THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 33/2022

In the matter between:

NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES	**FIRST APPELLANT**
JACOB GEDLEYIHLEKISA ZUMA	**SECOND APPELLANT**
and	
DEMOCRATIC ALLIANCE	**FIRST RESPONDENT**
HELEN SUZMAN FOUNDATION	**SECOND RESPONDENT**
AFRIFORUM NPC	**THIRD RESPONDENT**
SECRETARY OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE INCLUDING ORGANS OF STATE	**FOURTH RESPONDENT**
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**FIFTH RESPONDENT**
MEDICAL PAROLE ADVISORY BOARD	**SIXTH RESPONDENT**
SOUTH AFRICAN INSTITUTE OF RACE RELATIONS	***AMICUS CURIAE***

Neutral citation: *National Commissioner of Correctional Services and Another v Democratic Alliance and Others (with South African Institute of Race Relations intervening as Amicus Curiae)* (33/2022) [2022] ZASCA 159 (21 November 2022)

Bench: DAMBUZA, MAKGOKA, PLASKET and MABINDLA-BOQWANA JJA and GOOSEN AJA

Heard: 15 August 2022

Delivered: 21 November 2022

Summary: Correctional Services Act 111 of 1998 – medical parole – s 79(1) – role of the Medical Parole Advisory Board (the Board) – powers of the National Commissioner of Correctional Services (the Commissioner) – whether the Commissioner entitled to release an inmate on parole despite the absence of a positive recommendation of the Board.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Matojane J, sitting as a court of first instance): judgment reported *sub nom Democratic Alliance v National Commissioner of Correctional Services and Others and Two Similar Cases* [2022] 2 All SA 134 (GP).[1]

1. Paragraphs 5 and 6 of the order of the high court are set aside.
2. Save for the above, the appeal is dismissed with costs.
3. The first and second appellants are ordered to pay the costs of the first, second and third respondents, jointly and severally, the one paying the other to be absolved.
4. The costs shall include the costs of two counsel where so employed.

JUDGMENT

Makgoka JA (Dambuza, Plasket and Mabindla-Boqwana JJA and Goosen AJA concurring):

[1] On 29 June 2021, the second appellant, Mr J G Zuma (Mr Zuma), the former President and Head of State of the Republic of South Africa, was sentenced to 15 months' imprisonment by the Constitutional Court for failing to obey that court's order to appear before a Judicial Commission of Inquiry[2] (the Commission of Inquiry). The circumstances which led to the sentence are fully

[1] *Democratic Alliance v National Commissioner of Correctional Services and Others; Helen Suzman Foundation v National Commissioner of Correctional Services and Others; Afriforum NPC v National Commissioner of Correctional Services and Others* [2022] 2 All SA 134 (GP).
[2] The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State.

set out in *Judicial Commission of Inquiry into Allegations of State Capture v Zuma*.[3]

[2] Mr Zuma started serving his sentence on 8 July 2021. On 5 September 2021, the first appellant, the National Commissioner of Correctional Services (the Commissioner), released him on medical parole. Shortly thereafter, the first respondent, the Democratic Alliance, the second respondent, the Helen Suzman Foundation, and the third respondent, Afriforum NPC (Afriforum), launched separate applications in the Gauteng Division of the High Court, Pretoria (the high court), challenging the Commissioner's decision on various grounds in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA). Their applications were consolidated and heard together by the high court.

The order of the high court

[3] On 15 December 2021, the high court reviewed the decision of the Commissioner, set it aside, and substituted it with one rejecting Mr Zuma's application for medical parole. It consequently directed that Mr Zuma be returned to the custody of the Department of Correctional Services (the Department) to serve out the remainder of his sentence of imprisonment. The high court also ordered that the time Mr Zuma was out of jail on medical parole should not be considered for the fulfilment of the sentence of 15 months imposed by the Constitutional Court. This order was sought by the Helen Suzman Foundation.

[4] In addition, the high court issued a declaratory order, at the instance of Afriforum, that in terms of s 79(1)*(a)* of the Correctional Services Act 111 of 1998 (the Act), read with regulations 29A and 29B promulgated in terms thereof,

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

the statutory body to recommend whether medical parole should be granted or not is the Medical Parole Advisory Board (the Board). With the leave of the high court, the Commissioner and Mr Zuma appeal against the whole order.

Factual background

[5] Mr Zuma was admitted to the Estcourt Correctional Centre in KwaZulu-Natal on 8 July 2021 to commence serving his sentence of imprisonment. He was immediately transferred to the hospital wing of the Estcourt Correctional Centre. There, he was examined by Dr Q S M Mafa from the South African Military Health Services (Military Health Services).[4] Upon examination, Dr Mafa compiled a report in which he recommended that Mr Zuma be moved to a 'specialist medical high care unit' for further assessment, and 'to ensure his health is not prejudiced during this period and that a further specialist medical investigation [is] done to verify and rule out other challenges that could have been missed during the examination'. He further alluded to the possible release of Mr Zuma on medical parole.

[6] The following day, 9 July 2021, Brigadier General Dr M Z Mdutywa from the Military Health Services requested the Head of the Estcourt Correctional Centre to allow a paramedic to monitor Mr Zuma daily 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 Military Health Services has 'the sole mandate and responsibility of assuring and giving medical support and services' to Mr Zuma.

[7] On 28 July 2021, Dr Mafa made an application on behalf of Mr Zuma for his release on medical parole, on the prescribed form. Section 'C' of the form

[4] As former President and Head of State, Mr Zuma's health services are provided by the South African Military Health Services.

relates to whether an offender suffers from a terminal disease or condition. The following explanatory note appears at the foot of the page:

'A terminal disease or condition is a condition or illness which is irreversible with poor prognosis and irremediable by available medical treatment but requires continuous palliative care and will lead to imminent death within a reasonable time.'

Question 5(d) of section 'C' is as follows: 'Is the offender suffering from a terminal disease OR condition' which is 'chronic', 'progressive', and 'has deteriorated permanently or reached [an] irreversible state?'. Dr Mafa answered 'Yes' to the first two questions. As to the third, he answered that the condition had 'deteriorated significantly'.

[8] On 29 July 2021, the Operational Manager at the Estcourt Correctional Centre recommended to the Correctional Supervision and Parole Board that Mr Zuma be released on medical parole, based on the following: (a) Dr Mafa's report that Mr Zuma has a number of comorbidities; (b) Mr Zuma needs tertiary health care services that Correctional Services was not providing, and (c) that Mr Zuma's medical condition needed to be closely monitored by a specialist, and 'should his condition complicate during the night, it will take time for him to access relevant health services'.

[9] On 5 August 2021, Mr Zuma was transferred to a private hospital in Pretoria at the request of his medical team for him to be treated in 'a specialist medical facility' based on his 'medical conditions' and 'a fear that his condition [was] deteriorating'. In terms of regulation 29B(8) of the Correctional Services Regulations (the regulations), the Board designated one of its own, Dr L J Mphatswe, to examine Mr Zuma, which he did on 13 and 17 August 2021, at the private hospital. Dr Mphatswe submitted a report to the Board on 23 August 2021, in which he recommended that Mr Zuma be released on medical parole with immediate effect. In his report, Dr Mphatswe took into account that Mr

Zuma was 79 years of age, and generally, looked 'unwell and lethargic' with a 'complex medical condition which predisposes him to unpredictable medical fallouts or events of high-risk clinical picture'.

[10] He further noted:

'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.'

[11] The Board met on 26 and 28 August 2021 to consider Mr Zuma's medical parole application. On both occasions, it took the view that it did not have sufficient information to reach a decision, and accordingly, requested further medical reports from independent medical specialists who had treated Mr Zuma. These were furnished by the Surgeon-General on 30 August 2021 on behalf of the Military Health Services. In his cover letter accompanying the reports, the Surgeon-General pointed out the following:

'lt 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.'

[12] On 2 September 2021, the Board reconvened, and decided against recommending medical parole for Mr Zuma. It stated the following reasons for its decision:

'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 consider[ing] other information, should it become available. The MPAB can only make its recommendations based on the Act.'

The National Commissioner's decision

[13] As mentioned already, the Commissioner released Mr Zuma on medical parole on 5 September 2021 with immediate effect, three days after the Board had made its decision not to recommend his release. In a lengthy statement, the Commissioner explained the reasons for his decision. He correctly referred to the legislative scheme of ss 75(7)*(a)*, 79(1), and regulation 29A as the empowering provisions in respect of medical parole. Although he had delegated his powers to consider parole to Heads of Correctional Centres, he revoked that delegation in respect of Mr Zuma, and had given an instruction that he should be consulted in all decisions in respect of Mr Zuma. This was because of the public unrest and destruction of property in July 2021 following Mr Zuma's incarceration. He also viewed Mr Zuma's incarceration to have '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'.

[14] He had accordingly been kept abreast of Mr Zuma's reportedly deteriorating health condition. On 4 September 2021, he met with the KwaZulu-Natal Regional Commissioner and the Head of the Estcourt Correctional Centre, at their request. They expressed concern to him about the Board's decision not to

recommend the release of Mr Zuma on medical parole. The main concern for the Head of the Estcourt Correctional Centre was that the centre did not have the capacity to provide the type of tertiary health care required for Mr Zuma's medical conditions. As such, the centre could not risk Mr Zuma's life, and he shuddered at the consequences were Mr Zuma to die in the centre.

[15] After that meeting, the Commissioner requested that the relevant documents be placed before him. The following documents were presented to him: (a) three medical reports by the Military Health Services dated 8 July 2021, 28 July 2021 and 5 August 2021; (b) Dr Mphatswe's report; and (c) the Board's decision of 2 September 2021. As to the latter, the Commissioner pointed out that although the Board made the recommendation, he was 'the authority to make the decision'. The Commissioner stated that, in arriving at his decision, he considered the following:

'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 submitted by the treating specialists to support the above read recommendation.

12.4 The [Board] recommendation agreed that Mr Zuma suffers from multiple comorbidities. The [Board] 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 [of] 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.'

[16] It is this decision that is the subject of the appeal. Both the Commissioner and Mr Zuma contend that the high court erred in setting it aside and in making the order in the terms already set out. The Democratic Alliance, the Helen Suzman Foundation and Afriforum support the judgment of the high court and its order. The fourth to sixth respondents, respectively the Commission of Inquiry, the Minister of Justice and Correctional Services and the Board, did not take part in the appeal. The Commission of Inquiry filed a notice to abide by the decision of this Court. The South African Institute of Race Relations was admitted as *amicus curiae* (*amicus*) in this Court.

Amicus' submissions

[17] The gravamen of the submissions is this. A person detained for contempt of court is not a 'sentenced offender' within the contemplation of the Act, and can therefore never be released by a person or body other than the court that committed the person. Expressed differently, the parole provisions in the Act do not apply to persons incarcerated for contempt of court, like in Mr Zuma's case. This is because the process of committing a person to prison for contempt of court cannot be regarded as criminal proceedings and does not result in the person being convicted of any offence.

[18] Therefore, submitted the *amicus*, the Commissioner enjoyed neither the power nor competence to release Mr Zuma from custody ahead of the expiry of his period of detention, and only the Constitutional Court has the power to order

such a release. Consequently, the Commissioner's purported exercise of the power to grant Mr Zuma medical parole was a nullity, and Mr Zuma must accordingly be re-detained in custody until he has served the full term of his sentence, or released earlier in terms of a court order.

[19] The starting point is s 1 of the Act, which defines a 'sentenced offender' simply as a 'convicted person sentenced to incarceration or correctional supervision'. It makes no distinction in respect of offenders based on the nature of proceedings from which the sentence flows, nor whether the sentence is coercive or punitive. Offenders sentenced for contempt of court are not excluded from this definition. There is nothing in the text or context of the section that suggests that the Legislature intended to make a distinction between offenders based on the nature of proceedings that gave rise to the sentence. That should be the end of the matter in respect of the *amicus'* submissions.

[20] However, for the sake of completeness, I will consider the *amicus*' submissions with reference to the order of the Constitutional Court. The established test on the interpretation of court orders was summarised in *Eke v Parsons*[5] as follows:

'. . . "The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention".'(footnotes omitted.)

[21] To establish the 'manifest purpose' of the Constitutional Court's order, one has to consider what the court said when it imposed the sentence on Mr Zuma. The Constitutional Court described the proceedings as neither purely civil nor

[5] *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) para 29.

criminal, but a unique amalgamation of the two (*sui generis*).[6] The Constitutional Court proceeded to distinguish between coercive and punitive orders.[7] The court pointed out that a coercive order allows the respondent to avoid imprisonment by complying with the original order and desisting from the offensive conduct. As regards a punitive order, 'a sentence of imprisonment cannot be avoided by any action on the part of the respondent to comply with the original order; the sentence is unsuspended; it is related both to the seriousness of the default and the contumacy of the respondent; and the order is influenced by the need to assert the authority and dignity of the court, to set an example for others'.[8]

[22] The Constitutional Court then considered the appropriateness of each order in the circumstances. It decided that a punitive order was the only appropriate order, and explained:

'A coercive order would be both futile and inappropriate in these circumstances. Coercive committal, through a suspended sentence, uses the threat of imprisonment to compel compliance. Yet, it is incontrovertible that Mr Zuma has no intention of attending the Commission, having repeatedly reiterated that he would rather be committed to imprisonment than co-operate with the Commission or comply with the order of this Court. Accordingly, a suspended sentence, being a coercive order, would yield nothing. In *CCT 295/20*, this Court was at pains to point out how Mr Zuma had been afforded, perhaps too generously at times, ample opportunities to submit to the authority of the Commission. Notwithstanding that I recognise the importance of the work of the Commission, being guided by what this Court said in *CCT 295/20*, I do not think this Court should be so naïve as to hope for his compliance with that order. Indeed, it defies logic to believe that a suspended sentence, which affords Mr Zuma the option to attend, would have any effect other than to prolong his defiance and to signal dangerously that impunity is to be enjoyed by those who defy court orders.'[9] (footnote omitted.)

[6] *Judicial Commission of Inquiry v Zuma* para 21.
[7] *Ibid* para 47.
[8] *Ibid*.
[9] *Ibid* para 48.

[23] These remarks unambiguously manifest the Constitutional Court's clear intent: to punish Mr Zuma for defying its earlier order and to have him serve a prison sentence for that. This also takes care of the *amicus'* submission that persons convicted of contempt of court 'carry the keys of their prison in their own pockets', in that they can reverse their contempt by complying with the order, upon which they would be released. The *amicus* relied on the orbiter remarks in *De Lange v Smuts*[10] for that submission. That case concerned s 66(3) of the Insolvency Act 24 of 1936, in terms of which a person summoned to be examined at a meeting of creditors may be imprisoned if they, among other things, refuse to answer questions at such a meeting. The presiding officer 'may issue a warrant committing the said person to prison'. The proviso to such imprisonment is that the examinee 'shall be detained until he has undertaken to do what is required of him'. It is in that context that the court remarked that '[t]he examinees under s 66(3) also "carry the keys of their prison in their own pockets"', for the effect of the concluding part of the subsection is that the detention of an examinee comes to an end when the examinee "has undertaken to do what is required of him"'.[11]

[24] In the present case, the Constitutional Court had moved beyond the coercion point. It was no longer interested in trying to coerce Mr Zuma to mend his ways by appearing before the Commission. Therefore, Mr Zuma no longer 'carried the keys of his prison in his own pocket'. The keys were undoubtedly held by the Department. The Warrant of Committal issued by the Constitutional Court could not have made it clearer. It commanded the Department 'to receive' Mr Zuma 'into custody' and 'deal with him in accordance with the laws relating to prisons', as he had been 'found guilty . . . of the crime of contempt of court'. Indeed, Mr Zuma was dealt with as such. Like any other inmate, he was 'processed'; orientated with regard to prison life; given prison clothes and

[10] *De Lange v Smuts N O and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC).
[11] *Ibid* para 36.

sanitary material; and was expected to clean his cell and make his bed. Mr Zuma was therefore 'a sentenced offender' and had to be incarcerated in terms of the Act.

[25] As would be the case with any matter finalised before it, once it imposes a sentence, a court ordinarily has no further role in how a sentenced person serves his or her sentence. That is the responsibility of the Department. The Constitutional Court was in no different position with regard to Mr Zuma. Specifically, with regard to his release, the Constitutional Court consequently retained no power to deal with the matter again.

[26] I accordingly conclude that a person convicted and sentenced for contempt of court ordinarily falls to be dealt with in terms of the laws relating to prisons, including the privilege to be released on parole if they so qualify. It is immaterial: (a) that the proceedings which culminated in the sentence were criminal or civil, and (b) whether the order for their imprisonment is coercive or punitive.

[27] In any event, in this case, the Constitutional Court order culminated from *sui generis* proceedings, and it is indubitably punitive in nature, thus, making Mr Zuma 'a sentenced offender' as envisaged in s 1 of the Act. It follows that there is no merit in the *amicus'* submissions. Mr Zuma was entitled to apply for his release on medical parole, and the Commissioner was empowered to consider that application, in terms of the relevant provisions of the Act, to which I turn.

The medical parole legislative scheme

[28] I commence with s 75(1) of the Act, which is titled 'Powers, functions and duties of Correctional Supervision and Parole Boards'. Section 75(1) gives the Correctional Supervision and Parole Board the discretion to place under correctional supervision or day parole, or grant parole or medical parole, to a

sentenced offender serving a sentence of incarceration for more than 24 months. This it does upon consideration of a report on such a prisoner, submitted to it by the Case Management Committee in terms of s 42 of the Act, and in the light of any other information or argument submitted to it.

[29] The next relevant provision is s 75(7), which gives the Commissioner the power, among other things, to release a sentenced offender serving a sentence of incarceration for 24 months or less on medical parole. It reads as follows:

'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.'

[30] Section 79 specifically concerns the substantive and procedural requirements for medical parole. The substantive requirements are set out in subsection 1, which 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—

(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.'

[31] The procedural requirements are prescribed in s 79(2). Section 79(2)*(a)* provides that an application for medical parole shall be lodged in the 'prescribed manner', by either: (a) a medical practitioner; or (b) a sentenced offender in

person; or (c) a person acting on the offender's behalf. In the latter two instances, s 79(2)*(b)* requires the application to be supported by a written medical report recommending placement on medical parole. The section precludes the relevant authority (either the Commissioner, the Correctional Supervision and Parole Board, or the Minister of Justice and Correctional Services (the Minister)) from considering an application lodged by the offender in person or on his or her behalf, if not accompanied by a written medical report.

[32] In terms of s 79(2)*(c)* the written medical report must include, amongst others—

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

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

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

[33] Pursuant to s 79(3)*(a)*, the Minister established a Medical Parole Advisory Board (the Board). Its function is 'to provide an independent medical report' to the Commissioner, the Correctional Supervision and Parole Board, or the Minister, as the case may be, in addition to the medical report referred to in subsection s 79(2)*(c)*. The Board consists of ten members, all of whom are medical doctors.

The regulations

[34] Section 79 must be read together with regulation 29A of the regulations. Regulation 29A(2)-(4) complements the procedural requirements of s 79(2). In terms of regulation 29A(2) an application for medical parole in terms s 79(2) of the Act, shall be initiated by the completion of a prescribed application form. When the Head of a Correctional Centre receives an application for medical

parole, he or she must refer the application to the correctional medical practitioner who must make an evaluation of the application in accordance with the provisions of s 79 and make a recommendation in this regard (regulation 29A(3). In terms of regulation 29A(4) the recommendation must be submitted to the Board, which must make a recommendation to the relevant decision-maker, the Commissioner in this instance.

[35] The substantive requirements of s 79(1)*(a)* are given effect by regulation 29A(5)-(7). Regulation 29A(5) guides the Board on the procedure to be followed in determining whether an inmate suffers from a terminal illness or physical incapacity as required in s 79(1)*(a)*. It must first determine whether an offender's stated medical condition is one of the non-infectious and infectious conditions set out in regulation 29A(5). If it is not, the Board may, in terms of regulation 29A(6) consider 'any other condition', 'if it complies with the principles contained in section 79'. Needless to say, in this exercise, the Board would be guided by various medical reports serving before it.

[36] After undertaking the exercise set out in regulation 29A(5) (and possibly in regulation 29A(6)), the Board is enjoined to make a recommendation in terms of regulation 29A(7) on the appropriateness to grant medical parole. That regulation reads:

'The [Board] must make a recommendation to the National Commissioner . . . on the appropriateness to grant medical parole in accordance with section 79(1)*(a)* of the Act. If the recommendation of the [Board] is positive, then the National Commissioner . . . must consider whether the conditions stipulated in section 79(1)*(b)* and *(c)* are present.'

Viewed in this light, regulation 29A(7) does no more than confirm the purpose of s 79(1)*(a)*. It does not in any manner 'enlarge' its meaning, as contended on behalf of the Commissioner. It merely makes explicit what is implicit in s 79(1)*(a)*.

[37] To summarise the above provisions, s 75(7) empowers the Commissioner to release on medical parole an inmate serving a sentence of incarceration for 24 months or less. It must be read with s 79(1), which sets out three substantive requirements for medical parole, namely: (a) terminal disease or physically incapacity; (b) low risk of re-offending; and (c) appropriate arrangements post-release. The second and third requirements involve typical correctional services considerations and, therefore, fall within the Commissioner's remit. The first requirement is a medical one, and the Commissioner must be guided by the Board.

[38] Thus, the requirements set out in s 79(1) constitute jurisdictional facts that must be met for medical parole to be granted. If any of them is not present, an offender does not qualify for parole. These provisions apply to Mr Zuma (despite his status as former President and Head of State) as they would to any other inmate. That is the content and reach of the constitutional value and promise of equality before the law.[12]

[39] Before I step off the legislative scheme, there are two related interpretative aspects that need to be resolved. The first relates to the interrelation between ss 75(7)*(a)* and 79, and in particular, whether s 75(7) creates an alternative pathway to medical parole. The second is whether the Commissioner is entitled to release an inmate on parole without the Board's positive recommendation. I consider these, in turn.

Whether s 75(7) creates an alternative pathway to medical parole

[40] It was common ground among the parties that ss 75(7) and 79(1) must be read together. However, a submission was advanced on behalf of Mr Zuma that

[12] Section 9(1) of the Constitution provides:
'Everyone is equal before the law and has the right to equal protection and benefit of the law.'

s 75(7)*(a)* created an alternative 'pathway' to medical parole without the need to comply with the substantive and procedural requirements of s 79. The contention was that the general provisions of s 79 cannot limit the provisions of s 75(7) in terms of which, the Commissioner is empowered to grant medical parole to an inmate serving a sentence of incarceration for 24 months or less. As Mr Zuma's sentence fell into that category, the Commissioner was entitled to release him on medical parole, and, in fact, granted him medical parole based on that provision.

[41] I disagree. The upshot of s 75(7)*(a)* is that inmates serving sentences of incarceration for 24 months or less are excused from complying with s 75(1)-(6). The latter subsections deal mainly with the medical parole of inmates serving lengthy imprisonment terms, including life imprisonment. In respect of that category of inmates, their applications have to go through a Case Management Committee and the Correctional Supervision and Parole Board. Section 75(7)(*a*) removes the involvement of these two bodies in respect of applications of inmates serving sentences of incarceration for 24 months or less. Their applications are considered directly by the Commissioner. But, in respect of both categories of inmates, there must be compliance with the substantive and procedural requirements of s 79.

[42] Read on its own, s 75(7) would give power to the Commissioner to release on medical parole any offender serving a sentence of incarceration for 24 months or less, without any explicit substantive or procedural constraints. On this construction, an inmate would be entitled to be released on medical parole despite not being terminally ill or physically incapacitated. The reading of s 75(7) as being capable of an independent application from s 79 would result in an absurdity, as it would allow an inmate to be released on 'medical' parole without

any 'medical' basis. An interpretation resulting in absurdity is to be avoided.[13] For a sensible result, ss 75(7)(*a*) and 79 must be read together. As stated in this Court more than a century ago in *Chotabhai v Union Government*,[14] 'every part of a Statute should be so construed as to be consistent, so far as possible, with every other part of that Statute'.[15]

Whether the Commissioner is entitled to release an inmate on parole without the Board's positive recommendation

[43] On behalf of the Commissioner, the following submissions were made. Despite its importance, the recommendation of the Board is not binding on him, as the Act confers a discretion on the Commissioner whether or not to release an inmate on medical parole. If the Legislature intended the recommendation of the Board to be binding, it would have made that clear in s 79. The Board's recommendation, according to the Commissioner, is merely one of the relevant factors to be taken into account, including the inmate's medical records and reports.

[44] Section 79(1) should be construed using the conventional process of statutory interpretation, which is now well-settled. The words in the section must be given their ordinary grammatical meaning, unless doing so would result in an absurdity. This is subject to three interrelated riders, namely that the provision: (a) should be interpreted purposively; (b) be properly contextualized; and (c) must be construed consistently with the Constitution.[16] In line with *Natal Joint Municipal Pension Fund v Endumeni*,[17] regard must be had, among others, to the

[13] *Minister of Police and Others v Fidelity Security Services (Pty) Ltd* [2022] ZACC 16; 2022 (2) SACR 519 (CC) para 34.
[14] *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 AD 13.
[15] *Ibid* at 24.
[16] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (8) BCLR 869; 2014 (4) SA 474 (CC) para 28.
[17] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

apparent purpose to which s 79(1) was directed, and the material known to those responsible for the enactment of the provision. It is also permissible to consider the general factual background within which the current section was enacted.[18]

[45] As to the latter consideration, it is useful to have regard to the Correctional Matters Amendment Act 5 of 2011, which brought about the amendment to s 79, and which came into effect on 1 March 2012. It interposed the Board in a professional and advisory role to the decision-maker, in this instance the Commissioner. Prior thereto, the Commissioner was entitled to release an inmate on medical parole based on the written evidence of the medical practitioner treating such inmate that the latter was diagnosed as being in the final phase of any terminal disease or condition.

[46] There was no Board, and the Commissioner thus had the sole power to decide whether a medical condition was one that qualified in terms of the Act for the granting of medical parole. This was open to abuse, as there was no provision for an independent medical opinion to verify the diagnosis by the inmate's treating doctor. The Board was introduced in the 2012 amendment clearly to remedy this concern. As mentioned already, the Board consists of ten members, all of whom are registered medical doctors (regulation 29B(3). The Board is thus a specialist body.

[47] The interposition of the Board in the medical parole process in terms of s 79(1)(*a*) was thus for a good reason, namely, to allow for an independent and expert determination as to the medical aspect of the process, ie a professional judgment as to whether an inmate suffers from a terminal illness or physical incapacity. Therefore, the Legislature evidently intended the Board's advice,

[18] *Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16; 2020 (4) SA 428 (SCA) para 17.

opinion and recommendation to the Commissioner to be crucial to his or her decision on whether to release an inmate on medical parole. Thus, given the context referred to above, and its specialist and professional composition, the Board's recommendation holds sway.

[48] This must be so, as the recommendation by the Board is clearly to furnish the Commissioner with a basis for his or her opinion as to whether an inmate has a terminal illness or physical incapacity. The Commissioner cannot simply ignore it because he or she holds a different view. This is because the Board is an expert body on the 'medical' part of the medical parole process. Ordinarily, the Commissioner does not have that expertise. It follows that the Commissioner's role is not to determine whether medical parole is *medically* appropriate. That role is statutorily reserved for the Board.

[49] In my view, the Board's recommendation is akin to that considered in *Walele v City of Cape Town*.[19] There, the relevant legislation[20] required a Building Control Officer to make recommendations to the City of Cape Town for approval of, among others, building plans. Writing for the majority, Jafta AJ characterised the nature of the recommendation as follows:

'If the purpose of the recommendation is merely to inform the decision-maker of the Building Control Officer's attitude or view on the approval, as argued by the City's counsel, it is difficult to imagine why the recommendation is made a jurisdictional fact, when the decision-maker can investigate on his or her own, matters relating to compliance with requirements and the disqualifying factors. It is equally difficult to find the reason why the legislature would oblige the decision-maker to consider the recommendation before forming an opinion as to whether he or she was satisfied about a particular state of affairs, if the recommendation was not intended to be the primary source of information leading to being satisfied. The facts of the present case demonstrate that the Building Control Officer had information concerning the very

[19] *Walele v City of Cape Town and Others* [2008] ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC) (*Walele*).
[20] National Building Regulations and Building Standards Act 103 of 1977.

issues which the decision-maker was required to consider, but this information was not placed before the decision-maker. As a specialist, the Building Control Officer is best suited to advise the decision-maker about disqualifying factors. . . .
The recommendation therefore is the proper means by which information on disqualifying factors can be placed before the decision-maker.'[21]

[50] To my mind, the nature of the recommendation discussed above fits neatly with the one envisaged to be made by the Board in terms of regulation 29A(7). It must follow then that the Commissioner's discretion to release an inmate on medical parole is not triggered unless the Board makes a positive recommendation on the appropriateness to grant medical parole, which is based on a determination in terms of s 79(1)*(a)* as to the inmate's terminal illness or physical condition. In other words, it is only once the Board makes a positive recommendation that the Commissioner may enquire whether the inmate meets the requirements of s 79(1)*(b)* and *(c)*. This is fortified by the wording of regulation 29A(7):
'. . . If the recommendation of the [Board] is positive, *then* the . . . Commissioner . . . must consider whether the conditions stipulated in section 79(1)*(b)* and *(c)* are present.' (Emphasis added.)

[51] Furthermore, an interpretation that allows the Commissioner to grant medical parole to an inmate without the recommendation of the Board to that effect would give the Commissioner the same power he or she had prior to the 2012 amendment. This would undermine the very purpose for which the Board was created, and would render the provisions of s 79(1)*(a)* nugatory. The upshot of the above is that, once the Board has properly applied its mind and concluded that an inmate does not suffer from a terminal illness or physical incapacity so as

[21] *Walele* paras 70-71.

to severely limit daily activity or inmate self-care, the Commissioner is not entitled to grant medical parole.

[52] Since the Board is made up of skilled experts, the Commissioner has no discretion on the question of whether an inmate suffers from a terminal illness. Effectively, therefore, the Board is the ultimate decision-maker on this aspect. Thus, in the absence of a positive recommendation by the Board, the Commissioner had no power to release Mr Zuma on medical parole. Flowing from the interpretation of s 79(1)*(a)*, it must be emphasised that it is not within the Commissioner's remit to go beyond the Board's recommendation and analyse the various medical reports himself or herself. That task would have been undertaken by the Board, and it is not for the Commissioner to second-guess its determination and recommendation.

[53] If the Board's recommendation is negative, that is the end of the matter – the Commissioner cannot lawfully grant medical parole. It is only in the event of the Board's positive recommendation that the Commissioner can consider whether the requirements of s 79(1)*(b)* and *(c)* have been met, and if so, grant medical parole. In the present case, there was no positive recommendation by the Board. The Commissioner's decision was therefore unlawful and unconstitutional. It was invalid, in terms of s 6(2)(*b*) of the PAJA, because a mandatory and material condition prescribed by the empowering legislation was not met.

[54] But even if the argument on behalf of the Commissioner was accepted that he, as the ultimate decision-maker, is empowered to override the Board's decision, his decision does not pass muster. First, he took into account factors which are totally irrelevant in the enquiry of whether Mr Zuma qualified for medical parole. These are: (a) the fact that Mr Zuma is 79 years; (b) Mr Zuma's

status as former Head of State; (c) the riots which occurred in parts of KwaZulu-Natal and Gauteng in July 2021, allegedly as a result of Mr Zuma's incarceration; and (d) the fact that the Department of Correctional Services has no capacity to give Mr Zuma specialised care that he requires.

[55] While these factors may well be taken into consideration in an application for normal parole, they have no bearing at all in an application for medical parole. To that extent, the Commissioner acted irrationally. What is more, there was no mention of the requirement in s 79(1)*(b)*, ie the risk of re-offending in his decision. His decision was therefore also invalid in terms of s 6(2)(*e*)(iii) of the PAJA – the taking into account of irrelevant considerations and the failure to consider relevant ones.

[56] Thus, on any conceivable basis, the Commissioner's decision was unlawful and unconstitutional. The high court was correct to set it aside.

Remedy

[57] Having set aside the Commissioner's decision, the high court substituted its own decision for that of the Commissioner, ie it refused Mr Zuma's application for medical parole. In terms of s 8(*c*)(ii)(*aa*) of the PAJA, a court may substitute its own decision for that of an administrator in 'exceptional cases.' The lodestar in the enquiry whether there are exceptional circumstances, remains *Trencon v Industrial Development Corporation*[22] where the Constitutional Court identified the following factors:

'. . . 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.

[22] *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).

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.'[23]

[58] In the present case, in making the substitution order, the high court reasoned that remission would not serve any purpose 'as the Commissioner will have no discretion to exercise.' This conclusion is undoubtedly correct. As explained already, without the Board's positive recommendation, the Commissioner has no discretion but to refuse medical parole. The Board has decided that Mr Zuma does not qualify for medical parole. Viewed in this light, the high court was in as good a position as the Commissioner to make a decision, which is a foregone conclusion as the Board's decision stands and remains unchallenged.

[59] In addition, the high court made two declaratory orders which warrant comment. In the first one, at para 5 of its order, the high court declared that the time Mr Zuma was out on medical parole should not be considered for the fulfilment of his sentence of 15 months imposed by the Constitutional Court. This issue implicates the doctrine of separation of powers. Matters concerning how an inmate serves his or her sentence; when and how he or she qualifies for and is to be released on parole, quintessentially reside in the province of the executive – the Department in this instance. Counsel for the Helen Suzman Foundation, at whose instance the declaratory order was granted, fairly conceded that the order was inappropriate. It should be set aside.

[60] The effect of the setting aside of this declarator is that once the order in this appeal is handed down Mr Zuma's position as it was prior to his release on

[23] *Ibid* para 47.

medical parole will be reinstated. In other words, Mr Zuma, in law, has not finished serving his sentence. He must return to the Escourt Correctional Centre to do so. Whether the time spent by Mr Zuma on unlawfully granted medical parole should be taken into account in determining the remaining period of his incarceration, is not a matter for this Court to decide. It is a matter to be considered by the Commissioner. If he is empowered by law to do so, the Commissioner might take that period into account in determining any application or grounds for release.

[61] Related to this, I feel constrained to express this Court's disquiet about one aspect. While this judgment was pending, we became aware that the Department released a media statement to the effect that Mr Zuma had completed his sentence. Such a pronouncement was premature given that the determination of the very issue was still pending before this Court. A decision as to whether Mr Zuma's prison term had lawfully expired, could not be validly made until this Court had determined the appeal by the Commissioner and Mr Zuma. This Court has now determined that Mr Zuma's release on medical parole was unlawful. The Department's statement was unfortunate, and potentially undermines the judicial process, particularly since the Department is an appellant in this matter.

[62] In the second declaratory order, at para 6, the high court declared, at the instance of Afriforum, that:

'In terms of s 79(1)(a) read with regulations 29A, and 29B the [Board] 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).'

[63] The high court said that the declaration was pursuant to s 8(1)(*d*) and section 8(2)(*b*) to (*d*) of the PAJA. With respect, it appears that the high court misconstrued the remedial powers set out in s 8 of the PAJA. The section is titled 'Remedies in proceedings for judicial review.' Section 8(1)(*d*) provides that as

part of its power to grant a just and equitable order, a court may grant any order, including 'declaring the *rights* of the parties in respect of any further matter to which the administrative action relates. Section 8(2)(*b*)-(*d*) provides:

'The court or tribunal, in proceedings for judicial review in terms of section 6(3), may grant any order that is just and equitable, including orders—

. . .

(*b*) declaring the *rights* of the parties in relation to the taking of the decision;

(*c*) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or

(*d*) as to costs.'

[64] The order granted by the high court was not one envisaged in either ss 8(1)(*d*) or 8(2)(*b*) of the PAJA. It was not a declaration of rights, but a re-statement of the law. The latter does not constitute a 'remedy' for any of the parties. It is clear therefore that the declaratory order granted by the high court does not fall within the purview of s 8 of the PAJA. It should not have been granted. It was in any event not necessary as the correct legal position was articulated in the body of the judgment.

Costs

[65] There remains the issue of costs. The limited interference with the order of the high court is not sufficient to affect the general principle that costs should follow the result. The respondents remain overwhelmingly successful. There should not be any costs order consequent upon the participation of the *amicus*.

Order

[66] In the result I make the following order:

1. Paragraphs 5 and 6 of the order of the high court are set aside.
2. Save for the above, the appeal is dismissed with costs.
3. The first and second appellants are ordered to pay the costs of the first, second and third respondents, jointly and severally, the one paying the other to be absolved.
4. The costs shall include the costs of two counsel where so employed.

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T MAKGOKA

JUDGE OF APPEAL

APPEARANCES:

For first appellant:	M S Mphahlele SC (with him E B Ndebele)
Instructed by:	State Attorney, Pretoria
	State Attorney, Bloemfontein
For second appellant:	D C Mpofu SC (with him T Masuku SC, M Qofa, B Buthelezi and N Xulu)
Instructed by:	Ntanga Nkuhlu Inc., Johannesburg
	Peyper Lessing Attorneys Inc., Bloemfontein
For first respondent:	I Jamie SC (with him M Bishop and P Olivier)
Instructed by:	Minde Schapiro & Smith Inc., Cape Town
	Symington De Kok Attorneys, Bloemfontein
For second respondent:	M du Plessis SC (with him A Coutsoudis, J Mitchell, J Thobela-Mkhulisi and C Kruyer)
Instructed by:	Webber Wentzel, Johannesburg
	Honey Attorneys, Bloemfontein
For third respondent:	F J Labuschagne (with him A K Kekana)
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For *amicus curiae*:	M Engelbrecht SC (with her C F Avidon)
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