THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY: JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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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)

Today, the Supreme Court of Appeal, per Makgoka JA (Dambuza, Plasket and Mabindla-Boqwana JJA and Goosen AJA concurring) dismissed an appeal by the National Commissioner of Correctional Services (the Commissioner) and Mr Jacob Gedleyihlekisa Zuma (Mr Zuma), against an order of the Gauteng Division of the High Court, Pretoria (the high court) which held that Mr Zuma's release on medical parole by the Commissioner was unlawful and unconstitutional. Mr Zuma, the former President and Head of State of the Republic of South Africa, was on 29 June 2021, sentenced to 15 months' imprisonment by the Constitutional Court for failing to obey that Court's order to appear before the *Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State*. Mr Zuma commenced serving his sentence on 8 July 2021, and was released by the Commissioner on medical parole less than two months later, on 5 September 2021, despite the decision of the Medical Parole Advisory Board (the Board) that Mr Zuma did not qualify to be released on medical parole.

Having set aside the decision of the Commissioner, the high court 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. In the Supreme Court of Appeal, the Commissioner and Mr Zuma's appeal was opposed by the victorious applicants in the high court, namely: the Democratic Alliance, the Helen Suzman Foundation and Afriforum. The South African Institute of Race Relations was admitted as *amicus curiae* (*amicus*) in the Supreme Court of Appeal.

The Supreme Court of Appeal (the Court) first considered the submission of the *amicus curiae*, the South African Institute of Race Relations (the *amicus*) to the effect that a person committed to prison for contempt of court such as Mr Zuma, was not a sentenced offender envisaged in Correctional Services

Act 111 of 1998 (the Act). Therefore, the *amicus* submitted, the Commissioner enjoyed neither the power nor competence to release Mr Zuma from custody ahead of the expiry of his period of detention, and that only the Constitutional Court, as the court which had committed him, could order his early release. The Court did not accept this submission and held that the Act did not draw a distinction between offenders based on the type of offence for which they were convicted. In any event, the Court held, the Constitutional Court had made it plain in its judgment that its sentence on Mr Zuma was punitive, as opposed to coercive. The Court thus concluded that 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.

After setting out the factual background which preceded Mr Zuma's release on medical parole, the Court turned to the interpretation of the medical parole legislative scheme comprising of ss 75(1) and 79 of the Act, and the regulatory framework set out in regulation 29A, and concluded as follows: 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. These three requirements constitute jurisdictional facts that must be met for medical parole to be granted. If any of them is not present, an inmate does not qualify for medical parole.

The first requirement is a medical one, and the Commissioner must be guided by the Board, which comprises ten registered medical practitioners. The Board's decision as to whether an inmate suffers from a terminal illness or physical incapacity as required in s 79(1)*(a)*, is informed by the procedure laid down in regulation 29A(5). The Board must first determine whether an offender's stated medical condition is one of the non-infectious and infectious conditions listed 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'.

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 provides that the Board must make a recommendation to the Commissioner 'on the appropriateness to grant medical parole in accordance with s 79(1)*(a)* of the Act.' If the recommendation of the Board is positive, then the Commissioner must consider whether there is low risk of re-offending; and whether there were appropriate arrangements post-release.

The Court emphasised that the Board was the effective decision-maker on the aspect whether an inmate qualifies for medical parole and that the Commissioner had no residual powers to release an offender on medical parole without a positive recommendation by the Board to that effect. The simple reason is that the Board is a specialist, professional body, and the Commissioner is not.

Applying these legislative and regulatory provisions to the facts of the case, the Court concluded that the Commissioner did not have the power to release Mr Zuma on medical parole without a positive recommendation of the specialist medical panel (the Board). The Board had declined to make that positive recommendation as it concluded that Mr Zuma did not, from a medical point of view, qualify to be released on medical parole. In any event, the Commissioner's decision was unlawful since he took into account irrelevant factors into account when he decided to release Mr Zuma on medical parole, eg, Mr Zuma's age, the riots that occurred in parts of Gauteng and KwaZulu-Natal following Mr Zuma's

incarceration and the fact that the Department of Correctional Services (the Department) did not have the facilities to afford Mr Zuma the high care level he needed. These factors are not mentioned in s 79(1) of the Act, and by taking them into account, the Commissioner acted unlawfully. While those factors could well be considered when an inmate applies for ordinary parole, they had no place in an application for medical parole. The Court concluded that the high court was correct to set aside the Commissioner's decision to release Mr Zuma on medical parole.

Turning to the remedy, the Court considered the high court's decision not to remit the matter to the Commissioner, but make a substitution order. The Court concluded that since the Board had decided that Mr Zuma did not qualify for medical parole, no purpose would be served to remit the matter to the Commissioner, as the conclusion was a foregone one. The Court thus upheld the high court's decision in this regard.

However, the Court set aside two declaratory orders made by the high court. 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. The Court held that this issue implicated the doctrine of separation of powers, and should be left to the Department.

The Court explained the effect of the setting aside of this declaratory order as follows: Once the order in this appeal is handed down Mr Zuma's position as it was prior to his release on medical parole will be reinstated, as in law, Mr Zuma had not finished serving his sentence. He must return to the Escourt Correctional Centre to do so. The Court pointed out that whether the time he spent on unlawfully granted medical parole should be taken into account in determining the remaining period of his incarceration, was 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.

Related to the above issue, the Court deprecated the conduct of the Department in that, while the Court's judgment was pending, the Department issued a statement to the effect that Mr Zuma had completed his sentence. The Court pointed out that such a pronouncement was premature given that the determination of the very issue was still pending before the 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. The Court considered the Department's statement as unfortunate, and potentially undermining the judicial process, particularly since the Department was an appellant in this appeal.

In the second declaratory order, at para 6, the high court declared that in terms of s 79(1)(a) read with regulations 29A, and 29B the Board is the statutory body to recommend whether medical parole ought be granted or not. After analysing the provisions of ss 8(1)(*d*) and 8(2)(*b*) to (*d*) of the Promotion of Administrative Justice Act 3 of 2000, on which the high premised its order, the Court concluded that those sections did not empower the orders made by the high court. Thus, the high court had misconstrued the remedial powers set out in s 8 of the PAJA, as those sections envisaged 'declaration of rights' of any of the parties. The order of the high court did not declare rights of any of the parties, but made a statement of law. It was in any event not necessary as the legal position was articulated in the body of the judgment.

As a result, the two declaratory orders were set aside. Save for that, the Court dismissed the appeal of

the Commissioner and Mr Zuma with costs. The Commissioner and Mr Zuma were ordered to pay the costs of the Democratic Alliance, the Helen Suzman Foundation and Afriforum, jointly and severally, the one paying the other to be absolved. Those costs included the costs consequent upon employment of two counsel where so employed. No costs order was made with regard to the costs of the *amicus*.

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