IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case №: 46468/2021

In the matter between:

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

FIRST RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned

ARTHUR FRASER

Do hereby declare the following under oath and state that:

MA

1. I am an adult male and former National Commissioner of Correctional Services ("the National Commissioner") who is cited as the First Respondent in this matter. At the time when I took the impugned decision, I was occupying the said position as provided for in section 3(3) of the Correctional Services Act 111 of 1998 ("the Act") with my office situated at No. 124 WF Nkomo Street, Poyntons Building, Pretoria, Gauteng Province.

2. The contents of this Answering Affidavit fall within my personal knowledge, unless the context indicates otherwise, and are to the best of my belief and knowledge both true and correct.

3. Any legal submissions made herein are based on the advice of my legal representatives which advice I reasonably believe and accept.

4. By virtue of my previous position as aforesaid, I submit that I have the necessary authority to depose to this Affidavit.

5. I have read the Applicant's Founding Affidavit together with annexures thereto.

NATURE OF THE APPLICATION

6. The Applicant has made an application to the above Honourable Court for an order in the following terms:

MA

PART A

6.1. Dispensing with the forms and service and ordinary time periods provided by the Rules and disposing Part A of this application as one of urgency in terms of Rule 6(12).

6.2. Directing the First Respondent to deliver, under Rule 53, the record of the proceedings sought to be corrected or set aside, being the decision to grant the Fourth Respondent medical parole under section 75(7) of the Correctional Services Act 111 of 1998 ("the Act") within **3 days of this Court's order**, together with such reasons as he is by law required or desires to give or make, with such record including, but not limited to, the documents as referred to in paragraphs 2.1 to 2.9 of the notice of motion.

6.3. Issuing the directions as referred to in paragraphs 3.1 to 3.3 of the notice of motion, for the exchange of pleadings for Part B after the filing of the Record.

6.4. Directing the parties to approach the Deputy Judge President for the allocation of an urgent hearing date for Part B.

6.5. Ordering any Respondent that opposes the relief sought in Part A to pay the Applicant's costs.

MA

6.6. Further and/or alternative relief.

PART B

6.7. Dispensing with the forms and service and ordinary time periods provided in the Rules and disposing of Part B of this application as one of urgency in terms of Rule 6(12).

6.8. Declaring that the First Respondent's decision to grant the Fourth Respondent medical parole under section 75(7) of the Act is unconstitutional and unlawful.

6.9. Setting aside the First Respondent's decision to grant the Fourth Respondent medical parole.

6.10. Substituting the First Respondent's decision to grant the Fourth Respondent medical Parole with a decision rejecting the application, alternatively remitting the decision to the First Respondent.

6.11. Directing that the time that the Fourth Respondent was out of jail on medical parole shall not be counted for the fulfilment of his sentence of 15 months imposed by the Constitutional Court.

MA

6.12. Ordering any Respondent that opposes the relief sought in Part B to pay the Applicant's costs.

6.13. Further and/or alternative just and equitable relief.

7. Before I deal with the allegations made in the Applicant's Founding Affidavit, I intend to raise the following preliminary points:

A. LACK OF URGENCY

8. It is the Applicant's contention that this application should be heard on an urgent basis in terms of Rule 6(12) of the Uniform Rules of Court.

9. I submit that this application is not urgent as it fails to comply with the criteria as set out in the Uniform Rules of this Honourable Court, for dispensing with the forms and service provided for in the rules, in relation to urgent applications.

10. In particular, I submit that Rule 6(12)(b) of this Honourable Court requires an applicant in an urgent application to set forth explicitly the circumstances which he or she avers render the matter urgent and the reasons why he or she claims that he or she could not be afforded substantial redress at the hearing in due course.

MA

11. The Applicant is in short, required to first, expressly set out the circumstances which render this matter urgent and secondly, the reasons why it claims that it cannot obtain proper redress if the matter were to be dealt with in terms of the normal Court Rules. I submit that this application fails to comply with the Rules in this regard.

12. I am advised that an applicant who wishes to rely on the procedure provided for in Rule 6(12)(b) must set out sufficient facts in the founding affidavit to enable the court to decide whether urgent relief should be granted. The Applicant has failed to explicitly furnish this Court with circumstances which it claims render this matter urgent. In an attempt to justify urgency, in paragraph 28 of its founding affidavit, the Applicant is merely alleging that it will not obtain substantial redress at a hearing in due course allegedly mainly, on the basis of the following reasons, which I shall deal with individually below, namely:

12.1. Delaying the review application until a hearing in the ordinary course risks irreparable harm to the rule of law.

12.2. This is no run-of-the-mill exercise of public power as the Constitutional Court found that there was no doubt that the Fourth Respondent is in contempt of Court.

MA

12.3. The National Commissioner has deliberately shrouded his decision in secrecy and has failed to provide substantive reasons or supporting evidence.

13. It is my respectful submission, for the reasons that are set out below, that none of the aforesaid alleged reasons taken singly or cumulatively amount to a rational justification for the curtailment of the time limits prescribed by the Uniform Rules of Court in order to deal with this matter on an urgent basis:

13.1. **AD Irreparable harm to the rule of law**:

13.1.1. It should be stated right at the outset that the Applicant has, in the first place, failed to put this Honourable Court in its confidence as to what prejudice it will suffer if this matter were to be heard as a normal opposed motion application. The Applicant merely argues that delaying the review application until the hearing in ordinary course risks irreparable harm to the rule of law but it has failed to explain in what manner will such irreparable harm cause any prejudice to it.

13.1.2. In support of its contention for the alleged irreparable harm, the Applicant avers, in paragraph 29.1 of its founding affidavit, that the Constitutional Court sentenced the Fourth Respondent to 15 months imprisonment as the necessary

MA

sentence to defend our constitutional democracy, the rule of law and the administration of justice. It further contends that were it not for my decision, the Fourth Respondent would currently be serving that "*constitutionally-necessary sentence*". This contention is misplaced by reason of the following:

13.1.2.1. The Fourth Respondent has not been unconditionally released from incarceration. He is still serving his sentence that was duly imposed by the Constitutional Court albeit under medical parole in the community corrections system;

13.1.2.2. Parole is a form of punishment which is served by an inmate within the system of community corrections in terms of Chapter VI of the Act. Like any other offender who is serving his or her sentence in the community corrections system, the Fourth Respondent is subject to supervision conditions in terms of Section 52 of the Act which will apply to him up until the expiry of his sentence. This, in effect, implies that the Fourth Respondent is not a free man as insinuated by the Applicant;

MA

13.1.2.3. What needs to be properly understood by the Applicant, in this regard, is the fact that the Fourth Respondent is currently serving the same sentence that was imposed on him by the Constitutional Court, and like all sentenced inmates, the Fourth Respondent is entitled to any form of community corrections placement (be it parole or medical parole) as provided for in the Act. The fact that an inmate was sentenced to direct imprisonment does not imply that he or she can never be placed on parole (medical parole in this instance).

13.1.2.4. In light of the aforesaid, it is my respectful submission that irreparable harm to the rule of law as alleged by the Applicant is therefore just a figment of the Applicant's imagination.

13.1.3. The Applicant further contends, in paragraph 29.4 of the founding affidavit that even if the National Commissioner's decision is reviewed and set aside the intervening time that the Fourth Respondent is unlawfully released on parole may still count towards his sentence. The Fourth Respondent, so the argument goes, would have then

MA

benefited from the unlawful reduction of his sentence which would allegedly erode the effectiveness of the Constitutional Court's order. This contention too, is misplaced for the following reasons [Emphasis added]:

13.1.3.1. The Fourth Respondent's sentence has, in no way, been reduced, let alone unlawfully. He is still serving a sentence of 15 months that was imposed on him by the Constitutional Court, albeit, within the community corrections system. The Fourth Respondent's sentence expiry date, regard being had to his Warrant of Committal as was issued by the Constitutional Court, is 7 October 2022. His placement on medical parole has not, in any way whatsoever, interfered with the said date for the expiry of his sentence. [Emphasis added]

13.1.3.2. Moreover, parole is a form of punishment and that is why the Fourth Respondent is currently under the control and supervision of the Department of Correctional Services and, this will be the case until he has effectively served the entire period of the 15 months sentence.

MA

13.1.3.3. The mistake that the Applicant is making is to equate placement under medical parole with the reduction of the sentence that was imposed by the Constitutional Court. Placement on medical parole has not obliterated the sentence that was imposed by the Constitutional Court on the Fourth Respondent. The said sentence is still being effectively served by the Fourth Respondent . [Emphasis added]

13.1.3.4. Accordingly, whether this matter is heard on an urgent basis or is placed on the normal opposed motion court roll, this will in no way erode the effectiveness of the rule of law as alleged by the Applicant. In other words, the effect of the decision of the Constitutional Court on the Fourth Respondent will remain the same irrespective of whether this matter is heard on a normal court roll or urgently.

13.1.3.5. Most importantly, the Applicant will not suffer any prejudice by the placement of this matter on the normal opposed motion court roll for review purposes. I therefore, submit that logic dictates that this matter be heard and dealt with as

MA

normal opposed motion without truncating the forms and service provided for in the rules.

13.1.4. The Applicant further contends, in paragraph 29.5 of the founding affidavit, that the Fourth Respondent's current absence from prison does not accord with the requirements of the Constitutional Court order and that he is not entitled to an unconstitutional reprieve from his sentence. This contention is also misplaced for the following reasons [Emphasis added]:

13.1.4.1. The Fourth Respondent had been hospitalized for a period of over one (1) month due to his deteriorating state of health. Whilst in hospital he was, like any sick inmate, under guard by officials of the Department of Correctional Services ("the Department") on a 24 hour basis. This surely, implies that he was not and he is still not a free person that he used to be prior to his sentencing and he will never be free up until the expiry of the 15 months' sentence that was imposed on him by the Constitutional Court.

13.1.4.2. It is accordingly, not correct to equate the Fourth Respondent's absence from the Correctional

MA

Centre and/or his placement on medical parole as a reprieve from serving his sentence. [Emphasis added]

13.1.4.3. Any contention by the Applicant casting aspersions on my professional and ethical conduct, in the manner that the Applicant has done in par 29.5 of the founding affidavit, borders on defaming my dignity and good name without any shred of evidence.

13.1.5. The Applicant further alleges, in paragraph 29.7 of the founding affidavit, that the relief sought in Part A is urgent allegedly on the basis of the fact that access to the record is needed for the urgent review of my decision. This contention is ill-conceived on the basis of the following:

13.1.5.1. It is, in the first place my submission, on the basis of the submissions that I have already made above that this matter is not urgent. The Applicant has, in any event, failed to set out the circumstances which it avers render this matter urgent and the reasons why it claims that it could not be afforded substantial redress at a hearing

MA

in due course. The reasons provided fail to demonstrate the existence of any urgency.

13.1.5.2. I further find it strange that the Applicant had, in its two letters that are referred to in paragraph 26 of its founding affidavit, set the date of 13 September 2021 as a date on which it expected to be served with a copy of the record. However, without even waiting for the end of the said day (13 September 2021), the Applicant decided to file an application with the above Honourable Court, in a desperate attempt to demonstrate the alleged urgency.

13.1.5.3. I never, at any stage, stated that the Applicant would never receive the record of the proceedings sought to be set aside. This matter could have easily been dealt with in accordance with the normal processes and time frames that are set out in Rule 53 of the Uniform Rules of Court without any prejudice to the Applicant. I therefore, submit that the alleged urgency in relation to the record in order to deal with the review on an urgent basis, is merely self-created.

MA

13.2. **AD This is no run-of-the-mill exercise of public power as the Constitutional Court found that there was no doubt that Mr Zuma is in contempt of Court**:

13.2.1. In amplification of this part of its argument, in paragraph 30.3 of the founding affidavit, the Applicant contends that the Fourth Respondent's imprisonment "*was both vindication and constitutionally and immediately required*". The Applicant further contends that in the Court's view, that was the only way for the Court to rebuild broken confidence in the judiciary that the Fourth Respondent allegedly engineered. The Fourth Respondent, so goes the argument, attacked the judiciary and his attacks were egregious. This contention is misplaced based on the following [Emphasis added]:

13.2.1.1. The Fourth Respondent was indeed imprisoned and whether he is serving his sentence within a Correctional Facility or in the system of Community Corrections does not in any way undermine or erode the effectiveness of the sentence that was imposed by the Constitutional Court. The Constitutional Court exercised its power by sentencing the Fourth

MA

Respondent to incarceration, consequent upon which, he was handed over to the Department of Correctional Services which in turn is sanctioned by the Act to deal with inmates under its control within legal bounds.

13.2.1.2. Any wrong that was committed by the Fourth Respondent (however egregious it was) was properly considered and sanctioned by the Constitutional Court and, it is not for this Court to second guess the appropriateness of the administrator's decision to place the Fourth Respondent on medical parole as long as the decision is one which a reasonable decision-maker would take regard being had to a range of competing factors.

13.2.1.3. The fact that a person was sentenced to incarceration does not imply that he or she can never be placed under any form of Community Corrections. The placement of an offender on parole or medical parole is a discretionary exercise which is legally ordained by the Act. As long as such discretion is exercised in a

MA

judicious manner there is no reason that a court should interfere therewith.

13.2.1.4. I accordingly, insist with my submission that the Applicant's contention does not in any way justify that this matter be dealt with on an urgent basis.

13.3. **AD National Commissioner has deliberately shrouded his decision in secrecy and has failed to provide substantive reasons**:

13.3.1. The Applicant, among others, alleges, in paragraph 31.2, that lack of transparency has consequences for the esteem and respect that our judiciary and state institutions enjoy. The Applicant further contends that if I have good reasons for my decision, the sooner those are revealed the better for me and the country. The Applicant then goes further to allege, in paragraph 31.3, that by electing to keep my reasons away from the sunlight, I have made this matter urgent. This contention is devoid of the truth and baseless on the basis of the following:

13.3.1.1. My decision has never been shrouded in secrecy. Immediately after granting approval for the placement of the Fourth Respondent on

MA

medical parole, a media statement was released by the Department in which it was made known to the public that the Fourth Respondent has been placed on medical parole. It was further mentioned that the said decision was based on medical reasons which was supported by medical reports that were received by the Department and that this was done in terms of the provisions of Section 75 (7)(a) of the Act.

13.3.1.2. In my subsequent interview with the SABC as referred to by the Applicant in its founding affidavit, I stated that I had taken a decision to place the Fourth Respondent on medical parole and that my reasons for doing so were available. I also stated that the record of such reasons would be made available to whoever needs to see it. Running to court on an urgent basis to compel me to make the record available was therefore, a mere desperate public stunt.

13.3.1.3. The allegations regarding my decision being shrouded in secrecy and as such making this matter urgent, is therefore lacking substance and should be rejected by this Court. The record that was at my

MA

disposal was, in any event, delivered to the Applicant, on 4 October 2021, without any opposition.

14. In light of the aforegoing, I submit that the Applicant has failed to make out a case for urgency on this matter and that the alleged urgency is merely self-created. I further submit that the Applicant may obtain relief, if any, at a hearing in due course.

15. It is accordingly, my submission that this matter falls to be struck off the roll with costs for lack of urgency.

B. <u>NON-JOINDER</u>

1. I am advised that the South African Military Health Service ("SAMHS") is entrusted with the responsibility of providing health care services to former and current Presidents of the Republic of South Africa and as such the SAMHS is the institution responsible for the custodianship of the medical records and/or reports of the Fourth Respondent. The SAMHS is therefore a party with a direct and substantial interest in this matter. The Applicant is, in any event, challenging the decision that was taken on the basis of, among others, the reports from the SAMHS team of medical practitioners.

MA

2. I am advised that it is trite law that a party with a direct and substantial interest in a matter must be joined in the proceedings. The Applicant has failed to join SAMHS.

3. This application therefore, falls to be dismissed on the basis of failure to join SAMHS as a party with direct and substantial interest in the matter.

4. Before I deal with the allegations made in the Applicant's Founding Affidavit, I wish to provide the Court with the following brief legal context which I submit is necessary to place my response in the proper context.

C. LEGAL CONTEXT

20. Section 73(4) of the Act provides that a sentenced offender may be placed under correctional supervision, day parole, parole or medical parole before the expiration of his or her term of incarceration. The decision for the placement of the Fourth Respondent on medical parole was taken in terms of the provisions of section 75(7)(a) read with section 79(1) of the Act and also read with the relevant Correctional Services Regulations, in particular, Regulation 29A which regulates the processes and procedures for the placement of offenders on medical parole. Section 75 (7)(a) of the Act provides as follows:

"(7) Despite subsections (1) to (6) the National Commissioner may-

MA

(a) Place under correctional supervision or day parole, or day parole, or grant parole or medical parole to, a sentenced offender serving a sentence of incarceration for 24 months or less and prescribe conditions in terms of section 52…"[Emphasis added]

21. Section 79(1) of the Act provides as follows:

"(1) *Any sentenced offender may be considered for placement on medical parole, by the National Commissioner, the Correctional Supervision and Parole Board or the Minister, as the case may be, if –*

(a) Such offender is suffering from a terminal disease or condition or if such offender is rendered physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care;

(b) the risk of re-offending is low; and

(c) there are appropriate arrangements for the inmate's supervision, care and treatment within the community to which the inmate is to be released."[Emphasis added]

22. Section 79(2)(a) of the Act offers some guidance on the process of the lodging of the application for medical parole and, in this regard, provides as follows:

MA

"(2)(a) *An application for medical parole shall be lodged in the prescribed manner, by-*

(i) A medical practitioner; or

(ii) A sentenced offender or a person acting on his or her behalf."

23. Section 79(2)(b) of the Act provides that an application lodged by a sentenced offender or a person acting on his / her behalf, in accordance with paragraph (a)(ii) (as referred to under paragraph 22 above), shall not be considered by the National Commissioner, the Correctional Supervision and Parole Board or the Minister, as the case may be, if such an application is not supported by a written medical report recommending placement on medical parole.

24. Section 79(2)(c) of the Act further provides that the written medical report (as referred to in paragraph 23 above) must include, amongst others, the provision of –

(i) A complete medical diagnosis and prognosis of the terminal illness or physical incapacity from which the sentenced offender suffers;

(ii) A statement by the medical practitioner indicating whether the offender is so physically incapacitated as to limit daily activity or inmate self-care; and

MA

(iii) Reasons as to why the placement on medical parole should be considered.

25. I am advised that, the proper and correct interpretation of the provisions of section 79(2)(b) of the Act, is to the effect that the written report (as referred to in this section of the Act) is only mandatory in cases where the application for medical parole has been lodged by an offender or a person acting on his behalf in accordance with subsection 79(2)(a)(ii) of the Act as referred to above.

26. Mr Zuma's application for medical parole was lodged by Dr Mafa who was one of the medical practitioners from the South African Military Health Service ("SAMHS") who were providing care and treatment to the Fourth Respondent. Dr Mafa completed Part B of the Medical Parole Application Form ("the Application Form") as an applicant for medical parole[1]. The said Application Form forms part of the record that served before me. I am advised that, on the basis of the fact that the application for medical parole was lodged by a medical practitioner (Dr Mafa), the provisions of section 79(2)(b) of the Act which make it mandatory for the written report to accompany the form do not apply.

27. Dr Mafa, in any event, completed Part C of the Application Form ("Addendum to the Medical Parole Application Form") which on its own constitutes a

[1] See Applicant's Bundle of documents Annexure "**SFA11**" page 10

MA

Medical Report in terms of Correctional Services Regulation 29A(3)[2]. As a result the provisions of section 79(2)(b) of the Act did not apply. A medical practitioner who deals with the application for medical parole in terms of the provisions of Regulation 29A(3) must make an evaluation of the said application for medical parole in accordance with the provisions of section 79 of the Act and make a recommendation. Dr Mafa dealt with the application for medical parole and made a positive recommendation for the Fourth Respondent's placement on medical parole[3].

28. In the Medical Report in terms of the Correctional Services Regulation 29A(3) ("Addendum to the Medical Parole Application Form") Dr Mafa made the following findings, namely:

(i) *The offender is suffering from a terminal disease or condition that is chronic and progressive which has significantly deteriorated*[4]*;*

(ii) *The offender is unable to perform daily activities and self-care and is under full time comprehensive medical care of his medical team.*

(iii) Dr Mafa recommended medical parole as a result of medical/ physical incapacity[5].

---

[2] See Applicant's Bundle of documents Annexure "**SFA11**" pages 11 and 33
[3] See Applicant's Bundle of documents Annexure "**SFA11**" pages 14 and 36 para 6 and 6.1
[4] See Applicant's Bundle of documents Annexure "**SFA11**" page 33 para (d)

N
MA

29. The above facts have been noted and explicitly referred to in paragraph 40 of the Applicant's Supplementary Founding Affidavit.

30. It is furthermore, my submission that when the application for medical parole served before the National Commissioner for decision making purposes it was also accompanied by the report from Dr LJ Mphatswe ("Dr Mphatswe"), a member of the Medical Parole Advisory Board ("MPAB"), who was directed by the MPAB to conduct a medical assessment on the Fourth Respondent and found him to be a suitable candidate for immediate placement on medical parole.

31. The authority to consider and make a decision for the placement of an inmate on medical parole in terms of the provisions of section 75(7)(a) and 79(1) of the Act has, in terms of the provisions of section 97(2) of the Act, been delegated to the level of Head of the Correctional Centre. It is however, submitted that the existence of such delegation did not imply that, as the National Commissioner, I had been divested of the original powers that were bestowed upon me in terms of section 75(7)(a) and section 79(1) of the Act.

32. I am advised that, the relief sought by the Applicant in Part 2 of this application in which the Applicant seeks an order for the review and setting aside of my decision to place the Fourth Respondent on medical parole, falls to be

---

[5] See Applicant's Bundle of documents Annexure "**SFA11**"page 34 paras (f) and (g) read with page 36 paras 6 and 6.1

MA

determined in the light of the above-mentioned provisions of the Act, together with all the submissions that have been made above and guided by the following administrative law principles:

32.1. In circumstances where the decision-maker is given a discretion that is dependent on the consideration of a range of competing factors, the approach to be adopted by the courts in judicial review of administrative action is as follows:

"*The decision must strike a reasonable equilibrium between the different factors but the factors themselves are not determinative of any particular equilibrium. Which equilibrium is the best in the circumstances is left to the decision-maker. The Court's task is merely to determine whether the decision made is one which achieves a reasonable equilibrium in the circumstances*";

32.2. What constitutes a reasonable decision on the part of the decision-maker will depend on the circumstances of each case. In making determinations on reasonableness, the courts "*should take care not to usurp the functions of administrative agencies*", by way of the review of administrative actions "*to prefer their own views as to the correctness of the decision, and thus obliterate the distinction between review and appeal*";

32.3. The role of the courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the law and consistently with the requirements of the controlling legislation. If these requirements are met, and if the decision is one that a reasonable authority could make, the court will not interfere with the decision simply because it disagrees with the decision.

33. Against the aforegoing background, it is submitted that in essence the question for determination by the Honourable Court is whether my decision to place the Fourth Respondent on medical parole is one that a reasonable authority could make, by way of achieving a reasonable equilibrium between the positive factors in favour of the placement of the Fourth Respondent on medical parole and the negative factors which militate against his placement on medical parole.

34. I therefore, consider it appropriate to bring to the attention of the Honourable Court that, in the process of exercising the discretion bestowed upon me in terms of the Act, which discretion had to be exercised judicially, I had to consider the following positive factors that were in favour of the placement of the Fourth Respondent on medical parole, namely that:

34.1 I had to consider the Medical Report that forms part of the Application for Medical Parole that was completed by Dr Mafa, who was attending to the Fourth Respondent's care and treatment, which clearly stated that:

MA

34.1.1 *The Fourth Respondent is suffering from a terminal disease or condition that is chronic and progressive in nature which has significantly deteriorated;*

34.1.2 *The Fourth Respondent was unable to perform daily activities and self-care and under full-time comprehensive medical care of the medical team.*

34.1.3 Dr Mafa recommended medical parole as a result of medical/ physical incapacity.

34.2 On the basis of the above medical findings and facts (together with additional SAMHS medical reports filed as part of the Record), I reasonably believed that the Fourth Respondent's application for medical parole squarely fell within the provisions of section 79(1)(a) of the Act read with Correctional Services Regulation 29A(5)(xvii). The fact that the Fourth Respondent was ill (prior to his hospitalization) and rendered him physically incapacitated, is also confirmed by the Head of the Estcourt Correctional Centre ("the Head of the Centre"). Copies of the Supporting Affidavit of the Head of the Centre and the Confirmatory Affidavit of the Acting Regional Commissioner: Kwazulu-Natal, are attached hereto marked Annexure **"AF 1"** and **"AF2"**, respectively.

MA

34.3 The medical report by Dr L.J Mphatswe, a member of the Medical Parole Advisory Board ("the MPAB"), who was commissioned by the MPAB to assess the Fourth Respondent's state of health, which also forms part of the record that served before me, in particular, with specific reference to the recommendation he made on page 7 thereof, in which, among others, the following is stated[6]:

" *.....The outlook of his complex medical conditions and associated factors in an environment limited to support his optimum care is of extreme concern. More worrisome is the unpredictability of his plausible life threatening cardiac and neurological events. The risk for potential surgery has become in my assessment a personal one albeit a potentially development of a malignant condition ..... In the main and primarily in summation of the total clinical assessment motivated by high risk factors. I wish to recommend that the applicant be released on medical parole with immediate effect, because his clinical picture presents unpredictable health conditions constituting a continuum of clinical conditions. Sufficient evidence has also arisen from the detailed clinical reports submitted by the treating Specialist to support the above stated recommendation*."

34.4 Different reports from the team of SAMHS medical doctors who were attending to the Fourth Respondent's treatment, the last one being a

[6] See Applicant's Bundle of documents Annexure "**SFA11**" page 63

MA

letter from the Surgeon General dated 30 August 2021, paragraphs 2 and 3 of which read as follows[7]:

"2. *It is the view of the Surgeon General that these reports taken individually may paint a picture of a patient whose condition is under control but together reflect a precarious medical situation especially for optimization of each of them.*

3. *We will remember that the patient was fairly optimized prior to his incarceration and it took only four weeks for his condition to deteriorate such that his glucose, blood pressure and kidney function went completely out of kilter. The Surgeon General believes that the patient will be better managed and optimized under different circumstances than presently prevailing."*

34.1.1 It is submitted that the different circumstances referred to in paragraph 3 of the Surgeon General's report as referred to above, means circumstances different from incarceration. This implies that the Fourth Respondent's condition could only be brought under control under hospital care. It is common cause that the Correctional Centre has no capacity to ensure such optimal care.

[7] See Applicant's Bundle of documents Annexure "**SFA11**"page 80

MA

34.1.2 It should be noted that the condition of the Fourth Respondent required that he be under care of a Medic on a 24 hours basis, a situation that was not possible within the Department as the Correctional Centre can only accommodate inmates overnight. Therefore, the Medic could not be allowed to spend twenty four hours with the Fourth Respondent as the Medic could not be accommodated in a correctional facility.

34.5 The Fourth Respondent was considered as being a low risk in terms of re-offending as envisaged in section 79(1)(b) of the Act. It is, in particular, common cause that he is the first time offender and did not pose any security risk to the community into which he was going to be released;

34.6 There were appropriate arrangements for his supervision, care and treatment within the community into which he was to be released, as envisaged in section 79(1)(c) of the Act.

34.6.1 It should be mentioned, in this regard, that the addresses provided where he was going to stay did not pose any difficulty in terms of supervision and monitoring him for compliance with his community corrections conditions. The said addresses were also accessible to the SAMHS for his medical care;

MA

34.6.2 The Fourth Respondent was in hospital for a period starting from 5 August 2021 up until his discharge on 8 September 2021. Upon his discharge from hospital he was taken to a Waterkloof residence where he was under the care of his wife, Ms Bongekile Ngema, a Medic and doctors from SAMHS, attending to his medical needs and providing medical support and supervision.

34.6.3 The Fourth Respondent was, after a week, taken back to his home in Nkandla, with a similar arrangement of doctors from SAMHS, attending to his medical needs and providing medical support and supervision.

34.7 The placement of the Fourth Respondent on medical parole was also going to relieve the Department of the costs of keeping him in incarceration including the costs attendant upon guarding him whilst receiving medical care at a tertiary hospital;

34.8 The Fourth Respondent is 79 years old and frail and was categorized as a low security risk inmate who was not posing any risk to fellow inmates, officials and the public at large; and

34.9 In terms of section 73(6)(Aa) of the Act, the Fourth Respondent would, in any event, have become eligible for consideration for

MA (N)

placement on parole within the next seven (7) weeks (i.e 30 October 2021 upon completing a quarter of his sentence).

35. The only negative factor that militated against the Fourth Respondent's placement on medical parole was the fact that the Medical Parole Advisory Board had not recommended him for placement on medical parole. It is however, important to state that despite not recommending him for medical parole the MPAB, noted the fact that the Fourth Respondent is suffering from multiple comorbidities. Though the MPAB reached a conclusion that the Fourth Respondent's conditions have been stabilized and brought under control, it was clear from the other medical reports, in particular, the report of the Surgeon General which was referred to above, that his conditions were only brought under control through optimized care that he was receiving at an advanced health care facility, whilst the Correctional Centre environment lacked capacity for ensuring such care.

36. The MPAB only made a pronouncement on the Fourth Respondent's comorbidities and failed to make any comment on the findings and recommendation of Dr Mafa, reports submitted by the SAMHS and in particular the report by Dr Mphatswe, who is a delegated member of the MPAB assigned to conduct a medical assessment on the Fourth Respondent, leaving one wondering as to what the rationale was behind the omission thereof. I consider it important to mention that Dr Mafa had made worrying clinical diagnostic findings (which in the interest of the Fourth Respondent's privacy I will not divulge in this affidavit) and, which I submit led him to him

MA

recommending that the Fourth Respondent should be placed on medical parole.

37. Releasing the Fourth Respondent into the care of his family with the advanced medical support from the SAMHS team of medical practitioners was the best option compared to the Fourth Respondent remaining in hospital for a considerable and unforeseeable period of time at a considerable cost to the Department.

38. In light of consideration of a range of competing factors as referred to above, in particular, a comparative analysis of positive factors that favoured his placement on medical parole against those that militated against his placement (of which there was only one), I decided to approve the Fourth Respondent's placement on medical parole. It is my submission that the decision to place the Fourth Respondent on medical parole is a decision which a reasonable decision-maker would have taken.

39. Lastly, I consider it of utmost importance to state that the Fourth Respondent is still serving his sentence as was imposed by the Constitutional Court and he will remain under the control and supervision of the Department until the expiry of his sentence.

40. In what follows I deal, *seriatim*, with the allegations that are contained in the Applicant's Founding Affidavit.

MA

AD PARAGRAPH 1

41. I note the allegations that are made in this paragraph.

AD PARAGRAPH 2

42. Save to deny the allegation that the contents of the Applicant's founding affidavit are all true, I note the rest of the averments that are made in this paragraph.

AD PARAGRAPH 3

43. I note the allegations that are contained in this paragraph. However, it is my submission that the fact that the Constitutional Court imposed a sentence of incarceration on the Fourth Respondent on account of him having been found guilty of contempt of court does not preclude him from being considered and placed on medical parole in terms of the provisions of the Act.

AD PARAGRAPHS 4 - 4.1.9

44. I note the contents of these paragraphs. I however, wish to bring to the attention of the Honourable Court that the record of documents that served before me during the process of the consideration and placement of the Fourth Respondent on medical parole comprised two (2) types of documents, namely, (i) those documents that were generated from within the Department and some medical reports that were in the possession of the Department

MA

which were readily available and (ii) documents in the form of medical records and/or reports which contain classified information on the Fourth Respondent's clinical and medical conditions which are currently in the possession and control of SAMHS who are the custodian of the medical records of the Fourth Respondent as they are entrusted with the responsibility of providing health care services to all former and current Presidents of the Republic of South Africa. The documents forming part of the latter part of the record reside within a classification regime and are, according to the Surgeon General who is the head of SAMHS, classified as top secret and access thereto is subject to security protocols.

45. Part of the record which was in the possession of the Department has already been furnished to the Registrar of this Honourable Court and to the Applicant and it is attached to the Applicant's supplementary affidavit marked Annexure "**SFA11**". Engagements with SAMHS in an effort to secure part of the record that is currently under its custodianship could not be successfully pursued due to time constraints as the time for the filing of the Answering Affidavit fell due whilst the said engagements were unfolding.

AD PARAGRAPH 4.2

46. Save to note the relief sought in Part B of this application which, is in any event opposed, I deny the rest of the allegations that are made in this paragraph. It is, in particular, denied that there is any urgency on this matter and that there is an ongoing and repeated violation of the rule of law and the duties of transparency and rationality. It is my submission for reasons that have been provided above, that the Applicant's contention that the hearing of

MA

Part B of this matter should proceed on expedited timelines once the record has been provided has no substance, particularly, as the Applicant has failed to make out any case of urgency on this matter.

AD PARAGRAPH 5

47. Save to deny that there is a need to truncate the usual timelines as set out in Rule 6 and Rule 53 of the Uniform Rules of Court, I note the rest of the allegations that are made in this paragraph.

AD PARAGRAPHS 6 – 6.3

48. Save to deny the allegation made in paragraph 6.3 to the effect that my decision appears to undermine the Constitutional Court's order, I note the rest of the allegations that are contained in these paragraphs.

AD PARAGRAPHS 7 - 10

49. Save to state the correct name of the street where my former principal place of work as National Commissioner was located (which is wrongly stated in paragraphs 7.3 and 8), I note the rest of the contents of these paragraphs. The correct name of the street where the Department's National Office is situated, where my office used to be is WF Nkomo and not Nokomo.

AD PARAGRAPHS 11 – 15.3

MA

50. I note the allegations that are contained in these paragraphs.

AD PARAGRAPHS 16 - 17

51. Save for denying the allegations that are made in paragraph 17 to the effect that the report on the Fourth Respondent's placement on medical parole remains shrouded in secrecy, I note the rest of the allegations that are contained in these paragraphs. It is my submission that it was not necessary for the Department to include all the details that are raised in these paragraphs, which according to the Applicant are allegedly, lacking in the Department's media statement in which the Fourth Respondent's placement on medical parole was made publicly known. It is my submission that the allegations of secrecy that are made by the Applicant are devoid of the truth and baseless. The fact that such details were not provided in the media statement did not, in any way, mean that there was any secrecy around the Fourth Respondent's placement on medical parole.

AD PARAGRAPHS 18 - 19

52. I note the allegations that are contained in these paragraphs.

AD PARAGRAPHS 20 - 21

MA

53. I note the allegations that are made in these paragraphs. However, I need to provide clarity in relation to the allegations that are made in paragraph 20 to the effect that I allegedly admitted during the interview that I had with the South African Broadcasting Corporation ("the SABC") that the Medical Parole Advisory Board "*did not approve medical parole, because they indicated that Mr Zuma was in a stable condition*". The Medical Parole Advisory Board does not have any decision making competency in relation inmates' placement on medical parole. Their role is to make a recommendation to the National Commissioner in this instance, who has to consider the application on the basis of all the information placed before him or her and make a decision whether or not to grant approval for the placement of an inmate on medical parole. I considered the matter on the basis of the information that was placed before me and the decision to place the Fourth Respondent on medical parole was taken after considering all the relevant information.

AD PARAGRAPH 22

54. I deny the allegations that are made in this paragraph. I do not recall, at any stage, during the interview with the SABC where I stated that the power exercised by the MPAB was one to be exercised by me and that I had delegated that power to the MPAB and subsequently rescinded it. As stated above, the role of the MPAB is to make a recommendation to the decision making authority which, in this instance, was me. The MPAB made a recommendation to me, as the National Commissioner, and I took the decision in terms of the authority conferred upon me by the Act.

MA

AD PARAGRAPHS 23 - 25

55. I note the allegations that are contained in these paragraphs. I however, need to mention in relation to the allegations that are made in paragraph 25 under reply that I have not, at any stage, intimated that I would oppose any request for the disclosure or production of the record. I accordingly, consider the allegations that are contained in these paragraphs unnecessary.

AD PARAGRAPHS 26 - 27

56. Save to deny the allegation that is made in paragraph 27 under reply to the effect that I did not bother to reply to the Applicant's two letters as referred to in paragraph 26 and that, the Applicant approached this Court as soon as possible after the deadline that I was given by the Applicant to deliver the record, had expired, I admit that the Applicant indeed wrote two letters to my office in which a demand was made for the delivery of the record. I deem it appropriate to bring to the attention of the above Honourable Court that the first letter dated 6 September 2021 had given my office up until 13 September 2021 to furnish the Applicant with a copy of the record, whilst the second letter dated 9 September 2021 which made a similar demand was served on the Department on 13 September 2021. The Applicant's notice of motion is dated 13 September 2021.

MA

57. The Applicant did not wait any minute to determine if there was any response forthcoming in relation to its demand for the record, before approaching the Court. I therefore, deny the allegation made by the Applicant to the effect that the Applicant approached this Honourable Court as soon as possible after the deadline that I was given, had expired. The last letter and the application to this Honourable Court were, seemingly, done simultaneously. I further deny that there was any need for the second letter as it was drafted and delivered before the 13th of September 2021 could pass, which was according to the first letter, the day for the delivery of the record.

AD PARAGRAPHS 28 – 29

58. I deny the allegations that are contained in these paragraphs. It is, in particular, denied that this matter is urgent, that the Applicant will not obtain substantial redress at a hearing in due course and that the delay in the review application will cause irreparable harm to the rule of law.

59. I respectfully refer the above Honourable Court to the submissions that I have made under urgency above in relation to these allegations.

AD PARAGRAPHS 29.1 – 29.3

60. I note the allegations that are made in these paragraphs. It is however, deemed necessary to repeat the following as already stated under urgency above.

MA

61. It is true that the Constitutional Court sentenced the Fourth Respondent to 15 months imprisonment. However, it is incorrect for the Applicant to think that just because the Constitutional Court imposed the said sentence, the Fourth Respondent cannot be considered for placement on medical parole if he meets the requirements for such placement. It is furthermore, submitted that it is incorrect for the Applicant to think that the sentence imposed by the Constitutional Court is the only so-called *"constitutionally-necessary sentence".* As stated above, the following is worth noting with regard to the Fourth Respondent's placement on medical parole:

61.1 The Fourth Respondent has not been released from serving his sentence, he has just been placed on medical parole and is still effectively serving his sentence. This is the same sentence that was duly imposed upon him by the Constitutional Court albeit under the system of community corrections;

61.2 Parole is a form of punishment which is served by an inmate within the system of community corrections in terms of Chapter VI of the Act. Like any other offender who is serving his or her sentence in the community corrections system, the Fourth Respondent is subject to supervision and monitoring conditions in terms of Section 52 of the Act which will apply to him up until the expiry of his sentence; and

MA

61.3 Like all sentenced inmates the Fourth Respondent is entitled to be considered for any form of community corrections placement (be it parole or medical parole) as provided for in the Act. The fact that an inmate was sentenced to direct imprisonment does not imply that he or she can never be placed on parole.

62. In light of the aforesaid, it is my respectful submission that the Applicant's contention that the Fourth Respondent's placement on medical parole will cause irreparable harm to the rule of law is totally misconceived and should be rejected by the above Honourable Court.

AD PARAGRAPH 29.4

63. I deny the allegations that are contained in this paragraph. It is, in particular, denied that the Fourth Respondent was unlawfully released on medical parole and that even if my decision is reviewed and set aside he would have benefited from the unlawful reduction of his sentence which would allegedly erode the effectiveness of the Constitutional Court's order. This contention is totally misplaced for the following reasons:

63.1 The Fourth Respondent's sentence has, in no way, been reduced, let alone unlawfully. He is still serving a sentence of 15 months that was imposed on him by the Constitutional Court. Moreover, parole is a form of punishment and that is why the Fourth Respondent is currently under the control and supervision of the Department of

MA

Correctional Services and, this will be the case until he has effectively served the entire period of the 15 month sentence.

63.2 The mistake that the Applicant is making is to equate placement under medical parole with the reduction of the sentence that was imposed by the Constitutional Court or the obliteration of the sentence that was imposed by the Constitutional Court on the Fourth Respondent. This is not the case.

63.3 Whether this matter is heard on an urgent basis or is placed on the normal opposed motion court roll, this will in no way erode the effectiveness of the rule of law as alleged by the Applicant. The effect of the decision of the Constitutional Court on the Fourth Respondent will remain the same irrespective of whether this matter is heard on a normal court roll or not. Most importantly, the Applicant will not suffer any prejudice by the placement of this matter on the normal opposed motion court roll for review purposes.

AD PARAGRAPH 29.5

64. I deny the allegations that are made in this paragraph. The Fourth Respondent's placement on medical parole did not entitle or grant him any unconstitutional reprieve from his sentence. It is furthermore, incorrect to contend that he is, in effect, the cause of any illegality. I accordingly, deem it necessary to state the following in relation to the contentions made by the Applicant in this paragraph:

MA

64.1. The contentions that are made by the Applicant in this paragraph are insensitive and inhumane. The Fourth Respondent had been hospitalized for a period of over one (1) month due to his deteriorating health status and I am advised that he is currently recuperating from home. Whilst in hospital he was, like any sick inmate, under guard by officials of the Department on a 24 hour basis. This surely, implies that he is not a free person that he used to be prior to his sentencing and he will never be free up until the expiry of the 15 month sentence that was imposed on him by the Constitutional Court.

64.2. It is accordingly, not correct to equate the Fourth Respondent's absence from the Correctional Centre and/or his placement on medical parole as a reprieve from serving his sentence.

AD PARAGRAPHS 29.6 – 29.7

65. I deny the allegations that are contained in these paragraphs. The contention made in paragraph 29.6 under reply, to the effect that the Applicant will not obtain substantial redress in a hearing in due course, is for reasons, that have already been stated above, ill-conceived. Furthermore, the contention made in the same paragraph to the effect that if my decision is unlawful the effluxion of time should not be allowed to effect a *de facto* erosion of the Fourth Respondent's sentence is incorrect and have no legal basis.

MA

66. As stated above, the Fourth Respondent is serving the sentence that was imposed on him by the Constitutional Court. Whether this matter is heard on an urgent basis or is placed on the normal opposed motion court roll, this will in no way erode the effectiveness of the rule of law or the sentence that was originally imposed on him. The effect of the decision of the Constitutional Court on the Fourth Respondent will remain the same irrespective of whether this matter is heard on a normal court roll or not.

67. It is for the aforesaid reason that it is my submission that this matter is not urgent as alleged by the Applicant and therefore, have to be dealt with in accordance with the normal processes and time frames that are set out in Rule 53 of the Uniform Rules of Court.

AD PARAGRAPHS 30 – 30.7

68. Save to deny the allegation made in paragraph 30 under reply, to the effect that the vindication of the rule of law should not be left to wait, I note the rest of all the emotionally charged allegations that are made in paragraphs 30.1 – 30.6 under reply. I consider it appropriate to state the following in relation to the allegations that are made in the aforesaid paragraphs:

68.1. The Fourth Respondent was indeed found guilty of the crime of contempt of court and committed to incarceration. However, whether he is serving his sentence inside a correctional facility or in the system of community corrections does not in any way undermine or erode the

MA (N)

effectiveness of the sentence that was imposed by the Constitutional Court.

68.2. Any wrong that was committed by the Fourth Respondent was properly considered and sanctioned by the Constitutional Court and, it is not for this court to second guess the appropriateness of the administrator's decision to place the Fourth Respondent on medical parole as long as the decision is one which a reasonable decision-maker would have taken regard being had to a range of competing factors that had to be considered.

68.3. The fact that a person was sentenced to incarceration does not imply that he or she can never be placed under any form of community corrections. The placement of an offender on parole or medical parole is a discretionary exercise which is legally ordained by the Correctional Services Act. As long as such discretion is exercised in a judicious manner there is no reason that a court would interfere therewith.

68.4. The allegation made in paragraph 30.7 under reply to the effect that I overruled the MPAB, is unfounded. I repeat the submission that I have made above to the effect that the MPAB, made a recommendation which I had to consider on the basis of all the information that was placed before me.

MA

68.5. I accordingly, submit that all the contentions that are made by the Applicant in these paragraphs are baseless and have to be rejected by this Honourable Court.

AD PARAGRAPHS 30.7 – 30.9

69. I note the allegations that are made in these paragraphs. It is however, my submission that it is gratuitous for the Applicant to equate the Fourth Respondent's placement on medical parole with that of Mr Shabir Shaik without providing any shred of evidence to support such allegations. It is, in particular, incorrect to summarily conclude as alleged in paragraph 30.8 that like the Fourth Respondent, Mr Shaik was granted medical parole because he was allegedly suffering from a terminal illness. It is wrong to equate the Fourth Respondent's health condition with that of Mr Shaik without providing any evidence in support thereof.

AD PARAGRAPH 31 - 31.3

70. I deny the allegations that are contained in these paragraphs and wish to state the following in response thereto:

70.1. My decision has never been shrouded in secrecy. Immediately after granting approval for the placement of the Fourth Respondent on medical parole, a media statement was released by the Department in which it was made known to the public that the Fourth Respondent has been placed on medical parole. It was further mentioned that the

MA

said decision was based on medical reasons which were supported by a medical report that was received by the Department and that this was done in terms of the provisions of the relevant provisions of the Act.

70.2. In my subsequent interview with the SABC as referred to in the Applicant's founding affidavit, I stated categorically that I had taken a decision to place the Fourth Respondent on medical parole and that my reasons for doing so were available. I also stated that the record of such reasons would be made available to whoever needs to see it.

AD PARAGRAPHS 32

71. I deny the allegations that are contained in this paragraph. I repeat the submissions that I have already made above to the effect that this matter is not urgent and that running to court on an urgent basis to compel me to make the record available was just a mere desperate public stunt.

AD PARAGRAPHS 33 - 36

72. I note the allegations that are made in these paragraphs.

AD PARAGRAPHS 37 – 37.3

73. Save to deny the allegation that is made in paragraph 37.2 under reply, to the effect that the informed consent, in terms of section 79(4)(a)(i) of the Act, that was provided by the Fourth Respondent for allowing disclosure of his medical

MA

information, to the extent necessary, in order to process his application for medical parole, extends to the process of the review application, I note the rest of the allegations that are contained in these paragraphs. It is my submission that the informed consent that was provided by the Fourth Respondent only applies to the processing of his application for medical parole. The signing of a confidentiality regime, as referred to in paragraph 37.3, is the only reasonable way possible for the parties to be able to have access to and deal with the Fourth Respondent's classified medical records in a responsible manner.

AD PARAGRAPHS 38 - 40

74. Save to deny the allegations that are made in paragraphs 39 and 40 under reply, I note the rest of the allegations that are contained in paragraph 38. It is, in particular, denied that there are at least two basis for this court to find that my decision is unconstitutional and unlawful and, that the first of such alleged basis is that my decision was *ultra vires* the powers conferred upon me under the Act. Further submissions in this regard will be made hereunder in response to the Applicant's amplification of its allegations on this issue.

AD PARAGRAPHS 40.1 – 40.4

75. Save to deny the allegations that are contained in paragraph 40.4, I note the rest of the allegations that are contained in these paragraphs. I in particular, deny the allegation made in paragraph 40.4 which seeks to suggest that terminal illness is the only factor that has to be considered by the MPAB.

MA

Physical incapacity as a result of injury, disease or illness which severely limit daily activity or an inmate self-care is also a factor to be considered. I further deny the contention made in the said paragraph to the effect that the National Commissioner may only exercise the discretion conferred upon him, in terms of section 75(7)(a) and 79(1), to grant an offender medical parole when there is a positive recommendation by the MPAB in favour of the placement on medical parole.

76. The proper approach (which is now settled law) to the interpretation of statutory provisions is as follows:

76.1 Consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; and the apparent purpose to which the provision is directed;

76.2 In the interpretation of the statutory provisions, a sensible meaning is to be preferred to one that undermines the apparent purpose of the provision;

76.3 The point of departure is the language of the statutory provision, read in context and having regard to the purpose of the provision;

76.4 In the interpretation of statutory provisions, from the outset one considers the context and the language together, with neither predominating over the other.

MA

77. In its proper contextual and purpose driven interpretation section 79(1) read with section 75(7)(a) of the Act confers a discretion on the National Commissioner to place an offender on medical parole if:

77.1 Such offender is suffering from a terminal disease or condition or if such offender is rendered physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care;

77.2 The risk of re-offending is low; and

77.3 There are appropriate arrangements for the inmate's supervision, care and treatment within the community to which the inmate is to be released." [Emphasis added]

78. I am advised that the fact that the Act confers a discretion on the National Commissioner in the consideration of an offender's application for placement on medical parole implies that it is not correct that a positive recommendation is an absolute prerequisite for the National Commissioner to grant approval for an offender to be placed on medical parole.

AD PARAGRAPHS 40.4.1 – 40.5

MA

79. Save to note the allegations that are made in paragraph 40.4.1 to the effect that the MPAB has the necessary expertise to determine the existence of a terminal illness and the allegations that are contained in paragraph 40.4.2 of the founding affidavit, I deny the rest of the allegations which are contained in these paragraphs. It should, however, be mentioned that terminal illness is not the only factor that the MPAB may determine as section 79(1)(a) also refers to a physical incapacity as a result of injury, disease or illness which severely limit daily activity or an inmate self-care.

80. As stated above, the notion expressed by the Applicant in paragraph 40.4.4 to the effect that the Act does not allow the National Commissioner to overrule the MPAB's recommendation is not correct. It should be clearly stated that the MPAB and the National Commissioner have two distinct responsibilities in terms of the Act and the relevant Regulations, namely, the making of recommendation which has to be done by the MPAB and decision-making which is the National Commissioner's prerogative. Approval of the placement of an offender on medical parole despite the MPAB not having made a positive recommendation does not amount to the overruling of the MPAB as the Act confers a discretion on the National Commissioner.

81. Such a decision is taken, through consideration of a range of factors in favour of and against the placement of an offender on medical parole, in particular, regard being had to the three jurisdictional factors referred to in section 79(1). I therefore, respectfully refer the above Honourable Court to the submissions

MA (N)

that I made above in relation to the factors that I considered in the process of consideration of the placement of the Fourth Respondent on medical parole.

82. The Applicant's contention in paragraph 40.5 to the effect that my decision was unconstitutional and unlawful as, I allegedly exceeded my powers, is accordingly, incorrect and falls to be rejected by the Court.

AD PARAGRAPHS 41 – 41.3

83. I deny the allegations that are contained in these paragraphs. It is, in particular, denied that I acted irrationally and unreasonable in allegedly overruling the MPAB as I have also allegedly failed to provide reasons for doing so. As stated above, a copy of my reasons for approval of the placement of the Fourth Respondent on medical parole has been furnished to this Honourable Court and the Applicant together with part of the record that was in the possession of the Department, save for that part of the record that was in the possession of the South African Military Health Service.

84. I accordingly, deny that my decision was unconstitutional and unlawful as alleged in paragraph 41.3 under reply.

AD PARAGRAPHS 42 – 43

85. I deny the allegations that are contained in these paragraphs. I specifically deny the allegation that this is a rare case where substitution of my decision

MA

for that of the Honourable Court would be appropriate. The Applicant has, in any event, failed to substantiate its contentions in this regard. Furthermore, I deny the suggestion made in paragraph 43 under reply, to the effect that there is any hiatus in the Fourth Respondent's sentence as a result of his placement under medical parole.

AD PARAGRAPHS 44 – 45

86. I note the allegations that are contained in these paragraphs. I submit that Part A was not opposed. As a result, there is no need for this court to issue any order in relation to part A.

87. I submit that the Applicant has failed to make out a case for relief sought in the Notice of Motion.

AD SUPPLEMENTARY AFFIDAVIT

AD PARAGRAPHS 1 - 2

88. Save to deny that all the contents of the Applicant's Supplementary Founding Affidavit are true, I note the rest of the allegations that are contained in these paragraphs.

AD PARAGRAPHS 3 – 4

MA

89. I note the allegations that are contained in these paragraphs.

AD PARAGRAPHS 5 – 10.4

90. Save to deny that my decision to place the Fourth Respondent on medical parole is susceptible to being declared unlawful as suggested in paragraph 5, I note the rest of the allegations that are contained in these paragraphs. I insist, for reasons that I have already stated above, that my decision was not unlawful.

AD PARAGRAPHS 11 – 18.3

91. I note the allegations that are contained in these paragraphs. I consider it appropriate to provide clarity to the above Honourable Court that the date of the 28th of September 2021 which was initially communicated to the Applicants as the date on which the record would be provided was subject to the Department being able to secure all the documents that formed part of the complete record of the proceedings. As has already been stated above, the rest of the record which contain classified medical documents is currently in the possession of the South African Military Health Service and not in the Department's possession. The directives that were to be requested from the Deputy Judge President were only going to be requested when my legal team were in possession of the documents from SAMHS. There was no need to seek such directives anymore as the legal team did not have such documents.

MA

AD PARAGRAPHS 19 - 23

92. I note the allegations that are contained in these paragraphs. However, it needs to be mentioned that there was no need for the Applicant to demand a schedule of the material or documents that could not be provided as part of the non-controversial record because, at that stage, all the Applicants had already been apprised at the Judicial Case Management Meeting which was held with the Honourable Deputy Judge President, on 30 September 2021, of the fact that the part of the record that could not be provided comprised the Fourth Respondent's classified medical records that were with SAMHS.

93. It is also considered disingenuous of the Applicant to allege in paragraph 23 under reply, that the State Attorney did not respond to the HSF'S proposed confidentiality regime within the 48-hours deadline – ignoring the directive of the Deputy Judge President requiring meaningful engagement. The Applicant was well aware of the fact that the office of the State Attorney had a problem of their email system that is down and not functional. It is not true that the Deputy Judge President's directive was ignored. A copy of the response that was provided to the Applicants dated 6 October 2021, is attached hereto marked Annexure "**AF3**".

AD PARAGRAPHS 24 - 26

94. I note the allegations that are contained in these paragraphs. I however, consider important to state that the option of Rule 35 was more appropriate

MA

for the Applicants to exercise. The option that was available to the Department was to launch an urgent application to join the South African Military Health Service and/or the Surgeon General as a party who has a direct and substantial interest in the matter. However, this was considered as not the best option regard being had to the constitutional principles of co-operative governance and sound intergovernmental relations in terms of which legal proceedings between organs of state must be avoided. An urgent letter was written by the Acting National Commissioner to request the assistance of the Secretary for Defence in facilitating the process of securing the classified documents that are currently in SAMHS's possession. Unfortunately, the time for the filing of the Answering Affidavits fell due before the matter could be resolved.

AD PARAGRAPHS 27 - 30

95. Save to deny the allegations that are made in paragraphs 27 and 28 to the effect that my decision to approve the placement of the Fourth Respondent on medical parole was *ultra vires* the powers conferred upon me by the Act and that it was also unreasonable and irrational, I note the rest of the allegations that are contained in these paragraphs.

AD PARAGRAPHS 31 - 38

96. I note the allegations that are contained in these paragraphs.

MA (N)

AD PARAGRAPHS 39 - 42

97. I note the allegations that are contained in these paragraphs. I consider it important, in particular, to respond to the allegations that are made by the Applicant in paragraphs 41 and 42 under reply. In relation to the allegations made in paragraph 41, it is true that Dr Mafa did not explain in the form for the application for medical parole as to why the Fourth Respondent was under the care of SAMHS instead of the care of the Department. However, I submit that in a letter from SAMHS dated 9 July 2021 to which the Applicant, in any event, refers in paragraph 34 of its supplementary founding affidavit, the following is clearly stated in paragraph 1 thereof:

"*The South African Military Health Service has the sole mandate and responsibility of assuring and giving medical support and services to Mr Zuma.*"

98. The aforesaid letter explains the reason why the Fourth Respondent was under the care of SAMHS instead of the care of the Department. Secondly, it is my submission that according to reports from SAMHS which have been referred to by the Applicant, it is clear that the Fourth Respondent was ill. The Correctional Centre only have professional nurses in its employ, whilst SAMHS have a team of medical doctors who, as the Applicant knows very well, have advanced knowledge and skills in the health profession.

MA

99. The issue of the 79(2) written report as referred to in paragraph 42 has already been addressed under the section of this Affidavit that deals with the legal context.

AD PARAGRAPHS 43 - 50

100. I note the allegations that are contained in these paragraphs. However, I consider it appropriate to state with regard to the allegations that are made in paragraph 50 under reply, that whilst the social worker, Ms Mthonti indicates in her report that she had a consultation with Ms Bongekile Zuma about the suitability of the residence in Pretoria, it is clear from the form that is referred to by the Applicant in paragraph 46 of the supplementary founding affidavit that the official from the Community Corrections Office personally visited the residence at the Fourth Respondent's Nkandla Homestead where Ms Sizakele Zuma signed the "Confirmation of Address and undertaking for care form" in which form the Nkandla residence is confirmed as suitable.

AD PARAGRAPHS 51 - 69

101. I note the allegations that are contained in these paragraphs. I however, need to provide clarity in relation to the allegations that are made in paragraphs 63 and 69 under reply. The recommendation (not the decision of the MPAB of 26 August 2021) as referred to in paragraph 63 of the supplementary founding affidavit was, in fact, communicated to the Estcourt Correctional Centre on 27 August 2021, by the Office of the Chief Deputy Commissioner: Incarceration

MA

and Corrections, Mr MS Thobakgale and not by the MPAB. With regard to the allegations that are made in paragraph 69, I submit that I took the decision to place the Fourth Respondent on medical parole after considering all the information that was placed before me. I did not overrule the MPAB as alleged in paragraph 69 of the supplementary founding affidavit.

AD PARAGRAPHS 70 – 78

102. I note the allegations that are contained in these paragraphs. It is however, my submission, in relation to paragraph 70 of the supplementary founding affidavit, that, a copy of my decision appears as item 18 in Annexure "**SFA11**" of the Applicant's bundle of documents and not as item 17 as alleged at the end of paragraph 70 under reply. With regard to the allegations that are made in paragraph 76, it is my submission that paragraph 12 (inclusive of its sub-paragraphs) of the report that contain the reasons for my decision to place the Fourth Respondent on medical parole which appears on page 75 of Annexure "**SFA11**" of the Applicant's bundle of documents provides some clarity on the relevant and available information that was placed at my disposal. However, I submit that I have, in any event, provided more clarity above on the relevant information that I considered.

AD PARAGRAPHS 79 – 82

103. I deny the allegations that are made in these paragraphs. I in particular, deny that my decision was *ultra vires* the powers that were conferred upon me by

MA

the Act as National Commissioner, and that the MPAB determined that the Fourth Respondent is neither terminally ill nor physically incapacitated. I submit that the recommendation of the MPAB is rather silent on these issues. It among others, only state the following:

"*...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 quality for medical parole according to the Act. The MPAB is open to consider other information, should it be available. The MPAB can only make its recommendation based on the Act.*"

104. As already stated above, Dr Mafa made findings and recommended that the Fourth Respondent be placed on medical parole. However, the MPAB recommendation did not make any pronouncements on the said findings, nor that of the SAMHS medical reports and the medical report compiled by Dr Mphatswe. On the basis of the submissions that I have already made above including the following, I specifically, deny that my decision was *ultra vires* or that I committed an error of law as, I allegedly overruled the MPAB:

104.1. As an inmate, the Fourth Respondent was responsible for the upkeep of his cell (cleaning and make his bed) and according to the Supporting Affidavit of the Head of the Centre (Annexure "**AF1**"), the Fourth Respondent was weak and unable to perform these daily

MA

essential tasks. The nursing staff had to help him with the upkeep of his cell. This was a sign of incapacity. One does not have to be a medical doctor to witness incapacity to perform daily activities.

104.2. The Fourth Respondent was incarcerated in the hospital holding cell. As a result, should something have happened at night whilst he was without any support or necessary medical attention, , any delay in attending to him could have potentially resulted in a fatality and subsequent significant reputational damage to the Department and government at large.

105. I therefore, submit that my decision was neither *ultra vires* nor influenced by an error of law as alleged by the Applicant.

AD PARAGRAPHS 83 – 88

106. I deny the allegations that are contained in these paragraphs. It is my submission that my decision was taken having regard to all the jurisdictional facts as provided for in section 79(1)(a). In amplification hereof I need to bring the following to the attention of the Honourable Court:

107. As stated above, in the Medical Report in terms of the Correctional Services Regulation 29A(3) ("Addendum to the Medical Parole Application Form") Dr Mafa made the following findings, namely:

MA (N)

(i) The offender is suffering from a terminal disease or condition that is chronic and progressive which has significantly deteriorated;

(ii) The offender is unable to perform daily activities and self-care and is under full time comprehensive medical care of medical team.

(iii) Dr Mafa recommended medical parole as a result of medical/ physical incapacity.

108. The above facts have been noted and explicitly referred to in paragraph 40 of the Applicant's Supplementary Founding Affidavit.

109. The fact that the Fourth Respondent was incapable of performing his daily activities is also clearly stated in the Supporting Affidavit of the Head of the Correctional Centre (Annexure **"AF1"**);

110. These are some of the factors that I considered in the process of the consideration of the placement of the Fourth Respondent on medical parole. It is also clear from paragraph 12 of my reasons that the list of factors listed thereunder is not exhaustive[8]. Moreover, in paragraph 13 of my reasons, I specifically stated that I was satisfied that the Fourth Respondent meets the criteria set out in section 79(1) of the Act. It is inconceivable that I would have

[8] See Applicant's bundle of documents Annexure "**SFA11**" page 75 para 12

MA

stated the aforesaid, if I had not satisfied myself that the jurisdictional factors that are set out in the aforesaid section of the Act are indeed met.

111. I submit that I considered all the relevant and material factors before I took the decision. The fact that they are not specifically and individually stated in my reasons does not detract from the fact that they were indeed properly considered.

112. I therefore, submit that the Applicant's contention that on my reasons the jurisdictional facts necessary for the exercise of my power are absent, has no substance and stand to be rejected by this Honourable Court.

AD PARAGRAPHS 89 – 93

113. I deny the allegations that are contained in these paragraphs. It is correct that a section 79(2) written report recommending placement on medical parole is a jurisdictional fact necessary for the consideration of medical parole. However, it is my submission, for the following reasons, that it is incorrect for the Applicant to contend that the said report was mandatory in relation to Mr Zuma's application for medical parole:

113.1. Section 79(2)(a) provides as follows:

> *"An application for medical parole shall be lodged in the prescribed manner, by-*

MA (N)

(i) A medical practitioner; or

(ii) A sentenced offender or a person acting on his or her behalf.

114. In terms of the provisions of section 79(2)(b) of the Act, such report is only mandatory in cases where the application for medical parole has been lodged by an offender or a person acting on his behalf as envisaged in subsection 2(a)(ii) of the Act which is referred to above.

115. The Fourth Respondent's application for medical parole was lodged by Dr Mafa who was one of the medical practitioners from the South African Military Health Service ("SAMHS") who were providing care and treatment to the Fourth Respondent. Dr Mafa completed Part B of the Medical Parole Application Form ("the Application Form") as an applicant for medical parole. I am advised that, on the basis of the fact that the application for medical parole was lodged by a medical practitioner (Dr Mafa), the provisions of section 79(2)(b) of the Act which make it mandatory for the written report to accompany the form do not apply.

116. Dr Mafa also completed Part C of the Application Form ("Addendum to the Medical Parole Application Form") which constitutes a Medical Report in terms of Correctional Services Regulation 29A(3). A medical practitioner who deals with the application for medical parole in terms of the provisions of Regulation 29A(3) must make an evaluation of the said application for medical parole in

MA

accordance with the provisions of section 79 of the Act and make a recommendation. Dr Mafa dealt with the application for medical parole and made a positive recommendation for the placement of the Fourth Respondent on medical parole. Dr Mphatswe's report was also part of the record of documents that were placed before me.

117. I therefore, submit that the Applicant's contention in paragraph 92 under reply, to the effect that in the absence of a section 79(2) written report positively recommending the Fourth Respondent's placement on medical parole, I did not have the power to consider, let alone grant, the Fourth Respondent's application for medical parole, is ill-conceived and falls to be rejected by the court.

118. It is furthermore, my submission that the Applicant's contention in paragraph 93 under reply, to the effect that given the fact that I was not empowered to grant the Fourth Respondent medical parole in the circumstance and that my decision is reviewable in terms of the principle of legality and sections 6(2)(f)(i) and 6(2)(b) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") also falls to be rejected by the Court.

AD PARAGRAPHS 94 - 97

119. I deny the allegations that are contained in these paragraphs. It is in particular, for the following reasons, denied that my decision is unreasonable, irrational and arbitrary as my reasons allegedly do not meaningfully engage

MA

with whether it is appropriate to grant medical parole in accordance with section 79(1)(a):

119.1 In the Medical Report in terms of the Correctional Services Regulation 29A(3) ("Addendum to the Medical Parole Application Form") Dr Mafa made the following findings, namely:

(i) The offender is suffering from a terminal disease or condition that is chronic and progressive which has significantly deteriorated;

(ii) The offender is unable to perform daily activities and self-care and is under full time comprehensive medical care of medical team.

(iii) Dr Mafa recommended medical parole as a result of medical/ physical incapacity.

120. A medical practitioner who deals with the application in terms of the provisions of Regulation 29A(3) must make an evaluation of the application for medical parole in accordance with the provisions of section 79 of the Act and make a recommendation. Dr Mafa dealt with the application and made a positive recommendation to place the Fourth Respondent on medical parole.

MA

121. Dr Mafa's report forms part of the documents that served before me in the process of the consideration of the Fourth Respondent's application for medical parole. In paragraph 13 of my reasons, I specifically stated that I was satisfied that the Fourth Respondent meets the criteria set out in section 79(1) of the Act. I would have not stated this, if I had not satisfied myself that the jurisdictional factors that are set out in the aforesaid section of the Act are indeed met.

AD PARAGRAPHS 98 - 102

122. I deny the allegations that are contained in these paragraphs. It is my submission that the Applicant is not correct in contending in paragraph 102 of the supplementary founding affidavit that I set up a false predicate upon which to justify my departure from the recommendation of the MPAB. I submit that my comments about the recommendation of the MPAB as referred to in paragraph 101 under reply, are not far-fetched. It is an undeniable fact that the Fourth Respondent's conditions were brought under control as a result of the treatment and care actually received whilst in hospital.

123. I further, deny the contention that is made by the Applicant to the effect that I took the decision to place the Fourth Respondent on medical parole based on the conclusion that I had allegedly made to the effect that the Department cannot provide the same standard of care as the hospital. As stated in my reasons, I considered different documents and/or information that was placed at my disposal which, inter alia, include documents and information referred to

MT

under paragraph 12 of my reasons. Moreover, in the preceding paragraphs I have tried my best to provide as much clarity as possible on the factors and information that I considered during the process of the consideration of the Fourth Respondent's placement on medical parole.

124. The Applicant's contentions to the effect that my decision was unreasonable, irrational and arbitrary, are therefore, lacking substance.

PARAGRAPHS 103 - 105

125. I deny the allegations that are contained in these paragraphs. Although my decision to place the Fourth Respondent on medical parole was not, as contended by the Applicant, informed by the fact the Department could not provide the standard of care provided by the tertiary hospital to the Fourth Respondent, I deny the allegation made by the Applicant in paragraph 104 to the effect that I lacked the requisite expertise to determine whether the level of care that the Department is able to provide is adequate to the Fourth Respondent. I submit that it did not require a medical qualification to determine whether the Department was able to provide the same level of care as a tertiary hospital. I should however, emphasize that my comments about the Department lacking capacity to provide for such level of care were not the primary reason for the approval of the Fourth Respondent's placement on medical parole.

MA

126. I have, in any event, stated in paragraph 13 of my reasons that at the time I took the decision I was satisfied that the application for medical parole satisfied the requirements of section 79(1) of the Act. I submit that this is enough to dispel the misconception that I took the decision based on the fact that the Department could not provide for the same level of care as a tertiary hospital.

AD PARAGRAPHS 106 – 117

127. I deny the allegations that are contained in these paragraphs. It is, in particular, denied that I unreasonably, irrationally and arbitrarily preferred the medical reports of the SAMHS and a single member of the MPAB over the recommendation of the MPAB. It an undeniable fact that the SAMHS team of doctors are familiar with the Fourth Respondent's health status as their patient. I had no reason to doubt their efficiency and competency. The contention that seeks to suggest that I preferred the report of Dr Mphatswe above that of the MPAB is incorrect and baseless.

128. Dr Mphatswe is also not the only doctor who recommended the Fourth Respondent for placement on medical parole as Dr Mafa also recommended placement on medical parole. Dr Mphatswe's report formed part of a collection of a body of relevant information that was placed at my disposal in the process of the consideration of the matter.

MA

129. It is therefore, my submission that the picture that the Applicant seeks to create in these paragraphs to the effect that I favoured the reports from the SAMHS team of doctors and a report from a single member of the MPAB, is not correct.

AD PARAGRAPHS 118 – 123

130. I deny the allegations that are contained in these paragraphs. The Fourth Respondent's release to his home was a better option than returning him to the Correctional Centre. At home the Fourth Respondent would have someone with him throughout the night, whilst at the Correctional Centre he would be locked-up alone in his hospital cell.

131. I therefore, deny the contention that is made by the Applicant in paragraph 123 under reply, to the effect that my decision is unreasonable, irrational and arbitrary justifying a review in terms of the principle of illegality and sections 6(2)(e)(vi), 6(2)(f)(ii) and 6(2)(h) of PAJA.

AD PARAGRAPHS 124 - 129

132. I deny the allegations that are contained in these paragraphs. The comments that I made in my reasons as referred to in paragraphs 125 and 126 of the supplementary founding affidavit, are selective and misplaced.

MA

133. I therefore, need to emphasize that in considering the application for medical parole I was not influenced by any other external and/or irrelevant factors which had nothing to do with the jurisdictional factors that are set out in section 79(1) of the Act. Moreover, the process was sanctioned by the provisions of section 75(7)(a) read with section 79 of the Act as already explained above.

134. It is accordingly, my submission that the contentions that are made by the Applicant in these paragraphs are ill-conceived.

AD PARAGRAPHS 130 – 135

135. I deny the allegations that are contained in these paragraphs. It is not correct that I did not consider the jurisdictional factor set out in section 79(1)(b) of the Act. It is common cause that the Fourth Respondent is a first time offender and the fact that he was found guilty of the crime of contempt of court does not necessarily mean that he will re-offend.

136. I therefore, consider it appropriate to repeat the submissions that I have already made above, to the effect that in paragraph 13 of my reasons, I specifically stated that I was satisfied that the Fourth Respondent meets the criteria set out in section 79(1) of the Act. Reference to section 79(1) covered the said section in its entirety. I would have not made reference to the said section if I had not satisfied myself that all the jurisdictional factors that are set out in the aforesaid section of the Act are met.

MA

137. I therefore, submit that the contentions that are made by the Applicant in paragraph 135 under reply, to the effect that my decision is reviewable in terms of section 6(2)(e)(iii) of PAJA, have no substance and fall to be rejected by the Court.

AD PARAGRAPHS 136 - 138

138. I deny the allegations that are contained in these paragraphs. The Applicant wants this court to review and set aside my decision and substitute it with a decision refusing the Fourth Respondent's application for medical parole. For reasons that have been stated above, I deny that my decision is reviewable as contended by the Applicant. It should also be stated that for purposes of the relief sought by the Applicant by way of an order substituting my decision for that of the Honourable Court, the Court has a paucity of information before it. Not all the information that was before me when I took the decision is before this Honourable Court. It is accordingly, submitted that the relief claimed by the Applicant is not implementable. In addition, it is submitted that such an order would not accord with the principles that underpin the doctrine of separation of powers.

139. However, in the event of the Honourable Court finding that my decision to place the Fourth Respondent on medical parole does fall to be reviewed and set aside (which, it is respectfully submitted, is not the case), it is submitted that the court ought not to substitute its decision for my decision. The Honourable Court should rather remit the matter to the Acting National

Commissioner for the reconsideration of the Fourth Respondent application for placement on medical parole.

140. I am further advised that it is settled law that the court will, in terms of section 8(1)(c)(ii)(aa) of PAJA, substitute its decision for that of the administrator only in exceptional circumstances. It is submitted that the present case is not an exceptional case for purposes of the Honourable Court substituting its decision for my decision.

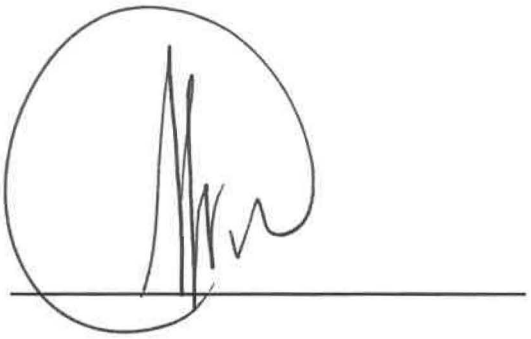
141. Lastly, it is my submission that the Fourth Respondent is currently serving his sentence as was imposed on him by the Constitutional Court and it would accordingly, be grossly unfair and unlawful for the Court to direct that the time that the Fourth Respondent was out of incarceration on medical parole shall not be counted for the fulfilment of his sentence of 15 months imprisonment, were this court to decide to review and set aside my decision and substitute it for that of the Honourable Court.

142. It is therefore, my respectful submission that the Applicant's contentions as set out in these paragraphs stand to be rejected by the Court.

143. I accordingly, respectfully submit that the Applicant has failed to make out a proper case for the relief sought in the Notice of Motion.

MA

WHEREFORE I pray that this application be dismissed with costs, including the costs of three (3) counsel.



DEPONENT: A FRASER

I certify that the Deponent acknowledged that he knows and understands the contents of this affidavit that he has no objection in the making of the prescribed oath and that he considers this oath to be binding on his conscience. I also certify that this affidavit was signed in my presence at Pretoria on this the 26th day of **October 2021** and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended by Government Notice R1648 of 19 August 1977, have been complied with.

COMMISSIONER OF OATHS:

FULL NAME

STREET ADDRESS:

CAPACITY:

AREA:

MAROTHI MASHIFANE INC ATTORNEYS
Marothi Mashifane
Commissioner of oaths : Practicing Attorney
Olivetti House 806, Floor 8, 241 Sophie De Bruyn Street, Pretoria
Tel: 012 3211512 Fax: 086 431 7635
Sign: ..... Date: 26/10/2021

ANNEXURE "AF1"

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case №: 46468/2021

In the matter between:

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

SUPPORTING AFFIDAVIT

I, the undersigned

NOMPUMELELO PRECIOUS RADEBE

Do hereby declare the following under oath and state that:

N.P.R

CP

MA

1. I am an adult female employed by the Department of Correctional Services as the Head of the Escourt Correctional Centre which is situated at No 2 Macfalae Street, Estcourt, KwaZulu-Natal Province.

2. The contents of this Supporting Affidavit fall within my personal knowledge and are to the best of my belief and knowledge both true and correct.

3. I have read the Answering Affidavit that has been deposed to by the former National Commissioner of Correctional Services, **Mr Arthur Fraser** and confirm the contents thereof insofar as it relates to me and the Third Respondent, Mr Zuma, including his incarceration at the Estcourt Correctional Centre.

4. Furthermore, I wish to bring the following to the attention of the above Honourable Court:

4.1. Mr Zuma was admitted at the Estcourt Correctional Centre on the 08th of July 2021. During the admission, he was orientated on the rules and regulations of the Correctional Centre, which amongst others, include the following:

4.1.1. Explanation of the sentence imposed and how he was going to serve it;
4.1.2. Daily complaints and requests which are taken by the Head of the Correctional Centre ("Head of the Centre") or her delegate on a daily basis;
4.1.3. He would be attended to by the Case Management Committee in respect of security classification and privileges;
4.1.4. His accommodation, which would be at the Hospital Section;
4.1.5. Stipulated time of the unlocking of the cells and lock-up (sleeping and waking up time). Mr Zuma was further informed that he will have to make up his bed and clean his cell;

NPR GP MA

4.1.6. He was issued with two pairs of offender uniform and toiletries;

4.1.7. Immediate medical assessment in collaboration with the South African Military Health Service ("SAMHS"); and

4.1.8. COVID-19 screening.

5. Mr Zuma indicated that he was well versed with the rules and regulations that govern correctional facilities as he had previously been imprisoned.

6. On the 9th of July 2021, after considering the results of the medical assessment that was conducted on 8 July 2021, the SAMHS submitted a request to the Head of the Centre requesting that one of the Medics be granted permission to monitor Mr Zuma on daily basis for the purposes of medical assistance. Such a request was approved by the Acting Regional Commissioner, Mr Kenneth Mthombeni.

7. On the 10th of July 2021, I noticed that Mr Zuma does not make-up his bed nor clean his cell as expected. I escalated the matter to the Acting Area Commissioner under whose jurisdiction the Estcourt Correctional Centre falls, who then reported the matter to the Regional Head of Corrections within the Province. The Regional Head: Corrections engaged Mr Zuma on the registered concerns, particularly, his failure to make-up his bed and cleaning of the cell. Mr Zuma indicated that he was not feeling well and that he often feels weak and unable to make-up his bed or clean his cell. Emanating from the engagement with Mr Zuma, the Regional Head: Corrections guided the nursing staff to assist in making up the bed and the cleaning of the cell and that they should monitor Mr Zuma's health condition on a daily basis.

8. On the 21st of July 2021, the Operational Manager Nursing registered several concerns on the physical state of Mr Zuma to me which included the drastic change of complexion, reddish eyes, loss of weight, challenges with his mobility, insomnia, inability or incapacity to execute his core responsibilities and swelling of feet. This was very concerning.

NPR AP

(N) MA

9. Having personally noted the above, I reported these concerns to the Acting Area Commissioner on the 21st of July 2021. The Acting Area Commissioner discussed the concerns that I had raised with her in respect of the physical state of Mr Zuma with the Regional Head: Corrections. On the 21st of July 2021, the Regional Head: Corrections had a telephonic consultation with the medical team from SAMHS to apprise them of the concerns in relation to the deterioration of Mr Zuma's state of health.

10. On the 23rd of July 2021, the Acting Regional Commissioner visited the Correctional Centre and noted with concern the state of Mr Zuma. He looked drained and didn't stand up as he would usually do. On the 24th of July 2021, SAMHS Medical team attended to the reported concerns.

11. On the 28th of July 2021, Mr Zuma was examined by the Medical team from SAMHS at the Escourt Facility, whereafter they handed over a Medical report that he be referred to an outside hospital.

12. On the 5th of August 2021, the Acting Regional Commissioner, Acting Deputy Regional Commissioner, Acting Area Commissioner and I visited the National Commissioner to brief him about the worrisome physical state of Mr Zuma. On the same date, the National Commissioner advised that he received a call from a doctor (SAMHS) who indicated that they will have to move Mr Zuma to an external hospital for urgent medical procedures to be conducted.

13. Mr Zuma was subsequently transferred to the Pretoria Heart Hospital on the 5th of August 2021. It should be noted that according to SAMHS the condition of Mr Zuma required that he be under care of a Medic on a 24 hours basis, a situation that was not possible at the facility as the Correctional Centre can only accommodate inmates overnight. Therefore, the Medic could not be

NPR GP

allowed to spend twenty four hours with Mr Zuma as the Medic could not be accommodated in the correctional facility.

DEPONENT: NP RADEBE

I certify that the Deponent acknowledged that she knows and understands the contents of this affidavit that she has no objection in the making of the prescribed oath and that she considers this oath to be binding on her conscience. I also certify that this affidavit was signed in my presence at Prestburg on this the 26 day of **October 2021** and that the Regulations contained in Government Notice R1258 of 21 July 1972 as amended by Government Notice R1648 of 19 August 1977, have been complied with

COMMISSIONER OF OATHS: [redacted] BIUASE

FULL NAME Ciu Ciu Precious Biuase

STREET ADDRESS: 106 Zwartkop Road

CAPACITY Constable

AREA Prestburg

2021 -10- 26

KWAZULU-NATAL

NPR

MA

ANNEXURE "AF2"

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case №: 46468/2021

In the matter between:

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

CONFIRMATORY AFFIDAVIT

I, the undersigned

TSANDZEKA KENNETH MTHOMBENI

Do hereby declare the following under oath and state that:

T.K.M. GP

MA

1. I am an adult male employed by the Department of Correctional Services as the Acting Regional Commissioner with offices situated at No 4 College Road, Pietermaritzburg, KwaZulu-Natal Province.

2. The contents of this Confirmatory Affidavit fall within my personal knowledge and are to the best of my belief and knowledge both true and correct.

3. I have read the Supporting Affidavit that has been deposed to by the Head of the Estcourt Correctional Centre, **Ms Nompumelelo Precious Radebe** and confirm the contents thereof insofar as it relates to me as well as the Third Respondent, Mr Zuma, and the deterioration of his health condition whilst he was incarcerated at the Estcourt Correctional Centre.

DEPONENT: TK MTHOMBENI

I certify that the Deponent acknowledged that he knows and understands the contents of this affidavit that he has no objection in the making of the prescribed oath and that he considers this oath to be binding on his conscience. I also certify that this affidavit was signed in my presence at Prestbury on this the 26 day of **October 2021** and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended by Government Notice R1648 of 19 August 1977, have been complied with.

COMMISSIONER OF OATHS:

FULL NAME Cucu Precious Buhase

STREET ADDRESS: 106 Zwartkop Road

CAPACITY: Constable

AREA: Prestbury

SOUTH AFRICAN POLICE
DETECTIVE SERVICES
2021 -10- 26
PRESTBURY CAPS
KWAZULU-NATAL

MA

ANNEXURE "AF3"

Office of the State Attorney
Pretoria

Private Bag X 91
PRETORIA
0001

SALU BUILDING
316 Thabo Sehume Street
Francis Baard Street
Entrance Thabo Sehume Street

Tel: (Switchboard): (012) 309 1500
(Direct Line): (012) 309 1576
(Secretary): (012) 309 1530

Fax (General): (012) 309 649/50

06 October 2021

Enquires: RN SEKGOBELA /BM MAKHAFOLA
Email:RSekgobela@justice.gov.za or
reubensekgobela@gmail.com

My ref: 2822/2021/Z59
Your ref:

TO: MINDE SCHAPIRO AND SMITH ATTORNEYS
Ref: R Nyama / MD / HM001035

AND TO: HURTER SPIES INC
Ref: WD Spies / MAT4215

AND TO: WEBBER WENTZEL REF: V Moshovich /P Dela / D Cron / D Rafferty / D Qolohle 3050264

AND TO: NTANGA NKUHLU INCORPORATED ATTORNEYS REF: M.NTANGA/Z0018/21

IN RE: THE DEMOCRATIC ALLIANCE // THE NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES AND 4 OTHERS

AFRIFORUM NPC // THE NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES AND 5 OTHERS

HELEN SUZMAN FOUNDATION // NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES AND 3 OTHERS

SIR/MADAM

Your letters dated the 05th October 2021 and the 30th September 2021 respectively bear reference.

MA

1. As you are aware, we act for the National Commissioner of Correctional Services in all three applications. This letter is meant to respond to the proposals by the Helen Suzman Foundation ("HSF"), the Democratic Alliance ("DA") and Ntanga Nkuhlu Incorporated acting for the Third Respondent in both the DA and the Afriforum matter and as the Fourth Respondent in the HSF matter.

2. We need to record that we have been served with a letter dated the 27th September 2021, where all the parties were copied, wherein the legal representatives of the Former President JG Zuma explicitly put it on record that they are denying us consent to divulge the medical reports and/or records of their client without his consent. It was made clear that we can only do that through a court order. In that regard, we are hamstrung and constrained by the refusal of the Former President and his legal representatives to give us consent to divulge the medical reports and/or records.

3. The other issue that impedes our disclosure of the whole record is the fact that we have been informed by the South African Military Health Service ("SAMHS") that they are the custodian of the medical records of the Former President as they have been entrusted with the responsibility of providing health care services to all Presidents, and Former and current Presidents of the Republic of South Africa. We were informed by SAHMS that those documents are classified as top secret and therefore they cannot just be disclosed.

MA

4. We are, as the legal representatives of the National Commissioner, in principle, in agreement with the confidentiality regime as proposed by both the legal representatives of the HSF and the DA but we are of the view that presently it will not assist us as the legal representatives of the Former President have denied us consent to produce those medical records without a court order.

5. We therefore agree with the legal representatives of the Former President that the set down date of the 26th October 2021 be retained for hearing on all the interlocutory disputes pertaining to the record and, depending on the outcome thereof, the matter can be scheduled for hearing on the merits in November or any other agreed date.

6. We also agree that as parties we should agree amongst ourselves on the timelines within which to file our papers as per the HSF letter in paragraph 3 where we are called upon to provide a schedule of the material not provided and the reasons why the material was not provided. We are in agreement that that should happen but we hold a different view that this should be done in the form of affidavits which can serve before a court when adjudicating on the further handling of the record. In this regard we propose that the parties should agree on the dates in which to exchange papers and for the interlocutory to be heard as soon as possible.

7. We also need to record that I, Mr Sekgobela the Attorney of the record of the National Commissioner of Correctional Services from the Pretoria State Attorney, has challenges with my work email and the use of my work computer as it is common cause that the Department of Justice had a

MAT

misfortune of having their systems down, we therefore request that all the parties should communicate with us through my personal 'gmail' account and also copy Adv Bheki Ndebele on this email address: bheki.ndebele@gkchambers.co.za.

8. It is also our understanding that the DJP had requested that we should agree amongst ourselves on the time in which to hold the next case management meeting on Friday early in the morning. We therefore propose that we give the DJP the time of 07h30 in order to manage this matter going forward.

Yours faithfully

SGD: R SEKGOBELA

RN SEKGOBELA
OFFICE OF THE STATE ATTORNEY: PRETORIA

MA