REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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K.E. MATOJANE **15 DECEMBER 2021**

CASE NUMBER: 2021/45997

In the matter between:

THE 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 COMMISSIONER 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

CASE NUMBER: 2021/46468

In the matter between:

HELEN SUZMAN FOUNDATION Applicant

and

THE NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES First Respondent

THE DEPARTMENT OF JUSTICE AND CORRECTIONAL SERVICE Second Respondent

THE MEDICAL PAROLE ADVISORY BOARD Third Respondent

JACOB GEDLEYIHLEKISA ZUMA Fourth Respondent

CASE NUMBER: 2021/46701

In the matter between:

THE 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 COMMISSIONER 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

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Sixth Respondent

Delivered: *This judgment was handed down electronically by circulation to the parties and/or their legal representatives by email and by uploading the same onto CaseLines. The date and time for hand-down are deemed to be on 15 December 2021.*

JUDGMENT

MATOJANE J:

Introduction

[1] This matter concerns an alleged unlawful exercise of public power that undermines the Constitutional Court's order granted to vindicate the rule of law and protect the administration of justice. It also raises important legal issues concerning the nature of the power to consider and determine applications for medical parole and the role of the Medical Parole Advisory Board.

[2] On 29 June 2021, the Constitutional Court handed down its judgement and order in the matter of Secretary of the Judicial Commissioner of Enquiry into allegations of a State Capture, Corruption and Fraud in the public sector, including organs of State v Zuma.[1] The Third Respondent, the former President of the Republic, was sentenced to 15 months' imprisonment for contempt of Court for failing to obey an earlier order of the Court requiring him to appear before the Zondo Commissioner.

[3] Less than two months into his sentence, the then National Commissioner of Correctional Services, Mr Arthur Fraser, decided to grant the Third Respondent medical parole ("the parole decision") under section 75(5) of the Correctional Services Act 111 of 1998 ("the Act").

[4] On 10 September 2021, the Democratic Alliance ("DA") brought an urgent application seeking, amongst others, that the parole decision is declared unlawful, reviewed and set aside, and to substitute it with a decision refusing medical Parole and directing that the Third Respondent be returned to the custody of the Department of Correctional Services to serve out the remainder of the sentence imposed by the Constitutional Court.

[5] Subsequently, similar urgent applications were launched by the Helen Suzman Foundation ('the HSF') on 13 September 2021 under case number 46468/2021

[1] [2021] ZACC 18.

('the HSF application') and AfriForum NPC ('AfriForum') on 15 September 2021 under case number 46701/21 ('the AfriForum application').

[6] The HSF, in addition, seeks an order that the time the Third Respondent was out of jail on medical Parole should not be counted for the fulfilment of the Third Respondent's sentence of 15 months imposed by the Constitutional Court.

[7] AfriForum, in addition, seeks a declarator that the Medical Parole Advisory Board is the statutory body to recommend in respect of the appropriateness of medical Parole to be granted or not granted in accordance with section 79(1)(a). That the National Commissioner is unable to make the aforesaid determination and should refrain from doing so.

[8] The case for the applicants is that the Third Respondent does not satisfy the requirement for medical Parole as set out in section 79(1) of the Correctional Services Act 111 of 1998 ("the Act") in that, to use the words of the subsection, the Third Respondent is not "suffering from a terminal disease or condition" or is not "rendered physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care."

[9] As the three applications share the same factual background and the same issues of law and fact arise, it was agreed that it would be convenient for all three applications to be heard together.

[10] The urgent applications are opposed by the National Commissioner of Correctional Services ('the Commissioner") and the Third Respondent, Mr Zuma. The two Respondents took the point that the applications are not urgent; the applicants have no standing and mootness. As explained in more detail below, the three preliminary points fall to be dismissed.

Urgency

[11] The applicants assert that the application is urgent because they would not obtain substantial redress in due course[2] if the application is brought in the ordinary course as the Third Respondent's sentence would have expired in October 2022. The Third Respondent contends in paragraph 38 of his answering affidavit that even if the matter is heard on an urgent basis, the outcome of the review application is unlikely to be determined before the term of his sentence expires, given the likelihood of an appeal of this Court's decision.

[12] In *Apleni*,[3] it was held that where allegations are made relating to abuse of power by a Minister or other public officials, which may impact the Rule of Law and have a detrimental impact upon the public purse, the relevant relief sought ought normally to be urgently considered. The alleged abuse of power in the present proceedings, if proven, would impact the rule of law, and the matter is accordingly urgent.

[13] In any event, the State Attorney representing the National Commissioner addressed a letter to the attorneys acting for the applicants in which the State attorney indicated that it held instructions not to oppose the urgent relief sought by the parties in their respective Part A applications. The Deputy Judge President managed the case to ensure an expedited hearing in consultation with all the legal teams involved. Comprehensive affidavits have been filed, including heads of argument on the merits, and the matter is ripe for hearing. The Respondents cannot now allege that the matter is not urgent when they conceded the urgency of Part A and when the application was treated as urgent all along. The alleged lack of urgency falls to be dismissed on this ground alone.

Standing

[14] The law of standing answers the question of who is entitled to bring a case to a Court for a decision. Limitations on standing are necessary to screen out the

[2] Luna Meubels Vervaardigers (Edms) Bpk v Makin 1977(4) SA 135 (W) at 137 F.
[3] Apleni v President of the Republic of South Africa 2018 SA 728 (GP) para 10.

mere "busybody" litigants and ensure that courts benefit from contending points of view of those most directly affected.

[15] The applicants claim to be acting in the public interest in terms of section 38(1)(d) of the Constitution. This provision confers legal standing on a party that seeks to enforce rights in the Bill of Rights by asking for appropriate relief for the breach of those rights.

[16] In *Giant Concerts*,[4] Cameron J stated that:

> "PAJA, which was enacted to realise section 33, confers a right to challenge a decision in the exercise of a public power or the performance of a public function that "adversely affects the rights of any person and which has a direct, external legal effect". PAJA provides that "any person" may institute proceedings for the judicial review of an administrative action. The wide standing provisions of section 38 were not expressly enacted as part of PAJA. Hoexter suggests that nothing much turns on this because "it seems clear that the provisions of section 38 ought to be read into the statute." This is correct.

[17] In *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*,[5] the Court said the following regarding the public interest element:

> "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 in the analysis."

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[4] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* (CCT 25/12) [2012] ZACC 28; 2013 (3) BCLR 251 (CC) (29 November 2012) par 29.
[5] Lawyers for Human Rights and Other v Minister of Home Affairs and other (CCT 18/03) [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) (9 March 2004) par 18.

[18] The factors set out by O'Regan J in *Ferreira v Levin*[6] that needs to be shown in order to establish whether a person or entity is acting in the public interest are:

> "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 the 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.

[19] In exercising my discretion to dismiss the point on standing, I have taken into account that the case raises a serious constitutionally justiciable issue, namely, whether the Commissioner exercised public power unlawfully to place the Third Respondent on medical Parole contrary to the Constitutional Courts order; that the parties bringing the applications have a genuine interest in its outcome and that the proposed action is a reasonable and effective means to bring the case to Court.

Mootness

[20] The Third Respondent contends that this matter is moot because he is now eligible for ordinary Parole. He contends that as the decision to place him on Parole lies with the Head of the Correctional Centre and that the latter "approached the National Commissioner because he disagreed with the recommendation to deny him medical parole", the decision to place him on parole, which is taken by Head is *fait accompli* and that the outcome of this application will be academic.

[21] The Constitutional Court has laid down the proper approach to mootness in *POPCRU*[7] it held that:

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[6] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995) at par 234.
[7] *POPCRU v SACOSWU and Others* 2019 (1) SA 73 (CC) at par 43-44

> "This Court's jurisprudence regarding mootness is well settled. As a starting point, this Court will not adjudicate an appeal if it no longer presents an existing or live controversy. This is because this Court will generally refrain from giving advisory opinions on legal questions, no matter how interesting, which are academic and have no immediate practical effect or result. Courts exist to determine concrete legal disputes, and their scarce resources should not be frittered away entertaining abstract propositions of law.
>
> But mootness is not an absolute bar to the justiciability of an issue. The Court may entertain an appeal, even if moot, where the interests of justice so require. In making this determination, the Court exercises judicial discretion based upon a number of factors. These include, but are not limited to, considering whether any order may have some practical effect, and if so its nature or importance to the parties or to others."

[22] This matter presents a live controversy as to whether the National Commissioner's decision was unlawful and unconstitutional and therefore whether it unlawfully undermined the order of the Constitutional Court and the rule of law.

[23] The HSF wants the Court to disregard the period the Third Respondent served on medical parole from the calculation of his total sentence. The interest of justice requires that the issues raised by the review application should be determined. The application is therefore not moot.

The Material Background Facts

[24] The Third Respondent turned himself in for internment on 8 July 2021 at the Estcourt Correctional Services Centre to serve his sentence under the threat of arrest. He was, upon his arrival, admitted to the hospital wing of the Escort Correctional Services Centre, where he was examined by Dr QSM Mafa from the South African Military Health Services ("SAMHS").

[25] On the same day, Dr Mafa produced a report recommending that the Third Respondent *"be moved to a specialist medical high care unit to be assessed further "to ensure his health is not prejudiced during this period and that a*

further specialist medical investigation be done to verify and rule out other challenges that could have been missed during the examination."

[26] The following day on 9 July 2021, Brigadier General M.Z Mdutywa wrote to the Head of the Estcourt Correctional Centre requesting that a paramedic be granted permission to monitor the Third Respondent on a daily basis and alert the doctors and specialists immediately of any changes should there be any. He stated that the reason for his request was that the SAMHS has "the sole mandate and responsibility of assuring and giving medical support Services to the Third Respondent."

[27] On 28 July 2021, Dr Mafa made an application for the Third Respondent's medical release to a specialist medical facility stating that:

> "Taking the abovementioned medical conditions into consideration, there is a fear that [Mr Zuma's] condition may further deteriorate if intervention is delayed. As a result of this report, it is hereby recommended that Mr Zurna be moved to a specialist medical facility to be assessed further by specialists under presidential medical team [sic[for proper investigations and to optimise therapy for better outcome [sic].
>
> …
>
> This is not a final report; the comprehensive medical report will follow once all the investigations have been conducted by the specialist. The specialists will also determine other investigations as necessary. The final report by the Specialist Medical Panel will assist towards further interventions; prognosis and application for Medical Parole."

[28] It bears mentioning that the recommendation that the Third Respondent be moved to a high-care unit was not because he was found to be terminally ill or physically incapacitated as required by the Act. It was for further medical assessment.

[29] On the same day, twenty days after the Third Respondent was taken into custody, Dr Mafa applied for medical Parole on behalf of the Third Respondent. In the application, Dr Mafa stated that the Third Respondent was suffering from a terminal disease or condition that is chronic and progressive. He stated further

that Third Respondent's condition has progressively deteriorated since 2018, and is unable to perform the activities of daily living or self-care. He recommended medical Parole as a result of "medical incapacity".

[30] On 29 July 2021, the Operational Manager at the Estcourt Correctional Centre provided a profile report on Third Respondent's application for medical parole to the Correctional Supervision and Parole Board ("the Board"). The Operations Manager recommended Third Respondent for release on medical parole. The recommendation was based on the following:

> "The report written by his medical team stating that Mr Zurna has a number of comorbidities including [REDACTEDJ [sic].
> [REDACTED]
> Mr Zuma needs tertiary health care Services that Correctional Services is not providing.
> His conditions need to be closely monitored by Specialist, and should his condition complicate during the night, it will take time for him to access relevant health Services."

[31] On 23 August 2021, the Third Respondent's spouse, Ms Sizakele Zuma, signed an undertaking of care form to accommodate the Third Respondent at her residential address in Kwanxamalala, Nkadla. It was anticipated at that stage that the Third Respondent would be released to Nkandla.

[32] On 5 August 2021, Mr Zuma's medical team wrote to the National Commissioner requesting that Mr Zuma be moved to a specialist medical facility on the following basis:

> "Taking the abovementioned medical conditions into consideration, there is a fear that his condition is deteriorating. As a result of this, it is hereby recommended that Mr Zuma be moved to a specialist medical facility as a matter of urgency to be assessed and managed further by specialists under the presidential medical team in order to avert a crisis coming if his medical condition is attended to. Proper investigations are urgently required to determine the therapy required for better management and outcome."

[33] On the same day, 5 August 2021, the Third Respondent was transferred to a private hospital in Pretoria on medical release. He was discharged from hospital on the 8 September 2021 and was taken to a residence in Waterkloof, where he was cared for by his wife, MaNgema and was provided with medical support and Supervision. A week later, the Third Respondent returned to his home in Nkandla, where a similar arrangement was put in place.

[34] On 13 August 2021, the Third Respondent was examined by Dr LJ Mphatswe, a member of the Medical Parole Advisory Board ("Board"). On 23 August 2021, Dr Mphatswe produced a medical report in which he recommended to the Board that the Third Respondent be released on medical Parole with immediate effect. He reported that:

> 'The Applicant being Mr JG Zuma, 79 years of age present as stated herein above a complex medical condition which predispose him to unpredictable medical fallouts or events of high-risk clinical picture (sic). He is of old age and generally looks unwell and lethargic. The total outlook of his complex medical conditions and associated factors in an environment limited to support his optimum care is of extreme concern. More worrisome is the unpredictability of his plausible life-threatening cardiac and neurological events. The risk for potential surgery has become in my assessment a personal one albeit a potentially development of a malignant condition arising from a high grade ileocecal and colon lesion exists. 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 Specialists to support the above-stated recommendation.

[35] On the 26 August 2021 and 28 August 2021, the Board met to consider the Third Respondent's application for medical Parole. The Board did not recommend the Third Respondent for release on medical Parole as it did not have sufficient information to reach a decision. The Board requested further medical reports from an independent medical specialist (Cardiologist, Surgeon, Physician and histopathologist).

[36] On 30 August 2021, the Surgeon General, on behalf of SAMHS, submitted a number of medical reports to the Board under a covering letter which stated that:

> '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 all together reflect a precarious medical situation, especially for the optimization of each one of them.
>
> 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.

[37] The Board reconvened on 2 September 2021 after receipt of the medical reports from specialists it requested, including the report by its own member, Dr Mphatswe. The Board did not accept Mr Mphatswe's recommendation[8] and decided not to recommend medical Parole. The Board produced a report that concluded that while the Third Respondent suffers from multiple comorbidities, he is not terminally ill and it's not physically incapacitated as required by the Act. I quote below the Boards decision for not recommending medical Parole dated 26 August 2021 in full; it reads:

> **"DECISION**
>
> ~~Recommended~~ / Not recommended based on the following:
>
> The MPAB appreciates the assistance from all specialists with the provision of the requested reports. The Board also notes and appreciates the use of aliases and has treated all submitted reports as those pertaining to the applicant. From the information received, the applicant suffers from multiple comorbidities. His treatment has been optimised, and all conditions have been brought under control. From the information received, the applicant suffers from multiple comorbidities. His treatment has been optimised and all conditions have been brought under control. From the available information in the reports, the conclusion reached by the MPAB is that the applicant is stable and does not qualify for medical Parole according to the Act. The MPAB is open to

[8] Regulations 29(6) permits a member of the Board to examine an applicant for medical parole, a decision of the majority of the Board shall be the decision of the board Regulation 29(6).

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

[38] On 4 September 2021 the National Commissioner was approached by the KwaZulu Natal Regional Commissioner and the Head of the Estcourt Correctional Centre who indicated that "*they were concerned that the Medical Parole Board had not recommended (sic) for the placement of Mr Zuma on medical parole."*

[39] On 5 September 2021, three days after the Board decided not to recommend medical Parole, the Commissioner took the decision to place the Third Respondent on medical Parole. It is not disputed that the Commissioner did not consider the other grounds in sections 79(1)(b) and (c).

The Reasons for the Impugned Decision

[40] The additional relevant background facts can be derived from the reasons the Commissioner advanced for the parole decision. They are reproduced in full for ease of reference:

"Decision: Application to be Released on Medical Parole: Mr JG Zuma: 221673598

1. In terms of section 75(7)(a) of the Correctional Services Act 111 of 1998, (CSA) as amended, read together with sections 79 and regulation 29A of the CSA, I, Arthur Fraser, National Commissioner: Department of Correctional Services must make a decision whether or not to approve an application for medical Parole of a sentenced offender.

2. I must first hasten to indicate that as the National Commissioner, I delegated the empowering authority in terms of section 75(7)(a) to Heads of Correctional Centres as promulgated in government gazette no. 43834 dated 23 October 2020 in terms of section 97(3) of the Act. However, the introduction of the delegation it indicates that "any delegation does not prohibit the National Commissioner from exercising power or duty assigned:...

3. Taking into consideration the events that occurred during the month of July 2021 (public unrests and destruction of property) following the incarceration of Mr JG Zuma (Mr Zuma), as well as the ongoing heightened public interest in any matter that relates to Mr Zuma, I instructed that all matters surrounding the incarceration and care of Mr Zuma where decisions are required, that such be done in consultation with myself (as the National Commissioner).

4. Prior to 6 August 2021, I was briefed by both the acting Regional Commissioner for the KwaZulu-Natal Region and the Estcourt Head of Correctional Centre on their concerns with regard to the deteriorating health and wellbeing of Mr Zuma. They informed me that his physical appearance (discolouration of his face) was a matter of concern and further thereto that he had a sudden and visible loss of weight within a short period. Such a report was of great concern to me.

5. On 4 September 2021, the KZN Regional Commissioner and Estcourt Head of Correctional Centre requested an audience indicating that they were concerned that the Medical Parole Advisory Board (MPAB) had not recommended for the placement of Mr Zuma on medical Parole as he had been hospitalised for an extended period of time. A legitimate concern for the Estcourt Head of Correctional Centre was that the facility (although new) would not be able provide the type of tertiary health care required for Mr Zuma.

6. The Estcourt Correctional Centre could not risk the life of an inmate being fully aware that it has no capacity to render the required tertiary health care and such will amount to major consequences should Mr Zuma perish within our facility.

7. As a result of this engagement, I requested that relevant documents be availed for my consideration.

8. The following documents were presented to me for consideration:

    8.1 Three medical reports by the South African Military Health Service (SAMHS) dated 8 July 2021, 28 July 2021 and 5 August 2021.

8.2 Report Dr LJ Mphatswe, a member of the MPAB Commissionered to do a physical examination of Mr Zuma and gathered evidence in support thereof

8.3 Recommendation by the MPAB on the condition of Mr Zuma.

9. I am advised by the Acting Chief Director Legal Services that the MPAB makes recommendations to the authority that must make a decision.

10. In my view, this situation occasioned a unique moment within the history of Correctional Services, where a former Head of State of the Republic of South Africa is incarcerated whilst still entitled to privileges as bestowed by the Constitution.

11. Having regard for the aforementioned and knowing that the Estcourt Head of Correctional Centre is at the level of an Assistant Director, it is within this context that I decided to rescind the delegation as confirmed in section 75(7)(a) of the Correctional Services Act 111 of 1998, as amended.

12. 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:

12.1 Mr Zuma is 79 years old and undeniably a frail old person.

12.2 That the various reports from the SAMHS all indicated that Mr Zuma has multiple comorbidities which required him to secure specialised treatment outside the Department of Correctional Services (DCS).

12.3 That Dr LJ Mphatswe (member of MPAB) in his report dated 23 August 2021 recommended that the applicant, Mr JG Zuma be released on medical Parole because his "clinical health present unpredictable health conditions" and that sufficient evidence has also arisen from the detailed clinical reports

12.4 The Medical Parole Advisory Board recommendation agreed that Mr Zuma suffers from multiple comorbidities. The MPAB

further stated that his treatment had been optimised and his conditions have been brought under control because of the care that he is receiving from a specialised hospital, therefore they did not recommend medical Parole. It is the type of specialised care that cannot be provided by the Department of Correctional Services in any of its facilities.

12.5 As a result, there is no guarantee that when returned back to Estcourt Correctional Centre Mr Zuma's "conditions" would remain under control. It is not disputed that DCS does not have medical facilities that provide the same standard of care as that of a specialised hospital or general hospital.

12.6 Mr Zuma's wife, Mrs Ngema, has undertaken to take care for him if released, as Mr Zuma will be aided by SAMHS as a former Head of State, providing the necessary health care and closely monitoring his condition.

13. Having considered all the relevant information, I am satisfied that Mr Zuma meets the criteria in section 79(1) to be placed on medical Parole. I hereby approve his release on medical Parole immediately (5 September 2021) on the following conditions:"

Legislative Framework and Policies Relevant to Medical Parole

[41] The Correctional Services Act 8 of 1959 has been amended many times before, most recently by the Correctional Matters Amendment Act 5 of 2011, which came into effect 1 March 2012.

[42] The parole regime that applied before 2012 limited parole consideration to offenders in the final phase of a terminal disease or condition[9]. The medical practitioner treating the offender had to produce written evidence of their diagnosis of terminal disease or condition, and the Commissioner was the decision-maker.

[9] Before the amendment section 79 read: “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 court, as the case may be, to die a consolatory and dignified death.”

[43] The 2012 amendment differs in significant respects from the previous regime. An offender or someone acting on the offender's behalf is now able to bring an application for release on an offender on medical Parole. The placement on medical Parole is extended to physically incapacitated offenders and those suffering from an illness that severely limits their daily activity or self-care.

[44] The offenders trusted medical practitioners no longer make a diagnosis of medical illness or physical incapacity. In terms of the new regime, the Medical Parole Advisory Board ("the Board"), an independent expert body, comprised of 10 medical practitioners appointed by the Minister, [10] has to impartially and independently make a medical determination whether or not an offender is terminally ill or is suffering from an illness that severely limits their daily activity or self-care.

[45] The Board must provide independent reports on each and every application for medical Parole throughout the country. It has special expertise related to medical parole requirements in section 79(1)(a). Each member of the Board applies his or her independent mind as to whether it is appropriate to grant medical Parole in accordance with section 79(1). Its decision is taken by a majority vote of members present.[11] The Board was introduced to prevent abuses of the medical parole system and ensure that there is consistency and transparency in the granting of medical Parole.[12]

Issues and Standard of Review

[46] There is no dispute that the National Commissioner's decision to grant Third Respondent medical parole is an administrative exercise of public power in terms of legislation. As such the decision must be lawful, rational, reasonable

[10] Section 79(3)(a).
[11] Regulation 29B(6).
[12] Section 14 of the Correctional Matters Amendment Act 5 of 2011 was introduced following the widely publicized release of Mr Shabir Shaik on medical parole after serving 3 years of his 15 year sentence.

and procedurally fair. In *Fedsure Life Assurance Ltd*[13] the Constitutional Court said that:

> '[I]t is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law — to the extent at least that it expresses this principle of legality — is generally understood to be a fundamental principle of constitutional law.'

[47] The applicants seek to review the parole decision on three grounds. Firstly, the Commissioner failed to comply with a mandatory material procedure or condition prescribed by the Act. Secondly, in releasing the Third Respondent on Parole the Commissioner took into account irrelevant considerations and failed to consider relevant considerations (subsection 6(2)(e)(iii)). Thirdly, the decision by the Commissioner is otherwise unconstitutional and therefore unlawful (subsection 6(2)(i)).

[48] Section 79 of the Act and regulation 29A[14] of the Correctional Services Regulations sets out the requirements and the processes and procedures for release on medical Parole. It subjects the Commissioner's power to grant medical Parole to substantive and procedural constraints. The section is headed Medical Parole and reads:

> (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 (own underlining)
>
> *(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.

[13] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA374 (CC); 1998 (12) BCLR 1458 (CC) at para 56.
[14] Correctional Services Regulations GN R914 in GG26626 of 30 July 2004.

[49] It is generally accepted that an offender cannot expect to escape punishment or seek an adjustment of his term of imprisonment because of ill health[15]. The Legislature deliberately took the responsibility to diagnose terminal illness or severe physical incapacity away from the treating physician and left it to an independent Board to make an expert medical diagnosis.

[50] Section 79(2) and (3) of the Act read with regulation 29A sets out a procedure to be followed before the Board can make its expert medical determination and recommendations to the Commissioner.

[51] First, an application for medical Parole must either be made by a medical professional or by a sentenced offender or a person acting on his behalf.[16] When an application is made by a sentenced offender or a person acting on their behalf, the application "shall not be considered by the National Commissioner, the Correctional Supervision and Parole Board or the Minister, as the case may be", unless it is accompanied by a written medical report justifying the recommendation for placement on medical Parole.[17]

[52] When the Head of a Correctional Centre in which the offender is incarcerated receive an application for medical Parole, he or she must refer the application to the Correctional medical practitioner[18] assigned to that Correctional Centre who must evaluate the application in accordance with the substantive requirements of section 79 of the Act and make a recommendation to the Board.[19] (my emphasis)

[53] The recommendation must be submitted to the Medical Parole Advisory Board, who must assess the application, the offender's medical report and the Correctional medical practitioner's recommendations. In assessing the

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[15] See Du Plooy v Minister of Correctional Services and Others [2004] JOL 12850 T, Paddock v Correctional Medical Practitioner, St Albans Medium B Correctional Centre 2014 JDR 1804 (ECP) at para 38.
[16] Section 79(2)(a) and regulation 29A(2) of the Regulations.
[17] Section 79(2)(b), section C of the prescribed form).
[18] Dr Mafa is not a correctional medical practitioner. He is in the employ of SAMHS. He evaluated his own application for the Third Respondent to be place on medical parole which is incompetent.
[19] Regulation 29A(3).

application, the Board must consider whether the offender suffers from one of the terminal diseases listed in regulation 29A (5) or any other terminal disease.

[54] The Board may obtain additional reports from other medical specialists.[20] Pursuant to this assessment, the Board must furnish the National Commissioner with an independent medical report and a recommendation as to whether the offender suffers from a terminal disease or is physically incapacitated as provided for in section 79(1)(a) of the Act.[21]

[55] Suppose the recommendation of the Medical Advisory Board is positive. In that case, the National Commissioner must, from a Correctional Services perspective, decide whether, despite being found to be terminally ill, there is still a high risk of re-offending or that the offender cannot be cared for properly outside the prison as stipulated in section 79(1)(b) and (c).

[56] It may not be in the interest of justice to grant Parole to a terminally ill offender who poses a serious risk to society or cannot be cared for outside prison, in these circumstances, the National Commissioner, in the exercise of his discretion, may refuse to grant Parole to such a terminally ill offender.

[57] In summary, the Board and not the doctors treating the offender, as it was the case previously, decides if an offender is terminally ill or severely incapacitated, if its recommendation is positive, the Commissioner must then decide whether section 79(1)(b) and (c) are satisfied.

[58] The recommendations of the Board as the expert body established to provide an independent medical report on whether an offender is terminally ill or physically incapacitated is ordinarily decisive and binding on the Commissioner. The Commissioner does not have the medical expertise to overrule the recommendation of the Board. A similar issue arose for decision in *Kimberly Junior School*[22] where Supreme Court of Appeal reviewed and set aside the

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[21] Regulation 29A(7).
[22] *Kimberly Junior School v Head Northern Cape Education department* 2010 (1) SA 217.

decision taken by Head of Education Department to appoint a candidate other than that recommended by the school governing body as the applicable legislation, section 6(3)(a) of the Employment of Educators Act 76 of 1998 provided that any appointment, promotion or transfer of an educator by the Head of the department to post at the public school may only be made on the recommendation of the governing body of the public school.

[59] The Commissioner says that he considered the various reports from the SAMHS, which indicated that the Third Respondent has multiple comorbidities which required him to secure specialised treatment outside the Department of Correctional Services. He also considered the report of Dr LJ Mphatswe, a member of the Board. In his minority report, the latter recommended that the Third Respondent be released on medical Parole because his "clinical health present unpredictable health conditions" and sufficient evidence has also arisen from the detailed clinical reports.

[60] In terms of regulation 29A (3), the report of the correctional medical practitioner, which in this case was compiled by Dr Mafa and the report of Dr Mphatswe and other reports are regulated to be provided to the Board in terms of section 79(2)(c) and not to be considered by the Commissioner. The Commissioner has impermissibly usurped the statutory functions of the Board.

[61] In its expert assessment, the Board has already considered the reports from the South African Military Health Services and in particular the report by Dr Mphatswe and has recommended against medical parole. The decision by the Commissioner to now rely on these reports to overturn the recommendation of the Board is irrational, unlawful and unconstitutional.[23]

[62] In any event, none of the expert reports relied upon by the Commissioner asserts that the Third Respondent is terminally ill or is physically incapacitated. Dr Mafa, in completing the medical parole application form, does not state that the Third Respondent *"suffers from a terminal disease or condition which is*

[23] subsection 6(2)(i) PAJA.

irreversible with poor prognosis and irremediable by available medical treatment and requires continuous palliative care and will lead to imminent death within a reasonable time.[24]"

[63] In answer to question 5(d), in which it is asked whether the offender is suffering from a terminal disease or condition that has deteriorated permanently or reached an irreversible state – he stated that the *"condition has deteriorated significantly".* He does not state that the Third Respondent's condition has deteriorated permanently or had reached an irreversible state.

[64] To the question of whether the Third Respondent is incapacitated, he answered that *"Patient is under full-time comprehensive care medical team."*

[65] To question 5(f) on page 2 of the addendum, which asks whether the offender is "able/unable to perform activities of daily living or self-care" – Dr Mafa merely states that *"patient is under full time comprehensive medical care of the medical team."*

[66] It is indicated in the addendum to the application form that an occupational therapist report should be attached if it is averred that the patient is unable to perform the activities of daily living or self-care, no such occupational therapist report is attached.

[67] To question 6, which asks why medical Parole should be considered -Dr Mafa answers *"medical incapacity"* he doesn't say that medical parole should be considered on the basis of physical incapacity, which is a listed option.

[68] Dr Mphatswe recommended that Third Respondent should be released on medical Parole with immediate effect because "*his clinical picture presents unpredictable health conditions constituting a continuum of clinical conditions"* and that prison limited support for the Third Respondent's optimum care. He

[24] This is a definition of a terminal disease or condition mentioned below paragraph 5(d) of the addendum to the medical parole application form that Dr Mafa completed.

does not say that the Third Respondent is terminally ill or is rendered physically incapacitated as a result of an injury, disease or illness.

[69] The Surgeon General also does not claim that the Third Respondent is terminally ill or incapacitated. His report only state that the reports "*reflect a precarious medical situation* and he believes that *the patient will be better managed and optimized under different circumstances that presently prevailing.*

[70] The Third Respondent claim that he suffers "*from a condition which carries significant risk to his life*" nowhere does he claim to be terminally ill or physically incapacitated.

[71] The reasons given by the Commissioner to release the Third Respondent on medical Parole are not connected with the requirements for medical parole and are not authorised by the empowering provision.[25] The Commissioner acted irrationally and considered irrelevant considerations and acted for an impermissible purpose. He justified his decision as follows:

70.1 There has never been a situation where a former Head of State has been incarcerated, and we will all agree this was an unprecedented situation'. This negates the Constitutional right of all people to be treated equally before the law.

70.2 The *'Estcourt Correctional Centre could not risk the life of an inmate'*. This is not a reason for granting medical Parole. Section 12(1) of the Act provides that the Department' must provide, within its available resources, adequate health care services, based on the principles of primary health care, in order to allow every inmate to lead a healthy life and section 12(2)(a) provides that every inmate has the right to adequate medical treatment'.

[25] PAJA section 6(2)(e)(i).

70.3 If Mr Zuma did die while incarcerated, it could have "dire consequences" and "could have ignited events similar to that of July 2022". Threats of riots is not a ground for releasing an offender on medical Parole.

70.4 *Significant reputational damage that will be suffered by the department in the event of the Third Respondent dying in detention*. None of the medical experts has contended that the Third Respondent condition has deteriorated permanently or reached an irreversible state.

70.5 That placing the Third Respondent on medical Parole was *"going to relieve the department of the costs of keeping him in incarceration"* . This is an irrelevant consideration.

70.6 That Third Respondent "would, in any event, become eligible for consideration for placement on parole within the next seven weeks". This is not a requirement for release on medical parole.

[72] The Commissioner states that he overrode the recommendation of the Board because it was clear to him from other medical reports that Respondent's conditions "*were only brought under control through optimized care that he was receiving at an advanced health care facility*". This decision is irrational because if there was no longer a need for the Third Respondent to receive the standard of care provided by the hospital, Third Respondent should have been returned to the Correction Centre where he had access to all the medical care he required instead of being released to the care of his wife who has no medical training.

[73] Having released the Third Respondent on Parole, the Commissioner failed to consider the other jurisdictional requirement in section 79, namely, that the risk of re-offending must be low. The Third Respondent continues to attack the Constitutional Court while on medical Parole. He states in the answering affidavit that he considers himself "a prisoner of the Constitutional Court and alleges that "he was incarcerated without trial despite the Court dismissing his rescission application.

[74] The parole decision is accordingly reviewable as the Commissioner failed to comply with a mandatory and material condition - that the Third Respondent is terminally ill or physically incapacitated.[26] The Commissioner was influenced by an error of law in believing that he was entitled to grant medical Parole when the Board has concluded that the Third Respondent did not meet the requirements for release on Parole.[27]

[75] Counsel for the Third Respondent relying upon section 75(7) of the Act submit that the National Commissioner has "self-standing powers" to grant medical Parole to a sentenced offender serving a sentence of incarceration for 24 months or less and accordingly, so the argument goes, there is no need for recommendation by the Board on the appropriateness of granting medical Parole as the parole decision was determined under section 75(7) and not under section 79 of the Act.

[76] Section 75(7)(a) reads:

> 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.

[77] A similar argument was advanced on behalf of the Commissioner that section 75(7)(a) Act empowers the National Commissioner to place a sentenced offender serving a sentence of incarceration for 24 months or less on Parole, and if the sentenced offender is serving a sentence of more than 24 months, the authority to place such a sentenced offender on medical Parole lies with the Correctional Supervision and Parole Board in terms of section 75(1) of the Act.

[78] When interpreting a provision of the Act, any reasonable interpretation which is consistent with the objects of the Act must be preferred to one that is

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[26] PAJA Section 6(2)(d)
[27] PAJA, section 6(2)(d)

inconsistent with the objects of the Act.[28] The argument that a distinction must be drawn between terminally ill offenders serving a sentence of incarceration of fewer than 24 months and those serving more has no merit. This differentiation may amount to unfair discrimination between offenders on death's doors purely by reasons of the period of incarceration they have to serve.

[79] Section 75 deals with the powers, functions, and duties of Correctional Supervision and Parole Boards, whose responsibility is to consider offenders for Parole or medical Parole. Section 75(7)(a) merely excuses them from their responsibilities if the offender is serving a sentence of incarceration of less than 24 months. Section 75(7)(a) must be read with section 79 of the Act, which is the only section that deals with medical Parole and no other kind of Parole are reserved for the National Commissioner.

[80] The aim of the interpretation of the statute is to discover the intention of the Legislature by examining the language used in its general context.[29] Section 79(1) reads, "*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…*

[81] Section 79 applies irrespective of who the decision-maker is. It is presumed that the Legislature is consistent with itself. The Constitutional Court decision *Independent Institute of Education (Pty) Limited*[30] is particularly instructive. The Court held:

> It is a well-established canon of statutory construction that "every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute, and with every other unrepealed statute enacted by the Legislature". Statutes dealing with the same subject matter, or which are *in pari materia,* should be construed together and harmoniously. This imperative has the effect of harmonising conflicts and

[28] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (CCT 39/10) [2010] ZACC 26; 2011 (4) SA 113 (CC) ; 2011 (3) BCLR 229 (CC) (30 November 2010).
[29] *President Insurance Co. Ltd v Kruger* 1994 (3) 789 A ..
[30] *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society and Others* (CCT68/19) [2019] ZACC 47; 2020 (2) SA 325 (CC); (2020 (4) at par 38.

> differences between statutes. The canon derives its force from the presumption that the Legislature is consistent with itself. In other words, that the Legislature knows and has in mind the existing law when it passes new legislation and frames new legislation with reference to the existing law. Statutes relating to the same subject matter should be read together because they should be seen as part of a single harmonious legal system.

[82] The argument by Respondents is also not sustainable on the facts. Both Dr Mafa and the National Commissioner did not, by oversight or administrative error, rely on the provisions of section 79(1).[31]

[83] Dr Mafa applied for medical Parole under section 79 of the Act. The application form is headed "*Medical Parole Application in terms of section 79 of Act 111 of 1998 as amended".*

[84] In the first paragraph of the reasons provided by the Commissioner for his decision, the Commissioner starts by saying that he understood the decision to be taken in terms of section 75(7) read with section 79 of the Act and Regulation 29A.

[85] In paragraph 47 of the answering affidavit, the Commissioner confirms that the application was lodged in terms of section 79(1) of the Act and regulation 29A (3). He states that:

> …" A medical practitioner who deals with the application for medical Parole in terms of the provisions of Regulation 29A (3) of the Act must make an evaluation of the said application for medical Parole in accordance with the provisions of section 79 of the Act and make a recommendation. Dr Mafa dealt with the application for medical Parole and made a positive recommendation for the fourth Respondent's placement on medical Parole".

[86] The Third Respondent states in paragraph 229 of his answering affidavit that the Medical Parole Advisory Board was not entitled to override the view of his specialist medical doctors that he should be released on Parole. It is argued on

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[31] See Minister of Education v Harris (CCT13/01) [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC) (5 October 2001) at paragraph 45 to 46.

behalf of the Third Respondent that has made a pronouncement on the Third Respondents comorbidities, the Board failed to make any comment on the findings and recommendations of Dr Mafa and Dr Mphatswe, who the Board assigned to conduct a medical assessment on the Third Respondent.

[87] As indicated above, the Board has to impartially and independently make a medical determination whether the Third Respondent does suffer from a terminal illness and that he is physically incapacitated. It conducts its investigations and has considered all the reports, including the unredacted reports by both Dr Mafa and Dr Mphatswe. It concluded in its expert opinion that though the Third Respondent has comorbidities, he does not meet the requirements for release on medical Parole.

The Remedy

[88] Section 8 of PAJA confers on a court in proceedings for judicial review a generous jurisdiction to make orders that are 'just and equitable.

[89] Moseneke DCJ in *Steenkamp NO*[32] explained that the aim of a just and equitable remedy is to correct or reverse the results of the unlawful decision. He stated that:

> "It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case, the remedy must fit the injury. The remedy *must be fair* to those affected by it and yet vindicate effectively the right violated. It must be *just and equitable in the light of the facts, the implicated constitutional principles*, if any, and the controlling law... . The purpose of a public law remedy is to pre-empt or *correct* or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision .... Ultimately the purpose of a public law remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law".

[32] *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16, 2007 (3) SA 121 (CC).

> ….
>
> Examples of public remedies suited to vindicate breaches of administrative justice are to be found in s 8 of the PAJA ... [which] confers on a court in proceedings for judicial review a generous jurisdiction to make orders that are 'just and equitable.

[90] *Bengwenyama Minerals*[33] provides a useful guide to assist the Court in the exercise of its remedial discretion. Froneman J stated that:

> "The apparent anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions. But then, the law often is a pragmatic blend of logic and experience. The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake. I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented - direct or collateral; the interests involved, and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case. "

[91] The kind of challenge presented in this matter is that the Constitutional Court has already determined that 15-month direct imprisonment was the only 'just and equitable' order to make under the circumstances and has rejected other lesser forms of punishment.

[92] In determining the length of sentence to be imposed on the Third Respondent, the Constitutional Court held that it was enjoined to consider the circumstances, the nature of the breach; and the extent to which the breach was ongoing. In doing so, it held that quantifying the egregiousness of Mr Zuma's conduct was an impossible task, but “that the focus had to be on what kind of sentence would demonstrate, generally, that orders made by a court must be obeyed”, and, to

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[33] *Bengwenyama Minerals v Genorah Resources* 2011(4) SA 113 at para 85.

the Third Respondent specifically, “that his contumacy stood to be rebuked in the strongest of terms”. The Constitutional Court concluded that “if with impunity, litigants, especially those in positions like that of Mr Zuma, are allowed to decide which orders they wish to obey and those they wish to ignore, a constitutional crisis will be precipitated”. The Court ordered an unsuspended sentence of imprisonment for a period of 15 months.

[93] The Commissioner's unlawful intervention has resulted in the Third Respondent enjoying nearly three months of his sentence sitting at home in Nkandla, not serving his sentence in any meaningful sense. The DA, in support of their review application, refers to a Sunday Times article of 17 October 2021 reporting that the Third Respondent met with his political allies Carl Niehaus (a former staffer at Luthuli house) and Dudu Myeni (the former chair of SAA) at the Sibaya Casino on the 15 October 2021. The Third Respondent also addressed his supporters at a virtual prayer meeting on 14 October 2021. As determined by the Board the Third Respondent is not terminally ill or severely incapacitated and seems to be living a normal life.

[94] The Commissioner has unlawfully mitigated the punishment imposed by the Constitutional Court, thereby rendering the Constitutional order ineffective, which undermines the respect for the courts, for the rule of law and for the Constitution itself.

[95] The consequential relief sought, sending the Third Respondent back to prison to do his time and order that the time spent on medical parole should not count towards fulfilling his sentence, will not impact him unfairly as there is no suggestion that he is an innocent party. The Third respondent defied the Zondo Commission, the judiciary and the rule of law and is resolute in his refusal to participate in the Commission’s proceedings. He continues to attack the Constitutional Court while unlawfully benefitting from a lesser punishment than what the Constitutional Court has imposed. He states in his answering affidavit that he considers himself "a prisoner of the Constitutional Court" and claim that he was "incarcerated without trial".

[96] I agree with the submission by HSF that without the order that the Third Respondent's time on medical parole not counting toward the fulfilment of his sentence, the Third Respondent will unduly benefit from a lesser punishment than that imposed by the Constitutional Court.

[97] In the relevant part, s 8(1)(c) of the PAJA reads:

> The Court or tribunal, in proceedings for judicial review ... may grant any order that is *just and equitable*, including orders–
>
> ...
>
> *(c)* setting aside the administrative action and—
>
> (i) remitting the matter for reconsideration by the administrator, with or without directions; or
>
> (ii) in *exceptional cases*—
>
> (aa) *substituting* or varying *the administrative action* or correcting a defect resulting from the administrative action.

[98] On the question of substitution Khampepe J in *Trencon Construction (Pty) Ltd*[34] formulated the test for exceptional circumstances as follows:

> To my mind, given the doctrine of separation of powers, in conducting this enquiry there are *certain factors that should inevitably hold greater weight*. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors *must* be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.

[99] Remitting the decision to the Commissioner will not serve any purpose as the Commissioner will have no discretion to exercise. There is no pending parole

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[34] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22, 2015 (5) SA 245 (CC), 2015 (10) BCLR 1199 (CC)('*Trencon*') at para 47.

application, whether ordinary or medical. The Board has finally determined that the Third Respondent is stable and does not qualify for Parole. Regarding the requisite information required to make a decision, the Court has the benefit of the record with all information and recommendations that would have been before the Commissioner. No administrative expertise is required from the Commissioner, and there is no basis upon which the Commissioner could again overrule the recommendation of the Board. This Court is in as good a position and thus as well qualified as the Commissioner to make a decision. It will accordingly be just and equitable to make a substitution order.

Order

[100] In the result, the following order is made:

1. The applicants' non-compliance with the usual forms, time periods, and service rules is condoned.

2. The decision of the first Respondent (Mr Arthur Fraser at the time) to place the third Respondent on medical parole, taken on 5 September 2021, is reviewed, declared unlawful, and set aside;

3. The medical parole decision is substituted with a decision rejecting the third Respondent's application for medical parole;

4. It is hereby directed that the third Respondent be returned to the custody of the Department of Correctional Services to serve out the remainder of his sentence of imprisonment;

5. It is declared that the time the Third Respondent was out of jail on medical Parole should not be counted for the fulfilment of the Third Respondent's sentence of 15 months imposed by the Constitutional Court.

6. In terms of section 8(1)(d) and section 8(2)(b) to (d) of the Promotion of Administrative Justice Act 3 of 200 (PAJA):

It is declared that in terms of section 71(1) (a) of the Correctional Services Act 111 of 1998 (CSA) read with regulations 29A, and 29B promulgated in terms of CSA, the Medical Parole Advisory Board (MPAB) is the statutory body to recommend in respect of the appropriateness of medical parole to be granted or not in accordance with section 79(1)(a) (the terminal condition and incapacity requirements).

7. The National Commissioner and Mr Zuma are ordered to pay the costs of the applicants, jointly and severally, such costs to include the costs of two counsel where so employed.

K.E. MATOJANE
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard:	23 November 2021
Judgment:	15 December 2021
For the Democratic Alliance:	I. Jamie SC (with M. Bishop and P. Olivier)
Instructed by:	Minde Schapiro & Smith
For the Helen Suzman Foundation:	M. du Plessis SC (with A. Coutsoudis, J Thobela-Mkhulisi, J. Mitchell, and C. Kruyer)
Instructed by:	Webber Wentzel
For Afriforum NPC:	F.J. Labuchagne
Instructed by:	Hurter Spies Inc.
For National Commissioner of Correctional Services:	S.Y. Mphahlele SC (with E. Baloyi-Mere SC and B. Ndebele)
Instructed by:	State Attorney
For Jacob Gedleyihlekisa Zuma:	D. Mpofu SC (with T. Masuku SC and M. Lebakeng)
Instructed by:	Ntanga Nkuhlu Incorporated