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

49.1 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*".[91]

49.2 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*."[92] The National Commissioner's reasoning forms a perfect circle of irrationality:

- in jail, Mr Zuma had only the "*full time medical care of the [South African Military Health Service]*";
- 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 (not at a "*specialised hospital*") he will be under the

[91] Core Bundle; pp CB42, para 12.4.
[92] Core Bundle; pp CB43, para 12.6.

"*full time medical care of the [South African Military Health Service]*".

49.3 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]*".

50. The National Commissioner's reasoning is irrational for another reason: the National Commissioner preferred reports that the expert Board *had already dealt with in its decision-making*. It was not open to the National Commissioner to cherry pick the reports, or extracts therefrom, that 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.[93] 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.

51. Finally, notably absent from the National Commissioner's reasons is any regard to an evaluation and recommendation of the "*correctional medical practitioner*", as Regulation 29A(3) requires. The reason for the absence is simple: in the rush to release Mr Zuma from jail, this important and mandatory step in the parole process was not followed.

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[93] Supplementary founding affidavit; Record vol 4 pp 614 to 615, paras 61 to 62. See also Core Bundle; p CB32.

51.1 Regulation 29A(3) of the Correctional Services Regulations 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*".

51.2 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.[94]

51.3 Dr Mafa is one of the medical practitioners from the South African Military Health Service's team assigned to Mr Zuma's care.[95] Dr Mafa is not a "*correctional medical practitioner*".[96]

51.4 In his heads of argument, the National Commissioner claims that Estcourt Correctional Centre does not have a "*correctional medical doctor*".[97] Tellingly, the National Commissioner does not say where in the record that fact can be found. There is no point to a careful search of the record; this assertion of fact is brand new, impermissibly made for the first time in heads of argument on appeal. Even if true, it is no reason to strike a line through the clear requirement in Regulation 29A(3).

52. For any of those reasons, the National Commissioner's decision is unlawful and was correctly set aside. It has long been the law that if a decision-maker takes into account

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94 Core Bundle; pp CB11 to CB14.
95 National Commissioner's answering affidavit; Record vol 4 p 703, para 26.
96 A correctional medical practitioner is a medical practitioner who is an employee of the Department of Correctional Services (section 1 of Correctional Services Act read with section 3(4)).
97 National Commissioner's heads of argument; p 9, para 4.8.

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.[98]

The National Commissioner's sequel reasons are just as bad

53. The National Commissioner gave his reasons in his decision.[99] His attempt to renovate some new reasons after-the-fact is impermissible. A decision-maker stands or falls by the reasons given at the time of the decision.

54. Our courts have consistently set their faces against a decision-maker defending a review with after-the-fact rationalisations. The High Court says so.[100] This Court says so.[101]

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98 *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 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)). Or, as this Court described the rule 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.*"

99 Core Bundle; p CB43.

100 *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.*"

101 See *Democratic Alliance* (note 45) 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.*

The Constitutional Court says so.[102] Reasons "*formulated after a decision has been made cannot be relied upon to render a decision rational, reasonable and lawful*".[103]

55. The National Commissioner says the reasons in his decision were not his last word. On his reading of his decision, the reasons that he listed somehow "*d[id] not include everything*".[104]

56. This is impermissible. The National Commissioner gave his reasons at the time he made his decision. He cannot supplement those after the fact. Nor can he rely on a bit of Latin ("*inter alia*") in his decision as a licence to reason in instalments.

57. Those basic rules of administrative law aside, the National Commissioner's "*ex post facto rationalisations for a bad decision*" are just as irrational and unlawful as the reasons set out in his decision.

58. First, there are Dr Mafa's findings in Addendum C to the parole application.

    58.1 Addendum C is supposed to be for the "*correctional medical practitioner*" to fill out. Dr Mafa is not that.[105]

    58.2 Non-compliance with Regulation 29A(3) aside, Addendum C of the application does not establish the first jurisdictional fact for medical parole: a terminal disease or a physical incapacity.

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".

[102] 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).*"

[103] *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 100).

[104] National Commissioner's heads of argument; p 34, para 8.3.2.

[105] High Court judgment; Record vol 6 pp 1026 to 1027; paras 62 to 65.

58.3 Dr Mafa does 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"*.[106] It is a yes-or-no question. Dr Mafa did not 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 to question 5(d) is startling. It means that *according to Mr Zuma's own doctor*, his (still-undisclosed) condition has *not* deteriorated permanently or reached an irreversible state, which means that he is not eligible for medical parole.

58.4 Next, in response to question 5(f) of the Addendum, which asks whether the offender is "*able / unable to perform activities of daily living or self care*", Dr Mafa did *not* select "*unable*".[107] He merely stated that "*patient is under full time comprehensive medical care of medical team*".[108] Dr Mafa did not answer the question, and so Mr Zuma's application did not, even on its own terms, meet either of the statutory requirements for the first jurisdictional fact (a terminal disease or a physical incapacity).

58.5 To question 6, which asks why medical parole should be considered, Dr Mafa answered, vaguely, "*medical incapacity*".[109] Tellingly, he did *not* select the "*physical incapacity*" option.

59. 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

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106 Core Bundle; p CB11.
107 Core Bundle; p CB12.
108 Core Bundle; p CB12.
109 Core Bundle; p CB13.

physically incapacitated. The Surgeon General's assessment was lukewarm: Mr Zuma "*will be better managed and optimised under different circumstances than presently prevailing*". Whatever that means, it is nowhere near the statutory requirement for medical parole.

60. Third, the National Commissioner's new reasons contain still more irrelevant considerations.

60.1 *Placing Mr Zuma on medical parole would "relieve the Department of the costs of keeping him in incarceration".*[110] Medical parole is not some austerity measure to help the Department meet its budget; cutting costs has no relationship at all to the requirements in section 79.

60.2 *Mr Zuma "would, in any event, have become eligible for consideration for placement on parole within the next seven (7) weeks".*[111]

- This is completely irrelevant. Medical parole is for inmates with a terminal disease or a physical incapacity. The remaining length of their sentences has no bearing on this.

- And besides: (a) regardless of when Mr Zuma would become *eligible* for ordinary parole, he would still have had to *apply for* and be *granted* ordinary parole (he did not and he has not); and (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

[110] National Commissioner's answering affidavit; Record vol 4 p 712, para 34.7.
[111] National Commissioner's answering affidavit; Record vol 4 pp 712 to 713, para 34.9.

his decision on medical parole makes no difference because Mr Zuma would have been eligible for ordinary parole anyway.[112]

60.3 *The Department would suffer "significant reputational damage" if Mr Zuma died in detention*.[113] 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 confirms that Mr Zuma has a terminal disease or a physical incapacity.

61. 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 2021 to receive treatment. The Board concluded in its report of 2 September 2021 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.

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[112] See, for example:
- *Van der Walt v S* 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 102) at para 85;
- *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC) at para 26; and
- *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 (4) SA 529 (CC) at paras 152 to 154.

[113] National Commissioner's answering affidavit; Record vol 4 p 743, para 104.2.

62. Lastly, Mr Zuma's reliance on the *residuum* principle is misplaced.[114] In short, the principle is no blank cheque for the National Commissioner to act unlawfully.

THERE IS NO PROPER CHALLENGE TO THE HIGH COURT'S DISCRETIONARY REMEDY

63. The High Court had a toolbox of "*wide decision-making powers*".[115] Just a few months ago, this Court reiterated that section 172 of the Constitution confers on courts "*very wide powers to craft an appropriate or just remedy*".[116] It is a discretion "*in the true sense*".[117] This Court may interfere with the High Court's exercise of its remedial discretion only if it was not exercised "*judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles*".[118] As this Court recently summed up the law: "*[p]ut simply, the appellants must show that the high court's remedial order is clearly at odds with the law*."[119]

64. Neither the National Commissioner nor Mr Zuma get this test right. For that reason alone, the High Court's remedy should stand.

65. The High Court's remedy is, in any event, correct. The "*default*" position for remedy is the "*corrective principle*" that aims to correct or reverse the consequences of the unlawful decision.[120]

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114 *Thukwane v Minister of Correctional Services and Others* 2003 (1) SA 51 (T) at para 20.
115 *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC) at para 90.
116 *Central Energy Fund* (note 10) at para 37.
117 *Central Energy Fund* (note 10) at para 43.
118 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para 11 (quoted with approval in *Trencon* (note 115) at para 88).
119 *Central Energy Fund* (note 10) at para 43.
120 *Central Energy Fund* (note 10) at para 39.

66. Here, the corrective principle requires the setting aside of the National Commissioner's decision. The High Court substituted it with a decision rejecting Mr Zuma's application for medical parole.[121] Substitution was not strictly necessary; the practical result of the High Court's order setting aside the National Commissioner's decision granting medical parole[122] is that Mr Zuma must go back to jail to serve the sentence that the Constitutional Court imposed.

67. But substitution is, in any event, justified. The Board's decision that Mr Zuma is "*stable*" makes the rejection of his application for medical parole a "*foregone conclusion*".[123] In this 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.

68. The High Court also directed that Mr Zuma's time on medical parole will not count towards fulfilment of his sentence.[124] This order falls well within the High Court's "*wide remedial powe[r]*" under section 172 of the Constitution.[125] This is also what justice and equity require to give full effect to the corrective principle and the Constitutional Court's contempt judgment: the order reverses the unlawful consequences of the decision, which allowed Mr Zuma to "*serve*" his sentence "*[s]ecure in [c]omfort*" at home rather than in prison. The Constitutional Court ordered imprisonment, not any lesser form of punishment like house arrest or a suspended

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121 High Court judgment; Record vol 6 p 1037, paras 100.3 and 100.4.
122 High Court judgment; Record vol 6 p 1037, paras 100.2.
123 *Trencon* (note 115) at para 59.
124 High Court judgment; Record vol 6 p 1037, para 100.5.
125 See, for example, *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) at paras 95 to 97.

prison sentence or a fine, for good reason.[126] If the National Commissioner's decision is unlawful, Mr Zuma shouldn't get the benefit of an unlawful reprieve from what the Constitutional Court decided was "*the only appropriate sanction*" for his contempt.[127]

69. An order in those terms comfortably falls within the High Court's wide remedial powers. But for this power, the safeguards put in place to shield medical parole from political interference will be entirely ineffectual. If this were not so, medical parole applications and subsequent reviews could easily be used to filibuster sentences. The National Commissioner's unlawful attempt to get Mr Zuma out of jail would have worked. Even when a court sets aside a medical parole decision, the politically powerful could still (ab)use congested courts (and the appeals process) to run out the clock on their sentences while at home.[128] Indeed, Mr Zuma already portended such an argument in this case: in his answering affidavit he raised an *in limine* point of anticipatory mootness, saying that "*[w]hatever decision is reach 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*".[129] He said the point was dispositive of the application.[130]

70. The High Court's order does not amount to "*double-jeopardy*" or a "*travesty of justice*".[131] A useful analogy is when a sentence of correctional supervision fails. Where a sentence of community corrections fails—even if through no fault of the offender[132]—a court may reconsider that punishment and "*impose any other proper punishment*",

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126 *Zuma* (note 1) at para 102.
127 *Zuma* (note 1) at para 102.
128 The National Commissioner has the power to consider and grant medical parole applications where the offender's sentence is of short duration.
129 Mr Zuma's answering affidavit; Record vol 3 p 425, para 38.
130 Mr Zuma's answering affidavit; Record vol 3 p 418, para 9 ("*I now deal with the preliminary legal points, each of which may be dispositive of the matter, namely: 9.1. Urgency; 9.2. Locus Standi; 9.3. Mootness; and 9.4. Non-Joinder*").
131 National Commissioner's heads of argument, p 37, para 10.1.2.
132 *S v Jacobs* [1994] 3 All SA 402 (C) at p 405.

including imprisonment.[133] The court must simply ensure that the new sentence is "*appropriate*" and "*proportionate*" to the crime committed.[134]

71. Nor is Mr Zuma an innocent party.[135] As the High Court correctly recognised, Mr Zuma has used his time out on medical parole to continue his contemptuous attacks against the Constitutional Court.[136] But, in any event, it is *Mr Zuma* who is the cause of the medical parole being sought and granted when there was no lawful basis to do so, and then defended to the hilt in court. Mr Zuma was not some bystander in the process. Mr Zuma received the outcome which he specifically desired. He can hardly complain when a court that rules such an outcome to be unlawful also orders its unlawful consequences to be reversed and corrected from the onset.

CONCLUSION

72. The National Commissioner's decision to grant Mr Zuma medical parole is unconstitutional and unlawful. The National Commissioner does not have the power to overrule the Board's expert determination that Mr Zuma does not qualify for medical parole. The National Commissioner's reasons reveal his decision to be irrational, based on irrelevant considerations, and unmoored from what the statute requires for medical parole.

73. Neither the National Commissioner nor Mr Zuma offers any proper reason for this Court to interfere with the High Court's discretionary remedy, which was plainly just and equitable, and necessary to give effect to what the Constitutional Court stressed was a term of imprisonment imposed precisely since Mr Zuma "*owes this sentence in respect of violating not only this Court, nor even just the sanctity of the Judiciary, but*

[133] Section 276A(4)(a) of the Criminal Procedure Act 51 of 1977.
[134] *S v Esau* [2021] ZAWCHC 140 (30 July 2021) para 13.
[135] National Commissioner's heads of argument, p 37, para 10.1.1.
[136] High Court judgment; Record vol 6 p 1035, para 95.

to the nation he once promised to lead and to the Constitution he once vowed to uphold".[137]

74. This Court should dismiss the appeal with costs including the costs of three counsel. If the National Commissioner and Mr Zuma succeed, the HSF submits that the *Biowatch* protection applies and safeguards it against any adverse costs order.[138]

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30 June 2022

[137] Zuma (note 1) at para 128.
[138] *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 323 (CC) para 29 to 31.

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA case no: 033/2022

GP case no: 45997/2021, 46468/2021, 46701/2021

In the appeal between

NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES First Appellant

JACOB GEDLEYIHLEKISA ZUMA Second Applicant

and

DEMOCRATIC ALLIANCE First Respondent

HELEN SUZMAN FOUNDATION Second Respondent

AFRIFORUM NPC Third Respondent

HSF'S CHRONOLOGY

DATE	**EVENT**	**REFERENCE**
29 Jun 2021	The Constitutional Court declares that Mr Zuma is guilty of the crime of contempt of court and sentences him to 15 months' imprisonment.	HSF founding affidavit: R vol 3 pp 554-555, para 11.
8 Jul 2021	Mr Zuma is admitted into the Estcourt Correctional Centre and begins his sentence.	Core Bundle p CB2 "Status".

	South African Military Health Service ("SAMHS") medical team recommends that Mr Zuma be moved to a specialist medical facility for further assessment.	Core Bundle p CB5.
28 Jul 2021	Dr Mafa applies for medical parole on Mr Zuma's behalf.	Core Bundle pp CB10 - CB14.
	SAMHS medical team recommends Mr Zuma's release to a specialist medical facility for further assessment.	Core Bundle pp CB8 - CB9
5 Aug 2021	SAMHS medical team again requests that Mr Zuma be moved to a specialist medical facility.	Core Bundle pp CB17 - CB18
	Mr Zuma is transferred to the Pretoria Heart Hospital on medical release.	Radebe affidavit; R vol 2 p 411, para 13; Core Bundle p CB2 "Status".
23 Aug 2021	Dr Mphatswe, a member of the Medical Parole Advisory Board ("MPAB"), recommends that Mr Zuma be placed on medical parole.	Core Bundle CB19 - CB26
26 Aug 2021	The Board elects not to recommend Mr Zuma for medical parole and calls for independent medical reports.	Core Bundle CB28

28 Aug 2021	The Board again elects not to recommend Mr Zuma for medical parole and calls for further medical reports from the SAMHS.	Core Bundle CB29 - CB30
2 Sept 2021	The Board takes the decision not to recommend Mr Zuma for medical parole – finding that his "treatment has been optimised" and he is "stable".	Core Bundle CB32
5 Sept 2021	The National Commissioner takes the decision to place Mr Zuma on medical parole.	Core Bundle CB40 - CB43
	The decision is announced in a media statement.	Core Bundle CB1
10 Sept 2021	The Democratic Alliance ("DA") launches an urgent application in the Gauteng North High Court ("High Court") under case number 46701/2021.	R vol 1 p 1.
14 Sept 2021	The Helen Suzman Foundation ("HSF") launches an urgent application in the High Court under case number 46468/2021.	R vol 3 p 542.
15 Sept 2021	Afriforum NPC ("Afriforum") launches an urgent application in the High Court under case number 46701/2021.	R vol 5 p 824.
23 Nov 2021	Justice Matojane hears the applications brought by the HSF, DA and Afriforum together.	R vol 6 p 1038

15 Dec 2021	High Court hands down judgment and orders in favour of the applicants.	High Court judgment; R vol 6 pp 1006 - 1038
	Mr Zuma applies for leave to appeal.	R vol pp 1039 - 1049
17 Dec 2021	The National Commissioner applies for leave to appeal.	R vol 6 pp 1050 - 1071
21 Dec 2021	High Court hears and grants the applications for leave to appeal.	R vol 6 pp 1081 - 1083
14 Jan 2022	The National Commissioner notes his appeal to this Court.	R vol 6 pp 1076 - 1080
20 Jan 2022	Mr Zuma notes his appeal to this Court.	R vol 6 pp 1084 - 1089

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In the appeal between

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

and

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

CERTIFICATE

We certify that Rules 10 and 10A(a) of this Court's Rules have been complied with in preparation of the HSF's heads of argument and practice note.

p.p.

MAX DU PLESSIS SC

ANDREAS COUTSOUDIS

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30 June 2022

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

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In the appeal between

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

and

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

HSF'S LIST OF AUTHORITIES

Statutes

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Correctional Services Act 111 of 1998

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Criminal Procedure Act 51 of 1977

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Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others 2022 (1) SA 100 (SCA)

* Central Energy Fund Soc Ltd v Venus Rays Trade (Pty) Ltd [2022] 2 All SA 626 (SCA)

Democratic Alliance v President of South Africa 2013 (1) SA 248 (CC)

Derby-Lewis v Minister of Justice and Correctional Services 2015 JDR 1119 (GP)

Economic Freedom Fighters v Speaker, National Assembly 2016 (3) SA 580 (CC)

Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 (2) SA 415 (CC)

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Jicama 17 (Pty) Ltd v West Coast District Municipality 2006 (1) SA 116 (C)

Kimberly Junior School v Head, Northern Cape Education Department 2010 (1) SA 217 (SCA)

Langa v Premier, Limpopo 2022 (3) BCLR 367 (CC)

Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews 2009 (4) SA 529 (CC)

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Minister of Health v New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC)

My Vote Counts NPC v Speaker of the National Assembly 2016 (1) SA 132 (CC)

National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC)

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National Lotteries Board v South African Education and Environment Project 2012 (4) SA 504 (SCA)

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