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 HEADS OF ARGUMENT

INTRODUCTION

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

PART A[1]

[1] Notice of Motion pp 001-1 – 001-3 prayer 1- 6

1.1. 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).

1.2. 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.

1.3. 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.

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

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

1.6. Further and/or alternative relief.

PART B[2]

1.7. 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).

1.8. 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.

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

1.10. 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.

1.11. 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.

[2] Notice of Motion pp 001-4 – 001-5 prayer 1-7

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

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

IN LIMINE

A. LACK OF URGENCY

2. 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[3].

3. We 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.

4. In particular, we 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.

[3] Founding Affidavit p 002-5 – 002-15 paras 11-32

5. 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. Specific averments of urgency must be made and facts upon which such averments are based must be set out[4]. 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 boldly alleging that it will not obtain substantial redress at a hearing in due course allegedly mainly, on the basis of the following reasons, which will be dealt with individually below, namely[5]:

5.1. Delaying the review application until a hearing in the ordinary course risks irreparable harm to the rule of law[6].

5.2. 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[7].

5.3. The National Commissioner has deliberately shrouded his decision in secrecy and has failed to provide substantive reasons or supporting evidence[8].

[4] Cekeshe and Others v Premier, Eastern Cape and Others 1998 (4) SA 935 (Tk) at p948A-B; See also Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers) 1977 (4) SA 135 (W)
[5] Founding Affidavit p 002-9 para 28
[6] Founding Affidavit p 002-9 para 29
[7] Founding Affidavit p 002-11 para 30.1
[8] Founding Affidavit p 002-14 para 31

6. It is our 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[9]:

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

6.1.1. 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.

6.1.2. 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 sentence to defend our constitutional democracy, the rule of law and the administration of justice. It further contends that

[9] Answering Affidavit p 005-7 para 13

were it not for my decision, the Fourth Respondent would currently be serving that "*constitutionally-necessary sentence*"[10]. This contention is misplaced by reason of the following[11]:

6.1.2.1. 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;

6.1.2.2. 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[12]. 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;

[10] Founding Affidavit p 002-10 para 29.1
[11] Answering Affidavit p 005-7 para 13.1.2
[12] Phaahla v Minister of Justice and Correctional Services and Another 2019 (7) BCLR 795 (CC) at [34]

6.1.2.3. 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).

6.1.2.4. 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.

6.1.3. 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 benefited from the unlawful reduction of his sentence which would allegedly

erode the effectiveness of the Constitutional Court's order[13]. This contention too, is misplaced for the following reasons[14] [Emphasis added]:

6.1.3.1. 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]

6.1.3.2. Moreover, as stated above 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

[13] Founding Affidavit p 002-10 para 29.4
[14] Answering Affidavit p 005-9 – 005-11 paras 13.1.3 – 13.1.3.5

effectively served the entire period of the 15 months sentence.

6.1.3.3. 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]

6.1.3.4. 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.

6.1.3.5. 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. We therefore, submit that logic dictates that this matter be heard and dealt with as normal opposed motion without truncating the forms and service provided for in the rules.

6.1.4. 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[15]. This contention is also misplaced for the following reasons[16] [Emphasis added]:

6.1.4.1. 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.

[15] Founding Affidavit p 002-10 – 002-11 para 29.5
[16] Answering Affidavit 005-12 – 005-13 paras 13.1.4 – 13.1.4.3

6.1.4.2. 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. [Emphasis added]

6.1.5. 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 the decision of the First Respondent[17]. This contention is ill-conceived on the basis of the following[18]:

6.1.5.1. The Applicant has, in the first place, 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 in due course. The reasons provided fail to demonstrate the existence of any urgency.

6.1.5.2. The First Respondent never, at any stage, stated that the Applicant would never receive the record

[17] Founding Affidavit p 002-11 para 29.7
[18] Answering Affidavit p 005-13 – 005-14 paras 13.1.5 – 13.1.5.3

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. We 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.

6.2. **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**:

6.2.1. 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 [19] . This contention is misplaced based on the following[20] [Emphasis added]:

6.2.1.1. 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 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.

6.2.1.2. 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

[19] Founding Affidavit p 002-12 para 30.3
[20] Answering Affidavit p 005-15 – 005-17 paras 13.2.1 – 13.2.1.4

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.

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

6.2.1.4. We accordingly, insist that the Applicant's contentions do not in any way justify that this matter be dealt with on an urgent basis.

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

6.3.1. 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 the First Respondent has good reasons for his 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 his reasons away from the sunlight, the First Respondent made this matter urgent[21]. This contention is devoid of the truth and baseless on the basis of the following[22]:

6.3.1.1. The First Respondent's 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 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.

[21] Founding Affidavit pp 002-14 – 002-15 paras 31.2 - 31.3
[22] Answering Affidavit p 005-17 – 005-18 paras 13.3.1 – 13.3.1.3

6.3.1.2. In the First Respondent's subsequent interview with the SABC as referred to by the Applicant in its founding affidavit, the First Respondent stated that he had taken a decision to place the Fourth Respondent on medical parole and that the reasons for doing so were available. The First Respondent 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 the First Respondent to make the record available was therefore, a mere desperate public stunt.

6.3.1.3. The allegations regarding the First Respondent's 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 the First Respondent's disposal was, in any event, delivered to the Applicant, on 4 October 2021, without any opposition from the First Respondent towards the disclosure thereof.

7. In light of the aforegoing, we 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. We further submit that the Applicant may obtain relief, if any, at a hearing in due course.

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

B. NON-JOINDER

9. The Applicant is well aware 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 made on the basis of, among others, the reports from the SAMHS team of medical practitioners[23].

10. 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.

11. 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.

C. ISSUES TO BE DETERMINED BY THE COURT

12. The crisp issues to be determined by the Court are as follows:

[23] Answering Affidavit p 005-19 para 1

12.1. Whether the decision of the First Respondent ("the National Commissioner") to place the Fourth Respondent on medical parole ("the decision") is ultra vires the powers conferred upon him by the Correctional Services Act 111 of 1998 ("the Act");

12.2. Whether the decision is unreasonable, irrational and arbitrary;

12.3. Whether the National Commissioner, in taking the decision took into account irrelevant considerations and failed to take into account relevant considerations;

12.4. Whether the decision was unconstitutional and unlawful, and falls to be reviewed and set aside, and if so, whether the decision should be substituted with a decision rejecting Mr Zuma's application for medical parole, alternatively, remitted to the National Commissioner; and

12.5. Whether Mr Zuma's time out of incarceration on medical parole should not be counted as time served towards the fulfilment of his sentence of 15 months imprisonment as imposed by the Constitutional Court.

D. LEGAL CONTEXT

13. 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[24] together with the relevant Correctional Services Regulations[25], in particular, Regulation 29A which regulates the processes and procedures for the placement of offenders on medical parole[26]. Section 75 (7)(a) of the Act provides as follows:

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

(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]

14. 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 –*

[24] Act 111 of 1998
[25] Correctional Services Regulations published under Government Notice R914 in Government Gazette 26626 of 30 July 2004
[26] Answering Affidavit p 005-20 para 20

(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]

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

"(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."

16. 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 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.

17. Section 79(2)(c) of the Act further provides that the written medical report (as referred to 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

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

18. It is our submission 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.

19. 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 him. Dr Mafa completed Part B of the Medical Parole Application Form ("the Application Form") as an applicant for medical parole[27]. The said Application Form forms part of the record that served before the First Respondent. A copy of the said record is attached to the Applicant's Supplementary Founding Affidavit marked Annexure "**SFA11**"[28]. We submit 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. The Applicant has conceded to this fact and legal position[29].

20. Dr Mafa, also completed Part C of the Application Form ("Addendum to the Medical Parole Application Form") which on its own constitutes a Medical Report in terms of Correctional Services Regulation 29A(3)[30]. 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

[27] Answering Affidavit p 005-23 para 26 read with Rule 53 Record (Annexure "**SFA11"** to the Supplementary Founding Affidavit) p 004-87

[28] Supplementary Affidavit p 004-75

[29] Replying Affidavit p 008-29 para 105 - 106

[30] Answering Affidavit p 005-24 para 27 read with Rule 53 Record (Annexure "**SFA11**" to the Supplementary Founding Affidavit) p 004-88 and 004-110

made a positive recommendation for the Fourth Respondent's placement on medical parole[31].

21. 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[32];*

    (ii) *The offender is unable to perform daily activities and self-care and is under full time comprehensive medical care of his medical team[33].*

    (iii) Dr Mafa recommended medical parole as a result of medical/ physical incapacity[34].

22. The above facts have been acknowledged and explicitly noted in paragraph 40 of the Applicant's Supplementary Founding Affidavit[35].

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[31] Answering Affidavit p 005-24 para 27 read with Rule 53 Record (Annexure "**SFA11**" to the Supplementary Founding Affidavit) pp 004-91 and 004-113 para 6 and 6.1

[32] Answering Affidavit p 004-24 para 28(i) read with Rule 53 Record (Annexure "**SFA11**" to the Supplementary Founding Affidavit) p 004-88 para (d)

[33] Rule 53 Record (Supplementary Founding Affidavit - Annexure "**SFA11")** p 004-89 para (f) and (g)

[34] Answering Affidavit p 005-24 para 28(ii) read with Rule 53 Record (Annexure "**SFA11**" to the Supplementary Founding Affidavit) p 004-89 paras (f) and (g) read with p 004-91 and 004-113 paras 6 and 6.1

[35] Supplementary Founding Affidavit p 004-14 para 40

23. However, in its Replying Affidavit and Heads of Argument the Applicant turns around and makes a U-turn on this issue. It contends that, in his Answering Affidavit, the National Commissioner has allegedly misquoted Dr Mafa as he (Dr Mafa) did not answer the question in paragraph 5(d) of Part C of the Medical Parole Application Form affirmatively[36]. This contention by the Applicant is misplaced. As the Court will note, the question in paragraph 5(d) of the Application Form and Dr Mafa's responses thereto are as follows[37]:

"5(d) *Is the offender suffering from terminal disease or condition which is*

- *Is chronic: Yes*
- *Is progressive: Yes*
- *Has deteriorated permanently or reached and irreversible state: deteriorated significantly*. "[Emphasis Added]

24. It is in fact very clear from the above quotation that Dr Mafa's responses to all the questions were affirmative. The Applicant's contention must therefore, be rejected by the Court.

25. Furthermore, in its Replying Affidavit and the Heads of Argument the Applicant contends that the Fourth Respondent's application for medical parole did not comply with Regulation 29A(3). In amplification of this stance, the Applicant contends, that Part C of the Medical Parole Application Form has to be completed only by the correctional medical doctor[38]. We submit that this

[36] Replying Affidavit p 008-33 paras 119.5 - 119.6
[37] P 004-88 para 5(d) - Dr Mafa's responses to the questions are underlined
[38] Replying Affidavit pp 008-30 – 008-31 paras 111

contention is misplaced as the Act does not place any prohibition on the Application Form being completed by any other doctor. It is therefore our submission that the Applicant's contention must be rejected by the Court.

26. It is furthermore, our 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[39].

27. 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 National Commissioner, the First Respondent had been divested of the original powers that were bestowed upon him in terms of section 75(7)(a) and section 79(1) of the Act[40].

28. We submit 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 the First Respondent's decision to place the Fourth Respondent on medical parole, falls

[39] Answering Affidavit p 005-25 para 30
[40] Answering Affidavit p 005-25 para 31

to be determined in the light of the above-mentioned provisions of the Act, together with the submissions that have been made above guided by the following administrative law principles[41]:

28.1. 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*"[42];

28.2. 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*";

[41] Answering Affidavit p 005-25 – 005-26 para 32
[42] Bato Star Fishing (PTY) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) at para [49]

28.3. The Courts must treat the decisions of administrative agencies with appropriate respect and in this way the Courts recognize the proper role of the executive within the Constitution. A court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts[43].

28.4. 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[44].

29. Against the aforegoing background, it is submitted that in essence the question for determination by the Honourable Court is whether the National Commissioner's 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.

[43] Bato Star supra at para at para [48]

[44] Bel Porto School Governing Body and Others v Premier, Western Cape, and Another 2002 (3) SA 265 (CC) at para [87], See also Paddock v Correctional Medical Practitioner, St Albans Medium B Correctional Centre 2014 JDR 1804 (ECP) at para [13]

30. In the process of exercising the discretion conferred upon him in terms of the Act, which discretion had to be exercised judiciously, the First Respondent had to consider the following positive factors that were in favour of the placement of the Fourth Respondent on medical parole, namely that[45]:

30.1 A medical report which is part of the Rule 53 record that was completed by Dr Mafa, as referred to above, which accompanies the Application for Medical Parole, which clearly stated that[46]:

30.1.1 The Fourth Respondent is suffering from a terminal disease or condition that is chronic and progressive in nature which has significantly deteriorated[47];

30.1.2 The Fourth Respondent was unable to perform daily activities and self-care and under full-time comprehensive medical care of the medical team[48].

30.1.3 Dr Mafa recommended medical parole as a result of medical/ physical incapacity[49].

[45] Answering Affidavit p 005-27 para 34
[46] Answering Affidavit pp 005-27 – 005-28 paras 34.1 – 34.1.3
[47] Rule 53 Record (Annexure "**SFA11**" to the Supplementary Founding Affidavit) p 004-88 para (d)
[48] Rule 53 Record (Annexure "**SFA11"** to the Supplementary Founding Affidavit) p 004-89 para (f) and (g)
[49] Rule 53 Record (Annexure "**SFA11**" to the Supplementary Founding Affidavit) p 004-91 and 004-113 paras 6 and 6.1

30.2 On the basis of the above medical findings and facts (together with additional SAMHS medical reports filed as part of the Record), the National Commissioner 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) which rendered him physically incapacitated, is also confirmed by the Head of the Estcourt Correctional 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 to the Answering Affidavit marked Annexure "**AF1"** and **"AF2**", respectively[50].

30.3 The National Commissioner also considered 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 him. On page 7 of the said report, Dr Mphatswe made the following comments and recommendation[51]:

"…..*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*

[50] Answering Affidavit p 005-28 para 34.2

[51] Answering Affidavit p 005-29 para 34.3 read with Rule 53 Record ("Annexure "**SFA1**1" to the Supplementary Affidavit) p 004-140

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."

30.4 The National Commissioner also considered different reports from the team of SAMHS medical doctors who were attending to the Fourth Respondent's treatment, the last one being a letter from the Surgeon General dated 30 August 2021, paragraphs 2 and 3 of which read as follows[52]:

"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.*

[52] Answering Affidavit p005-29 para 34.4. See also Rule 53 Record (Annexure "**SFA11**" to the Supplementary Founding Affidavit) p 004-157

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."*

30.4.1 The different circumstances referred to in paragraph 3 of the Surgeon General's report as referred to above, means circumstances different from incarceration. It is important to note, in this regard that the Fourth Respondent's condition was only brought under control under hospital care. It is common cause that the Correctional Centre had no capacity to ensure such optimal care[53].

30.4.2 The condition of the Fourth Respondent also 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[54].

[53] Answering Affidavit p 005-30 para 34.1.1
[54] Answering Affidavit p 005-31 para 34.1.2

30.5 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[55];

30.6 There were appropriate arrangements for the Fourth Respondent's supervision, care and treatment within the community into which he was to be released, as envisaged in section 79(1)(c) of the Act[56]. Such arrangements, *inter alia,* included the following[57]:

30.6.1 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;

30.6.2 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

[55] Answering Affidavit p 005-31 para 34.5
[56] Answering Affidavit p 005-31 para 34.6
[57] Answering Affidavit p 005-31 – 005-32 paras 34.6 – 34.6.3

SAMHS, attending to his medical needs and providing medical support and supervision.

30.6.3 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.

30.7 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[58];

30.8 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[59]; and

30.9 In terms of section 73(6)(Aa) of the Act, the Fourth Respondent would have become eligible for consideration for placement on parole within the next seven (7) weeks (i.e 30 October 2021 upon completing a quarter of his sentence)[60].

[58] Answering Affidavit p 005-32 para 34.7
[59] Answering Affidavit p 005-32 para 34.8
[60] Answering Affidavit p 005-32 para 34.9

31. 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[61].

32. 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 and the report by Dr Mphatswe, who had been assigned by the MPAB to conduct a medical assessment on the Fourth Respondent. This raised a question as to what the rationale was behind the omission thereof. It is important to mention, in this regard, that Dr Mafa had made some worrisome clinical diagnostic findings (which in the interest of the Fourth Respondent's privacy could not be divulged in the Answering Affidavit). The said findings had led to Dr Mafa recommending that the Fourth Respondent should be placed on medical parole[62].

[61] Answering Affidavit p 005-33 para 35
[62] Answering Affidavit p 005-33 – 005-34 para 36

33. 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[63].

34. In light of consideration of a range of competing factors as referred to above, in particular, a comparative analysis of positive factors that favoured the Fourth Respondent's placement on medical parole against those that militated against his placement (of which there was only one), the National Commissioner decided to approve the Fourth Respondent's placement on medical parole. It is our submission, regard being had to the aforegoing submissions (particularly, the fact that the application fell within the criteria set in section 79(1) of the Act), that the decision to place the Fourth Respondent on medical parole is a decision which a reasonable decision-maker would have taken.

35. The Applicant contends in his Replying Affidavit that, in his Answering Affidavit, the National Commissioner is providing *ex post facto* reasons and that he is seeking to justify his decision to grant Mr Zuma medical parole by providing different reasons[64]. He further contends in his Heads of Argument that as part of the record, the National Commissioner provided six (6) reasons in respect of his decision to place the Fourth Respondent on medical parole,

[63] Answering Affidavit p 005-34 para 37
[64] Replying Affidavit p 008-31 para 114

and that he must stand or fall by those reasons[65]. This contention has no merit and falls to be rejected by reason of the following:

35.1. In paragraph 12 of his reasons the National Commissioner states as follows: "*I therefore, requested that all relevant and available information be at my disposal for consideration as the legal authority to arrive at a decision. I inter alia, considered the following in coming to a decision*:"[66]. He then lists such information in paragraphs 12.1 to 12.6 of his reasons.

35.2. A well-reasoned and honest interpretation of paragraph 12 of the National Commissioner's reasons is to the effect that the information listed under paragraph 12 (paras 12.1 – 12.6) of the National Commissioner's reasons does not include the entire body of information and/or facts that were considered. According to a simple Concise Oxford English Dictionary interpretation, the word *inter alia* means "*among other things*". This simply means that what is listed does not include everything.

35.3. In paragraph 34 (inclusive of its sub-paragraphs) of the Answering Affidavit the National Commissioner is providing a list of information that he considered in arriving at the impugned decision. Above all, the said information is sourced from the Rule 53 record. As such, this information

[65] Applicant's Heads of Argument p 009-7 para 7, pp 009-11 para 19 read with p 009-27 para 54
[66] See Rule 53 Record (Annexure **"SFA11**" to the Supplementary Founding Affidavit) p 004-152 para 12

does not constitute new reasons as insinuated by the Applicant. The National Commissioner is simply stating as to what information that forms part of the record informed his decision. Now that the record is at the Applicant's disposal, the Applicant cunningly wants to divorce the rest of the record from the document that contain reasons. That does not make sense.

35.4. Moreover, the reason for the provision of the Rule 53 record is to enable the parties to see and consider the facts and/or information upon which the impugned decision is based. The information that is provided by the National Commissioner in paragraph 34 of the Answering Affidavit is inextricably part of the record. The record constitutes exactly what informed the decision. Put differently, the information that is sarcastically and conveniently referred to as new reasons by the Applicant, is in fact not new. It comes from the Rule 53 record that was so urgently required by the Applicant in order to determine what exactly informed the decision to place the Fourth Respondent on medical parole.

36. It is accordingly, submitted that the bold contention by the Applicant in his Heads of Argument to the effect that the National Commissioner is invoking new reasons as he or his lawyers think that his first reasons don't cut it[67] lacks merit and must be rejected out of hand.

[67] Applicant's Heads of Argument p 009-27 para 56

37. An important fact for consideration, after all, is the fact 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.

GROUNDS FOR REVIEW

AD WHETHER THE DECISION IS *ULTRA VIRES*

38. The Applicant contends that the decision of the National Commissioner to place the Fourth Respondent on medical parole is ultra vires the powers conferred upon him by the Act by reason of the following:

38.1. The National Commissioner does not have the power to overrule the recommendation of the Medical Parole Advisory Board and that his decision is ultra vires his powers for his reason alone[68].

38.2. Even if the National Commissioner is empowered to overrule the recommendation of the MPAB, the jurisdictional fact set out in section 79(1)(a) is absent in Mr Zuma's case[69];

38.3. A section 79(2) written report recommending placement on medical parole is a jurisdictional fact necessary for the consideration of medical parole. In the absence of a section 79(2) written report positively

[68] Founding Affidavit p 002-17 para 40, Supplementary Founding Affidavit p 004-24 para 81
[69] Founding Affidavit p 002-20 para 41, Supplementary Founding Affidavit p 004-25 paras 83 – 84.2

recommending Mr Zuma's placement on medical parole, the National Commissioner did not have the power to consider, let alone grant, Mr Zuma's application for medical parole[70].

39. We submit that the Applicant's contentions as set out above are misplaced and have no merit by reason of the following:

39.1. The notion expressed by the Applicant to the effect that the Act does not allow the National Commissioner to overrule the MPAB's recommendation is not correct. 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[71].

39.2. 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). The above Honourable Court is respectfully referred to a range of factors that were considered by the National Commissioner in the process of the consideration of the placement of

[70] Supplementary Founding Affidavit p 004-26 – 004-27 paras 89 - 92
[71] Answering Affidavit p 005-53 para 80

the Fourth Respondent on medical parole as set out and discussed above[72].

39.3. 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 based on the examination that he had conducted on the Fourth Respondent, namely:

39.3.1 The offender is suffering from a terminal disease or condition that is chronic and progressive which has significantly deteriorated[73];

39.3.2 The offender is unable to perform daily activities and self-care and is under full time comprehensive medical care of his medical team[74].

39.3.3 Dr Mafa recommended medical parole as a result of medical/ physical incapacity[75].

39.3.4 On the basis of the above medical findings and facts (together with additional SAMHS medical reports filed as part of the

[72] Answering Affidavit p 005-53 para 81; see also p 005-27 – 005-33 paras 34 - 35

[73] Answering Affidavit p 004-24 para 28(i) read with Rule 53 Record (Annexure "**SFA11**" to the Supplementary Founding Affidavit) p 004-88 para (d)

[74] Answering Affidavit p 005-24 para 28(ii) and Rule 53 Record (Annexure "**SFA11**"to the Supplementary Founding Affidavit p 004-89 para (f) and (g)

[75] Answering Affidavit p 005-24 para 28(iii) and Rule 53 Record (Annexure "**SFA11**" to the Supplementary Founding Affidavit) p 004-91 and 004-113 paras 6 and 6.1

record), the National Commissioner 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).

39.3.5 The fact that the Fourth Respondent was ill (prior to his hospitalization) which rendered him physically incapacitated, is also confirmed by the Head of the Estcourt Correctional 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 to the Answering Affidavit marked Annexure "**AF1"** and **"AF2**", respectively[76].

39.3.6 The Applicant's contention that the jurisdictional fact set out in section 79(1)(a) is absent in Mr Zuma's case, is therefore baseless and falls to be rejected.

39.4 In relation to the contention on the section 79(2) written medical report, we submit that 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 section 79 of the Act[77].

[76] Answering Affidavit p 005-28 para 34.2
[77] Answering Affidavit p 005-66 para 114

39.5 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. 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 a written report to accompany the form do not apply[78]. The Applicant has conceded to this fact and legal position[79].

39.6 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 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 the National Commissioner when the decision was taken[80].

[78] Answering Affidavit p 005-66 para 115
[79] Replying Affidavit p 008-29 para 105; p 008-44 paras 151-152
[80] Answering Affidavit p 005-66 para 116

39.7 We therefore, submit that the Applicant's contention to the effect that in the absence of a section 79(2) written report positively recommending the Fourth Respondent's placement on medical parole, the National Commissioner 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[81]. The Applicant has, in any event, conceded to the fact that there was indeed no need for a section 79(2)(b) written report.

40. The Applicant further contends that the MPAB concluded that Mr Zuma's treatment had been optimized, that all his conditions had been brought under control, that he was stable and did not qualify for medical parole in terms of section 79(1)(a). Mr Zuma's temporary absence to receive treatment, so the argument goes, was sufficient for that purpose[82]. This interpretation of the Act is ludicrous and does not make sense at all for the following reasons:

40.1. There is nowhere in the Act where it is stated that optimization of treatment or bringing under control of an offender's condition is a requirement for not recommending him or her for medical parole. The fact that a patient has been stabilized does not imply that he or she has been cured from a terminal disease or condition. The legal jurisdictional factor remains what it is in terms of the text of the Act, irrespective of whether an inmate has been stabilized or not. This is the reason why in

[81] Answering Affidavit p 005-67 para 117
[82] Replying Affidavit p 008-23 para 86. See also Applicant's Heads of Argument p 009-18 para 36

terms section 79(7) of the Act no placement on medical parole may be cancelled merely on account of the improved medical condition of an offender;

40.2. Section 79(1)(a) of the Act only refers to a terminal disease or condition and/or physical incapacity which severely limits daily activity and, nothing more or less than that as suggested by the Applicant. Dr Mafa noted that the Fourth Respondent is suffering from a terminal disease or condition that is chronic and progressive which has significantly deteriorated. He further noted that he was unable to perform daily activities and self-care and that he was under full time comprehensive medical care of his medical team. This fact is confirmed by the Head of the Escourt Correctional Centre. Dr Mafa accordingly, recommended medical parole.

40.3. 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 and the report by Dr Mphatswe, who was a delegated member of the MPAB assigned to conduct a medical assessment on the Fourth Respondent. This raised a question as to what the rationale was behind such an omission. As stated above, Dr Mafa had made some worrisome clinical diagnostic findings (which in the interest of the Fourth Respondent's privacy could not be divulged in the Answering Affidavit – such findings were redacted in the report). These

were the findings that apparently led to him recommending that the Fourth Respondent should be placed on medical parole[83].

41. We submit that in terms of section 75(7)(a) read with section 79(1) of the Act the National Commissioner has to exercise a discretion in the process of the consideration of an offender's application for medical parole and that such discretion has to be exercised judiciously. It is clear from the aforegoing submissions that, contrary to the Applicant's contentions, Mr Zuma's application fell within the ambit of section 79(1)(a) of the Act. It accordingly, required consideration in terms of the Act.

42. The proper approach (which is now settled law) to the interpretation of statutory provisions is as follows[84]:

42.1 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;

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

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

[83] Answering Affidavit p 005-33 para 36

[84] Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA); Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA).See also Derby-Lewis v Minister of Justice and Correctional Services and Others 2015 (2) SACR 412 (GP) at para [57] and [58]

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

43. The above approach in legislative interpretation, with specific reference to section 79 of the Act, was endorsed and applied by the court in **Derby-Lewis v Minister of Justice and Correctional Services**[85]. 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:

43.1 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;

43.2 The risk of re-offending is low; and

43.3 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]

44. We submit 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.

[85] 2015 (2) SACR 412 (GP) at paras [57] - [58]

45. The Applicant's insistence on a positive recommendation as an absolute requirement is also not founded on any authority. If such insistence is based on the provisions of Regulation 29A(7) as is evident from the Applicant's Replying Affidavit[86], we submit that such interpretation is flawed. We submit that there is authority to the effect that *it is not permissible to treat the Act and regulations made thereunder as a single piece of legislation and to use the latter as an aid to the interpretation of the former. A regulation cannot be used to enlarge the meaning of a section of an Act*[87].

46. We accordingly, submit on the basis of the aforegoing that, in taking the impugned decision, the National Commissioner did not exceed his powers in terms of the Act.

AD WHETHER THE DECISION IS UNREASONABLE, IRRATIONAL AND ARBITRARY

47. The Applicant contends that the decision of the National Commissioner is unreasonable, irrational and arbitrary based on the following:

[86] Replying Affidavit p 008-52 para 181. See also Applicants Heads of Argument p 009-17 (see un-numbered paragraph above para 32)

[87] Moodley and Others v Minister of Education and Culture, House of Delegates and Another 1989 (3) SA 221 (A) at p233E-F, Freedom of Expression v Chair Complaints and Compliance Committee 2011 JDR 0036 (GSJ) at para [95], Amalgamated Engineering Union of South Africa v Minister of Labour 1965 (4) SA 94 (W) at p96D and Hamilton Brown v Chief Registrar of Deeds 1968 (4) SA 735 (T) at 737C-D.

47.1. The National Commissioner's reasons do not meaningfully engage with whether it is appropriate to grant medical parole in accordance with section 79(1)(a) of the Act.[88]

47.2. The National Commissioner does not explain why he departed from the recommendation of the MPAB of 2 September 2021[89].

47.3. National Commissioner could have engaged with the Board before overruling it[90].

47.4. The National Commissioner unreasonably, irrationally and arbitrarily prefers the medical reports of the SAMHS and a single member of the MPAB over the recommendation of the Board[91].

48. It is denied that the National Commissioner's reasons do not meaningfully engage with whether it is appropriate to grant medical parole in accordance with section 79(1)(a). Furthermore the issue of whether the Fourth Respondent met the criteria set in section 79(1)(a) of the Act has been extensively addressed above with specific reference to Dr Mafa's medical findings and his recommendation for the placement of the Fourth Respondent on medical parole.

[88] Supplementary Founding Affidavit p 004-27 para 96
[89] Supplementary Founding Affidavit p 004-28 para 98
[90] Supplementary Founding Affidavit p 004-29 para 103
[91] Supplementary Founding Affidavit p 004-30 para 106

49. 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[92].

50. Dr Mafa's report forms part of the documents that served before the National Commissioner in the process of the consideration of the Fourth Respondent's application for medical parole. In paragraph 13 of the National Commissioner's reasons, he specifically stated that he was satisfied that the Fourth Respondent met the criteria set out in section 79(1) of the Act[93]. In the Answering Affidavit the National Commissioner stated that he would have not stated this, if he had not satisfied himself that the jurisdictional factors that are set out in the aforesaid section of the Act are indeed met[94].

51. The fact that the provisions of the Act confer a discretion on the National Commissioner in the process of the consideration of an offender's application for medical parole provides the reason to the Applicant's question as to why the National Commissioner did not approve the recommendation of the MPAB or as the Applicant put it, departed from the recommendations of the Board. The Board made its recommendation and handed the matter over to the National Commissioner for a decision. There was no reason to further engage

[92] Answering Affidavit p 005-68 para 120
[93] Answering Affidavit p 005-69 para 121; Rule 53 Record (Annexure "**SFA11"** to the Supplementary Founding Affidavit) p 004-153 para 13
[94] Answering Affidavit p 005-67 – 005-69 paras 119 - 121

with the Board whilst there was adequate information at the disposal of the National Commissioner to consider and take a decision, in particular regard being had to the fact that the National Commissioner had to exercise a discretion.

52. It is not correct that the National Commissioner 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 is an undeniable fact that the SAMHS team of doctors are familiar with the Fourth Respondent's health status as their patient. The National Commissioner had no reason to doubt their efficiency and competency. The contention that seeks to suggest that the National Commissioner preferred the report of Dr Mphatswe above that of the MPAB is incorrect and baseless[95]. The MPAB played its part and the National Commissioner had to consider the matter on the basis of information before him.

53. Dr Mphatswe is also not the only doctor who recommended the Fourth Respondent for placement on medical parole as Dr Mafa recommended placement on medical parole. Dr Mphatswe's report formed part of a collection of a body of relevant information that was placed at the disposal of the National Commissioner in the process of the consideration of the matter[96].

[95] Answering Affidavit p 005-71 para 127
[96] Answering Affidavit p 005-71 para 128

54. In **Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others**[97], the Constitutional Court as per Chaskalson P, as he then was, stated that it is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

55. In **Pharmaceutical Manufacturers Association** *supra,* the Court further stated the following:

> "[90] *Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be*

[97] 2000 (2) SA 674 (CC) at para [85].

made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision.

56. **Yvone Burns** defines an irrational decision, with reference to English judicial decisions and the writings of English academics which, amongst others include Lord Diplock, as follows[98]:

56.1. A decision unsupported by evidence;

56.2. A decision in which there is no connection between evidence and the reasons provided for it; and

56.3. Decisions in which the reasons themselves are unintelligible.

57. The task of the Court is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution[99]. We submit that the decision of the National Commissioner is supported by evidence, there is connection between the said evidence and the reasons given for it and, viewed objectively, the reasons provided are not unintelligible. As such the decision does not fall foul to irrationality or unreasonableness.

58. We submit, regard being had to the aforegoing submissions that, viewed objectively, the decision of the National Commissioner is rational and, therefore, this Court cannot interfere therewith simply because it might disagree with therewith or if it feels that the power was exercised inappropriately.

[98] Administrative Law, Yvone Burns 4th Ed, LexisNexis at p 422
[99] Bato Star *supra*

AD WHETHER IRRELEVANT CONSIDERATIONS WERE TAKEN INTO ACCOUNT AND RELEVANT CONSIDERATIONS NOT CONSIDERED

59. In the process of exercising the discretion conferred upon him in terms of the Act, which discretion had to be exercised judiciously, the National Commissioner had to consider a range of positive factors that were in favour of the placement of the Fourth Respondent on medical parole against factors that militated against such placement and only one negative factor came to the fore, namely the fact that the MPAB did not recommend Mr Zuma's placement on medical parole. Upon weighing the last mentioned factor against all the positive factors the National Commissioner came to the conclusion that it was a reasonable decision to place Mr Zuma on medical parole, in particular based on the fact that his application met all the jurisdictional factors stated in section 79(1) of the Act. These factors have been extensively dealt with above.

60. The facts complained about in the Applicant's Supplementary Founding Affidavit, Replying Affidavit and the Heads of Argument[100] were, in fact, comments in passing that were never material in the actual decision making process[101].

61. We accordingly, submit that the Applicant's contentions to the effect that the decision of the National Commissioner is reviewable in terms of section

[100] Supplementary Founding Affidavit p 004-34 paras 124 – 127; Applicant's Heads of Argument p 009-31 – p 009-33 paras 64 - 66

[101] Answering Affidavit p 005-72 – 005-73 paras 132 - 133

6(2)(e)(iii) of PAJA as irrelevant considerations were taken into account and relevant considerations were not considered, is misplaced.

AD WHETHER THE DECISION WAS UNCONSTITUTIONAL AND UNLAWFUL, AND FALLS TO BE REVIEWED AND SET ASIDE, AND IF SO, WHETHER THE DECISION SHOULD BE SUBSTITUTED WITH A DECISION REJECTING MR ZUMA'S APPLICATION FOR MEDICAL PAROLE.

62. The Applicant bases his argument on the alleged unlawfulness of the National Commissioner's decision mainly on the contention that the National Commissioner overruled the MPAB and that he had no reason to do so[102]. This contention is misplaced and is unfortunately based on the wrong interpretation of the Act. We have dealt with this wrong interpretation of the law above.

63. The Applicant wants this court to review and set aside the decision of the National Commissioner and substitute it with a decision refusing the Fourth Respondent's application for medical parole. For reasons that have been stated above, we persist with the submission that the decision is not 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 the decision of the National Commissioner for that of the Honourable Court, the Court has a paucity of information before it to deal with the matter adequately. Not all the information that was before the National

[102] Applicant's Heads of Argument p 009-26 paras 52 - 53

Commissioner when he 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.

64. In **Gauteng Gambling Board v Silverstar Development Ltd and Others**[103], the Supreme Court of Appeal held that:

"[28] *The power of a court on review to substitute or vary administrative action or correct a defect arising from such action depends upon a determination that a case is "exceptional": s8(1)(c)(ii)(aa) of the PAJA. Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon the consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair…."*

[103] 2005 (4) SA 67 (SCA). See also **University of the Western Cape and Others v Member of Executive Committee for Health and Social Services and Others 1998 (3) SA 124 (C)** at 131D – G: where it was held that 'Over the years South African Courts have recognized that in exceptional circumstances the Court will substitute its own decision for that of a functionary who has a discretion under the Act. Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter, the Courts have not hesitated to substitute their own decision for that of the functionary. . . . The Courts have also not hesitated to substitute their own decision for that of a functionary where further delay would cause unjustifiable prejudice to the applicant. . . . Our Courts have further recognized that they will substitute a decision of a functionary where the functionary or tribunal has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again. . . . It would also seem that our Courts are willing to interfere, thereby substituting their own decision for that of a functionary, where the Court is in as good a position to make the decision itself.'

[29] *An administrative functionary that is vested by statute with power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court has none of these advantages and is required to recognise its own limitations…….That is why remittal is almost always the prudent and proper course."*

65. Lastly, in **International Trade Administration Commission v Scaw South Africa (Pty) Ltd**[104], the Constitutional Court held as follows:

"[95] *Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp the power or function by making the decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."*

66. We therefore submit that, in the event of this Honourable Court finding that

[104] 2012 (4) SA 618 (CC). See also Minister of Home Affairs and Others v Scalabrini Centre and Others 2013 (6) SA 421 (SCA) at para [59]

the decision of the National Commissioner 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), the court ought not to substitute its decision for the decision of the National Commissioner. 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. In any event, the position of the National Commissioner is no longer occupied by the deponent to the Answering Affidavit which is before this Honourable Court.

67. It is furthermore our submission, regard being had to the *dicta* referred to above, 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 the decision of the National Commissioner.

68. It is also our submission that the Fourth Respondent is currently serving his sentence as was imposed on him by the Constitutional Court and, were this court to decide to review and set aside the impugned decision and substitute it for that of the Honourable Court, it would 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.

69. In the premises, we submit that the Applicant has failed to make out a case for

relief sought in the Notice of Motion.

70. We accordingly submit that it may please this Honourable Court to dismiss this application with costs and such costs to include the costs attendant upon the employment of three counsel.

SIGNED AT **PRETORIA** ON THIS THE 16th DAY OF **NOVEMBER 2021**

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SM MPHAHLELE SC

_____
E BALOYI-MERE SC

_____
EB NDEBELE

Counsel for the First Respondent