

**IN THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS**

**(Secretariat of the Commission, based in Banjul, The Gambia)**

CASE NUMBER: **779/2022**

In the matter between:-

**JACOB GEDLEYIHLEKISA ZUMA**

COMPLAINANT

(Former President of the State Party)

AND

**REPUBLIC OF SOUTH AFRICA**

STATE PARTY

**VOLUME 4:**

**HEADS OF ARGUMENT IN SUPPORT OF SUBMISSION ON ADMISSIBILITY IN TERMS OF  
RULE 116(1) WITH INCORPORATED URGENT RELIEF**

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## DEFINITIONS

- 1 In these Heads of Argument, unless the context clearly indicates otherwise, the following definitions are used:-

***African Charter*** African Charter on Human and Peoples’ Rights;<sup>1</sup>

***AU*** African Union;<sup>2</sup>

<sup>1</sup> Adopted in Nairobi (Kenya) 27 June 1981; Entered into force 21 October 1986

<sup>2</sup> a2 Constitutive Act of the African Union

<b>Commission</b>	African Commission on Human and Peoples' Rights; <sup>3</sup>
<b>Commissioner</b>	The <b>RSA</b> National Commissioner of Correctional Services. At the time of granting parole to the <b>Complainant</b> , this position was held by Mr. Arthur Fraser and since September 2021, held by Mr. Makgothi Samuel Thobakgale;
<b>Complainant</b>	The complainant in this very matter, the former President of the <b>RSA</b> , Mr. JACOB GEDLEYIHLEKISA ZUMA;
<b>Constitution</b>	Constitution of the Republic of South Africa, 1996
<b>Constitutional Court</b>	Constitutional Court of <b>RSA</b> ; <sup>4</sup> the highest court of the <b>State Party</b> ; <sup>5</sup>
<b>Courts</b>	Courts of <b>RSA</b> and also reference to its <b>Judiciary</b> ;
<b>heads</b>	These very Heads of Argument marked <u>Volume 4</u> ;
<b>Imprisonment Case</b>	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 (CCT52/21)(29

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<sup>3</sup> Established by s30 **Charter**

<sup>4</sup> s166 **Constitution**

<sup>5</sup> s167(3)(a) **Constitution**

June 2021) – Annexure “**C**” to the original referral dated 19 January 2022;<sup>6</sup>

***Instigating Case***

Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma [2021] ZACC 2 (CCT295/20) (28 January 2021) – Annexure “**B**” to the original referral dated 19 January 2022;<sup>7</sup>

***Introduction Letter***

Letter of Introduction of Complaint Relating to Alleged Human Rights Violations with Incorporated Request for Urgent Relief, dated 19 January 2022;<sup>8</sup>

***Judiciary***

Judiciary of ***RSA*** and also reference to its ***Courts***;

***Parole Case***

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). For convenience, this case is attached to these ***heads*** as Annexure “**Vol4-A**”;

***Rescission Case***

Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of

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<sup>6</sup> Vol. 1, pp. 76 - 202

<sup>7</sup> Vol. 1, pp. 32 - 75

<sup>8</sup> Vol. 1, pp. 1 - 16

State and Others [2021] ZACC 28 (CCT 52/21)(17 September 2021) – Annexure “D” to the original referral dated 19 January 2022;<sup>9</sup>

**RSA** The respondent **State Party** in this very matter, the Republic of South Africa;

**Rules** Rules of Procedure of the African Commission on Human and Peoples’ Rights, 2020;<sup>10</sup>

**SCA** Supreme Court of Appeal of **RSA**;<sup>11</sup> the highest court of appeal for matters arising from, *inter alia*, the High Court of the **State Party**, however, is inferior to the **Constitutional Court**,<sup>12</sup>

### **State Capture**

**Commission** The Presidential Commission of Inquiry appointed by the **Complainant** when still in office to inquire into the allegations of state capture, corruption and fraud in the public sector including organs of state<sup>13</sup>;

**State Party** The respondent state party in this very matter, **RSA**;

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<sup>9</sup> Vol. 1, pp. 203 - 309

<sup>10</sup> Adopted by the **Commission** during its 27<sup>th</sup> Extra-Ordinary Session held in Banjul (The Gambia) from 19 February to 04 March 2020

<sup>11</sup> s166 **Constitution**

<sup>12</sup> s168(3)(a) **Constitution**

<sup>13</sup> Proclamation 3 of 2018 GG 41403 (25 January 2018); Vol. 2, pp. 77 – 82

**submission** Rule 116(1) of the **Rules** intended submission by the **Complainant** dated 21 February 2023, accompanying Volumes 1 to 4;

**UN** United Nations<sup>14</sup>

- 2 Where a word or phrase is presented in **bold italics**, such word or phrase has been defined in paragraph 1 *supra* of these **heads**.
- 3 In these **heads** a reference to one gender shall also mean a reference to the other gender and to the neutral.
- 4 Further, in these **heads** a reference to the singular shall also refer to the plural, unless specifically stated otherwise.

## INTRODUCTION

- 5 The **Complainant** hereby submits his succinct **heads** on the admissibility of the communication seized by the **Commission** on its 72<sup>nd</sup> Ordinary Session held between 19 July 2022 and 2 August 2022 under the above-mentioned case number and requesting urgent relief.
- 6 The **Complainant** has lodged his complaint in his personal capacity as being directly affected by these violations, but also in the interest of the public<sup>15</sup>, the citizens of the **State Party**, being directly affected by these ongoing violations.<sup>16</sup>

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<sup>14</sup> The Charter of the United Nations is the founding document of the United Nations. It was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945.

<sup>15</sup> s38(d) **Constitution**

<sup>16</sup> r115(1) **Rules**

7 The **Complainant** has respectfully requested the **Commission** for the following remedies<sup>17</sup> as per a PART “A” (Urgent Relief) and PART “B”:-

7.1 Under PART “A”<sup>18</sup> –

7.1.1 That the late filing of the **submission** be condoned;<sup>19</sup>

7.1.2 that the **State Party** is ordered not to commit the **Complainant** to imprisonment resulting, directly or indirectly, from any one or more of either the **instigating case, imprisonment case, and/or rescission case**, pending the final outcome of this complaint;<sup>20</sup>

7.1.3 that the **State Party** is prohibited from withdrawing, hindering or obstructing any of the benefits the **Complainant** are entitled to and those he had been provided with as the former President of the **State Party**, pending the outcome of this complaint;<sup>21</sup>

7.1.4 that, giving effect to the requested urgent relief in PART “A”, the **Commission** sets any conditions to either one or both of the **Complainant** and **State Party**, grants any additional or alternative urgent relief it deems fit and proper.<sup>22</sup>

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<sup>17</sup> **Submission**, pp. 2 – 4

<sup>18</sup> **Submission**, p. 2

<sup>19</sup> **Submission**, p. 2

<sup>20</sup> **Submission**, p. 2 (Item 2, PART “A”)

<sup>21</sup> **Submission**, p. 2 (Item 3, PART “A”)

<sup>22</sup> **Submission**, p. 2 (Item 4, PART “A”)

7.2 In the alternative or addition to the requested urgent relief in terms of PART “A” *supra*, PART “B”<sup>23</sup> –

7.2.1 That it be declared that the **Complainant** may bring this complaint before the **Commission** in his own personal capacity as well as in the interest of the people of the **State Party**;<sup>24</sup>

7.2.2 That the entire orders by the **Constitutional Court** granted in the matters of:-

- a) [the] **Instigating Case**; and
- b) [the] **Imprisonment Case**; and
- c) [the] **Rescission Case**,

be reviewed in respect of their compliance to **African Charter**, and, if found to be in violation, set aside;<sup>25</sup>

7.2.3 As a result of setting aside any one or more of the orders as per Item [7.2.2] *supra*, or otherwise, that it be declared that the **State Party** violated the human rights of the **Complainant** on one or more grounds as set out in the **African Charter**, as determined by the **Commission**;<sup>26</sup>

7.2.4 As a result of setting aside any one or more of the orders as per Item [7.2.2] *supra*, or otherwise, that it be declared

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<sup>23</sup> **Submission**, p. 2 – 4

<sup>24</sup> **Submission**, p. 2 (Item 5, PART “B”)

<sup>25</sup> **Submission**, p. 3 (Item 6, PART “B”)

<sup>26</sup> **Submission**, pp. 3 – 4 (Item 7, PART “B”)

that the **State Party** violated the peoples' rights of the people of the **State Party** on one or more grounds as set out in the **African Charter**, as determined by the **Commission**;<sup>27</sup>

- 7.2.5 In the alternative or addition to Items [7.2.2] to [7.2.4] *supra*, that the **Commission** refers such requested relief, or the entire complaint, to the African Court on Human and Peoples' Rights;<sup>28</sup>
- 7.2.6 That as a result of the declaration of human rights violation in terms of Item [7.2.3] *supra*, the **Complainant** be awarded compensation in such amount and currency as determined by the **Commission** and that it be paid within 30 days after granting of the request;<sup>29</sup>
- 7.2.7 That the compensation award in terms of Item [7.2.6] *supra*, that such an amount will increase in line with the annual inflation rate of the **State Party** over the period the matter was considered until date of final payment;<sup>30</sup>
- 7.2.8 That the compensation award in terms of Item [7.2.6] *supra*, read with Item [7.2.7] *supra*, bears interest at 15% per annum from date of lodgement of this complaint on 19 January 2022 until date of final payment;<sup>31</sup>

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<sup>27</sup> **Submission**, p. 4 (Item 8, PART "B")

<sup>28</sup> **Submission**, p. 4 (Item 9, PART "B")

<sup>29</sup> **Submission**, p. 4 (Item 10, PART "B")

<sup>30</sup> **Submission**, p. 4 (Item 11, PART "B")

<sup>31</sup> **Submission**, p. 4 (Item 12, PART "B")

7.2.9 That, giving effect to the requested relief in PART “B”, the **Commission** sets any one or more conditions to either one or both of the **Complainant** and **State Party**, grants any additional or alternative relief it deems fit and proper.<sup>32</sup>

8 Each one of the requested remedial relief will be highlighted *infra* under the heading “Relief Sought”.<sup>33</sup>

9 The **Complainant** has further submitted the following complete records as evidence and part argument in support of his complaint:-

9.1 **Volume 1:** COMMISSION INITIAL RECORD OF LETTER OF INTRODUCTION OF COMPLAINT RELATING TO ALLEGED HUMAN RIGHTS VIOLATIONS WITH INCORPORATED REQUEST FOR URGENT RELIEF; and

9.2 **Volume 2:** RECORD OF THE ENTIRE INSTIGATING CASE BEFORE THE CONSTITUTIONAL COURT;

9.3 **Volume 3:** RECORD OF THE ENTIRE RESCISSION CASE BEFORE THE CONSTITUTIONAL COURT; and

9.4 **Volume 4:** HEADS OF ARGUMENT IN SUPPORT OF SUBMISSION ON ADMISSIBILITY IN TERMS OF RULE 116(1) WITH INCORPORATED URGENT RELIEF

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<sup>32</sup> **Submission**, p. 4 (Item 13, PART “B”)

<sup>33</sup> *paras.* 96 – 105

- 10 The **Introduction Letter**<sup>34</sup>, contained in Volume 1, provides a proper background to the complaint and should be read first.
- 11 The **Rescission Case**, contained in Volume 3, is probably the most important, as it summarises the entire processes before the **Courts** and the human rights violations committed by the **State Party** against the **Complainant** and effectively it's People, while the **Instigating Case**, contained in Volume 2, is only for background information.
- 12 Relevant to determine the admissibility, few aspects relating to the law requires some emphasis which are highlighted in these **heads**, which are:-
- 12.1 Obligations of the State Party;
  - 12.2 Status of the **Constitution**;
  - 12.3 **Judiciary versus the State Party**;
  - 12.4 Violations of the **African Charter**;
  - 12.5 Relief Sought
- 13 Firstly, the **Complainant** will address the admissibility of the Communication and then, secondly, provide a summary of his arguments in support of this complaint.

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<sup>34</sup> Vol. 1, pp. 1 - 16

## ADMISSIBILITY OF COMMUNICATION

- 14 The admissibility of Communications submitted in conformity with the ***African Charter***<sup>35</sup> is governed by conditions.<sup>36</sup>
- 15 It is the ***Complainant***'s respectful opinion that he has fully adhered to all of the set conditions.<sup>37</sup> It is specifically stated that the Communication:-
- 15.1 Indicate the authors;<sup>38</sup>
- 15.2 Is compatible with the ***African Charter***, as the complaint pertains to human and peoples' rights violations contained in it committed by the ***State Party*** against the ***Complainant*** and effectively against the ***RSA*** people;
- 15.3 Is not written in disparaging or insulting language directed against the ***State Party*** and its institutions or to the ***AU***;
- 15.4 Is based on actual events experienced by the ***Complainant*** himself and not exclusively based on news disseminated through the mass media;
- 15.5 Has been sent after exhausting local remedies, to wit dismissal by the ***Constitutional Court***;
- 15.6 notwithstanding that the violations are ongoing, submitted within a reasonable period of only four (4) months from the time local remedies

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<sup>35</sup> a55 ***Charter***

<sup>36</sup> a56 ***Charter***

<sup>37</sup> Vol. 1, pp. 1 – 16

<sup>38</sup> Vol. 1, p. 2

were exhausted, on 17 September 2021 when the **Rescission Case** judgment was delivered;<sup>39</sup>

- 15.7 Does not deal with any matter which have been settled by the **State Party** of which there had been no attempt to resolve the ongoing dispute with the **Complainant** in relation to the human rights violations committed against him;
- 16 In particular, communications can only be considered if they are submitted “... after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged”.<sup>40</sup> The fact that the **Complainant** had his complaint ventilated to the **Constitutional Court**, where even organs of state must accept its orders<sup>41</sup>, means that all local remedies were exhausted.
- 17 Even if the **Complainant** might find some loophole contained in the law to follow a process claiming damages from the **State Party** for its ongoing human rights violations committed against him and the failure of the **State Party** to protect him from the **Courts** further violating his human rights, such a matter will have to be heard by the same **Courts** where, in accordance with the precedent system of *stare decisis*, they all must follow the judgments of the **Constitutional Court**.
- 18 The **Complainant** humbly submits that any other suspect local remedy, if any, will not be legal, be ineffective and subject to the discretionary powers of the organs of state. This would not be considered as classifying as a “remedy” in terms of the **African Charter** and its accompanied jurisprudence.

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<sup>39</sup> Vol. 1, p. 204

<sup>40</sup> a56(5) **African Charter**

<sup>41</sup> s165(5) **African Charter**

- 19 The **Complainant** does not have any other intention than to request the **Commission** to play its role by controlling the conformity to the **African Charter** by the **State Party**.
- 20 The Communication is based on allegations of violating provisions of the **African Charter** which the **Commission** has the mandate to promote and protect.
- 21 The object of the communication falls under the **Commission's** mandate and, as a result, the **Complainant** respectfully states that the Communication is compatible with the **African Charter** and therefore admissible.
- 22 Resultantly, the **Complainant** humbly opines that the **Commission** has personal (*ratione personae*), material (*ratione materiae*), temporal (*ratione temporis*) and territorial (*ratione loci*) jurisdiction to finally seize his complaint.

#### CONDONATION FOR LATE LODGEMENT OF SUBMISSION

- 23 The **submission** was due on or around 13 December 2022 in accordance with the letter of seizure received from the **Commission** by email on 13 October 2022.
- 24 On that same day, 13 December 2022, Mr. De Beer for the **Complainant** addressed a letter to the **Commission** to kindly request extension for the **submission** resulting from the reasons stated therein and the **Commission** is kindly referred to them. The initiating email and accompanying referenced letter are attached hereto as Annexures “**Vol4-B1**” and “**Vol4-B2**”, respectively.

- 25 The **Commission** declined to have responded to the request for extension dated 13 December 2022, however, the **Complainant** proceeded in good faith to prepare this **submission** to be lodged by 13 February 2023 resulting from those reasons stated in the letter for the **Complainant** dated 13 December 2022.
- 26 On 14 February 2023, one day after the **submission** was due in accordance with the original commitment, Mr. De Beer for the **Complainant** wrote another letter to the **Commission** requesting a further indulgence to file the **submission** one week later by 21 February 2023, for the reasons that the stepfather of Mr. De Beer passed away the previous week and that his 76 years old mother fell ill and was also hospitalised as explained therein. The initiating email and accompanying referenced letter are attached hereto as Annexures “**Vol4-C1**” and “**Vol4-C2**”, respectively.
- 27 The **Complainant** had been advised that the **Commission** has the authority to grant extensions for lodgement of the **submission** when exceptional reasons are presented and the interest of justice justify such an extension.<sup>42</sup>
- 28 The **Complainant** as the former **RSA** President is at present one of the leading political figures with millions of People supporting him locally and also across the continent of Africa, still with vested influential links to various countries. These facts are well-known and easily verifiable from public accessible records and information.
- 29 The matter of the **Complainant’s** imprisonment without a trial and the option of appeal, and also continued persecution for various vindictive and unfounded

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<sup>42</sup> r98(3) **Rules**

allegations fuelled by personal enemies, has already according to reports, allegedly resulted in mass public unrest of which the rioting and looting in the Kwazulu-Natal Province in **RSA** during July 2021, regrettably, already left more than 350 innocent People dead. Although these unrest actions by mere coincidence overlapped with the imprisonment of the **Complainant**, it is respectfully submitted that the **Complainant** was not part of planning any of such unrest and that it is believed that it happened spontaneously and not necessarily for any reason directly or indirectly connected to the **Complainant**.<sup>43</sup> The media, in fact, sensationally invented the story that, probably planted by those very personal enemies, those unrest actions were linked to the **Complainant**, again finding him guilty without any evidence in the public domain for the sole purpose to harm the **Complainant's** reputation.

30 However, the continued risk management the **Complainant** has to enact to alleviate the direct impact left by the infamous sentence of imprisonment without the option of an appeal, is constantly the centre of news in **RSA** making the adjudication of this complaint critical to the future of, not only **RSA** but also effectively the entire African continent for the fact that **RSA** is undisputedly one of the leading economies and influencers on our mutual soil.

31 For example, at present the **Complainant** effectively has another application before the **Constitutional Court** for an appeal against the judgment in the **Parole Case**, which would technically become moot if the **Commission** would

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<sup>43</sup> AfricaNews, 'South Africa: Police arrest 20 alleged instigators of July 2021 riots', <https://www.africanews.com/2022/08/12/south-africa-police-arrest-20-alleged-instigators-of-july-2021-riots/#:~:text=In%20July%202021%2C%20the%20country,more%20than%20350%20people%20dead.> (last accessed on 20 February 2023)

resolve this very complaint dealing with the initiating sentence of imprisonment without a trial or the option of an appeal.<sup>44</sup>

- 32 In line with local legal precedents, which this **Commission** is respectfully obliged to also consult<sup>45</sup>, the **Complainant** is aware that the **Commission** reserves the power to extent timelines in the **Rules** where exceptional circumstances and the interests of justice require it to do so<sup>46</sup>, especially where it has become clear that this case is indeed exceptional, due to its safety, security and vast continental economic impact and that the delay was for well-established and honest reasons as identified *supra* and was not due to any intentional unexplainable delays. However, these delays are regretted and not intended to undermine the workings of the **Commission**.
- 33 Should this complaint be refused on a technical point of not complying to the set deadlines after presenting those reasons stated *supra*, respectfully, it could reasonably have devastating results, as alleged previously against the **Complainant**, where such news most probably, by no will of the **Complainant**, spontaneously could spark yet another wave of unrest in the **RSA** leading to possibly death of innocent civilians as historically already occurred. If, God forbid, such unrest action could occur it is simply logical that the **Complainant** will then again be blamed by the media and his personal enemies directly impacting on his right to be innocent until proven guilty.

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<sup>44</sup> EWN, 'Correctional Services Commissioner takes Zuma Medical Parole Fight to the ConCourt', <https://ewn.co.za/0001/01/01/correctional-services-commissioner-takes-zuma-medical-parole-fight-to-concourt> (last accessed on 20 February 2023)

<sup>45</sup> a60 & a61 **African Charter**

<sup>46</sup> Mukaddam v Pioneer Foods (Pty) Ltd & Others 2013 (5) SA 89 (CC) at *para.* 39

- 34 The **Commission**'s power to grant such extension ensures access to justice, specifically in a matter of public importance like this one. Non-compliance with the filing deadlines contained in the **Rules**<sup>47</sup> despite a reasonable and persuasive explanation for the filing delays, would amount to an absolute bar to participate in proceedings and mean the end of the line to getting justice, especially where the matter is of such public importance that not seizing the matter could possibly amount to death and public unrest, as have been reported before.<sup>48</sup>
- 35 The **Complainant** humbly submits that the purpose of the power to condone the late lodgement is to ameliorate "*the potentially fatal limitation on the right to access to courts*" and the **Commission**, guaranteed by Section 34 of the **Constitution** and Articles 3 and 26 of the **African Charter**, that would result from the inflexible treatment of non-compliance with the filing deadlines.<sup>49</sup>
- 36 It is for this reason that the **Complainant** believes that the overarching focus of the test for condonation rests on the interests of justice.
- 37 The **RSA** Courts, and effectively this **Commission**, have a discretion to grant condonation<sup>50</sup> and to rectify a violation of basic human and peoples' rights and it is for this reason that the test for condonation centres on whether it is in the interests of justice to do so or not<sup>51</sup>.

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<sup>47</sup> r98(3) **Rules**

<sup>48</sup> Minister of Safety and Security v De Witt (588/2007) [2008] ZASCA 103; 2009 (1) SA 457 (SCA) (19 September 2008) at *paras.* 2 and 12

<sup>49</sup> Vlok v Sun International [2017] JOL 37229 (GJ) at *para.* 60

<sup>50</sup> Grootboom v National Prosecuting Authority & Another 2014 (2) SA 68 (CC) at *para.* 20

<sup>51</sup> Van Wyk v Unitas Hospital & Another (Open Democratic Advice Centre as *amicus curiae*) 2008 (2) SA 472 (CC) *para.* 20 and Brummer v Gorfil Brothers Investments (Pty) Ltd & Others 2000 (2) SA 837 (CC) *para.* 3

- 38 The prospect of success is most likely in favour of the **Complainant** as he respectfully submits that the **Constitutional Court** had to have functioned within the confinements of the **Constitution** and **African Charter** and has failed to have done so, especially for the fact that the matter involves the protected right to a trial and an appeal which negative effects also filtered through to the entire citizenry of **RSA**.
- 39 The **Complainant** is respectfully confident that the **Commission** will come to the same conclusion in this complaint so that it can be finally seized. That, in fact, there is a prospect of success in the complaint appears from the **submission's** content and that condonation for late filing of it, should respectfully be granted.

## SUMMARY OF ARGUMENTS

- 40 The **Constitutional Court**, as the highest court or institution of appeal in the **State Party**, has failed to adequately and reasonably address the three (3) cases before it concerning the **Complainant**, giving rise that his rights, on one or more principles, as enshrined in the **African Charter** have been violated, in its judgment dated 29 June 2021<sup>52</sup>, by *inter alia*:-

- 40.1 Finding the **Complainant** guilty of the crime of contempt of court without any personal appearance;

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<sup>52</sup> Vol. 1, Annex. C, pp. 76 – 202

- 40.2 Violating the right of the **Complainant** to participate in a trial, but using motion procedures in his absence of appearance to reach its judgment;
- 40.3 Sentencing the **Complainant**, in his absence of appearance and without affording him the benefit of a trial, to fifteen (15) months of direct imprisonment without even the option of a suspended sentence;
- 40.4 By having found the **Complainant** guilty, there was no further option of an appeal as the awkward proceedings before the **Constitutional Court**, as the court of last instance, did not make provision for it.
- 41 For the fact that this complaint is not only exceptional, but also critical for the security and safety of **RSA** and its People to be resolved, as indicated *supra* under “*Condonation for Late Lodgement of Submission*”<sup>53</sup>, if it would turn out that these **heads** and/or the **submission** appear not to be adequate or complete, that the **Commission** utilises its authority to request further argument and/or submissions for purposes of determining the admissibility of the Communication.<sup>54</sup>

## IMPRISONMENT OF COMPLAINANT

- 42 The **Complainant** was admitted to the Estcourt Correctional Centre in KwaZulu-Natal on 8 July 2021 to commence serving his sentence of imprisonment,<sup>55</sup> while the urgent **Rescission Case** against the judgment in the

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<sup>53</sup> *paras.* 23 – 39

<sup>54</sup> r116(3) & (4) **Rules**

<sup>55</sup> **Parole Case**, *para.* 5

**Imprisonment Case** was already lodged with the **Constitutional Court** on 2 July 2021 as a last attempt to rectify the clearly wrong imprisonment sentence, even though the infamous judgment was final and not appealable locally anymore.

- 43 Although the **Rescission Case** was lodged only three (3) days after judgment was delivered to imprison the **Complainant** to commence on 4 July 2021,<sup>56</sup> the matter was only enrolled for hearing on 12 July 2021 and decided longer than two (2) months later, on 17 September 2021.<sup>57</sup>
- 44 Notwithstanding the urgent lodgement of the **Rescission Case**, the **Constitutional Court** did not find it necessary to grant urgent interim relief by suspending the sentence against the **Complainant**, even when such application could have proved that the reasoning of the majority judges were, respectfully, wrong. Besides, two judges were brave enough to have voiced their concerns about the direct committal and proposed a suspended sentence in their minority judgment in the **Imprisonment Case** and later in the **Rescission Case**.<sup>58</sup>
- 45 On 5 September 2021, the **Commissioner** released the **Complainant** on medical parole. Shortly thereafter, the Democratic Alliance, the Helen Suzman Foundation, and Afriforum NPC, launched separate applications in the Gauteng Division of the High Court, Pretoria, challenging the **Commissioner's** decision on various grounds in terms of s6 of the *Promotion of Administrative Justice*

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<sup>56</sup> **Imprisonment Case**, Order (para. 5), p. 77

<sup>57</sup> **Rescission Case**, p. 202

<sup>58</sup> **Imprisonment Case**, paras. 143 – 269; **Rescission Case**, paras. 134 – 248

*Act, 2000 (Act No. 3 of 2000)*. Their applications were consolidated and heard together by the high court.<sup>59</sup>

- 46 On 15 December 2021, the high court reviewed the decision of the **Commissioner**, set it aside, and substituted it with one rejecting the **Complainant's** application for medical parole. It consequently directed that the **Complainant** be returned to the custody of the Department of Correctional Services to serve out the remainder of his sentence of imprisonment. The high court also ordered that the time the **Complainant** 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.<sup>60</sup>

#### MEDICAL CONDITION OF COMPLAINANT

- 47 The **Complainant** is nearly 81 years of age, with prevailing serious medical conditions of which he chooses not to make them public for reasons, *inter alia*, of privacy.
- 48 However, the **Parole Case** records these medical conditions under its heading of "*Factual Background*" as having been presented and confirmed by the **Commissioner**, a representative of the **State Party**, and are therefore undisputed.<sup>61</sup>

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<sup>59</sup> **Parole Case**, para. 2

<sup>60</sup> **Parole Case**, para. 3

<sup>61</sup> **Parole Case**, paras. 5 – 12

- 49 Kindly be reminded that these are the recordings as per the condition of the **Complainant** nearly two (2) years ago and since then, considering his age now, have systematically deteriorated and should be interpreted against this essential backdrop.
- 50 It was recorded that the **Complainant** 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). Upon examination, Dr Mafa compiled a report in which he recommended that the **Complainant** 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'. Dr Mafa further alluded to the possible release of the **Complainant** on medical parole.<sup>62</sup>
- 51 The State Party would not contest that 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 the **Complainant** 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 the **Complainant**.<sup>63</sup>
- 52 Further, it would be common facts with the State Party that on 29 July 2021, the Operational Manager at the Estcourt Correctional Centre recommended to

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<sup>62</sup> *Parole Case*, para. 5

<sup>63</sup> *Parole Case*, para. 6

the Correctional Supervision and Parole Board that the **Complainant** be released on medical parole, based on the following:

- (a) Dr Mafa's report that the **Complainant** has a number of comorbidities;
- (b) the **Complainant** needs tertiary health care services that Correctional Services was not providing, and
- (c) that the **Complainant'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'.<sup>64</sup>

53 The **State Party's** Medical Parole Advisory Board designated one of its own, Dr L J Mphatswe, to examine the **Complainant**, 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 the **Complainant** be released on medical parole with immediate effect. In his report, Dr Mphatswe took into account that the **Complainant** was 79 years of age (at that point in time), 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'.

54 Dr Mphatswe 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*

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<sup>64</sup> **Parole Case**, para. 8

*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.*<sup>65</sup>

55 the Surgeon-General of the **State Party** pointed out the following: *'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.'*<sup>66</sup>

56 Although the Board, did not grant medical parole for the **Complainant** at that point in time totally discarding the medical reports by the state's own appointed medical experts, the **Commissioner**, as representative of the **State Party**, did grant medical parole to the **Complainant** on 5 September 2021, implying that the **State Party** was under the view that the **Complainant** is not medically fit to be imprisoned.

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<sup>65</sup> **Parole Case**, para. 10

<sup>66</sup> **Parole Case**, para. 11

57 Irrespective of the fact that the **SCA** of the **State Party** has confirmed the order by the high court to set aside the decision by the **Commissioner** on technical grounds only, it is the **Complainant's** respectful argument that there is clear indication that the **State Party** is sure that the **Complainant** is medically unfit and unable to return to prison, emphasised by the fact that the **Commissioner**, for the **State Party**, is the one who has in fact taken the **SCA's** decision on appeal to the **Constitutional Court** at present.<sup>67</sup>

## OBLIGATIONS OF THE STATE PARTY

58 In terms of Article 1 of the **African Charter**, the **State Party** is obliged to “...recognize the rights, duties and freedoms enshrined in this **African Charter** and shall undertake to adopt legislative or other measures to give effect to them.”

59 The **State Party** acceded to the **African Charter** on 9 July 1996. A note *verbale* was entered to accompany the instrument of accession – The Parliament of the **State Party** agreed to the country's adherence to the **African Charter**, but decided that the instrument of accession should be accompanied by a declaration.

60 This *supra* declaration contains **RSA's** view that consultation should take place between state parties on a number of issues. These include “possible measures to strengthen the enforcement mechanisms of the [**African Charter**]” and “criteria for the restriction of rights and freedoms recognised and

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<sup>67</sup> fn 43

guaranteed in the [**African Charter**]" and bringing the **African Charter** in line with the **UN**'s resolutions "regarding the characterisation of Zionism."

- 61 The **Constitution** provides that "[a]ny international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the **Constitution** or an Act of Parliament".<sup>68</sup>
- 62 Whilst the **African Charter** is not enacted into **RSA** law by national legislation, the **Constitution** does make provision for the application of international law: "When interpreting any legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."<sup>69</sup>
- 63 The **Complainant** also humbly submit that the **African Charter** is an agreement between the **State Party** and all other member states and therefore is law in **RSA**, as no part thereof, is inconsistent with either the **Constitution** or any other Act of Parliament.<sup>70</sup>
- 64 It is further argued, that if it was anyhow inconsistent to not qualify as law in **RSA**, the **State Party** has preempted its right to argue the contrary as its continued participation in the activities and structures of the **AU** clearly establishes that the **African Charter** is a legitimate international agreement and can therefore not be considered as inconsistent with the **Constitution** for purposes of this complaint.

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<sup>68</sup> s231(4) **Constitution**

<sup>69</sup> s233 **Constitution**

<sup>70</sup> s231(4) **Constitution**

- 65 With “*peremption*” it is meant that the **State Party**, through its actions, has reasonably shown that it accepts that the **African Charter** is consistent with the **Constitution** and can legally not argue the contrary position.<sup>71</sup> Basically, the *Doctrine of Estoppel*, as recognised in international public law, is also an underlying factor.<sup>72</sup>
- 66 The **State Party** has also adopted numerous laws, case law and other measures to give effect to the provisions of the **African Charter**. Thus, the **RSA** legal system is mirroring the protection of rights as provided for in the **African Charter**, thereby advocating the protection of human rights through incorporation of the **African Charter** norms into the national legal system.
- 67 However, it is the argument of the **Complainant** that in this particular dispute, the **State Party**, via the **Judiciary**, has violated the **Complainant’s** rights in terms of the **African Charter**.
- 68 The **Commission** controls the conformity of the **State Party’s** actions to the **African Charter** and subsequently has the jurisdiction to entertain this Communication.

## STATUS OF THE CONSTITUTION

- 69 The **Constitution** has also incorporated all, or at least most, of these Articles and therefore the interpretation given to them nationally, should not be much

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<sup>71</sup> Venmop 275 (Pty) Ltd and Another v Cleverland Projects (Pty) and Another (2014/14286) [2015] ZAGPJHC 176; 2016 (1) SA 78 (GJ) (3 August 2015) *paras.* 25 – 27 (<https://www.saflii.org/za/cases/ZAGPJHC/2015/176.html>)

<sup>72</sup> Yogogombaye v Senegal (File No. 001/2008) [2009] AfCHPR 4; (15 December 2009) *para.* 32 (fn 5)

different within the contents of the **African Charter**; meaning, and so **Complainant** respectfully argues, that if a violation of those very rights occurred within the context of the **Constitution**, it should be reasonably accepted, *mutatis mutandis*, that a violation of the corresponding right contained in the **African Charter**, likewise occurred.<sup>73</sup> This was extensively addressed in the **Rescission Case** in the **Constitutional Court**.<sup>74</sup>

### JUDICIARY VERSUS THE STATE PARTY

70 The **Judiciary** is independent of the **State Party**, because it is, firstly, independent,<sup>75</sup> secondly, free from interference of both the People and the **State Party**,<sup>76</sup> and, lastly, it is not a state organ.<sup>77</sup>

71 Notwithstanding that the **Judiciary** is a structure, creature or conceptualisation, outside the **State Party**, via the **Constitution** the **State Party** accepts full responsibility<sup>78</sup> as, *inter alia*, the so called agent or representative of the **Judiciary** for purposes of this complaint before the **Commission** and has an obligation towards the **Complainant**, as its citizen, not to cause the violation of his rights.<sup>79</sup>

72 For purposes of this complaint, the **Complainant** is of the humble view that the **State Party** is effectively the one who has violated the rights of the

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<sup>73</sup> s7 – 39 (Ch. 2 “Bill of Rights”) **Constitution**

<sup>74</sup> Vol. 3

<sup>75</sup> s165(2) **Constitution**

<sup>76</sup> s165(3) **Constitution**

<sup>77</sup> s239 para. (b)(ii) “organ of state” **Constitution**

<sup>78</sup> s7(2) **Constitution**

<sup>79</sup> s165(4) **Constitution**

**Complainant** and the affected People as represented by him in the interest of the public.

## VIOLATIONS OF THE *AFRICAN CHARTER*

73 The **Complainant** has stated in his original referral that the **State Party**, *inter alia*, violated the following Articles of the **African Charter**:-

### Article 1

75 The **State Party** shall recognize the rights, duties and freedoms enshrined in the **African Charter** and shall undertake to adopt legislative or other measures to give effect to them.

### Article 2

76 The **Complainant**, and the People, shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present **African Charter** without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

### Article 3

77 The **Complainant**, and the People, shall be equal before the law and shall be entitled to equal protection of the law.

#### Article 4

78 The **Complainant**, and the People, are inviolable. The **Complainant**, and the People, shall be entitled to respect for their life and the integrity of their persons. No one may be arbitrarily deprived of this right.

#### Article 5

79 The **Complainant**, and the People, shall have the right to the respect of the dignity inherent in a human being and to the recognition of their legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

#### Article 6

80 The **Complainant**, and the People, shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

#### Article 7

81 The **Complainant**, and the People, shall have the right to have his or her cause heard. This comprises:

- a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
- b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
- c) the right to defence, including the right to be defended by counsel of his choice;
- d) the right to be tried within a reasonable time by an impartial court or tribunal.

82 No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

### Article 8

83 Freedom of conscience, the profession and free practice of religion shall be guaranteed.

84 No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

### Article 9

85 The **Complainant**, and the People, shall have the right to receive information.

86 The **Complainant**, and the People, shall have the right to express and disseminate his opinions within the law.

### Article 13

87 The **Complainant**, and the People, shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

88 The **Complainant**, and the People, shall have the right of equal access to the public service of his country.

89 The **Complainant**, and the People, shall have the right of access to public property and services in strict equality of all persons before the law.

### Article 19

90 The **Complainant**, and the People, shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

### Article 23

91 The **Complainant**, and the People, shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the **UN** Charter and reaffirmed by that of the **AU** shall govern relations between States.

### Article 24

92 The **Complainant**, and the People, shall have the right to a general satisfactory environment favourable to their development.

## Article 25

93 States parties to the present ***African Charter*** shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present ***African Charter*** and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

## Article 26

95 The ***State Party*** shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present ***African Charter***.

## RELIEF SOUGHT

96 The relief sought is contained in the ***Submission*** under a PART “A”, requesting urgent relief, and PART “B”, for normal incidental relief.<sup>80</sup>

97 The ***Complainant*** humbly submits that the requested relief does fall within the jurisdiction of the ***Commission***.<sup>81</sup>

98 The requested relief is highlighted in greater detail *infra*.

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<sup>80</sup> ***Submission***, pp. 2 – 4

<sup>81</sup> a45 ***African Charter***

## Urgent Relief (PART “A”)

- 99 Firstly, condonation is required for late filing of the **submission** and is the **Commission** respectfully referred to “*Condonation for Late Lodgement of Submission*” *supra*.<sup>82</sup>
- 100 Secondly, the **Commission** is humbly required to grant relief which would entail that the **State Party** is prohibited to imprison the **Complainant** resulting, directly or indirectly, from the **instigating case**, **imprisonment case**, and/or **rescission case**, pending the final outcome of this complaint. This request is specifically justified for the fact that it is clear that there is *prima vacie* evidence that the **Complainant** was prosecuted for alleged contempt of court without a trial being conducted, in the normal legal understanding of the phrase where the **Complainant** actually physically attended and participated in those proceedings, and that there was no option of an appeal provided as specifically prohibited by Article 7 of the **African Charter** and, further, the **Commission** is also referred to the medical condition of the **Complainant** as highlighted *supra* under “*Medical Condition of Complainant*”.<sup>83</sup>
- 101 Thirdly, to prevent any form of retaliation, the **Commission** is further respectfully requested to reprimand the **State Party** that it is not allowed, directly or indirectly, to act against the **Complainant** for such time as this complaint is being considered.

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<sup>82</sup> paras. 23 – 39

<sup>83</sup> paras. 47 – 57

102 Lastly, under urgent relief, the **Commission** may set any reasonable condition or restriction to either one or both of the **Complainant** and **State Party** as it deems fit and necessary under the circumstances.

### Other Relief (PART “B”)

103 Firstly, that it be declared that the **Complainant** may bring this complaint before the **Commission** in his own personal capacity as well as in the interest of the people of the **State Party**. From the evidence and arguments already presented, it should be clear that this entire matter does not only affect the **Complainant** personally, but the implications thereof physically and by the unjustified, un-African, legal precedence established by the **Constitutional Court**, bare directly on the People and could reasonably give rise, although not wished, to more waves of civil unrest which could lead to the death of more innocent civilians caught in this ongoing vendetta against the **Complainant**.

104 As justified *supra*, the **Commission** is respectfully requested to review the judgments of the **Instigating Case**, **Imprisonment Case** and **Rescission Case** and, if found to be in violation with the **African Charter**, declare it as such, and, if allowed in terms of the **African Charter**, set it aside.

105 The **Complainant** has suffered tremendous direct and indirect financial and other losses as a result of the vendetta against him and the unlawful imprisonment sentence. The **Commission** is respectfully requested to, when this matter is finally seized and the requested relief is granted, to allow the **Complainant** the opportunity to then submit his claim against the **State Party**.

**CLOSING**

106 The **Complainant** kindly request the **Commission** to finally seize his complaint as per the requested relief.

SIGNED at **PRETORIA** (GAUTENG, REPUBLIC OF SOUTH AFRICA) on this **21<sup>ST</sup>** day of **FEBRUARY 2023**.



Mr. Reyno Dawid De Beer

Complainant'S Representative

Pretoria, Gauteng

Republic of South Africa

Mobile: +27 67 735 7288

Landline: +27 12 023 1976

Email(1): [reyno@libertyfighters.co.za](mailto:reyno@libertyfighters.co.za)

Email(2): [debeerreyno@gmail.com](mailto:debeerreyno@gmail.com)

TO: Secretary, African Commission on Human and Peoples' Rights

Kairaba Avenue, Banjul

The Gambia

Fax: +220 4392 962

Email: [au-banjul@africa-union.org](mailto:au-banjul@africa-union.org)



**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.

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## ORDER

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**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).<sup>1</sup>

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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## JUDGMENT

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**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<sup>2</sup> (the Commission of Inquiry). The circumstances which led to the sentence are fully

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<sup>1</sup> *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).

<sup>2</sup> 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*.<sup>3</sup>

[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,

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<sup>3</sup> *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).<sup>4</sup> 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 Mduywa 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

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<sup>4</sup> 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:

‘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.’

[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*<sup>5</sup> 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

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<sup>5</sup> *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*).<sup>6</sup> The Constitutional Court proceeded to distinguish between coercive and punitive orders.<sup>7</sup> 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’.<sup>8</sup>

[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.’<sup>9</sup> (footnote omitted.)

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<sup>6</sup> *Judicial Commission of Inquiry v Zuma* para 21.

<sup>7</sup> *Ibid* para 47.

<sup>8</sup> *Ibid*.

<sup>9</sup> *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*<sup>10</sup> 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".<sup>11</sup>

[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

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<sup>10</sup> *De Lange v Smuts N O and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC).

<sup>11</sup> *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.<sup>12</sup>

[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

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<sup>12</sup> 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.<sup>13</sup> 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*,<sup>14</sup> ‘every part of a Statute should be so construed as to be consistent, so far as possible, with every other part of that Statute’.<sup>15</sup>

### **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.<sup>16</sup> In line with *Natal Joint Municipal Pension Fund v Endumeni*,<sup>17</sup> regard must be had, among others, to the

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<sup>13</sup> *Minister of Police and Others v Fidelity Security Services (Pty) Ltd* [2022] ZACC 16; 2022 (2) SACR 519 (CC) para 34.

<sup>14</sup> *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 AD 13.

<sup>15</sup> *Ibid* at 24.

<sup>16</sup> *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (8) BCLR 869; 2014 (4) SA 474 (CC) para 28.

<sup>17</sup> *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.<sup>18</sup>

[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,

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<sup>18</sup> *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*.<sup>19</sup> There, the relevant legislation<sup>20</sup> 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

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<sup>19</sup> *Walele v City of Cape Town and Others* [2008] ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC) (*Walele*).

<sup>20</sup> 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.’<sup>21</sup>

[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

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<sup>21</sup> *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*<sup>22</sup> 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.

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<sup>22</sup> *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.<sup>23</sup>

[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

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<sup>23</sup> *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.

---

**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)  
Instructed by: Hurter Spies Inc., Pretoria  
Rossouws Attorneys, Bloemfontein
- For *amicus curiae*: M Engelbrecht SC (with her C F Avidon)  
Instructed by: Cilliers & Gildenhuys Inc., Pretoria  
Badenhorst Attorneys, Bloemfontein

**Subject:** URGENT - EXTENSION FOR SUBMISSIONS AND PROVISIONAL MEASURES: JACOB GEDLEYIHLEKISA ZUMA v THE REPUBLIC OF SOUTH AFRICA (REF. 779/2022)  
**From:** Reyno De Beer <reyno@libertyfighters.co.za>  
**Date:** 2022/12/13, 17:35  
**To:** ACHPR-Registry <au-banjul@africa-union.org>

**ATTENTION:** African Commission on Human and Peoples' Rights

c/o Ms. Lindiwe Khumalo

Ag. Executive Secretary to the Commission

Dear Madam,

**KINDLY FIND ATTACHED** an urgent letter for your attention.

--  
Kind Regards,

Reyno De Beer  
President: Liberty Fighters Network  
Landline: +27 12 023 1976  
Mobile: +27 67 735 7288  
Telegram News Channel: @libertyfightersnews  
Facebook: libertyfightersnetwork  
Twitter: @LFN\_SouthAfrica  
YouTube: Reyno De Beer, Liberty Fighter #1  
Website: [www.libertyfighters.co.za](http://www.libertyfighters.co.za)  
Email: [reyno@libertyfighters.co.za](mailto:reyno@libertyfighters.co.za)

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Attachments:

221213-ACPHR-exPresidentJacobZuma-MsKhumalo.pdf

736 KB



## Liberty Fighters Network

Est. 2016 - A voluntary association without gain (*Universitas*)

***Office of the President: Reyno De Beer***

Landline: +27 12 023 1976 / Cellular: +27 67 735 7288

Electronic Mail: [reyno@libertyfighters.co.za](mailto:reyno@libertyfighters.co.za)

Website: [www.libertyfighters.co.za](http://www.libertyfighters.co.za)

Telegram: @libertyfightersnews / Twitter: @LFN\_SouthAfrica / Facebook: Libertyfightersnetwork

---

Date: 13 December 2022

### URGENT

ATTENTION: African Commission on Human and Peoples' Rights  
c/o Ms. Lindiwe Khumalo  
Ag. Executive Secretary to the Commission  
Email: [au-banjul@africa-union.org](mailto:au-banjul@africa-union.org)

Dear Madam

### EXTENSION FOR SUBMISSIONS AND PROVISIONAL MEASURES: JACOB GEDLEYIHLEKISA ZUMA v THE REPUBLIC OF SOUTH AFRICA (REF. 779/2022)

---

1. Writer refers to your letter dated 4 October 2022, under reference **ACHPR/STC/COM/779/22/955/2022**, received on 13 October 2022, informing the Complainant that the *supra* matter was seized.
2. In accordance with the letter under reference, the submissions for the Complainant were expected today.

3. However, it was just not possible for the Complainant to have finalised his submissions in time, for either the Rule 116(1) submission and those in respect of the requested provisional measures, during a period in his life where he, as an elderly man with a serious life-threatening medical condition, had to constantly travel around the country to defend himself from his enemies, in and outside of the State Party, whom are all committed to bring him to a fall.
4. The Complainant is the political anchor and father figure for literally millions of us South Africans and resultantly he is under severe pressure to proof his innocence and the successful prosecution of this very complaint is unquestionably a priority.
5. However, current circumstances coupled with the lead up to the upcoming 55<sup>th</sup> National Conference of the African National Congress (ANC), his political home, scheduled to take place from 16 to 20 December 2022, are presently preventing him to give his full attention to this complaint which requires proper and well-established content and legal arguments to ensure the successful completion thereof, which cannot be rushed.
6. As a result of the ongoing court cases, although none of them challenges the judgment itself by the Constitutional Court which has sentenced the Complainant to prison without having been afforded the option of an appeal as demanded by the *African Charter*, the outcomes of these matters are also relevant to be considered when drafting the submission and request for provisional measures.
7. The Complainant's extremely busy diary, especially having to guard his innocence in ongoing court cases and other related matters besides those already mentioned, did not allow him any opportunity to consult with writer relating to this very complaint and the contents of his submissions.
8. You would, respectfully, agree that the Commission as the vanguard of human rights for all us Africans cannot allow any person's complaint to be dismissed, simply because of him being unable to have properly consulted with his legal counsellors without first affording him with the opportunity to lodge same at a later stage.

9. The Complainant completely respects the Commission's rules and practices and regrets that he and his consult were unable to comply with the set deadlines.
10. The Complainant is committed to bring his complaint before the Commission to its finality and want to respectfully request that the Commission grants him with an extension to lodge both his Rule 116(1) submissions and those pertaining to his request for provisional measures, by no later than 13 February 2023, or such date as the Commission would find suitable under the circumstances.
11. Your urgent response as soonest possible to this request will be highly appreciated. Until such a response is received, the Complainant will continue to work on the lodgement as soonest possible.
12. Your response in this respect will be highly appreciated.

Yours Faithfully,

A handwritten signature in black ink, appearing to be 'RD De Beer', written in a cursive style.

**Reyno D. De Beer**

President: Liberty Fighters Network

**Subject:** Re: URGENT - EXTENSION FOR SUBMISSIONS AND PROVISIONAL MEASURES: JACOB GEDLEYIHLEKISA ZUMA v THE REPUBLIC OF SOUTH AFRICA (REF. 779/2022)  
**From:** Reyno De Beer <reyno@libertyfighters.co.za>  
**Date:** 2023/02/14, 16:13  
**To:** ACHPR-Registry <au-banjul@africa-union.org>  
**CC:** Reyno De Beer <debeerreyno@gmail.com>  
**BCC:** reyno@libertyfighters.co.za

ATTENTION: African Commission on Human and Peoples' Rights

c/o Ms. Lindiwe Khumalo

Ag. Executive Secretary to the Commission

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Kind Regards,

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On 2022/12/13 17:35, Reyno De Beer wrote:

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c/o Ms. Lindiwe Khumalo

Ag. Executive Secretary to the Commission

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Email: [reyno@libertyfighters.co.za](mailto:reyno@libertyfighters.co.za)

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Telegram: @libertyfightersnews / Twitter: @LFN\_SouthAfrica / Facebook: Libertyfightersnetwork

---

Date: 14 February 2023

### URGENT

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c/o Ms. Lindiwe Khumalo  
Ag. Executive Secretary to the Commission  
Email: [au-banjul@africa-union.org](mailto:au-banjul@africa-union.org)

Dear Madam

**RE: EXTENSION FOR SUBMISSIONS AND PROVISIONAL MEASURES: JACOB GEDLEYIHLEKISA ZUMA v THE REPUBLIC OF SOUTH AFRICA (REF. 779/2022)**

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2. In accordance with the request made in the letter under reference, the submissions for the Complainant were expected yesterday.
3. Writer's stepfather suddenly passed away last week on Thursday, 9 February 2023 and the funeral will be on this coming Friday, 17 February 2023.

4. As a result of grieving the passing and prevailing serious medical conditions, writer's mother was also admitted to hospital yesterday, 13 February 2023.
5. Regretfully, writer had to put the last touches of finalising the Complainant's submission on temporary hold and was unable to have met the requested deadline yesterday.
6. The submissions are indeed near completion and ready for submission within the next couple of days, most probably before or on next week Tuesday, 21 February 2023.
7. Writer dearly apologises for the further delay and ensures the Commission that it was not intentional and that this further indulgence is respectfully sought as a result of writer's unforeseen family responsibilities.
8. Your urgent response as soonest possible to this request will be highly appreciated. Until such a response is received, writer will continue to work on the lodgement as soonest possible.
9. Your response in this respect will be highly appreciated.

Yours Faithfully,

A handwritten signature in black ink, appearing to read 'Reyno D. De Beer', written in a cursive style.

**Reyno D. De Beer**

President: Liberty Fighters Network