IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 46468/21

In the matter between:

HELEN SUZMAN FOUNDATION **Applicant**

And

NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES **First Respondent**

DEPARTMENT OF JUSTICE AND CORRECTIONAL SERVICES **Second Respondent**

MEDICAL PAROLE ADVISORY BOARD **Third Respondent**

JACOB GEDLEYIHLEKISA ZUMA **Fourth Respondent**

AND

CASE NO: 46701/21

In the matter between:

AFRIFORUM NPC **Applicant**

And

NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES **First Respondent**

THE MEDICAL PAROLE ADVISORY BOARD **Second Respondent**

JACOB GEDLEYIHLEKISA ZUMA **Third Respondent**

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

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

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

AND

CASE NO: 45997/21

In the matter between:

DEMOCRATIC ALLIANCE **Applicant**

And

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

THE MEDICAL PAROLE ADVISORY BOARD **Second Respondent**

JACOB GEDLEYIHLEKISA ZUMA **Third Respondent**

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

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

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

FILING SHEET

Filing of Respondent's Written Submissions who is Fourth Respondent under Case Number 46468/21, Third Respondent under Case Number 45997/21 and Case Number 46701/21.

DATED AT HONEYDEW ON THIS THE 16TH NOVEMBER 2021.

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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASES NOS: 45997/21
46468/21 and 46701/21

In the matter between:

THE DEMOCRATIC ALLIANCE	1st Applicant
THE HELEN SUZMAN FOUNDATION	2nd Applicant
AFRIFORUM NPC	3rd Applicant

and

THE NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES AND OTHERS	1st to 6th Respondents

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COMPOSITE WRITTEN SUBMISSIONS ON BEHALF OF THE 3rd RESPONDENT (FORMER PRESIDENT JG ZUMA)

Preamble

"Section 35(2) of the Constitution addresses *the general rights of detained and incarcerated persons, including the right to living conditions consistent with human dignity. This entails, among other things, adequate medical treatment, and the right to communicate with their spouses, next of kin, religious counsellors and medical practitioners.*"[i1]

A: INTRODUCTION

1. The three applications discussed in these submissions raise similar factual and legal issues. In a nutshell, there are four broad topics with which we deal, all of which properly considered should result in the dismissal of the

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[1] Per Theron J in *Sonke Gender Justice NEC v President of the RSA* 2021 (3) BCLR 269 (CC) at paragraph [38]

applications upon various preliminary reasons and on the merits. The first is whether all these applicants have the requisite standing to pursue this litigation ostensibly to set aside the decision of the Commissioner to grant Mr Zuma medical parole. Secondly, the application is not urgent. Thirdly, the application is moot. Fourthly, and even if these preliminary objections are not sustained, the applicants cannot do so without impugning the medical basis on which the medical parole was granted. Ancillary to that question is whether the applicants are entitled to impugn Mr Zuma's medical reports for the purpose of impugning the decision to grant medical parole. The third is, even if the applicants were to establish another legal basis – aside from the medical grounds – whether it is just and equitable under section 8 of PAJA and/or section 172 of the Constitution to grant the relief that they seek.

2. Stripped of all the frills, the Applicants approach this court to seek an order directing the physical re-incarceration of Mr Zuma. They do so on the basis of the substitution principle. They do not seek that the decision on medical parole be reconsidered by the relevant functionaries that are vested with the statutory powers to consider and grant or refuse medical parole. So, this is not a case in which the Applicants contend or can contend that Mr Zuma has no medical condition justifying that his physical imprisonment be closely watched whether in prison or outside prison. It is not a case in which the Applicants contend or can contend that the relief that they seek is consistent with our rights and dignity-based jurisprudence – or even the purpose of the Correctional Services Act 111 of 1998 ("the Act").

3. The DA, HSF and Afriforum (collectively referred to as "the applicants") all make essentially similar factual and legal contentions. Briefly, they contend that the Commissioner was not authorised to grant medical parole when the recommendation of the Medical Parole Advisory Board was that he should not be released on medical parole in terms of section 79(1)(a) of the Act, when properly interpreted. The material facts and sequence of events are not seriously disputed.

4. The applicants accuse the Commissioner of breaking the law to extend a favour to Mr Zuma for an unspecified reason. The base their accusation on the perception that the Commissioner has a political relationship with Mr Zuma the nature of which drove him into exercising his statutory powers in an unlawful manner by granting Mr Zuma an unjustified benefit. In pursuance of this false narrative, they incorrectly and deliberately label the Commissioner as "a politician", when they know too well that he was performing his duty a as public official.

5. There are four basic misconceptions underpinning these politically driven applications. The fundamental one is that Mr Zuma's medical condition does not qualify him for medical parole because it is allegedly not terminal as required under section 79(1)(a) of the Act. The second is that granting Mr Zuma medical parole undermine the rule of law and the Constitution as it relieves him of the physical pain of incarceration – and therefore does not accord with the terms of the Constitutional Court order directing his imprisonment. The third is that, even if the Commissioner's decision could be impugned on another technical legal basis, a just and equitable order on the

known facts is the direct physical re-incarceration. The fourth is whether there is a factual basis on which the Court should usurp the statutory functions of the Commissioner to substitute a decision of the Commissioner, bearing in mind the applicable legal principles, including the doctrine of separation of powers.

6. These submissions will firstly address the following preliminary points *in limine*:

6.1. The applicants do not have standing to bring this application as they do not have a right to access Mr Zuma's medical condition or records;

6.2. The application is not urgent;

6.3. Mootness; and

6.4. The issue of non-joinder will no longer be pursued as any objection but will be raised as a consideration in respect of remedy and the scale of costs.

7. We will then deal with the merits under the following topics:

7.1. The legal framework for the granting of medical parole; and

7.2. The Commissioner's decision to grant medical parole complies with the law.

8. Finally, we deal with the relief as follows:

8.1. Even if the Commissioner has erred, a just and equitable order is to order that the decision be reconsidered and pending the decision, Mr Zuma to remain on medical parole;

8.2. There is no factual basis for the substitution order.

9. To avoid prolixity, we deal herein with submissions directed at all three applicants. They overlap and have been clearly synchronised. Whenever it is necessary to specify which applicant is being referred to, that will be made clear. Otherwise, the key submissions apply to all three of them interchangeably.

B: PRELIMINARY POINTS *IN LIMINE*

10. We address the preliminary points of law first.

B1: The DA has no standing to bring the application

11. The applicants must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and it must be a current interest and not a hypothetical one.[2] It is trite that the duty to allege and prove *locus standi* rests on the party instituting the proceedings. The rule that only a person who has a direct interest in the relief sought can claim a remedy, is no more clearly expressed than in the judgment of Innes CJ in *Dalrymple*:3:

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[2] DE van Loggerenberg and E Bertelsmann: Erasmus: Superior Court Practice 2 ed Vol (loos- leaf) at D1-186

> "*The general rule of our law is that no man can sue in respect of a wrongful act, unless it constitutes a breach of a duty owed to him by the wrongdoer, or unless it causes him some damage in law.*"

12. The DA does not meet the threshold to bring this application either under section 38(a) or (d) of the Constitution. In *Giant Concerts CC v Rinaldo Investments (Pty) Ltd*[3] at paragraph 41, the Constitutional Court held that:

> "*To establish own-interest standing under the Constitution a litigant need not show the same written "sufficient, personal and direct interest" that the common law requires but must still show that a contested law or decision directly affects his or her rights or interests, or potential rights and interests*" (emphasis added).

13. The requirement must be generously and broadly interpreted to accord with constitutional goals.

14. What is clear is that the DA, and the other applicants, do not even pretend to be protecting any fundamental Chapter 2 rights but rely on the alleged breach of "*the role of law*". To the extent that they rely on PAJA, it is not clear whose rights they are asserting.

15. The DA is a political party represented in the National Assembly. It is the official opposition political party with constitutional standing in Parliament. As a party represented in Parliament, the DA has parliamentary remedies in relation to holding the Commissioner to account for his decision to grant medical parole. Using its position in Parliament, the DA has the constitutional right, in its oversight role, to call the Commissioner or the Department to

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[3] 2013 (3) BCLR 251 (CC)

account for the decision to grant medical parole. It does, not as a political party have a right to access Mr Zuma's medical record. It does not as a political party have a right to publicly speculate on whether Mr Zuma is terminally ill or not. As a political party, the DA has no public interest right to trump Mr Zuma's constitutional rights by seeking to either litigate matters involving Mr Zuma's medical reports and speculating over the veracity of those medical reports.

16. Conversely, when its standing is challenged, as it is the case here, it bears the onus to prove such standing to the satisfaction of this Honourable court, failing which, the application must be dismissed.

17. The DA claims to be acting in the public interest in terms of section 38(d) of the Constitution which provides that

> "*Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are*
>
> ....
>
> *(d) anyone acting in the public interest.*"

18. The Constitutional Court in *Lawyers for Human Rights v Minister of Home Affairs*,[4] quoting with approval the judgment of *Ferreira v Levin*, dealt with must be shown by a party asserting its standing based on section 38(d) of the Constitution.

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[4] [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) at paragraph 11,

19. In *Ferreira v Levin NO and Others,*[5] dealing with section 7(4)(b)(v) of the Interim Constitution, which is the equivalent of section 38(d), the Constitutional Court held that:

> "*This Court must be circumspect in affording applicants standing by way of s 7(4)(b)(v) and will require an applicant to show that he or she is genuinely acting in the public interests. Factors relevant to determining whether a person is generally acting in the public interest will include consideration such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and a range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These factors will need to be considered in the light of the facts and circumstances of each case.*"

20. The fact that the DA is a political party with political interests in the physical incarceration of Mr Zuma in the total absence of any link to the subject matter of the medical parole decision cannot be brought within the fold of the *Giant Concerts* criterion, however generously and broadly interpreted. The DA's political interests do not clothe it with the right to litigate a dispute over the medical parole of any prisoner for that matter. The DA's own real interests are largely to enforce a humiliating incarceration for its selfish political agenda rather than a legal interest. It must be determined whether there are rights and interests relied on by the DA which are implicated in the conduct of the Commissioner and that have been directly affected by the medical parole decision and/or whether it has a legitimate interests. The courts are not there

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[5] 1996 (1) SA 984 (CC) at paragraph 234

to be used as platforms to launch political attacks against political opponents or enemies.

21. The duty of the court is to look beyond the interest claimed by an applicant and into the real interest being pursued. The Constitutional Court in *Ferreira v Levin (supra)* further held that:

> "*The issue is always whether a person or organisation acts genuinely in the public interest. A distinction must however be made between the subjective position of the person or organisation claiming to act in the public interest on the one hand, and whether it is, objectively speaking, in the public interest for the particular proceedings to be brought. It is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. The factors set out by O'Regan J help to determine this question. The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations in the analysis*" (emphasis added).

22. The DA does not meet the threshold held for meeting the standard set in section 38(a) and/or 38(d) of the Constitution.

23. The DA does not properly or adequately address the issue of standing in the written submissions, even though its standing is specifically challenged by Mr Zuma.

24. In addition to the above, there is no recognised legal dispute between the DA and Mr Zuma involving his medical parole. There may be a political dispute

about whether a foe of the DA deserves the medical parole but that is not a justiciable dispute giving the DA the locus standing to sue Mr Zuma in a court of law. Neither section 38 nor section 34 of the Constitution allows it.

25. The DA has no right to the medial reports of Mr Zuma on which the medical parole decision was granted. On that basis alone, the DA has no locus standing to challenge a decision which if standing is granted would result in a gross violation of the constitutional rights of Mr Zuma or any patient for that matter. This is because a review of the medical parole is essentially a review of the medical basis on which it was refused or granted. Recognising the standing of the DA to challenge the medical parole would give it the right to access and comment on the medical reports of Mr Zuma – a right that it does not have. The DA and the other applicants fall into the category of persons against whom Mr Zuma's privacy rights must be protected.

26. Accordingly, a litigant has locus standi to challenge a law which objectively viewed conflicts with a right contained in the Bill of Rights only in circumstances where the litigant can show a sufficient interest in the declaration of invalidity. The majority of the Court in Ferreira, in finding that the applicants had locus standi, considered that:

26.1. the rule sought to be protected had to be inextricably linked to the right sought to be protected;

26.2. the requirements ordinarily set by a court for the exercise of its jurisdiction to issue a declaration of rights must be present;

26.3. the basis of the applicant's attack must be a valid and not a hypothetical concern;

26.4. the application must deal with real and substantial issues and the applicants must have a direct interest in having the issues resolved.

27. The majority in *Ferreira* concluded that it is only where the applicants have a sufficient interest in seeking a ruling that they can rely on an allegation that, objectively, a right in the Bill of Rights has been affected or threatened or infringed. Section 38 of the Constitution applies to rights infringements. The DA has not alleged a right that is threatened for which it is competent for it to rely on section 38 for its standing to bring this urgent review application. On the contrary, the application objectively viewed threatens the constitutional rights of Mr Zuma to his inherent dignity encapsulated in the duty to ensure that prison conditions are not degrading and inhumane. Physically incarcerating a person who is known to have a debilitating medical condition is nothing else but cruel and unusual punishment similar to the death penalty. The considerations made in *S v Makwanyane*[6] are therefore directly

28. No substantial facts are advanced to support either claimed basis for standing. The mere fact that the DA, like thousands of other organisations, is allegedly "*committed to the value (sic) of the rule of law*" cannot constitute sufficient basis for it to launch any application in which the rule of law has been allegedly infringed, which is the case in practically all judicial review applications. Neither is the public entitled to be directly represented in every court case simply because it has an interest "*in ensuring that the government abides by*

[6] 1992 (3) SA 391 (CC)

the law". Such glib utterances do not even approximate the satisfaction of the sufficient interest test, otherwise everybody would have the standing to lodge any application about anything.

B2: Whether the HSF has standing to bring these proceedings

29. The HSF only claims own interest standing. It bases its assertion of standing on two grounds, namely its "participation" in the litigation in the Constitutional Court, which resulted in the incarceration of Mr Zuma without the benefit of a trial. It claims to have been "*a party*" to that litigation. This claim is false since the HSF was only admitted as an *amicus curiae*, which fact was specifically reconfirmed by the Constitutional Court during the recent hearing of the matter in July 2021.

30. In any event and even if the HSF had been a party in separate and completely unrelated litigation about contempt of court and/or rescission, that could never form the basis for *locus standi* in the present application about medical parole, unless it is accepted that theirs is a personal vendetta driven by personal hatred. In that event, their interest is not a legitimate legal interest.

31. In passing, the HSF also claims to have "*in any event, public-interest standing given the public importance of the National Commissioner's decision and its effect on the rule of law*". Whatever this means, it is woefully inadequate to form a basis for standing under section 38(d) of the Constitution. Simply put, there is no basis pleaded in support of public-interest standing except alleged "importance".

32. For the same reasons advanced against the standing of the DA, the HSF does not have asset meet the threshold to bring the urgent review application. It does not assert a fundamental right that it seeks to enforce. Instead, it seeks an order that would violate the constitutional rights of Mr Zuma to the privacy of his medical information. It also seeks an order that can only be recognised if the obligation on the Commissioner to respect Mr Zuma's medical information is breached. The HSF has not demonstrated how it has a legal dispute with Mr Zuma for which would entitle it to bring these proceedings to protect a right or enforce a duty. Finally, the HSF has no standing to seek to review a decision on medical parole of Mr Zuma without impugning the medical report on which the decision to grant him medical parole was given.

33. The DA cannot challenge the medical report on which the medical parole was considered and granted. It, as the DA and the Afriforum do not present alternative objective medical evidence on which the Commissioner's decision based on his access to Mr Zuma's medical reports should be discarded. The three applicants engage in reckless and mindless conjecture and speculation about Mr Zuma's medical situation and invites the Court to accept such views as sufficient to displace that of a functionary with access to the medical records of Mr Zuma.

B3: Whether Afriforum has the standing to bring these proceedings

34. The basis upon which Afriforum claims standing is rather confusing and confused. On the one hand, it claims to bring the application "*in the public interest and on behalf of its members*". This phrase suggests reliance on section 38(d) and 38(e). In the same breath and at paragraph 10.9, it claims

to be an interested person, without any substantiation, and to be acting "specifically" in terms of section 38(d) and 38(e) of the Constitution.

35. Afriforum also claims to have been approached by its unnamed ad unidentified members on an unspecified date and by unspecified means or medium, "*to launch this application*". It too claims to be "*committed to the value (sic) of the rule of law and the equal application of the law*".

36. For the reasons set out above, the Afriforum similarly does not meet the threshold for the standing required to bring urgent review proceedings against Mr Zuma.

B4: General remarks on *locus standi*

37. Putting aside the inadequacies identified in the pleadings which lack the necessary averments to establish *locus standi*, there are additional objections which will be elaborated upon in argument and which cut across all three applicants.

38. This application is a thinly-veiled political stunt aimed at cheap electioneering, racist hatred, opportunism and the unwanted attention of busybodies, such as the three applicants. They do not have any legitimate interest in the outcome of the application apart from posturing, attention-seeking and settling political and historical scores.

39. All three are white-dominated and proto-racist right-wing organisations whose mission in life is to mock the current black-dominated government, of which Mr Zuma was Head of State and President of the ruling party. This Honourable Court can no longer be the playground of apartheid apologists who

nostalgically hanker for "*the good old days*" when black people, especially Africans, were treated as sub-humans. Their present conduct is nothing short of seeking a judicial lynching of their political opponent or enemy. The courts cannot be used as a tool to legitimise a racist lynch mob reminiscent of the American South on African slaves, who could be hanged on trees at the whim of their slave masters.

40. In any event and even if these were genuine and democratically minded organisations, which is denied, there should be no place in our courts for aimless busybodies to litigate in respect of matters in which they have no sufficient or legitimate interest. This will set a dangerous precedent, which will burden our already strained legal system by pushing out deserving cases and wasting scarce judicial resources on aimless litigation only aimed at impressing the supremist funders of these entities.

41. What makes matters worse, these organisations, without any claim to any medical expertise, seek to second-guess the expert and educated opinions of qualified medical experts and prison officials which led to the impugned decision to place me under medical parole and based on the common-cause facts. Only arrogance can drive any lay person to do so without even soliciting the assistance of their own experts. Our court system does not allow or condone such conduct. Neither does the court possess the expertise to refute medical opinions given by professionals who are bound by their own professional obligations and the Hippocratic Oath. The conduct of medical practitioners is also highly regulated in terms of the Health Professions Act 56 of 1974.

42. In short, no party can have the *locus standi* to abuse the court process to advance ulterior, improper and/or racist motives and agendas. Apart from platitudes about the rule of law, the applicants have not revealed any rights or interests of theirs or those they represent which have been violated by the conduct of the National Commissioner, which conduct merely seeks to protect Mr Zuma's own constitutional rights referred to in the rest of these submissions.

43. Neither can the court's assistance be properly enlisted to assist these applicants to violate, without justification, the fundamental rights contained in the Bill of Rights. In the *Sonke Gender Justice* case (*supra*), Theron J correctly stated that:

> "*Violations of the right to freedom and security of the person may necessarily infringed other rights: for example ... the rights to dignity, healthcare and privacy.*"[7]

44. The application(s) must accordingly be dismissed for want of *locus standi*.

B5: Urgency

45. These applications have been brought on an extremely urgent basis without any factual allegations made out in their respective affidavits to support the adoption of this extraordinary procedure in review proceedings. The only discernible basis for this urgent review application is the applicants' committed political hostility and its political desire to see Mr Zuma in prison walls on a manufactured political narrative that such a situation would affirm the

[7] At paragraph [37]

supremacy of our constitutional democracy. In some convoluted manner, the applicants appear to contend that this review application is urgent because as long as Mr Zuma is on medical parole, he serves his term of imprisonment under physical conditions that do not inflict the full physical pain of imprisonment and display the full humiliation and the indignity of a physical incarceration. The applicants want to see Mr Zuma serve his term of imprisonment within the physical walls of a prison as their political trophy in their fight for the rule of law. Rather than see Mr Zuma serving his prison sentence under conditions in terms that take into account his medical condition and the view of his medical team on how to manage that medical condition, the Applicants wish to impose their view of what punitive conditions he must serve his term of imprisonment. The applicants know that, in the eyes of the law, Mr Zuma is a prisoner serving his term of incarceration. The only difference is that due to his medical condition, the considerations that must be given to how he serves his time in prison, rationally must include medically determined prison conditions. To do so is to vindicate the Constitution and not to fail to do so would constitute a serious infringement of the Constitution. There can be no urgency to breach the supreme law.

46. The applicants contend that Mr Zuma's medical condition is such that he must continue to be physically incarcerated in prison walls, even if to do so would deprive him of his constitutional entitlement to adequate medical care and treatment. They say so without challenging the medical basis on which the decision to grant the parole was granted. The applicants are political opponents of Mr Zuma and therefore can have no objectivity to serve the public interests that they contend is the basis of their standing. We have

already dealt with standing but we point out that, in the context of urgency, the applicants have not established, based on objective facts, why this review application must be determined on an urgent basis, except that they will derive some joy in seeing their political enemy physically paraded as a prisoner within prison walls.

47. There are no grounds for urgency for a number of related reasons. First, it is a notoriously widely publicised fact that Mr Zuma suffered a medical condition that required him to travel abroad for specialist medical treatment. His medical situation was widely publicised when it was given and accepted as a basis for his absence at the Commission of Inquiry in 2020. While Justice Zondo accepted his explanation for his absence to appear before him in 2020, Justice Pillay initially refused to accept a medical report when dealing with his absence in a holding date for his criminal trial and instead granted a warrant for his arrest while he was on medical leave in Cuba. She too eventually came to accept that there was no basis to second-guess the professional conclusions of trained medical experts.

48. When he was imprisoned on 8 July 2021, the applicants must have foreseen that his widely reported medical condition would have to be considered by the prison authorities. Like all human beings, the applicants are expected to know that a 79-year-old prisoner with Mr Zuma's widely reported medical history would immediately trigger the duty to ensure that the conditions of his physical incarceration did not exacerbate his frail medical condition. The applicants are expected to have known that Mr Zuma, as a former President of the Republic of South Africa, was under the medical care of a team of State

specialist medical doctors and Military Intelligence. While in prison, the medical care of Mr Zuma remained under the State medical doctors and his medical information remained classified under the applicable intelligence and national security legislation.

49. The applicants finally are expected to have known that medical parole was always an imprisonment option that could be imposed on a prisoner widely reported to suffer from a debilitating medical condition and that such an imprisonment option could be decided on by, *inter alios*, the Commissioner based on objective medical facts.

50. Despite knowing that a medical parole for Mr Zuma was a realistic possibility, the Applicants did nothing to register their 'legal' interests to be informed when that process of medical parole may be triggered. The Applicants did not write to the Commissioner or any of the authorised persons responsible for the management of the parole system to alert them of their special 'interest' in any medical parole applications involving Mr Zuma. Their failure to announce their special interest to Mr Zuma or the Commissioner or any other relevant functionary of their interest in any medical parole application of Mr Zuma created the urgency that they now seek to rely on. Had these Applicants taken immediate steps to ensure that their special 'legal' interests in any medical parole applications on behalf or by Mr Zuma was registered with the prison authorities or the Commissioner, they should have written to him as soon as Mr Zuma was incarcerated.

51. Two facts stand firms against the allegation of urgency. First, the applicants have no legal right to challenge a decision based on medical reasons without

challenging the veracity of those medical reasons. If they had the right to access and challenge the medical reports of Mr Zuma, their right to challenge the confidential medical basis on which Mr Zuma was granted medical parole might have been justified.

52. It was a fatal error on their part to launch urgent review proceedings without first satisfying themselves or obtaining proper legal advice as to whether they would be entitled to the Rule 53 record.

53. Second, as a matter of law, following from the first point, the applicants do not have a legal right to bring review proceedings in circumstances that would violate the constitutional rights of Mr Zuma. In other words, the applicants do not have a right to violate Mr Zuma's constitutional rights by forcing him or the authorities to publish the private and confidential medical records on which the medical parole decision was made. The political speculation of political organisations as to whether Mr Zuma is terminally ill is a very distasteful and reprehensible development in the law of standing if these applicants' locus standi were to be recognised. In essence, granting the applicants the right to "urgently" question the medical condition of Mr Zuma forces him to abandon his constitutional rights to prevent a court from accepting the political speculation over his medical condition. In addition, granting the applicants the standing to review and set aside the decision of the Commissioner places him in a position where he will violate his constitutional obligations under section 7 of the Constitution read together with the provision of the Correctional Services Act.

54. In any event, the Applicants bring an application that is entirely inconsistent with our dignity-based jurisprudence and international law to deliberately trigger a public controversy on whether Mr Zuma's or anyone else's medical condition is terminal or not. This application engages in speculation about whether Mr Zuma is terminally ill in circumstances where a body with the statutory authority to access and consider Mr Zuma's medical records has given consideration to his medical condition in determining the appropriate conditions for his imprisonment.

55. The HSF contends that the rule of law and the supremacy of our Constitution is the card on which they can urgently access the Courts to challenge the decision of the Commissioner. For its part, the HSF presents self-contradictory grounds of urgency. On the one hand, (without any basis in law) it seeks an order in its Prayer 5 that the period served under medical parole should not count towards the fulfilment of the sentence. In the same breath, the HSF states that the matter is urgent because Mr Zuma would otherwise "benefit" from an unlawful reduction of his sentence. This argument is illogical and untenable. Medical parole does not reduce the sentence of a prisoner. It simply allows a prisoner to serve the remainder of his or her sentence outside prison and in conditions of dignity consistent with the dictates of our Constitution and the *residuum* principle.

56. Apart from invoking the irrelevant factors relating to the alleged offence and judgment of the Constitutional Court, the HSF feigns surprise at the fact that Mr Zuma's personal medical information is not being splashed in public like all

other human beings, even putting aside the obvious safety and security considerations or classified status thereof.

57. The dead giveaway of their ulterior motives is best demonstrated by the disrespectful and sensationalist headline grabbing language they deliberately use in their pleadings and heads of argument. Examples of this abound but we can single out the mischievous dragging of the completely irrelevant case of Mr Schabir Shaik, leaving out thousands of other more recent examples of persons who were granted medical parole.

58. As far as Afriforum is concerned, no additional facts or real grounds for urgency have been addressed. As with the other applicants, reliance is merely placed on unsubstantiated and unsustainable legal conclusions.

59. Last but not least, the relief sought by the applicants in respect of both the merits and the remedy is so outlandish that it can be described as fanciful and unattainable. The idea that this Honourable Court can review and set aside a polycentric decision taken by the duly designated functionary and then go on to substitute its own decision, all this without any contradictory medical expert evidence or allegations of exceptional circumstances, is so outrageous that it should never be granted, either urgently or in due course. This would indeed be a textbook case of judicial overreach, a step which ought not to be in the urgent court and without affording the parties their full rights and the opportunity to engage with the issues.

60. The application(s) do not pass the most basic legal tests of urgency, namely the rule against self-created urgency and the need to demonstrate that substantial redress cannot be obtained in due course.

61. In the circumstances, the application must be struck out on the grounds of lack of urgency.

B6: Mootness

62. Even if the applicants could somehow establish urgency, we respectfully submit that the application(s) must be dismissed on the separate ground of mootness.

63. It is common cause and undisputed that as at the end of October 2021, Mr Zuma was eligible for ordinary parole, which is triggered by the completion of a sixth of the total sentence imposed.

64. Of particular significance to the mootness enquiry, which is context-specific to this particular case, the person(s) upon whose decision Mr Zuma's release on such parole would depend are either the Acting National Commissioner or the Head of the Estcourt Correctional Services, Mr Mthombeni.

65. Mr Mthombeni and the present Acting National Commissioner have both given evidence under oath in the present application, confirming and motivating their firm view that Mr Zuma ought to be released on medical parole because the centre is unable adequately to provide him with the requisite medical care and treatment for his serious conditions. From common sense, it can therefore be deduced that their decision on any application which he may lodge for ordinary parole will, in the circumstances, be a foregone conclusion. That decision will be unrelated to the alleged disputes about the requirements of section 79(1)(a) of the Act.

66. So, although at face value the certainty of the decision may seem speculative, in reality it is guaranteed. If so, any decision which this court may reach will be hypothetical and academic. That being so, the test for mootness will be met.

67. In any event and once the objection of mootness has been sufficiently raised, it is incumbent upon the applicant(s) to demonstrate why it is nevertheless in the interests of justice for the matter to be heard. The applicants have dismally failed to do so.

68. They all take the overly technical point that the parole application, in respect of which eligibility is conceded, has not been lodged and/or approved. We concede that to be so, but we respectfully submit that, in the unique circumstances of this case and taking into account all the surrounding circumstances and the personal circumstances of the inmate, and the known attitude of the decision-maker(s), there are sufficient grounds for the court to adopt a practical and "*robust, common-sense approach*", as described in an admittedly different context in the well-known case of *Soffiantini v Mould*.[8] Further submissions in this regard will be presented during oral argument.

69. If the court finds that the issue is moot and that the judgment will not have any practical effect, then we respectfully submit that it should exercise its discretion against hearing the application, taking into account the totality of the circumstances.[9]

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[8] 1956 (4) SA 150 (E) at 154G

[9] See *President of the RSA v DA* 2020 (1) SA 428 at paragraphs 14 to 19

70. In the circumstances, we respectfully submit that the application ought to be dismissed, alternatively struck off the roll, upon one or more or all of the three points *in limine* raised above. The objections must also be considered on a cumulative or related basis. The integrated question is whether it is in the interests of justice to give legal standing for the urgent hearing of an application with a degree of mootness. The answer must be a big NO. A similar approach was adopted in the leading case of *IEC v Langeberg Municipality.*[10]

71. In the unlikely event that this Honourable Court might dismiss all the above legal objections, we now turn to dealing with the merits and we demonstrate that, even in that event, the application falls to be dismissed on its own merits.

C: THE MERITS

72. Regarding the merits of the application, it is firstly important to identify the nature of the exercise which this Honourable Court is called upon to adjudicate. Primarily, the issue is one of constitutional and statutory interpretation.

73. The application is specifically based on section 33 of the Constitution (read with sections 6 and 8 of PAJA), alternatively section 1 (legality). The main case is supposedly based on alleged breaches of the rule of law.

74. The defences are specifically premised on sections 7, 12 and 39 of the Constitution.

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[10] 2001 (3) SA 925 (CC) at paragraphs [9] to [16]

75. The application is doomed to fail because it is based on a false foundation. All three applicants have disingenuously and deliberately approached the matter on the clearly incorrect premise that the impugned decision was based on section 79 of the Act. However and in truth, the decision was based on "*section 75(7) read with section 79*". This attempt at pulling the proverbial wool over the eyes of the court must be frowned upon.

76. The fact that the decision was mainly based on section 75(7), albeit read with section 79 for understandable reason, cannot be wished away, deceptively edited away or ignored. It is an inescapable fact. It has legal implications.

77. Before examining the applicable law, we must point out that the merits of the application must be examined against the material concession made by the HSF at paragraph 12.5 of its heads of argument, to the effect that:

> "*It is not disputed that DCS does not have medical facilities that provide the same standard of care as that of a specialised hospital or general hospital.*"

C1: The applicable regulatory framework

78. Before analysing the legal implications, it would be appropriate to cite the statutory and constitutional framework against which Mr Zuma's defences have been raised.

79. Section 75(7) of the Act provides that:

> "***Despite subsections (1) to (6), the National Commissioner may:***
>
> ***(a) place under correctional supervision 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; or

(b) ***cancel correctional supervision or day parole or parole or medical parole and alter the conditions for community corrections applicable to such person***".

80. Section 79(1) of the Act provides that:

"***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***".

81. Section 7(2) of the Constitution provides that:

"***The state must respect, protect, promote and fulfil the rights in the Bill of Rights***".

82. Section 12(1) of the Constitution provides that:

"***Everyone has the right to freedom and security of the person, which includes the right:***

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) ***not to be treated or punished in a cruel, inhuman or degrading way***".

83. Section 39 of the Constitution provides that:

> "***(1) When interpreting the Bill of Rights, a court, tribunal or forum:***
>
> ***(a) must promote the values that underlie in open and democratic society based on human dignity, equality and freedom;***
>
> ***(b) must consider international law; and***
>
> ***(c) may consider foreign law;***
>
> ***(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights;***
>
> ***(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, the extent that they are consistent with the Bill.***"

84. Other relevant constitutional provisions include the right to human dignity (section 10), life (section 11), healthcare (section 27) as well as sections 36 and 37 of the Constitution.

85. As a starting point, it must be accepted as trite and common cause that the entire point of imprisonment is always to take away some of the fundamental

rights of a person who has been convicted and sentenced. That goes without saying. However, the inmate retains the rest of human rights, and it is illegal to restrict or take away his rights beyond what is constitutionally permissible. This is known as the *residuum* principle, which has been articulated and restated by the Constitutional Court and other courts on numerous occasions, both before and after he adoption of the Constitution, for example:

85.1. The residuum principle was first laid down in *Whittaker v Roos*[11] in 1912, as follows and by Innes CJ when dealing with the rights of prisoners

> . "*They were entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed.*"

85.2. 85 years late, in *Van Biljon v Minister of Correctional Services*,[12] Brand (as he then was) said:

> "*... once it is established that anything less than a particular form of medical treatment would not be adequate, the prisoner has a constitutional right to that form of medical treatment and it would be no defence for the prison authorities that they cannot afford to provide that form of medical treatment ... What is 'adequate medical treatment' cannot be determined* in vacuo."

85.3. Most recently, in *Sonke Gender Justice*:[13]

> "*All the rights in the Bill of Rights apply to inmates, save where justifiably limited in terms of section 36 of the Constitution. There are, however, a number of non-derogable rights that become*

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[11] *Whittaker v Roos* 1912 AD 92 at 122-123
[12] *Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 (CC) at paragraph [49]
[13] *Sonke Gender Justice NEC v President of the RSA* (*supra*) at paragraph [32]

> *especially important when an individual is incarcerated and thus directly subjected to the State's coercive powers. These include the rights to dignity, life, freedom and security of the person; and to be detained in conditions that are consistent with human dignity, which include opportunities for exercise and the provision, at State expense, of adequate accommodation, nutrition, reading material and medical treatment*" (emphasis added).

86. These principles were correctly applied by the National Commissioner. They have been completely ignored and overlooked by the applicants.

87. In closing, we cannot express the basis of the principle any better than the HSF itself, which correctly states, at paragraph 86 of its heads of argument, that:

> "*(physical) imprisonment intentionally entails a more severe curtailment of an inmate's liberty and rights compared to less invasive forms of punishment.*"

88. We respectfully agree.

C2: Analysis

89. In assessing the impugned conduct and/or decisions of the National Commissioner, it is crucial to approach this matter from the point of view of the duties which he was discharging. Section 7(2) of the Constitution enjoins the state to respect, protect, promote and fulfil the rights in the Bill of Rights. This obviously includes the rights of an inmate which are strictly protected by the *residuum* principle, particularly the right to adequate medical treatment and the right not to be subjected to cruel and degrading punishment. Both of these rights are consonant with the values of human dignity and *ubuntu*.

Section 7(2) imposes a positive obligation on the National Commissioner and others to take positive steps to protect the relevant rights of inmates.

90. It is against that background that the relevant provisions of the Act must be approached. Both sections 75 and 79 are legislative instruments, the purpose of which is the proper implementation of the state's section 7(2) obligations in view of the *residuum* principle. Any purported interpretation of the relevant legislative provision that does not take heed of this constitutional context, as in the present application, is doomed to fail.

91. On the other hand, a correct approach to the interpretation of section 75(7) and/or section 79(1) must proceed from the premise dictated in section 39(2), namely the court "*must promote the spirit, purport and objects of the Bill of Rights*".

92. The nationality or otherwise of the impugned decisions and the reasons offered by the National Commissioner can only be gauged against the abovementioned legal and constitutional principles and the correct interpretation of the relevant legislative provisions.

93. Before proceeding any further, it is important, lastly, to examine the relationship between section 75(7) and 79(1) *inter se*, i.e. in relation to each other.

94. It is self-evident that section 79(1) deals with the granting of medical parole generally and to any and all inmates. By way of contrast, section 75(7) deals specifically with the granting of medical parole to inmates serving sentences of less than 24 months.

95. This situation is governed by one of the most prominent canons of statutory interpretation, namely *generalia specialibus non derogant*[14] – which means that a general law or a general provision in the same law does not abrogate or interfere with the special provisions of another provision or section of the same law. Put simplistically, the general provisions of section 79 cannot limit the clear and specific provisions of section 75.

96. Common sense would also dictate that whenever we are dealing with medical parole granted to an inmate serving a sentence of 24 months or less, exercised under section 75(7), we need to interrogate whether the requirements of that section were satisfied. The mere fact that the process started under section 79 and was unsuccessful is of some relevance, but it cannot derogate from the application of section 75(7).

97. The entire case of the applicants is premised on the false assertion that in acting under section 75(7), the National Commissioner thereby "*overruled*" the Board. Nothing could be further from the truth. If the National Commissioner had any intention to overrule the Board, there would have been no need for him to approach the matter fresh from a different statutory provision, namely section 75(7). That alternative course was left open to him only because of the duration of the sentence.

98. On the common-cause facts, it is indisputable that Mr Zuma's sentence of 15 months is less than 24 months. It is also undisputed that the National Commissioner is the correct official envisaged in the section. Finally, it is common cause that he exercised his discretion for the reasons he has

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[14] See *Kommissaris van Binnelandse Inkomste v Van der Walt* 1986 (4) SA 303 (T) at 310I-J

advanced. There is therefore no room for setting his decision aside or remitting it for reconsideration, let alone getting the court to cross the line by taking the decision itself.

99. Neither is there anything irrational with the legislature imposing a more stringent test for those serving longer sentences than those serving shorter sentences. In any event, the applicants have failed to attack the constitutionality of either section 75(7), section 79(1) or both.

100. Therefore, even if we accept, for the sake of progress, that the recommendation of the Board amounted to a *cul-de-sac* for the granting of medical parole in terms of section 79, there is no reason in logic or in law why the National Commissioner was then precluded from applying section 75(7) as an alternative pathway, given the undisputed duration of the sentence. This entire application is therefore much ado about nothing. It is for that reason why all the applicants miraculously hardly mention section 75(7). The defence raised, based on the reasons offered, is unanswerable.

101. The applicants' view that the National Commissioner was precluded from taking into account the public interest in avoiding a repeat of the widely reported looting which took place in July 2021 and in the aftermath of what was, rightly or wrongly, perceived to be the unfair denial of Mr Zuma's constitutional rights, is naïve in the extreme but also wrong in law, There is a well-established legal presumption that statutes must be interpreted so as to promote the public interest, sometimes even at the expense of individual rights.

102. This Honourable Court will be asked to take judicial notice that such public disturbances did indeed take place in the month or July 2021 and that an estimated 300 or more people lost their lives. That is clearly a matter of public concern, which would ordinarily necessitate a public enquiry. Conversely, the perceived prevention of the recurrence of such an event was a legitimate and very relevant consideration for the National Commissioner to take into account.

103. So was the fact that Mr Zuma is a former Head of State, which is directly responsible for his unique access to 24-hour medical care from SAHMS and the classification of his medical information. All of these were relevant factors to be considered in taking the impugned decision in the context of the facts of this particular case. The glib dismissal by the applicants of these factors as evidence of "preferential treatment" is either naïve in the extreme or simply a sign of ignorance or opportunism.

104. In this regard, it must be highlighted that for better or worse, the applicants, acting in typical orchestrated and clearly co-ordinated unison, voluntarily elected to abandon their Rule 53 rights and proceed with the application based solely on the redacted record. Having made their bed, they must now lie in it. They cannot complain or cry foul. *Volante non fit injuria*.

105. The simple rules of the law of evidence dictate that in these circumstances, the non-disclosed parts of the medical records must be read against the onus-bearing parties, i.e. the applicants. They must accordingly fail. There is nothing the court can do to assist them when they elected not to invoke the protections afforded by the law to obtain evidence which may or may not have been helpful

to their application and their version. The real reason for not pursuing the record was the sober realisation that there was no legal entitlement to it, particularly in a situation where the *locus standi* of the applicants was in serious doubt and the resultant invasion of privacy rights was so severe and potentially irreversible.

106. In all the circumstances, the applications must be dismissed and the conduct of the applicants, as gleaned from all the aforegoing, must be deprecated by an appropriate order of punitive costs.

C3: The applicable legal context for interpreting the power to grant medical parole

107. Finally, we seek to aid the interpretation exercise by painting the context.

108. The Commissioner, as the Medical Parole Board, is bound by the Constitution when he exercises his powers under the Act to grant a prisoner medical parole The incarceration of person has far-reaching implications for the constitutional rights that are guaranteed in the Constitution. Great care must be struck between the public interests represented in holding an offender liable for his or her criminal conduct, the conditions for holding such person accountable ought not to violate the constitutional rights of an offender and the granting of medical parole or any parole for that matter.

109. The general rule is that a prisoner cannot expect to escape the punishment or seek adjustment of his or term of imprisonment because of ill-health. [15]. Some prisoners have been released on medical parole before they have spent the minimum period required under the sentencing law. Under section 79 of the

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[15] *Du Plooy v Minister of Correctional Services and Others* [2004] JOL 12850 (T) Case No. 6399/04, paragraph 4

Correctional Services Act, any person serving any sentence in a prison and who, based on the written evidence of the medical practitioner treating that person, is diagnosed as being in the final phase of any terminal disease or condition may be considered for placement under correctional supervision or on parole, by the Commissioner, Correctional Supervision and Parole Board or the Minister, as the case may be, to die a consolatory and dignified death. The new amended section 79(1)(a) extends the possibility of being considered for medical parole beyond inmates who are terminally ill and bedridden. It provides that an inmate may be considered for placement on medical parole if he is …'suffering from a terminal disease or condition or if he is rendered physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care. The omission of the phrase "in the final stage of a terminal condition" from the new section 79 definitely broadens the scope of who qualified for medical parole. The argument by the Applicants is not based on any objective medical evidence as they have deliberately elected to challenge this decision without any knowledge of Mr Zuma's medical condition. However, the proper approach to interpreting the medical parole dispensation is to examine its purpose – which is to give effect to the dignity of the terminally ill prisoners at whatever stage of their illness. The question that confronts the prison authorities who must take care of the welfare of all prisoners is whether the terminally ill prisoner's dignity is best served inside or outside the walls of prison.

110. The Courts have held that the nature of conviction and the length of the sentence and the period served by the prisoner are irrelevant to the granting of medical parole – which is based entirely on objective medical factors. The

only requirement for a person to be considered and released on medical parole is written evidence from the treating medical practitioner that he or she has diagnosed the prisoner to suffer from a terminal disease or condition, that such a release on parole or correctional supervision will enable that person to die a consolatory and dignified death. However, this requirement does not require the prison authorities to wait for such a prisoner to be bedridden because, according to the court, 'to insist that he remain incarcerated until he has become visibly debilitated and bedridden can by no stretch of imagination be regarded as humane treatment in accordance with the right to inherent dignity.'[16] The Courts have also held that 'the continued imprisonment of a terminally ill inmate in circumstances where the necessary medical facilities to palliate his condition are lacking, infringes on the right to inherent dignity.' Likewise, if considerations such as the crime committed by the inmate or the actual time served are relied upon to preclude the granting of medical parole, then the right to inherent dignity is breached.

111. Courts have reviewed and set aside decisions by prison authorities refusing to grant medical parole on the basis that such decisions were unjust, unlawful, unreasonable and procedurally unfair. In *Mazibuko v Minister of Correctional Services and Another*, the applicant, who was serving a life sentence for the crimes of murder, assault with intent to do grievous bodily harm, theft and unlawful possession of firearm and ammunition, applied for medical parole. His application was unsuccessful but the High Court found that the refusal to release the applicant whose medical condition was deteriorating because of

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[16] *Stanfield v Minister of Correctional Services and Another* [2003] 4 All SA 282 (C), p 314 paragraph 124

AIDS on medical parole, violated the right of the applicant not to be treated in a cruel and inhumane or degrading manner and his right to access medical care and therefore his right to inherent dignity.

112. Even assuming that the decision was based on section 79, the applicants fail to appreciate that the National Commissioner has self-standing powers to grant medical parole, as separately provided on a proper interpretation of sections 75(7) and/or 79(1), whether read separately or together.

113. The role of the MPAB is to make a recommendation. A recommendation is, by definition, non-binding. The applicable regulations are silent on what must happen if the recommendation of the MPAB is negative. The regulation in any event only applies in the event of a section 79(2) application. Section 79(1) stands apart from section 79(2). It is also significant that the National Commission did consider the recommendation of the MPAB but together with other relevant medical evidence. In the present case, there was evidently no section 79(2) application.

114. Most importantly and in any event (i.e. even if the above analysis is not upheld), what is crystal clear is that Regulation 29A, on which the present applications are pivoted, only apply section 79(2) applications and find no relevance to a decision taken in terms of section 75(7) of the Act. Section 75(7) clearly applies "*despite sections 75(1) to 75(6)*" and only in relation to "*a sentenced offender serving a sentence of incarceration for 24 months or less*". That is the category in which I fall. That a section 79(2) based decision is procedurally different from a section 75(7) decision is more clearly illustrated by the totally different cancellation and delegation regimes attached to each.

115. The above approach makes it completely unnecessary to waste the court's time by demonstrating that the applicants have in any event failed to discharge the onus to establish that Mr Zuma does not meet the requirements of section 79(1). Such a conclusion would be impossible in view of the unknown contents of the redacted parts of the record, the evidence of Mr Zuma and Mr Fraser and the reports and/or recommendations of Doctors Mafa, Mphatswe, Dabula and Mdutywa. However, the approach taken above assumes that the Board's negative recommendation spelt the end of the road for a purely section 79 release. It therefore avoids a semantic or medical debate which does not take the matter anywhere.

D: JUST AND EQUITABLE ORDER AND COSTS

116. This application must be dismissed with costs including a punitive costs order or attorney and own client. It is clear that the application has been brought in order to abuse the court for the political interests of the DA and HSF. In its political campaigns, the DA has made its goal to scandalise Mr Zuma's medical condition by creating political controversy over whether he has a terminal medical condition. Casting doubts and scandalising of Mr Zuma's medical condition without any contrary medical evidence is an irresponsible abuse of the court. These applicants are using the Courts to harass Mr Zuma and to continue the political narrative that he has corruptly obtained an undeserved medical parole. Off-course this is done without any shred of evidence. Just to prove that the Applicants do not care about the dignity of Mr Zuma, they specifically elected to seek the review without any knowledge of the medical records on which the medical parole was granted. Having

conceded that they do not have a right to Mr Zuma's medical records, these applicants nonetheless persist with seeking orders that would require the disclosure of such medical records without a court order.

117. The various public statements made by the applicants regarding Mr Zuma's medical parole are reckless and inconsistent with the principles of *ubuntu.* Mr Zuma should not be expected to defend himself against a political party regarding his private medical condition.

118. The substitution order is a non-starter since the *Trencon* test has not been met at all. So desperate are the applicants that baseless allegations of bias are levelled against the former National Commissioner for the first time in the written heads of argument.

119. Even if the accusations were true and given the recent change of guard, there is not even a shred of evidence to support that the decision on medical parole, if it was still a live issue, would not be taken lawfully by the Acting National Commissioner. In any event, any new decision would be based on the latest medical evidence. The August decision has no relevance to what may or may not happen when new evidence is placed before a new decision-maker. The Board itself may return a different decision. In short, the impugned August decision is old news and is likely to have no bearing on a new decision which the court may order to be taken. The application is also academic for that additional reason.

120. Finally, it would be impractical to expect the court to substitute a decision without itself having access to all the relevant information, let alone the requisite expertise.

121. The substitution order cannot be seriously pursued beyond the publicity stunts which underlie this entire application. To the knowledge of the applicants, it was doomed to fail from the start as a legal proposition.

122. Finally, the applications have no factual basis to challenge the decision of the Commissioner. They have engaged in speculation which in itself serves their political narrative rather than an attempt to have a genuine constitutional dispute resolved. In the absence of any orders challenging the lawfulness of the Commissioner's decision not to disclose my medical record, or my decision not to grant my consent to my medical records disclosed to a hostile political foe for its political use, the threshold required to review and set aside the Commissioner's decision on any basis has not been met.

123. In the premises, we respectfully submit that the following order ought properly to be granted in respect of all three applications:

123.1. The application is dismissed; and

123.2. The specific applicant) is hereby ordered to pay the third respondent's cost on the attorney and client scale. Such costs shall include the costs attendant upon the employment of three counsel.

D MPOFU SC
T MASUKU SC
M QOFA
B. BUTHELEZI
N XULU
Chambers
Sandton, Johannesburg,
Cape Town and Durban
16 November 2021

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13. *Whittaker v Roos* 1912 AD 92