IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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

In the matter between:

THE NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	First Applicant
and	
THE DEMOCRATIC ALLIANCE	First Respondent
HELEN SUZMAN FOUNDATION	Second Respondent
AFRIFORUM NPC	Third Respondent

NOTICE OF OPPOSITION

TAKE NOTICE THAT the second respondent, the **HELEN SUZMAN FOUNDATION**, hereby notifies the applicant of its intention to oppose the application for leave to appeal, dated 12 December 2022.

TAKE FURTHER NOTICE THAT the second respondent has appointed, as its attorneys of record, **WEBBER WENTZEL**, at the address and details set out below, and at which it will accept notice and service of all documents and process in these proceedings.

TAKE FURTHER NOTICE THAT the answering affidavit of **NICOLE LOUISE FRITZ** will be used in support of the answering affidavit.

DATED AT JOHANNESBURG ON THIS THE 20th DAY OF JANUARY 2023.

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT case no: 360/22
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In the matter between:

THE NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	Applicant
and	
THE DEMOCRATIC ALLIANCE	First Respondent
HELEN SUZMAN FOUNDATION	Second Respondent
AFRIFORUM NPC	Third Respondent

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

I, the undersigned,

NICOLE LOUISE FRITZ

do hereby make oath and state that:

1. I am an adult female director of the second respondent, the Helen Suzman Foundation ("**HSF**"), situated at 6 Sherborne Road, Parktown, Johannesburg. The HSF is cited as the second respondent in the notice of motion under this

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case number dated 12 December 2022 and delivers this affidavit in response to the applicant's application for leave to appeal.

2. I am duly authorised to depose to this affidavit on behalf of the HSF.

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

INTRODUCTION

4. This Court sentenced former President, Mr Jacob Gedleyihlekisa Zuma ("**Mr Zuma**") to 15 months' imprisonment for his "*flagrant and disdainful*" contempt of its order directing him to appear and give evidence before the Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State ("**the Commission**").[1]

5. An order of imprisonment was "*the only appropriate sanction*" given the exceptional features of Mr Zuma's contempt.[2] Mr Zuma's contempt undermined the integrity of this Court, the Judiciary, and the Constitution itself.[3] Anything less than jail time would be to "*effectively sentence the legitimacy of the Judiciary to inevitable decay*".[4]

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[1] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) at para 101 ("**Contempt judgment**").

[2] Ibid at para [102].

[3] Ibid at para [62].

[4] Ibid at para [102].

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6. Notwithstanding this, Mr Zuma was released on medical parole, after an application made on Mr Zuma's behalf, just eight weeks after he started serving his sentence. The decision to place Mr Zuma on medical parole was taken by the then-National Commissioner of Correctional Services ("**the National Commissioner**"), Mr Arthur Fraser ("**Mr Fraser**"), against the recommendation of the Medical Parole Advisory Board ("**the Board**") – the expert body tasked with giving independent medical advice on medical parole applications ("**the decision**"). The result: Mr Zuma was sent home to Nkandla (not a medical facility) in the "*care of his wife who has no medical training*"[5] to see out the rest of his sentence despite plainly not meeting the requirements for medical parole.

7. The High Court[6] and the Supreme Court of Appeal[7] ("**SCA**") both correctly held that the National Commissioner's decision was unlawful and unconstitutional. The High Court, per Matojane J, reviewed and set aside the decision of the erstwhile National Commissioner to place Mr Zuma on medical parole, substituted the decision with a decision rejecting Mr Zuma's application for medical parole and declared that the time Mr Zuma served whilst on medical parole "*should not be counted for the fulfillment of (Mr Zuma)'s sentence of 15 months imposed by the Constitutional Court*" ("**the High Court decision**").[8]

8. The SCA dismissed the appeal by the National Commissioner and Mr Zuma against the High Court decision, but it set aside that part of the order that

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[5] *Democratic Alliance v National Commissioner of Correctional Services and Others; Helen Suzman Foundation v National Commissioner of Correctional Services and Others; Afriforum NPC v National Commissioner of Correctional Services and Others* [2021] ZAPPHC 814; [2022] 2 All SA 134 (GP) ("**High Court judgment**") par 72.

[6] Ibid.

[7] *National Commissioner of Correctional Services and Another v Democratic Alliance and Others (with South African Institute of Race Relations intervening as Amicus Curiae)* [2022] ZASCA 159; [2023] 1 All SA 39 (SCA) ("**SCA judgment**")

[8] High Court judgment at paras [100.2] and [100.3].

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declared that the time Mr Zuma served during his unlawfully granted medical parole does not count towards the 15 month sentence.[9]

9. The National Commissioner now seeks leave to appeal the judgment and order of the SCA to this Court ("**this/the application**"), even though Mr Zuma himself does not.

10. The purpose of this affidavit is to oppose this application.

11. On the question of this Court's jurisdiction:

11.1. Despite the applicant's efforts, this matter does not raise any constitutional issues that fall for determination. It is not in the interests of justice for this Court to entertain the application, given that the National Commissioner's complaints are factual issues, or interpretations of statue, which are not worthy of engaging the jurisdiction of this Court.

11.1.1. The National Commissioner's complains about a variety of alleged factual misdirections by the High Court and the SCA.[10] These complaints which account for most of the founding affidavit, are issues of fact in respect of which this Court has repeatedly held it has no jurisdiction. Even if any of those matters could be subject to this Court's scrutiny, it is apparent that there is no prospect for the applicant to convince this Court that his predecessor's decision was lawful. It was transparently taken with no regard to the law and

[9] Supreme Court of Appeal judgment at para 60.

[10] The alleged factual misdirections include, among others, whether on the facts Dr QSM Mafa's report was considered, whether Dr Mafa applied for parole, whether there was as a matter of fact a finding of terminal disease or physical incapacity, whether the Medical Parole Advisory Board made findings on Mr Zuma's incapacity, and what factors precisely the erstwhile National Commissioner in fact took into account.

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instead based on a series of obviously irrelevant considerations. One material irrelevant consideration is sufficient. On the other hand, it is apparent from the record that relevant factors (including the prospect of reoffending) were not considered. The belated attempt to create a new narrative or come up with additional reasons in the answering papers is unavailing, as the SCA and this Court have held.

11.1.2. The only issue raised on appeal which squarely raises a legal issue is a question of interpretation of section 79 of the Correctional Services Act[11] (**"the CSA"**) – whether the recommendation of the Board under section 79(1)(a) of the CSA on whether there is a terminal disease or physical incapacity is binding on the National Commissioner. But this does not make it a constitutional issue or an arguable point of law of general public importance. This Court has stated that interpretation of statutes is not, as a general proposition, a constitutional issue and does not in itself implicate matters of general public import. The applicant tries to get around these issues by making an imaginative argument that because the CSA in the preamble speaks to giving effect to the Bill of Rights and because the CSA seeks to ensure that the conditions under which inmates are held in prison conduce to human dignity, the matter in this case raises constitutional issues. But this case does not concern a complaint about the conditions under which Mr Zuma was held in prison or his sentencing. The statutory

[11] 111 of 1998.

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interpretation dispute in this matter does not implicate a constitutional issue.

11.2. The application further fails to meet the test in s 167(3)(b)(ii) of the Constitution[12] for the engagement of this Court's general jurisdiction, because the singular point of law raised by the National Commissioner in the founding affidavit is not *arguable*: it is unmeritorious and has no measure of plausibility. The other points he makes are simply related to facts.

12. Accordingly, this Court should dismiss the application, because, for the reasons set out in this affidavit, the HSF submits that it is plainly not in the interests of justice to grant leave to appeal.

13. The National Commissioner's decision to place Mr Zuma on medical parole is unconstitutional and unlawful, as rightly held by the SCA and the High Court. The application for leave to appeal brought by the National Commissioner lacks prospects of success and provides no compelling reason as to why an appeal to this court should be heard.

14. The combination of the National Commissioner's incredulity and continued efforts to contest the jurisdictional facts whilst repeatedly, purposefully and incorrectly interpreting the CSA and its regulations undermine the core functions of the legislative and judicial branches.

15. The application has no prospects of success because:

[12] The Constitution of the Republic of South Africa, 1996 (**"the Constitution"**)

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15.1. The decision of the National Commissioner to grant Mr Zuma medical parole is evidently unlawful and unconstitutional on numerous bases, including:

15.1.1. On a correct interpretation of section 79 of the CSA,[13] the National Commissioner did not have the power to grant Mr Zuma medical parole in the absence of a positive recommendation from the Board. The National Commissioner does not have a discretion to be exercised by him as to whether to accept the recommendation of the Board. This is because the jurisdictional fact in section 79(1)(a) is an objective jurisdictional fact[14] and not one that is to be met 'in the opinion', for example, of the National Commissioner. If the Board determines objectively that there is no terminal disease or condition or physical incapacity, that is the end of the matter. The contention by the National Commissioner that if the Legislature wanted the recommendation to be binding the CSA would have made this clear, is unsupported by the text, context and purpose of section 79(1), (2)(b) and (8)(a) when read with the CSA Regulations, which directs that regulations be made (which must be approved by the Legislature) regarding the process and procedures to be followed in an application for medical parole. The CSA Regulations provide such process and in particular, Regulation 29A(7) specifies that only if the recommendation of the Board is positive can the rest of the jurisdictional facts be considered. The SCA has not elevated the role

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13 Ibid.

14 *Kimberley Junior School & Another v Northern Cape Education Department & Others* 2010 (1) SA 217 (SCA) at paras [12]-[14].

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of the Board above that of the National Commissioner. A sensible interpretation of the CSA and its regulations, given the text, context, and purpose, shows that only the Board is qualified to make a decision on whether the requirement in section 79(1)(a) is met.

15.1.2. The National Commissioner did not find that Mr Zuma has a terminal disease or condition or is physically incapacitated, which are disjunctive jurisdictional facts that must be met.

15.1.3. The National Commissioner failed to consider the risk of Mr Zuma reoffending[15] and he failed to consider whether there are appropriate arrangements for Mr Zuma's supervision, care and treatment in Nkandla.[16]

15.1.4. The National Commissioner took into account irrelevant considerations pertaining to Mr Zuma's position as former President and the riots that followed his incarceration.

15.2. And there is no basis to interfere with the remedial discretion of the High Court and the SCA.

16. The application accordingly falls to be dismissed with costs.

17. In what follows in the remainder of this affidavit, I:

17.1. provide a synopsis of some relevant background facts;

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15 Section 79(1)(b) of the CSA.

16 Section 79(1)(c) of the CSA.

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17.2. briefly discuss the medical parole application process and the statutory and regulatory scheme by which it is regulated;

17.3. set out the bases upon which the decision is unlawful and unconstitutional;

17.4. explain why there is no basis to interfere with the remedial discretion of the courts *a quo*;

17.5. respond *seriatim* to some of the applicant's grounds of appeal but only to the extent that they were not addressed in the thematic responses.

THE BACKGROUND FACTS

18. The origin of this matter is well known to this Court. In June 2021, this Court sentenced Mr Zuma to 15 months in jail for his contempt of court for failing to appear before the Commission.

19. Mr Zuma started serving his sentence on 8 July 2021. However, by the end of the month, one of Mr Zuma's doctors in his South African Military Health Service team, Dr Mafa, applied for medical parole for Mr Zuma.

20. The Board considered the application and concluded that Mr Zuma "*is stable and does not qualify for medical parole according to the Act.*" The recommendation of the Board reads in full:

> "*The MPAB appreciates the assistance from all specialists with provision of the requested reports. The Board also notes and appreciates the use of aliases and has treated all submitted reports as those pertaining to the applicant. From the information received, the applicant suffers from multiple comorbidities. His treatment has been optimised and all conditions have been brought under*

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control. From the available information in the reports, the conclusion reached by the MPAB is that the applicant is stable and does not qualify for medical parole according to the Act. The MPAB is open to consider other information should it become available. The MPAB can only make its recommendation based on the Act." (emphasis added)

21. Notwithstanding the recommendation of the Board, less than two months into his sentence, Mr Zuma was released from prison following the National Commissioner's decision to grant him medical parole in terms of "section 75(7)(a) of the (CSA) as amended, read together with sections 79 and regulation 29A of the CSA". In the decision, the National Commissioner himself recognised that Regulation 29A forms part of what he had to consider in the decision made by him. The question now raised by the National Commissioner as to whether it was correct for the High Court and the SCA to use regulation 29A to interpret section 79 can thus be answered by referring to the decision which itself answers the question in the affirmative. It is unavailing for the National Commissioner to question the application of the regulation by the courts when he himself founded the decision on regulation 29A. In any event, as submitted below, the correct interpretation of the CSA is simply *reinforced* by the Regulations and it is incorrect to state that the High Court or the SCA interpreted the CSA by reference to the Regulations.[17]

22. This very court imposed imprisonment precisely because Mr Zuma "*owes this sentence in respect of violating this Court, nor even just the sanctity of the*

[17] See eg paras [36] and [50] of the SCA judgment.

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Judiciary, but to the nation he once promised to lead and to the Constitution he once vowed to uphold."[18]

23. The sentence was imposed by this Court as a matter of urgency in the rare exercise of its direct access jurisdiction, emphasising that the blatant and callous disregard for the rule of law had to be arrested forthwith.

24. The National Commissioner's decision was plainly unlawful and unconstitutional. Mr Zuma did not satisfy the requirements for medical parole: There was no positive recommendation by the Board and Mr Zuma does not suffer from a terminal disease or physical incapacity. Beyond this, the decision was riddled with irregularities.

25. The decision to grant medical parole effectively drew a line through this very Court's judgment.

26. In what followed, the first, second and third respondents (collectively, "**the respondents**"), separately applied to the High Court, Pretoria, to have the decision reviewed and set aside. The High Court reviewed and set aside the National Commissioner's decision and substituted in its place its decision in terms of section 8(c)(ii)(aa) of the Promotion of Administrative Justice Act,[19] rejecting Mr Zuma's application for medical parole; correctly ruling (in short) that a terminal disease or physical incapacity calls for expert medical determination by the Board.[20] Accordingly, the High Court ordered Mr Zuma's return to jail. The High Court further made a declaratory order that the time that Mr Zuma was

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[18] Contempt judgment at para [128].

[19] 3 of 2000.

[20] High Court judgment paras [57] – [58].

out of jail on medical parole should not be counted for the fulfilment of his sentence.[21]

27. The National Commissioner and Mr Zuma then applied to the SCA to have the High Court decision overturned, but the SCA dismissed the appeal.

28. The National Commissioner now seeks leave to appeal the SCA decision to this Court.

THE MEDICAL PAROLE APPLICATION PROCESS AND STATUTORY FRAMEWORK

29. Section 75 of the CSA sets out the powers, functions and duties of Correctional Supervision and Parole Boards. It is primarily the responsibility of Correctional Supervision and Parole Boards to consider offenders for parole or medical parole.

30. However, the National Commissioner may grant parole or medical parole where the offender is sentenced to a short period. Section 75(7) of the CSA states that the National Commissioner may "*grant ... medical parole to a sentenced offender serving a sentence of incarceration for 24 months or less*". The National Commissioner granted parole in this case because Mr Zuma was serving a sentence of less than 24 months.

31. The National Commissioner's power to grant medical parole under section 75(7) of the CSA must be read with section 79 and regulation 29A of the CSA

[21] High Court judgment para [100.5].

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regulations. Section 79 of the CSA sets out the substantive and procedural requirements for medical parole.

32. Section 79(1) lists three jurisdictional facts for medical parole:

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

32.2. the "*risk of reoffending*" must be low; and

32.3. 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.

33. The requirements in section 79(1) are mandatory and conjunctive.

34. Section 79(2) of the CSA sets out the process for applying for medical parole. Section 79(2)(a) provides that an application for medical parole must be lodged in the prescribed manner by either (i) a medical practitioner or (ii) a sentenced offender or a person acting on the offender's behalf. Where the application is not made by a medical practitioner, it must be accompanied by a written medical report. In this case, the application was made by Mr Zuma's medical practitioner in terms of section 79(2)(a)(i) of the CSA.

35. Section 79(8) requires the Minister to promulgate "regulations regarding the processes and procedures to follow in the consideration and administration of medical parole" and requires those regulations to be approved by Parliament. (emphasis added)

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36. Regulation 29A(3) provides that any head of a correctional centre must refer all applications for medical parole to a correctional medical practitioner for evaluation in terms of section 79 of the CSA. The correctional medical practitioner should make a written recommendation as to whether the criteria prescribed by section 79 are present or not to the Board. The CSA defines a 'correctional medical practitioner' to mean a medical practitioner registered in terms of the Health Professions Act, No.56 of 1974, and appointed in terms of section 3(4) of the CSA which provides for the appointment of correctional officials.

37. Section 79(3)(a) of the CSA establishes the Board, which is tasked with providing independent medical reports on applications for medical parole to the Correctional Supervision and Parole Board, the Minister or, as in this case, the National Commissioner.

38. The Board comprises ten medical doctors who are appointed by the Minister of Justice and Correctional Services. They have the requisite medical expertise to assess whether an applicant for medical parole is terminally ill or is rendered physically incapacitated by disease or illness so as to severely limit daily activity or self-care.

39. In particular, the Board is tasked with assessing whether an inmate suffers from one of the conditions listed in regulation 29A(5)(a) and (b) or any other condition not listed in these regulations, provided it complies with the principles of section 79.

40. Regulation 29A(7) provides that if the Board's recommendation is positive, the National Commissioner must then consider whether the inmate indeed poses a

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low risk of reoffending and whether appropriate arrangements for his supervision, care and treatment had been made.

THE HIGH COURT AND SCA ARE CORRECT: THE NATIONAL COMMISSIONER'S DECISION IS UNLAWFUL

41. I do not propose to rehearse the detailed facts or legal submissions pertaining to this matter. They are set forth extensively in the High Court judgment and the SCA judgment. They make it clear why there is no prospect of success in any further appeal by the applicant.

42. I briefly highlight four independent reasons why the decision is unlawful and unconstitutional. For any and all of these reasons, the National Commissioner's decision is unlawful and was correctly set aside.

First: The High Court and the SCA's interpretation is correct – a positive recommendation by the Board is a prerequisite for the grant of medical parole.

43. The High Court and the SCA correctly held that the National Commissioner may only grant medical parole once the Board has established that the offender is suffering from a terminal disease or physical incapacity.[22]

44. The first substantive requirement for medical parole – whether an offender has a terminal disease or is physically incapacitated – plainly requires expert medical determination. Because this determination is ordinarily outside the expertise and knowledge of the National Commissioner, the CSA establishes the Board which comprises ten medical doctors whose role is to provide an independent medical

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

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report on applications for medical parole. The Board was established to ensure that fairness and objectivity will prevail and to instill confidence in the amended medical parole system. Furthermore, it was created as an independent body to act as a bulwark against the abuse of medical parole and ensure the legitimacy of medical parole as a humanitarian safety valve for deserving and justified cases.

45. This does not mean that the Board decides medical parole but rather that the Board's role is to determine but one of the three substantive requirements. The HSF submits that on a textual, purpose-driven and contextualised interpretation of section 75(7) read with section 79 and understood in the context of 'objective recommendations' in law, it is clear that a positive recommendation by the Board about whether the sentenced offender is suffering from a terminal disease or physical incapacity is a jurisdictional requirement for the National Commissioner's power to grant medical parole; ie it is for the Board to determine first that the offender is suffering from a terminal disease or physical incapacity.

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

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47. The SCA correctly had regard to the history of the amendment of the CSA in interpreting section 79 of the CSA. In explaining the purpose of the establishment of the Board, it highlighted that prior to the amendment—

> "*[t]here was no Board, and the Commissioner thus had the sole power to decide whether a medical condition was one that qualified in terms of the Act for the granting of medical parole. This was open to abuse, as there was no provision for an independent medical opinion to verify the diagnosis by the inmate's treating doctor. The Board was introduced in the 2012 amendment clearly to remedy this concern.*"[23]

48. The words, context and purpose of section 79 taken together, in a unitary exercise, make it plain that the High Court and the SCA's interpretation is correct. The correct interpretation is simply *reinforced* by the Regulations and it is incorrect to state that the High Court or the SCA interpreted the CSA by reference to the regulations.[24] The SCA judgment itself makes this plain. The SCA says that its interpretation is "*fortified by the wording of regulation 29A(7)*".[25]

49. The interpretation contended for by the National Commissioner is remarkable as it would permit medical parole to be afforded to any person whom he (with no medical expertise) deemed to meet exacting medical requirements, even where medical experts have expressly determined otherwise. The National Commissioner's efforts to interpret section 79 to allow himself the power to second-guess a multi-member expert body on the ground of a 'discretion', are an 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

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[23] SCA decision at para [46].

[24] See para [36] of the SCA judgment, for example.

[25] SCA decision at para [50].

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was meant to be the amendment's headline feature. As explained by the SCA, the National Commissioner's interpretation would "*undermine the very purpose for which the Board was created, and would render the provisions of s 79(1)(a) nugatory*".[26]

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

51. But in this case, there was a litany of other material illegalities to which I turn next.

Second: The National Commissioner's decision is irrational and unlawful because he did not determine that Mr Zuma has a terminal disease or physical incapacity

52. Section 79(1) of the CSA sets out objective jurisdictional facts that must be present for medical parole to be granted. If any of the jurisdictional facts are not present, the National Commissioner may not grant medical parole. Even if the National Commission has the power to overrule the Board, he did not find that Mr Zuma satisfies the requirement in section 79(1)(a).

53. Nowhere in the National Commissioner's reasons for his decision is it stated that Mr Zuma suffers from a terminal illness or disease or that Mr Zuma is physically

[26] SCA decision at para [51].

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incapacitated as a result of illness or disease so as to severely limit his ability to engage in daily activity or self care.

54. The National Commissioner's reasons for granting Mr Zuma medical parole are quoted in full at paragraph 40 of the High Court judgment. Instead of finding that the requirement in section 79(1)(a) was satisfied, the National Commissioner granted Mr Zuma medical parole on the grounds that: Mr Zuma is "*79 years old and undeniably a frail person*"; has "*multiple comorbidities*"; has an "*unpredictable health condition*"; and requires specialised treatment that the Department of Correctional Services cannot provide.

55. But old age, comorbidities and an unpredictable health condition are not close to the same as having a terminal disease or physical incapacity. The ordinary meaning of a "terminal disease" is an incurable disease or condition that makes death imminent.[27] Or, as the medical parole application form defines it, "*[a] terminal disease or condition is a condition or illness which is irreversible with poor prognosis and irremediable by available medical treatment but requires continuous palliative care and will lead to imminent death within a reasonable time*." (emphasis added)

56. Moreover, requiring specialised treatment is not a basis to grant medical parole. Section 44 of the CSA already provides a tailored mechanism of "*[t]emporary leave*" from jail if an inmate needs "*treatment*". Indeed, Mr Zuma received treatment at a private hospital before being released on medical parole.

[27] Oxford English Dictionary (online) ("terminal"). The medical definition requires an "irreversible decline in normal function" that sets in "just prior to death". See HPCA Clinical Guidelines (note 25) at p 104.

57. To make matters worse, none of the expert reports upon which the National Commissioner purports to rely in his reasons state that Mr Zuma is terminally ill or physically incapacitated, as correctly found by the High Court.[28] In particular, the Board expressly found the opposite – concluding that Mr Zuma does not meet the requirements for medical parole in terms of the CSA.

58. On the reasons provided by the National Commissioner, the jurisdictional facts necessary for the exercise of his power are absent. Granting medical parole without establishing that the applicant suffers from a terminal disease or is physically incapacitated is arbitrary, irrational and unlawful. The High Court correctly reviewed and set aside the decision on this basis, among others;[29] and the SCA correctly upheld the decision.

59. Moreover, the Commissioner – when defending his decision – misquotes the Board. Whether this was deliberate or not, it further demonstrates the irrationality of the National Commissioner's decision.

60. The National Commissioner said this in his decision:[30]

    61. "*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.*"

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[28] High Court decision at paras [60] - [70].

[29] Ibid at para [71].

[30] Digital Version of Record of Appeals, Core Bundle Volume; p CB42, para 12.4 (emphasis added).

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62. 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:[31]

> 63. *"[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."*

64. 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*".

65. 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".[32] 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.*"[33]

66. 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

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[31] Digital Version of Record of Appeals Core Bundle Volume; p CB32.

[32] Digital Version of Record of Appeals, Core Bundle Volume; CB42, para 12.4.

[33] Digital Version of Record of Appeals, Core Bundle Volume; 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.

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concern of medical parole to begin with (but instead something catered for through "[t]emporary leave" under section 44 of the CSA).[34] But, perhaps most fundamentally, the premise of this reasoning is a finding about Mr Zuma's "specialised care" that the Board simply did not make.

67. 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*".[35] And Nkandla is not a "*specialised*" care facility.[36]

68. The above underscores that, even on the National Commissioner's own reasoning, he fails to find the prerequisites necessary for medical parole and the parole he granted was entirely unrelated to the reasons he – after the fact – sought to create.

Third: The National Commissioner failed to consider the second and third jurisdictional facts – that the risk of reoffending must be low and that there are appropriate arrangements in Nkandla.

69. The National Commissioner's decision does not even mention the second jurisdictional fact for the granting of medical parole set out in section 79(1)(b) of the CSA. There is no evidence that the National Commissioner considered the risk of reoffending at the time of the decision. The rule 53 record shows that the erstwhile National Commissioner did not consider and did not gather any facts to consider whether there is a risk of reoffending. The decision-maker is bound by its own record and cannot supplement it by its *ipse dixit* in answering papers.

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[34] 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.

[35] High Court judgment; Record vol 6 p 1029, para [72].

[36] High Court judgment; Record vol 6 p 1029, para [72].

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70. The risk of reoffending is patently a relevant consideration that the National Commissioner ought to have taken into account. The second jurisdictional fact is by no means a given: as the record reveals, Mr Zuma's contempt of this Court has continued unabated throughout this litigation. The High Court correctly recognised that Mr Zuma "*continues to attack the Constitutional Court while on medical parole*".[37]

71. The failure to consider the second jurisdictional fact is fatal to the legality of the decision, as correctly held by both the High Court[38] and the SCA.[39]

72. The failure to consider the third jurisdictional fact is equally fatal to the lawfulness of the National Commissioner's decision. That fact is that appropriate arrangements for the inmate's supervision, care and treatment in Nkandla must be confirmed. The reasons of the National Commissioner make no mention of the measures put in place by Correctional Services to ensure such supervision, care and treatment. The requirements being conjunctive, the failure by the National Commissioner to apply his mind to all three requirements is also fatal to the decision made.

Fourth: The National Commissioner took into account irrelevant considerations

73. In the reasons provided for his decision to grant Mr Zuma medical parole, the National Commissioner took into account the irrelevant considerations of Mr Zuma's former office as President and the countrywide unrest in July 2021.

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[37] High Court decision at para [73].

[38] High Court decision at para [73].

[39] SCA decision at para [55].

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74. 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*".

75. 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.*"[40]

76. Mr Zuma's former office as President and the riots which took place following his incarceration have no bearing at all in an application for medical parole. They are entirely irrelevant to whether Mr Zuma met the statutory requirements for medical parole.

77. The National Commissioner's consideration of these facts is especially inappropriate because this Court was at pains to make clear in its judgment that "*no person is above the law*".[41] The consideration of these factors violates the bedrock principle of equality before the law.

78. Both the High Court[42] and the SCA[43] correctly held that these factors are irrelevant. The taking account of *any* one of these factors would, and did, render the decision unlawful.[44]

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[40] Digital Version of Record of Appeals, Core Bundle Volume; CB41.

[41] Contempt judgment at para [140].

[42] High Court decision at para [71].

[43] SCA decision at paras [54] to [55].

[44] *Eskom Holdings Limited and Another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA).

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

79. This Court may interfere with the High Court and SCA's exercise of their 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*".[45] This Court will rarely interfere with the remedy, unless there was a misdirection on the legal principles.[46] There was no such misdirection and none has been suggested by the applicant.

80. The setting aside order 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. The National Commissioner's decision is unlawful and had to be set aside. The consequence is that Mr Zuma must return to prison to serve out his sentence. As correctly explained by the SCA, the legal effect of the setting aside order is that "*Mr Zuma's position as it was prior to his release on medical parole will be reinstated.*"[47]

81. In addition, substitution was justified. The High Court and the SCA were well aware of and applied this Court's jurisprudence in *Trencon Construction (Pty) Ltd v Industrial Development Corporation.*[48] Given the proper construction of the

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[45] *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 at para 88).

[46] See for example, Trencon and, *Van Rensburg v AA Mutual Insurance Co Ltd and Mdlalose v Road Accident Fund* at para [14]

[47] SCA decision at para 60.

[48] [2015] ZASCA 22; 2015 (5) SA 245 (CC) 2015 (10) BCLR 1199 (CC) ("***Trencon***").

CSA, the decision is plainly a foregone conclusion. In the absence of a positive recommendation from the Board, the medical parole application must be refused. But even if the National Commissioner retained any final power, he had no facts before him to allow him to grant medical parole to Mr Zuma. The decision was thus likewise a foregone conclusion for this reason.

82. In light of this, there was no specialist knowledge which the High Court did not possess. The application for medical parole as presented to Mr Fraser had to be rejected.

83. As such, there was no misdirection by the High Court as to any principle and none of the other conditions outlined in *Trencon* for interfering with the exercise of a true discretion on appeal present before the SCA or is currently present.

84. There is accordingly no prospect that this Court would interfere with the High Court's and the SCA's exercise of their remedial discretion There is simply no merit in the applicant's proposed appeal.

***SERIATIM* RESPONSE**

85. While the applicant sets forth the bases on which the courts below purportedly misdirected themselves, his complaints are factual issues which do not in any way engage the jurisdiction of this Court;

86. I briefly deal with the specific allegations in the founding affidavit of Mr Makgothi Samuel Thobakgale, only insofar it is necessary.

87. Any averment in the founding affidavit which is not expressly admitted is denied.

Ad paragraph 9.2 – 9.4

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88. I deny that Dr Mafa stated in his report that Mr Zuma was terminally ill (Dr Mafa's key findings are set forth in the SCA judgment), and even if he had, I submit that this would have been irrelevant given that this was overtaken by the Board's determination and recommendation, and Dr Mafa made the application for medical parole on Mr Zuma's behalf; i.e., Dr Mafa is not an independent practitioner. Dr Mafa has also not made any sworn averments to this effect.

Ad paragraph 9.5

89. What the applicant alleges in these paragraphs is misleading. The applicant avers that "*[t]*here *is nowhere, in its recommendation where the MPAB states that Mr JG Zuma is not terminally ill or that he is not physically incapacitated*" merely because the Board did not explicitly include these words in its recommendation, in circumstances where the Board found that Mr Zuma "*is stable and does not qualify for medical parole according to the Act.*"

90. The three jurisdictional requirements for medical parole have been discussed at length in this affidavit. The first jurisdictional requirement is that the sentenced offender must be suffering from a terminal disease or condition or must be physically incapacitated. These are the requirements to qualify for medical parole according to the CSA to which the Board refers.

91. It is apparent from the Board's recommendation as a whole that Mr Zuma is not terminally ill or physically incapacitated. The applicant is clutching at straws.

Ad paragraph 9.14

92. To a question which asked why medical parole should be considered, Dr Mafa answered, vaguely, "medical incapacity". He did not select the other available

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option "physical incapacity". There is no basis to suggest that they are coterminous.

Ad paragraph 9.16

93. It is denied that the National Commissioner considered the risk of reoffending. The risk of reoffending is an enquiry of its own, much like the enquiry pertaining to terminal disease or physical incapacity. The risk of reoffending has its own set of jurisdictional factors necessary for the National Commissioner to consider, provided in section 79(5) of the CSA. These factors include (i) whether, at the time of sentencing, the court was aware of the inmate's medical condition for which he is seeking parole; (ii) the presiding offer's sentencing remarks; (iii) the type of offence for which the inmate seeking parole has been convicted; (iv) the length of the sentence served and still to be served; and (v) the previous criminal record of the offender.

94. None of those were considered and Mr Fraser did not turn his mind to the question of reoffending, and nothing in the rule 53 record suggests that he did, let alone confirms it.

95. Against this backdrop, it is clear that the National Commissioner did not actually consider these factors in coming to his decision to grant medical parole.

Ad paragraph 10.10

96. The claim that the SCA was wrong to find that Mr Zuma did not complete his sentence does not give rise to any issue on appeal. The SCA was considering whether the High Court judgment in 2021 was correct or should be overturned. The SCA correctly ruled that the High Court properly upheld the review

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application and granted the default remedy of retrospective invalidation. What might or might not properly be taken into account by the National Commissioner in due course in respect of further parole applications by Mr Zuma (including the time Mr Zuma spent on unlawful medical parole) is a matter for another day.

CONCLUSION

97. It is not in the interest of justice for this Court to entertain the proposed appeal. The disputes about factual findings do not raise constitutional issues deserving of this Court's attention, and the points of law raised are bad in law and are in no way arguable.

98. The applicant has had two full hearings on the merits and the only person who benefits from further appeals is Mr Zuma, who – as the High Court held – has during his time on medical parole further attacked this Court.

99. Moreover, the judgments in the courts below are clearly correct and there is no prospect of success on appeal.

100. The HSF respectfully requests that the application be dismissed with costs, including the costs of two counsel.

DEPONENT

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at JOHANNESBURG on this the 20th day of January 2023, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

M.E
NLF

COMMISSIONER OF OATHS
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