



**THE ELECTORAL COURT OF SOUTH AFRICA
BLOEMFONTEIN**

Reportable

Case no: 0015/24EC

In the matter between:

**UMKHONTO WESIZWE POLITICAL PARTY
JACOB GEDLEYIHLEKISA ZUMA**

**FIRST APPLICANT
SECOND APPLICANT**

and

**ELECTORAL COMMISSION OF SOUTH AFRICA
MAROBA MATSAPOLA
BETHUEL TERRENCE NKOSI**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT**

Neutral citation: *Umkhonto Wesizwe Political Party and Another v Electoral Commission of South Africa and Others* (0015/24EC) [2024] ZAEC 05 (26 April 2024)

Coram: ZONDI JA, MODIBA J, YACOOB AJ and PROFESSORS NTLAMA-MAKHANYA and PHOOKO (Additional members)

Heard: 04 April 2024

Delivered: 26 April 2024 – This judgment was handed down electronically by circulation to the parties' representatives via email, by publication on the website of the Supreme Court of Appeal and by release to SAFLII. The date and time for hand-down is deemed to be 11:00 on 26 April 2024.

Summary: Appeal against the Electoral Commission's decision upholding the objection lodged in terms of s 30 of the Electoral Act 73 of 1998 – whether the

Electoral Commission has the power to determine eligibility for National Assembly membership - whether a sentence imposed on a candidate rendered such candidate ineligible to be a member of National Assembly in terms of s 47(1)(e) of the Constitution – effect of remission on the sentence imposed - whether reasonable apprehension of bias established-effect of act remission on sentence.

ORDER

1. The application for leave to appeal is granted.
 2. The appeal succeeds.
 3. The decision of the Electoral Commission of 28 March 2024 in terms of which the Electoral Commission upheld Dr Matsapola's objection to the second applicant's candidacy (Mr Zuma) is set aside and substituted with the following:
"The objection is hereby dismissed".
 4. No order is made as to costs.
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JUDGMENT

Zondi JA (Modiba J, Yacoob AJ and Professors Ntlama-Makhanya and Phooko concurring):

Introduction

[1] This is an application for leave to appeal, and an appeal, against the decision of the first respondent, Electoral Commission (Commission) upholding the objections lodged with it by the second respondent, Dr Matsapola, and the third respondent, Mr Bethuel Terrence Nkosi (Mr Nkosi) in terms of s 30 of the Electoral Act 73 of 1998 (the Act) against the nomination of the second applicant, Mr Gedleyihlekisa Jacob Zuma (Mr Zuma) as a candidate of the first applicant, Umkhonto Wesizwe Political Party (The MK Party). Mr Zuma is a former President of the Republic of South Africa. The MK Party is a political party registered in terms of s 15 of the Electoral Commission Act 51 of 1996. The MK Party submitted that to the Electoral Commission its list of candidates on 8 March 2024. That list included Mr Zuma's name. The Commission received objections to the inclusion of Mr Zuma's name in the list of candidates for the MK Party. It upheld two of the objections. The issues are whether leave to appeal should be granted and whether the Commission erred in upholding the objection.

Background facts

[2] The following facts are relevant to the determination of the issues before this court. On 28 January 2021 in the matter between *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Another*,¹ the Constitutional Court granted an order in favour of the Judicial Commission of Inquiry (State Capture Commission) in terms of which Mr Zuma was ordered to attend the State Capture Commission and give evidence before it. The order was served on Mr Zuma on 15 February 2021, Mr Zuma did not attend the State Capture Commission as required by the summons and the Constitutional Court's order. Instead, his legal representatives informed the State Capture Commission that Mr Zuma would not be appearing before it on the date stipulated in the summons.

[3] As a result of Mr Zuma's failure to appear before the State Capture Commission on the stipulated date, the State Capture Commission instituted contempt of court proceedings against him in the Constitutional Court under Case Number CCT 52/21. On 29 June 2021 the Constitutional Court made an order, among others, in the following terms:

- '3. It is declared that Mr Jacob Gedleyihlekisa Zuma is guilty of the crime of contempt of court for failure to comply with the order made by this Court in *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.
4. Mr Jacob Gedleyihlekisa Zuma is sentenced to undergo 15 months' imprisonment.
5. Mr Jacob Gedleyihlekisa Zuma is ordered to submit himself to the South African Police Service, at Nkandla Police Station or Johannesburg Central Police Station, within five calendar days from the date of this order, for the Station Commander or other officer in charge of that police station to ensure that he is immediately delivered to a correctional centre to commence serving the sentence imposed in paragraph 4...'

¹ *State Capture v Zuma and Another* Case Number CCT 295/ 20.

[4] On 8 July 2021 Mr Zuma began serving his sentence at the Estcourt Correctional Centre (the Centre) in KwaZulu-Natal. On 5 September 2021 the National Commissioner of Correctional Services (the Department) released Mr Zuma from the Centre on medical parole. This decision was successfully challenged on review in the high court and was set aside. The high court directed that Mr Zuma be returned to the Centre. The Department appealed to the Supreme Court of Appeal (SCA) against the high court's judgment and on 21 November 2022 the SCA dismissed the appeal. Mr Zuma approached the Constitutional Court for leave to appeal but his application was dismissed on 13 July 2023. That was the end of the road for Mr Zuma. He had to go back to the Centre to complete his sentence, which he did on 11 August 2023.

[5] On 11 August 2023, President Cyril Ramaphosa, acting in terms of s 84(2)(j) of the Constitution, issued Proclamation Notice 133 of 2023 in terms of which he approved the periods of special remission to specified categories of offenders, offenders placed under correctional supervision, parolees and day parolees who were or would have been incarcerated or serving sentences within the system of Community Corrections, 2023. In terms of para 1 of the Proclamation Probationers, Parolees and Sentenced Offenders were granted 12 months Special Remission of sentence. Paragraph 2 of the Proclamation stated that sentenced offenders who were classified to be of low risk would receive additional 12 months' special remission of sentence. Mr Zuma benefited from the Presidential remission, and as a result he was released from the Centre on the same day on which he presented himself for completion of his sentence. As at the date of the Proclamation Mr Zuma had served just less than three months of the original sentence.

[6] In due course, the MK Party was registered as a political party as it intended to contest the 2024 general elections. Mr Zuma became a member of the MK Party, and he was nominated as a candidate for the National Assembly election, which nomination Mr Zuma accepted.

Objections

[7] Section 30 of the Act deals with 'Objections to lists of candidates. It provides as follows:

'(1) Any person, including the chief electoral officer, may object to the nomination of a candidate on the following grounds:

- (a) The candidate is not qualified to stand in the election;
- (b) a party has failed to submit the prescribed acceptance of nomination signed by the candidate as contemplated in section 27 (4) ; or
- (c) there is no prescribed undertaking, signed by the candidate, that the candidate is bound by the Code.

(2) The objection must be made to the Commission in the prescribed manner by not later than the relevant date stated in the election timetable and must be served on the registered party that nominated the candidate.

(3) The Commission must decide the objection and must notify the objector and the registered party that nominated the candidate of the decision in the prescribed manner by not later than the relevant date stated in the election timetable.

(4) The objector, or the registered party who nominated the candidate, may appeal against the decision of the Commission to the Electoral Court in the prescribed manner and by not later than the relevant date stated in the election timetable.

(5) The Electoral Court must consider and decide the appeal and notify the parties to the appeal and the chief electoral officer of the decision in the prescribed manner and by not later than the relevant date stated in the election timetable.

(6) If the Commission or the Electoral Court decides that a candidate's nomination does not comply with section 27, the Commission or the Electoral Court may allow the registered party an opportunity to comply with that section, including an opportunity to substitute a candidate and to re-order the names on the list as a result of that substitution.'

[8] Section 30 must be read together with s 47 and s 19 of the Constitution. Section 47 of the Constitution is headed 'Membership'. The relevant provisions are contained in s47(1) and (2) which provide the following:

'(1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except –

(a) anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service, other than

(i) the President, Deputy President, Ministers and Deputy Ministers; and

(ii) other office-bearers whose functions are compatible with the functions of a member of the Assembly, and have been declared compatible with those functions by national legislation;

(b) permanent delegates to the National Council of Provinces or members of a provincial legislature or a Municipal Council;

(c) unrehabilitated insolvents;

(d) anyone declared to be of unsound mind by a court of the Republic; or

(e) anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed.

(2) A person who is not eligible to be a member of the National Assembly in terms of subsection (1)(a) or (b) may be a candidate for the Assembly, subject to any limits or conditions established by national legislation.'

[9] The next relevant statutory provision is s 19 of the Constitution headed 'Political rights' which provides as follows:

'(1) Every citizen is free to make political choices, which includes the right-

(a) to form a political party;

(b) to participate in the activities of, or recruit members for, a political party; and

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

(3) Every adult citizen has the right

(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and

(b) to stand for public office and, if elected, to hold office'.

[10] Having set out the applicable statutory provisions I now proceed to deal with the facts which form the basis of the impugned decision of the Commission. On about 27 March 2024 the Commission, a body which, among others, is responsible for management of the elections of national, provincial and municipal legislative bodies, received objections in terms of s 30 of the Act read with regulation 6 of the Regulations Concerning the Submission of Lists of Candidates, 2004 to the nomination of Mr. Zuma from Dr Matsapola and Mr. Nkosi. The gist of their objections was that they were opposed to Mr Zuma's nomination. Mr Nkosi has since written a letter to the Commission denying that he objected to Mr. Zuma's

nomination. He stated that he has no knowledge of the objection. We are therefore concerned only with Dr Matsapola's objection.

[11] The relevant part of the objection reads thus:

'[4] [Mr Zuma] appears on the National List of the Umkhonto Wesizwe Party...

[5] On June 29 2021, in the matter of Secretary of the Judicial Commission of inquiry into the Allegations of State Capture, Corruption and Fraud in the Public Sector including *Organs of State v Zuma and Others* [2021] ZACC 18, attached hereto as Annexure B, the Constitutional Court ordered that:

(a) it is declared that Mr Jacob Gedleyihlekisa Zuma is guilty of the crime of contempt of court for failure to comply with the order made by this court in 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.

(b) Mr Jacob Gedleyihlekisa Zuma is sentenced to undergo 15 months' imprisonment.

[6] Mr JG Zuma completed his sentence when he was released from prison on 11 August 2024 following a special remission of sentence in terms of section 84(2)(j) of the Constitution for certain categories of sentenced offenders, correctional supervision and parolees. Proclamation 133 in Government Gazette number 49106 of 11 August 2024 is attached here too as Annexure C.

[7] I submit, therefore that in terms of section 47(1)(e) of the Constitution, Mr JG Zuma is not eligible to be a member of the National Assembly in that:

(a) he was convicted of an offence and sentenced two more than 12 months' imprisonment without the option of a fine, to wit 15 months;

(b) a period of five years after the sentence has been completed has not elapsed.

[9] Accordingly, I further submit that in terms of section 30(1)(a) of the Electoral Act, Mr. J G Zuma is not eligible to be a candidate and accordingly I object to his candidature'.

[12] On or about 24 January 2024 Commissioner Janet Love ("Commissioner Love") is alleged to have made a public statement pronouncing upon the eligibility of Mr Zuma to register as a candidate. That statement was published by Lindsay Dentlinger of Eye Witness News. The publication reported that 'the Electoral Commission (IEC) has confirmed that former President Jacob Zuma does not meet the requirements to register as a candidate to stand in this year's elections.' The article went on to say: 'the Electoral Commission on Thursday confirmed this when asked at a press briefing whether Zuma could be included on a party list for election to parliament. Commissioner Janet Love said the IEC was bound by the law and the Constitution in terms

of who was eligible to run for political office'. According to the article Commissioner Love is reported to have stated: 'That excludes anybody who has been given a sentence that was not the subject of any deferral and in that sense, it is not ourselves, but the laws of the country that would stand as an impediment for that candidacy'. This forms the basis of MK Party's claim that Commissioner Love should not have considered the objections to Mr Zuma's candidacy because she had displayed bias against Mr Zuma.

[13] On 28 March 2024 four Commissioners including Commissioner Love considered the objections and upheld them. Commissioner Pillay recused herself. In terms of the 2024 election timetable published by the Commission on 24 February 2024 Mr Zuma had until 2 April 2024 to bring a challenge to the Commission's decision to this Court. Aggrieved by the Commission's decision the MK Party and Mr Zuma approached this Court on an urgent basis for leave to appeal against that decision.

[14] Leave to appeal was sought on the following preliminary grounds:

(a) That the Commission and the objectors failed to give the requisite and timely notification to the MK Party. The complaint is that the notification was sent to the wrong e-mail address. This ground was subsequently abandoned by the MK Party and nothing further needs be said about it.

(b) It was alleged that the Commission exceeded its powers or authority in purporting to implement or apply s 47(1)(e) of the Constitution which, the MK Party contended, falls under the powers of the National Assembly to regulate its own affairs in terms of s 57 of the Constitution.

(c) It was alleged that the Commission, alternatively Commissioner Love was biased. This allegation was based on the pronouncements she allegedly made in the media prior to the lodgment and consideration of the objection in which she is alleged to have stated that 'Zuma is not eligible to register as a candidate'.

[15] As regards the merits of the appeal, the MK Party argued that the Commission erred in finding that s 47(1)(e) of the Constitution finds application.

(a) It was alleged that the Commission erred in conflating the issue of standing as a candidate (in terms of 30(1)(a) of the Act) with eligibility to be a member of the National Assembly in terms of s 47(1) of the Constitution.

(b) The MK Party disputed that Mr Zuma was convicted of an offence and sentenced within the meaning of s 47(1)(e) of the Constitution.

(c) The Commission did not take into account the fact that Mr Zuma's sentence was remitted.

[16] The Commission opposed the application for leave to appeal and asked this Court to dismiss it. It denied that the MK Party was not notified of the objections and of its decision. It alleged that it notified MK Party on 29 March 2024 of its decision. As regards the source of its authority to disqualify Mr Zuma, the Commission contended that Mr Zuma's disqualification applies to both nomination as a candidate and to being a member of parliament. It asserted that neither the Act nor the Constitution distinguishes between eligibility to stand in an election for the National Assembly and eligibility to be a member of the National Assembly.

[17] The Commission averred that ineligibility under s 47(1) of the Constitution is a ground for objection under s 30(1)(a) of the Act. The Commission maintained that the pre-election process is the only opportunity to determine eligibility for membership of the National Assembly before a new Parliament is constituted. The Commission, contended the Commission, does not provide for a special after-election sitting of the National Assembly to determine eligibility. It went on to state that the Act requires the Commission to satisfy itself that each candidate on the party's list is eligible to be a member of the National Assembly.

[18] As regards the accusation that it and Commissioner Love prejudged Mr Zuma's eligibility and that for that reason they were precluded from considering the objection, the Commission denied that the statement attributed to Commissioner Love gives rise to bias or conflict of interest and that there was any reasonable basis for it and Commissioner Love to recuse themselves. The Commission averred that Commissioner Love simply stated the correct legal position and her statement was made in response to a question about Mr Zuma's eligibility; neither Commissioner Love nor anyone else from the Commission raised Mr Zuma's eligibility of their own accord. It asserted that it was not responsible for the headline of the article, or the reporting. It denied the accuracy of the headline and the reporting. It denied further that it or Commissioner Love prejudged Mr Zuma's eligibility. The Commission explained that Commissioner Pillay recused herself from the Commission's decision

on the objections because she was an acting Judge at the Constitutional Court when that Court convicted Mr Zuma of contempt of court.

[19] At the hearing the issues were narrowed down to the following issues:

(a) whether the Commission exceeded its powers when it determined that, in terms of s 47(1)(e) of the Constitution, Mr Zuma was disqualified from becoming a member of National Assembly because of his conviction and the sentence of 15 months that was imposed on him;

(b) whether the Commission and /or Commissioner Love prejudged Mr Zuma's eligibility and, whether they should have excused themselves from considering the objections to Mr Zuma's candidacy.

(c) whether Mr Zuma was convicted of an offence as contemplated in s 47(1)(e) of the Constitution;

(d) whether Mr Zuma was sentenced as contemplated in s 47(1)(e) of the Constitution;

(e) what the legal effect is of the Presidential remission of sentence on the sentence the Constitutional court imposed on Mr Zuma.

Whether leave to appeal should be granted

[20] The matter raises issues which are of public interest. It is about the interplay between s 30 of the Act and s 47(1)(e) as read with s 19(3)(b) of the Constitution. It is in the interests of justice that leave should be granted. Leave is also granted because MK Party has prospects of success.

Whether the Commission lacked authority to make a determination under s 47 of the Constitution

[21] Counsel for the MK Party submitted that the Commission exceeded its powers, authority or jurisdiction in upholding the objection on the basis of s 47(1) of the Constitution and therefore acted unlawfully. This is so, proceeded the argument, because the powers of the Commission in respect of determining objections are limited to the question whether or not a candidate is qualified to stand in the election. That question is different from whether or not a citizen is eligible to be a member of the National Assembly. To substantiate his argument counsel pointed to the fact that s 47 is located in Chapter 4 of the Constitution headed "Parliament".

[22] Parliament, so went the argument, is made up of the National Assembly and the National Council of Provinces. The significance of this is that the Commission cannot encroach upon the area reserved for Parliament. Counsel submitted that the regulation and administration of membership of the National Assembly is a matter which falls in the heartland of what is preserved for the National Assembly itself. It is an internal matter over which the Commission has no role. In support of this submission, he referred to s 57 of the Constitution read with rule 13 of the National Assembly which provides that the National Assembly may determine and control its (own) internal arrangements, proceedings, and procedures. Rule 13 provides that:

‘When the convening notice has been read at the commencement of the proceedings of the House on the first day on which it meets after a general election at which members of the House were elected, such members must be sworn in or make affirmation before the Chief Justice or a judge designated by the Chief Justice, in accordance with Section 48 read with Schedule 2 of the Constitution.’

[23] Counsel for the MK Party rejected the Commission’s contention that there is no distinction in the Constitution or the Electoral Act between the eligibility for National Assembly membership and qualification to stand as a candidate. He argued that s 47(2) of the Constitution makes it clear that non-eligibility for membership of the National Assembly does not automatically translate into disqualification to stand for elections. The two concepts, so it was argued, are therefore not synonymous and do not represent two sides of the same coin, as contended by the Commission.

[24] It was further submitted on behalf of the MK Party that the right to stand for election is directly sourced from s 19(3)(b) of the Constitution which right cannot be easily defeated. It was argued that the contention that a pre-election objection is the “only” opportunity to determine eligibility for membership of the National Assembly, was incorrect for the simple reason that if such was true, anybody convicted and sentenced after 28 March 2024 but before (and even after) the election date of 29 May 2024 would be off the hook. Counsel emphasized that the power of the National Assembly to regulate membership arises from the acquisition of such membership *i.e.* at the first ever sitting of the National Assembly until the end of the term.

[24] It is correct that one of the most fundamental principles of the rule of law, that it is central to the conception of our constitutional order, is that the Legislature and Executive and other organs of state such as the Commission “are constrained by the principle that they may exercise no power and perform no other function beyond that conferred upon them by law” (*Fedsure Life Assurance Ltd v Greater Johannesburg Metropolitan Council*).² They have no inherent powers. In the context of this case this means that the Commission may not exercise powers and perform functions that are beyond those that are conferred on it by s 190 of the Constitution or the Electoral Commission Act and the Act.

[25] I disagree with the MK Party’s argument that the Commission exceeded the limits of its powers when it determined under s 30 of the Act that Mr Zuma is not eligible to be a member of the National Assembly in terms of s 47(1)(e) of the Constitution. The source of power to make that determination is to be found in s 27 and s 30 of the Act. In terms of s 27 a registered party intending to contest an election must nominate candidates and submit a list or lists of those candidates for that election to the chief electoral officer in the prescribed manner. The Commission is given powers to ensure that there is a compliance with the provision of s 27 and to reject a nomination if there has been non-compliance with the relevant provisions of s 27. Section 30(1)(a) of the Act allows an objection to the nomination of a candidate if the candidate is not qualified to stand in the election. In this regard, I agree with counsel for the Commission’s submission that s 47(1)(e) of the Constitution serves the purpose of determining which candidates are qualified to stand in an election and that if a candidate is not qualified to hold office they are also not qualified to stand for office.

[26] The provisions of s 47(1)(e) of the Constitution and s 30 of the Act show that the Commission is empowered to determine, before the election, qualification for membership of the National Assembly. This was recognized by this Court in *Freedom Front Plus v African National Congress* [2009] ZACC 4, although there, the court was concerned with a suspended sentence. In the lead up to the 2009 elections, the list of candidates for the National Assembly that the ANC had

² *Fedsure Life Assurance Ltd v Greater Johannesburg Metropolitan Council* 1999(1) SA 374 (CC) at para 58.

submitted to the Commission included Ms Madikizela-Mandela's name. The Freedom Front Plus objected to Ms Madikizela-Mandela's inclusion. It argued that she was, in terms of s 47(1)(e) of the Constitution, ineligible to stand for election because of her conviction and sentencing in 2004. The Commission dismissed the objection and an appeal to this Court was dismissed. The authority of the Commission to determine objections and make determination under s 47(1)(e) of the Constitution was accepted.

[27] The construction of s 47 contended for by the MK Party frustrates the apparent purpose of the section and leads to impractical results to the extent that it allows candidates to stand for an office which they may not hold. Such construction is not to be preferred (*Natal Joint Municipal Pension Fund v Endumeni Municipality*).³ The purpose of s 47 of the Constitution read with s 30 of the Act is to ensure that candidates who are nominated by the parties are candidates that are eligible to be members of the National Assembly. For that purpose to be served, the Commission is given powers to screen the list of nominated candidates through the medium of s 30 objection procedure. A party's list of candidates submitted before the election must demonstrate, through the undertaking, that its candidates are eligible. The form for a candidate list is prescribed in Appendix 1 to the Regulation concerning the Submission of List of Candidates, 2004. The list must include, amongst the other things, an undertaking from a party representative confirming he or she has confirmed that each candidate is qualified to stand for election in terms of s 47 and/or s 106 of the Constitution of South Africa or national or provincial legislation or any applicable legislation. Each candidate on a party's list must then sign an acceptance of nomination in the form prescribed in Appendix 4 to those Regulations. The acceptance includes a declaration that the candidate is qualified to be elected as a member of the National Assembly in terms of s 47 of the Constitution.

Whether the Commission and/or Commissioner Love were biased

[28] It was submitted on behalf of MK Party that Commissioner Love clearly prejudged the issue. It is no answer to state, as the Commission seeks to do, that she made the impugned utterances in response to a question. It maintained that the

³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA) at para 18.

fact is that she expressed a view which was prejudicial to one of the parties or sides to the dispute. The issue, so the argument went, is that she should not have responded to the question in the manner that she did – alternatively she ought properly to have recused herself when the same issue came for determination as a result of the objection. Commissioner Love, is reported to have made the following statement in response to an unspecified question about Mr Zuma:

“That excludes anybody who has been given a sentence that was not the subject of any deferral, and in that sense, it is not ourselves, but the laws of the country that would stand as an impediment for that candidacy.”

[29] The MK Party submitted that the words “that candidacy”, clearly referred to Mr Zuma’s candidacy, and this meant that Commissioner Love, and by extension the whole Commission, had prematurely prejudged the issue and could not come to a fair decision. At best, so it was argued, Commissioner Love ought not to have participated in the decision. The MK Party also submitted that since the Commission did not distance itself from Commissioner Love’s comments, there is a reasonable apprehension that it was not able to make a fair decision and therefore that the decision was tainted.

[30] It is common cause that the statement was made, and that it was made in response to an unspecified question about Mr Zuma being a candidate. Both parties also were *ad idem* about the test for bias which would disqualify a decision maker, or which would taint a decision. The test is by now well established. It is an objective test,⁴ which “requires both that the apprehension of bias be that of a reasonable person in the position of the litigant and that it be based on reasonable grounds”.⁵

[31] The evidence on which the complaint of bias rests is tenuous to say the least. It is a single “illustrative” newspaper report, with only the words set out above being directly quoted from Commissioner Love. Both the applicant and the Commission put forward different possible interpretations of the statements. Neither interpretation is dispositive of what the statement may have meant. What is clear to this court is that

⁴ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) at 48.

⁵ *South African Human Rights Commission OBO South African Jewish Board of Deputies v Masuku and Another* 2022 (4) SA 1 CC at 64.

the statement made by Commissioner Love, in a context in which she was speaking for the Commission, is ambiguous and without specificity. All it says is that a person who falls into a category defined by the law would be excluded from standing as a candidate. This is in fact the case. Without more there is no basis for a conclusion of bias. The submission by the MK Party that the reference to “that candidacy” refers directly to Mr Zuma and can only refer to Mr Zuma and shows bias against Mr Zuma has no merit. The words in the context of the statement refer clearly to a person whose candidacy is affected by a provision of the law. The words refer to any such person and not specifically to Mr Zuma.

[32] Nor is there any evidence which would lead to a conclusion that, when being asked to determine whether Mr Zuma falls into the category of people whose candidacy is impeded by the law, the Commission would be unable to apply its mind fairly and without bias. The applicant bears the onus to establish the existence of bias, and it has failed to do so. For these reasons, the bias point must fail.

Whether Mr Zuma was convicted as contemplated in s 47(1)(e)

[33] It was submitted on behalf of Mr Zuma that he was not convicted as contemplated in s 47(1)(e) of the Constitution and that therefore he is not hit by that section. The basis for this argument is that the ‘conviction’ occurred in the context of contempt of court proceedings which are both civil and criminal in nature. For a conviction to ensue, so it was argued, there must have been a criminal charge and criminal trial proceedings as contemplated by s 35 of the Bill of Rights, which, it was submitted, did not happen in Mr Zuma’s case. The relevant subsection of s 35 that was relied upon is s 35(3) of the Bill of Rights which provides that “every accused person has a right to a fair trial which includes the right to a public trial before an ordinary court”.

[34] The contention that Mr Zuma was not convicted of an offence is rejected. He disobeyed an order of court which is a crime. He was in contempt of court. The order of the Constitutional Court (para 3) declared Mr Zuma to be guilty of a crime. In *Fakie NO v CCII Systems (Pty) Ltd*⁶ the Supreme Court of Appeal described contempt of court in these terms:

⁶ *Fakie NO v CCII Systems (Pty) Ltd* 2006(4) SA 326(SCA) at para 6.

'It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has in general terms received a constitutional 'stamp of approval', since the rule of law – a founding value of the Constitution – 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained'

[35] This definition of contempt of court was adopted by the Constitutional Court in *Matjhabeng Local Municipality v Eskom Holdings Ltd.*⁷ The Court there had this to say at para 50:

'It is important to note that it "is a crime unlawfully and intentionally to disobey a court order". The crime of contempt of court is said to be a "blunt instrument". Because of this, "[w]ilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence". Simply put, all contempt of court, even civil contempt, may be punishable as a crime. The clarification is important because it dispels any notion that the distinction between civil and criminal contempt of court is that the latter is a crime, and the former is not'. (Footnote omitted.)

[36] As correctly pointed out by counsel for the Commission, Mr Zuma's sentence entails a conviction. This was not disputed by Mr Zuma and the MK Party that a sentence of 15 months' imprisonment was imposed on Mr Zuma and that while he was serving that sentence Mr Zuma fell under the provisions of the Correctional Services Act. The fact of the matter is that Mr Zuma would not have been incarcerated had he not been convicted. Accordingly, I find that Mr Zuma was convicted of a crime.

What is the legal effect of the Presidential remission of sentence on the sentence imposed on Mr Zuma

[37] At the hearing a considerable amount of time was spent on the legal effect of the act of remission on the sentence imposed on Mr Zuma's sentence. It was submitted on Mr Zuma's behalf that Mr Zuma is not affected by the disqualification contained in s 47(1)(e) of the Constitution because of the remission he received. This argument was formulated as follows. On 11 August 2023 Mr Zuma's sentence was remitted, and the remission had the effect of 'cancelling or extinguishing the

⁷ *Matjhabeng Local Municipality v Eskom Holdings Ltd* 2018(1) SA 1 (CC).

remainder of his sentence after having served nearly 3 months. As a result of the remission, his effective and ultimate sentence was therefore reduced to 3 months' imprisonment. It is totally irrelevant whether that 3 month sentence was "served" in a prison or on parole. Neither is it relevant if his alleged conviction remained intact'. It was submitted that for s 47(1)(e) to take effect, both the conviction and prescribed sentence requirements must be satisfied.

[38] I disagree with the submission that the effect of the remission was to cancel or extinguish the remainder of the sentence. This was not a reprieve or pardon. It was simply a general remission. The submission that the President has powers to extinguish a sentence imposed by a court undermines the fundamental doctrine of separation of powers which is recognized by the Constitution. This is to be found in the provisions of the Constitution outlining the functions and structures of various organs of state and their respective independence and interdependence. In terms of the Constitution the legislature makes the laws and monitors the executive; the executive makes policy, proposes laws and implements legislation passed by the legislature; and the judiciary is responsible for resolving disputes by the application of law.

[39] The President may not through the act of remission undo what the judiciary has done. The supremacy clause in s 2 of the Constitution binds the executive and leaves no room for prerogative powers, unless authorised in the Constitution, outside the scope of judicial review. The power that is vested in the President to remit certain sentences is cast upon him through a constitutional mandate to ensure that some public purpose may require fulfilment by a grant of remission in appropriate cases. This is how the exercise of power by the President when he or she grants remission of sentences under s 84(2)(j) of the Constitution should be understood.

[40] It may be of assistance to have regard as to how foreign jurisdictions have interpreted legislation dealing with presidential remission. This is permissible subject

to the guidelines set out by the Constitutional Court in *H v Fetal Assessment Centre*.⁸

The Court set out the following guidelines:

'Foreign law has been used by this Court both in the interpretation of legislation and in the development of the common law. Without attempting to be comprehensive, its use may be summarised thus:

- (a) Foreign law is a useful aid in approaching constitutional problems in South African jurisprudence. South African courts may, but are under no obligation to, have regard to it.
- (b) In having regard to foreign law, courts must be cognisant both of the historical context out of which our Constitution was born and our present social, political and economic context.
- (c) The similarities and differences between the constitutional dispensation in other jurisdictions and our Constitution must be evaluated. Jurisprudence from countries not under a system of constitutional supremacy and jurisdictions with very different constitutions will not be as valuable as the jurisprudence of countries founded on a system of constitutional supremacy and with a constitution similar to ours.
- (d) Any doctrines, precedents and arguments in the foreign jurisprudence must be viewed through the prism of the Bill of Rights and our constitutional values.

The relevant question then is what role foreign law can fulfil in considering this case. Where a case potentially has both moral and legal implications in line with the importance and nature of those in this case, it would be prudent to determine whether similar legal questions have arisen in other jurisdictions. In making this determination, it is necessary for this Court to consider the context in which these problems have arisen and their similarities and differences to the South African context. Of importance is the reasoning used to justify the conclusion reached in each of the foreign jurisdictions considered, and whether such reasoning is possible in light of the Constitution's normative framework and our social context.⁹

[41] In *Rajendra Mandal v The State of Bihar & Ors Writ Petition 9 Criminal No 252 of 2023* the Supreme Court of India was concerned with the question whether the appellant in that case was eligible for remission. The court had this to say about the operation of act of remission at para 7:

'Sentencing is a judicial exercise of power. The act thereafter of executing the sentence awarded, however, is a purely executive function – which includes the grant of remission,

⁸ *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) BCLR 127 (CC); 2015 (2) SA 193 (CC) paras 31-32. See also, *Nelson Mandela Foundation Trust and Another v Afriforum NPC and Others* [2019] ZAEQC 2; [2019] 4 All SA 237 (EqC); 2019 (6) SA 327 (GJ) at 115-117.

⁹ *Ibid* paras 21-32.

commutation, pardon, reprieves, or suspension of sentence. This executive power is traceable to Article 72 and 161 of the Constitution of India, by which the President of India, and Governor of the State, respectively, are empowered to grant pardons and to suspend, remit or commute sentences in certain cases. Whilst the statutory (under Section 432 CrPC) and constitutional (under Articles 72 and 161 of the Constitution) powers are distinct- the former limited power, is still an imprint of the latter (much wider power) and must be understood as such and placed in this context'.

[42] The court quoted with approval the following statement in *State of Haryana v Jagdish* [2010] 3 SCR 716 at para 27 in which the framework of executive power and how it is to be exercised was explained:

' Nevertheless, we may point out that the power of the sovereign to grant remission is within its exclusive domain and it is for this reason that our Constitution makers went on to incorporate the provisions of Article 72 and Article 161 of the Constitution of India. This responsibility was cast upon the executive through a constitutional mandate to ensure that some public purpose may require fulfilment by grant of remission in appropriate cases. This power was never intended to be used or utilised by the executive as an unbridled power of reprieve. Power of clemency is to be exercised cautiously and in appropriate cases, which in effect, mitigates the sentence of punishment awarded and which does not, in any way, wipe out the conviction. It is a power which the sovereign exercises against its own judicial mandate. The act of remission of the State does not undo what has been done judicially. The punishment awarded through a judgment is not overruled but the convict gets benefit of a liberalised policy of State pardon. However, the exercise of such power under Article 161 of the Constitution or under Section 433-A CrPC may have a different flavour in the statutory provisions, as short-sentencing policy brings about a mere reduction in the period of imprisonment whereas an act of clemency under Article 161 of the Constitution commutes the sentence itself.'

[43] In the present case the President remitted certain sentences to address the overcrowding problem in correctional centres. This power was exercised during COVID-19 pandemic, and it was exercised to prevent and contain the spread of the Covid-19. The remission was not specific to Mr Zuma. The effect of remission was that the period that Mr Zuma was going to spend in prison was reduced. It did not erase the fact that Mr Zuma was sentenced to a 15 month prison sentence. The Presidential remission did not extinguish or reduce the sentence of 15 months to 3 months which Mr Zuma actually served. In general, that could only be achieved

through the invocation of judicial appeal or review processes. MK Party's reliance on the judgment of the Constitutional Court in *Masemola v Special Pensions Appeal Board and Another* [2019] ZACC 39; 2020(2) SA 1 (CC) is misplaced. *Masemola* has absolutely no relevance to the issue at hand. The case dealt with the effect of the presidential pardon on Mr Masemola's special pension. It did not concern the presidential remission of sentence.

[44] Mr Masemola was a recipient of a special pension. On 2 April 2001, Mr Masemola was convicted of several counts of fraud and was sentenced to five years' imprisonment. Pursuant to an investigation by the Special Investigation Unit in 2007 the Special Pensions Appeal Board terminated his special pension. He then applied for and was granted pardon by the President in terms of s 82(2)(j) of the Constitution. The pardon was in respect of his conviction on his five counts of fraud which it expunged. In addition, he received a South African Police Services Clearance Certificate certifying that his convictions had been expunged from his record. The Constitutional Court had this to say at para 37 regarding the effect of a presidential pardon:

'In this case, and given the particular wording of the presidential pardon, the applicant received what is generally referred to as a full pardon. The President also directed that the applicant's conviction be expunged from his criminal record. The result being that for all intents and purposes, the applicant, with effect from 21 July 2011, is legally to be treated as a person who has not been convicted of the offence. The applicant is with effect from the date of the pardon no longer affected by any legal disqualifications that are as a result of his conviction. He is no longer subject to any civil or statutory disabilities that are imposed on a person convicted of the offence.'

It is clear that Mr Masemola received a full pardon in respect of his conviction which is not the case in relation to Mr Zuma. He did not apply for pardon.

Whether the sentence imposed on Mr Zuma is a sentence contemplated in s 47(1)(e) of the Constitution.

[45] What I have stated above regarding the legal effect of a remission on the sentence is on the assumption that the sentence imposed on Mr Zuma is a sentence that is contemplated in s 47(1)(e) of the Constitution. I deal with it directly in this section. It was submitted on behalf of Mr Zuma that the Commission erred in

upholding the objection on the basis that he was sentenced to a period of more than 12 months of imprisonment, without the option of a fine. It was argued that because Mr Zuma could not appeal, he could not be regarded as having been 'sentenced' for the purpose of s 47(1)(e) because this subsection does not regard a person 'as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired.' It is common cause that Mr Zuma was convicted and sentenced by an apex court and for that reason his conviction and sentence were not appealable.

[46] The issue involves the interpretation of 47(1)(e) of the Constitution. The principles of statutory interpretation are well settled. The Supreme Court in *Endumeni*¹⁰ held that the statutory interpretation is the objective process of attributing meaning to words used in legislation. That process entails a simultaneous consideration of –

- (a) The language used in the light of the ordinary rules of grammar and syntax;
- (b) The context in which the provision appears; and
- (c) The apparent purpose to which it is directed.

[47] What the Constitutional Court stated in *Cool Ideas 1186CC v Hubbard and Another* 2014 (4) SA 474 at para 28 in the context of statutory interpretation is particularly apposite. It said:

'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised; and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).'

¹⁰ Note 4.

[48] In *Road Traffic Management Corporation v Waymark (Pty) Ltd*¹¹ the Constitutional Court explained at paras 31 and 32:

'Where a provision is ambiguous, its possible meanings must be weighed against each other given these factors. For example, a meaning that frustrates the apparent purpose of the statute or leads to unbusinesslike results is not to be preferred. Neither is one that unduly strains the ordinary, clear meaning of words. That text, context and purpose must always be considered at the same time when interpreting legislation has been affirmed on various occasions by this Court.

Allied to these factors, courts must also interpret legislation to promote the spirit, purport and object of the Bill of Rights. Again, courts should not unduly strain the reasonable meaning of words when doing so. But this obligation entails understanding statutes to "lay the foundations for a democratic and open society, improve the quality of life for all and build a united and democratic South Africa.'

[49] In terms of s 47(1)(e) a person who is convicted of an offence and sentenced to more than 12 months' imprisonment without an option of a fine is not eligible to be a member of National Assembly. The disqualification does not operate immediately. If there is an appeal against the conviction and/or sentence a nominated candidate remains eligible to be a member of the National Assembly pending the final determination of the appeal. In the event that the nominated candidate loses the appeal or elects to not appeal the conviction and/or sentence the disqualification kicks in and he or she becomes ineligible to be a member of the National Assembly. Section 47(1)(e) and s 19 (3)(b) of the Constitution should be read together. They both serve an important function. The purpose of s 47(1)(e) is to ensure that those who are convicted and sentenced to more than 12 months' imprisonment without an option of a fine are disqualified from standing for public office and to hold office if elected. In those circumstances those who are excluded under s 47(1)(e) do not have a right to stand for public office under s 19(3)(b) of the Constitution. But the fact that a person is convicted and sentenced to a period stipulated in s 47(1) does not mean that he or she is disqualified immediately. He or she may appeal against the conviction and/or sentence and pending the determination of the appeal he or she is not regarded as having been sentenced. It was submitted by the Commission that where a sentence is imposed by the highest court in the land such as the

¹¹ *Road Traffic Management Corporation v Waymark (Pty) Ltd* [2019] ZACC;2019 (5) SA 29 (CC) at paras 31 and 32.

Constitutional Court the conviction and sentence are not appealable with the result that the person convicted becomes disqualified immediately.

[50] The Commission's construction of s 47(1)(e) is incorrect for two reasons. First, the actual words in s 47(1)(e) of the Constitution are incapable of this interpretation. Secondly, this construction requires the court to read in words into s 47(1)(e) the effect of which will be to exclude the operation of the proviso in s 47(1)(e) if a person concerned was sentenced by the highest court in the land. The construction of the section contended for by the Commission does not promote certainty. Both s 47(1)(e) and s 19(3)(b) are provisions of the Constitution. They have to be read simultaneously and harmoniously and in a manner that gives each equal weight. Section 19(3)(b) encourages citizens to participate in the electoral process by standing for public office and to hold office if elected. On the other hand, s 47(1) is there to maintain the integrity of the electoral process by ensuring that those that campaign for public office and elected to hold office are not serious violators of the law. They are fit and proper persons to hold public office.

[51] The drafters of the Constitution recognized the fact that a person convicted and sentenced has a right to appeal against their conviction and sentence, upon leave being granted by the trial court or, if refused, on petition to the superior court. If that fact was not important to them, they would not have inserted the proviso which seeks to preserve the status quo pending the appeal processes. In other words, the conviction and sentence do not take effect until the appeal process has taken place alternatively a convicted and sentenced person has elected to not appeal the conviction and/or sentence. In my view the sentence that was imposed on Mr Zuma cannot be said to be a sentence which the section contemplates. The Commission erred therefore to uphold an objection to Mr Zuma's candidacy on the basis that the sentence that was imposed on him disqualified him from being eligible to be a member of National Assembly.

[52] As regards costs each party should pay its own costs as is the practice in this court.

[53] These are my reasons for the order we granted.

DH ZONDI

Chairperson of the Electoral Court

Modiba J (Professors Ntlama-Makhanya and Phooko concurring):

[54] I have had the pleasure of reading and carefully considering the reasons set out in the judgment prepared by my colleague Zondi JA (the first judgment). I concur with the order and the reasons for the findings made in respect of the two preliminary grounds of appeal as well as two of the three grounds in respect of the merits. The latter are whether Mr Zuma was (a) convicted, and (b) sentenced as contemplated in s 47(1)(e).

[55] The first judgment dismisses the ground of appeal that relates to the legal effect of the remission of sentence on the sentence imposed on Mr Zuma. I disagree with the dismissal of this ground of appeal and the reasons for this outcome as set out in the first judgment. I would uphold that ground of appeal. Below, I set out the reasons why I would do so.

[56] After articulating the submission made on behalf of Mr Zuma in paragraph 38 of the first judgment, it disagrees with the submission because it undermines the fundamental separation of powers doctrine.

[57] The first judgment accepts the submission made on behalf of the Commission, that the remission of sentence did not reduce the sentence imposed on Mr Zuma because the President may not, through the act of remission, “undo what the judiciary has done [when it sentenced Mr Zuma to 15 months in prison]”. It reasons that the reduction of Mr Zuma’s sentence could only be achieved through a judicial review or appeal. It further reasons that the supremacy clause in s 2 of the Constitution binds the executive and leaves no room for prerogative powers outside the scope of judicial review. The President’s power to remit sentences serves to ensure that some public purpose is fulfilled by granting of a remission of sentence in

appropriate cases. The remission was granted to address overcrowding to prevent and contain the Covid-19 pandemic. It was not specific to Mr Zuma. Lastly, it finds that MK Party's reliance on *Masemola* is misplaced. because Mr Masemola had received a full pardon, which is not the case in respect of Mr Zuma.

[58] I set out my reasons under the following sub-headings:

- (a) Whether the view that the legal effect of a remitted sentence reduces the sentence imposed by a court violates the separation of powers doctrine.
- (b) What is the legal effect on the remission of sentence on the sentence imposed on Mr Zuma?
- (c) Whether it matters that the remission of sentence served a public purpose not specific to Mr Zuma.

Whether the legal effect of a remitted sentence reducing the sentence imposed by a court violates the separation of powers doctrine

[59] In my view, the legal effect of a remitted sentence reducing the sentence imposed by a court does not violate the separation of powers doctrine. The view the first judgment adopts, that it does, emanates from submissions made on behalf of the Commission. No authority for this proposition was provided by either the Commission or MK Party who disagreed with the proposition.

[60] I find support for my view in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*¹² (*Certification* judgment). I would have ordinarily requested the parties to file supplementary written submissions, addressing this judgment. However, these reasons were prepared under extreme pressure because, shortly after this Court granted its order on 9 April 2024, and before this Court issued reasons, the Commission appealed against the order to the Constitutional Court. Subsequently, the Constitutional Court issued directives for the conduct of the Commission's appeal even before the reasons were issued. I nonetheless rely on the *Certification*

¹² *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, (*Certification* judgment) 1996 (4) SA 744 (CC).

judgment. The parties will have an opportunity to address the Constitutional Court whether I correctly based my reasons on it.

[61] In the *Certification* judgment, the Constitutional Court determined an objection to the President's power to pardon or reprieve offenders and remit fines, penalties or forfeitures in terms of section 84(2)(j) of what then was the proposed new text of the Constitution of the Republic of South Africa, 1996. An objection to the inclusion of s 84(2)(j) had been raised on the basis that the exercise of the President's powers in terms of this provision encroaches upon the judicial terrain and overrules or negates judicial decisions in violation of both the separation of powers requirement of Constitutional Principle (CP) IV and the provisions pertaining to judicial functions in CP VII.

[62] CP IV provides that "The Constitution shall be the supreme law of the land. It shall be binding on all organs of State at all levels of government." CP VI provides that "There shall be a separation of powers between the Legislature, Executive and Judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness." CP VII provides that "The Judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights".

[63] In the *Certification* judgment, the Constitutional Court observed that there is no universal model of separation of powers. In democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute.¹³ It further went on to say:

[109] The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always

¹³ *Certification* judgment at para [108].

one of partial separation. In Justice Frankfurter's words, '(t)he areas are partly interacting, not wholly disjointed.'

'[115] It is alleged that this power offends CPs IV, VI and VII. The basis of the objection is, first, that the exercise of the power is not constrained by any constitutional or common-law procedures, or any substantive constitutional criteria or rules, and that no reasons need be given for its exercise or for any refusal to exercise the power. It was contended that the power therefore detracts from the requirements of CP IV, which proclaims the supremacy of the Constitution. Second, it was argued that the responsibility entrusted to the President is an executive and not a judicial power, yet its exercise encroaches upon the judicial terrain and in fact overrules or negates judicial decisions in violation of both the separation of powers requirement of CP IV and the provisions pertaining to judicial functions in CP VII.

"[116] The power of the South African Head of State to pardon was originally derived from royal prerogatives. It does not, however, follow that the power given in ...[s] 84(2)(j) is identical in all respects to the ancient royal prerogatives. Regardless of the historical origins of the concept, the President derives this power not from antiquity but from the NT [new text] itself. It is that Constitution that proclaims its own supremacy. Should the exercise of the power in any particular instance be such as to undermine any provision of the NT, that conduct would be reviewable.

"[117] The objection based on CPs VI and VII really amounts to a complaint about a perceived overlap of powers and functions between the President, as a member of the Executive, on the one hand and the Judiciary, on the other. It has never been part of the general functions of the court to pardon and relieve offenders after justice has run its course. The function itself is one that is ordinarily entrusted to the head of State in many national constitutions, including in countries where the constitution is supreme and where the doctrine of separation of powers is strictly observed.'

[64] I am of the view that by not upholding the objection and by allowing s 84(2)(j) to be included in the Constitution of the Republic of South Africa, 1996, by implication, the Constitutional Court in the *Certification* judgment accepted that when the President exercises his powers in terms of this provision, the legal effect of a remission reducing a sentence would not violate the separation of powers doctrine. It expressly stated that historically, it has never been the function of the courts to pardon and relieve offenders and remit sentences. The President exclusively enjoys this power notwithstanding that he is not part of the judiciary.

[65] I therefore find that s 84(2)(j) is consistent with the notion that, although the President is part of the executive arm of government and functionally independent from the judiciary, when he exercises his constitutional power to remit sentences, it is necessary or unavoidable that the effect of a remission reducing a sentence will intrude on the sentencing powers of the judiciary.

[66] Accordingly, I do not agree with the view expressed in the first judgment that the remission of sentence did not reduce the sentence the Constitutional Court imposed on Mr Zuma, because to hold otherwise would mean that the legal effect of a remission violates the separation of powers doctrine. The reduction of a sentence by way of a remission issued in terms of s 84(2)(j) is consistent with the supremacy of the Constitution because the President derives the power to remit sentences from the Constitution itself. When the remission reduces a sentence, thus encroaching on the sentencing powers of the judiciary, the intrusion is lawful because the Constitution permits it.

What is the legal effect of the remission of sentence have on the sentence imposed on Mr Zuma

[67] For the reasons set out below, I agree with the contention made on behalf of the MK Party that the remission of Mr Zuma's sentence by the President, effectively reduced it to three months and for that reason he is not disqualified by s 47(1)(e) from National Assembly membership.

[68] It was argued on behalf of the Commission that Mr Zuma is hit by the disqualification portion of s 47(1)(e) because a sentence of more than 12 months' imprisonment without the option of the fine had been imposed on him. Counsel for the Commission urged this court to ignore the remaining part of s47(1)(e) which deals with the expiry of the disqualification, because the five-year period during which the disqualification is operative has not expired.

[69] This approach is inconsistent with the approach to the interpretation of texts followed in *Endumeni*. This Court must consider the text of s47(1)(e) as a whole. When the portion of the provision this Court is urged to ignore is considered, the

absurd results of the interpretation contended for by the Commission becomes apparent. That portion of s 47(1)(e) provides that 'a disqualification under this paragraph ends five years after the sentence has been completed'.

[70] *Freedom Front Plus v ANC and Another*¹⁴ relied on by the MK Party, reveals the imperfections in the formulation of s 47(1)(e). It does not provide for all possible sentence permutations. One of these is the legal effect of a wholly suspended imprisonment sentence of more than twelve months. This is what the Electoral Court in that case was called upon to determine. Similarly, the formulation of s 47(1)(e) does not consider that once justice has run its course, a convicted and/ or sentenced person may benefit from a presidential act in terms of s84(2)(j) changing the legal effect of their conviction and/ or sentence.

[71] The Court in *Freedom Front Plus* resolved this legislative inadequacy by determining what constitutes the effective sentence imposed on Ms Madikizela-Mandela. It did so, as I do here, by not only considering the disqualification portion of s47(1)(e), but the expiry of the disqualification portion as well. It found that since Ms Madikizela-Mandela's imprisonment sentence is wholly suspended, her effective sentence is not a sentence of more than 12 months' imprisonment. Therefore, the disqualification requirement in s 47(1)(e) is not met.

[72] If I were to accept that the sentence of 15 months' imprisonment imposed on Mr Zuma was effectively not reduced by the remission, to determine whether the disqualification has expired or not, it is necessary to determine the date of completion of the sentence. Counsel for the Commission initially answered this question by suggesting two dates. The first is on the date the sentence was remitted and Mr Zuma was released from prison. This occurred on 11 August 2023. The second is when the 15 month period expires, reckoned from the date of sentencing.

[73] The second answer raises two difficulties: (a) whether the sentence is completed or not is not reckoned from the date the sentence was imposed, but the date Mr Zuma started serving his sentence; (b) Mr Zuma did not serve the 15

¹⁴ *The Freedom Front Plus v African National Congress* 2011 JDR 0054 (EC).

months sentence that was imposed on him. The latter presents an even more serious difficulty. After 11 August 2023, the sentence imposed on Mr Zuma was no longer operative. It is legally incorrect to continue to attribute the legal effect of his sentence on him after this date. Therefore, it is uncertain from the second answer when Mr Zuma's disqualification from holding membership of the National Assembly will expire.

[74] The difficulty that confronts the Commission with the first answer, which it ultimately placed its case on, is that since Mr Zuma completed serving his sentence on 11 August 2023, the conclusion that the legal effect of the remission was that his sentence was reduced is unavoidable. His effective sentence was no longer 15 months but 3 months. This approach to determining the legal effect of the remission of sentence on a remaining period of imprisonment has been consistently followed by the courts in the judgments relied on by MK Party, namely, *Smith v Minister of Justice and Correctional Services*¹⁵ (*Smith*) and *Boshego v Correction Supervision and Parole Board: Kgosi Mampuru II (Boshego)*.¹⁶ It matters not that those judgments dealt with the effect of the remission on Mr Smith and Mr Boshego's date of parole. The Court in both cases rejected the contention that the remission only applies to their parole. It held that it also applies to their sentence. In both cases, the court held that the remission reduced these parties' effective sentences. In the result, not only did they qualify for parole earlier, but their imprisonment sentences would also, as a result of the remission, expire earlier.

[75] To get around the unavoidable conclusion that a remission of sentence reduces an imprisonment sentence, it was argued on behalf of the Commission that the remission only reduced the period Mr Zuma served and not the sentence imposed. The sentence imposed, which implicates the disqualification portion of s 47(1)(e) is not changed by the remission.

[76] It was further argued on behalf of the Commission that to determine whether the disqualification has expired, we ought to use a different criteria, namely the

¹⁵ *Smith v Minister of Justice and Correctional Services and Others* [2022] ZAGP JHC 60 (11 February 2022) at paragraph 34.

¹⁶ *Boshego v Correctional Supervision and Parole Board : Kgosi Mampuri II and others* 2023 JDR 2026 (GP) at para 34 to 40.

sentence served. This approach is inconsistent with that followed in *Smith* and *Boshego* because the sentence served is that effectively reduced by the remission.

[77] The legal effect of the remission is not only to authorise an early release from prison. This is what a parole would do. A parole does not cancel the remaining portion of the sentence, whereas a remission does.

[78] In my view, on the date it was granted, the remission reduced Mr Zuma's effective sentence. As a result, the legal effect of a remission reducing the sentence absolved Mr Zuma from the legal consequences of the sentence imposed by the Constitutional Court.

[79] As correctly submitted on behalf of the Commission, the 15 month imprisonment term the Constitutional Court imposed on Mr Zuma will forever remain factually correct. However, same cannot be said about the legal effect of that sentence. The remission altered its legal effect. Put differently, from the date of the remission, the sentence imposed on Mr Zuma was bereft of its legal consequences. It could no longer be enforced on Mr Zuma. The legal consequences are not only limited to the obligation to serve the remainder of the sentence; they include all legal consequences that flow from the sentence that was imposed on him including disqualification from public office in terms of s47(1)(e).

[80] The MK Party also placed reliance on *The Citizen 1978 (Pty) Ltd v McBride (McBride)*.¹⁷ It was contended for the Commission that the facts in *McBride* support its contention and not that of the MK Party because the Constitutional Court in that case held that despite the fact that Mr McBride had been released from prison while serving an imprisonment term for a murder convicted as a result of being granted amnesty, the fact of this conviction and sentence remains and is not obliterated by the amnesty. This is indeed what the Constitutional Court said. It equally holds true for Mr Zuma in the present case. But, the Constitutional Court's remarks in *McBride* are taken out of context by the Commission. The Constitutional Court went further to say that the amnesty does not absolve Mr McBride from moral condemnation for

¹⁷ *The Citizen 1978 (Pty) Ltd v McBride (McBride)* 2011 (4) SA 191 (CC).

murder. Therefore, referring to him as a murderer does not amount to defamation. Correctly so, the Constitutional Court never held that the amnesty did not have a legal effect on McBride's conviction. The amnesty interfered with the conviction and sentence imposed on McBride, thus absolving him from the legal consequences thereof. For this reason, I find that *McBride* is good authority for the interpretation contended for by the MK Party.

[81] The fact that Mr McBride received amnesty in terms of an act of Parliament is of no moment. So is the fact that the President specifically expunged Mr McBride's criminal record. The different facts in this case do not render the implicated legal principle inapplicable. Parliament, through legislation, interfered with the order of the Court convicting McBride. That constitutes lawful interference with the Court's verdict and sentence. It changed the legal effect of these outcomes.

[82] Lastly, the first judgment places reliance on two international authorities. I have not specifically addressed those judgments for two reasons. Firstly, foreign courts have not dealt with the legal effect of presidential acts of pardoning offenders and remitting sentences consistently. The judgments in *Dissanayake v. Sri Lanka*, Comm. 1373/2005, U.N. Doc. A/63/40, Vol. II, at 109 (HRC 2008) [Human Rights Committee Rights Committee] and *Rolandas Paksas v. Lithuania*, Communication No. 2155/2012, U.N. Doc. CCPR/C/110/D/2155/2012 (2014) reflects this. Secondly, foreign judicial authorities were not ventilated in this Court because none of the parties placed reliance thereon. It is for that reason that I did not have regard to foreign law when formulating these reasons. The Commission's appeal pending before the Constitutional Court affords the parties an opportunity to address that court on foreign judgments if they are so instructed and/ or directed.

Whether it matters that the remission of sentence served a public purpose not specific to Mr Zuma

[83] It matters not that the remission of sentence served a public purpose not specific to Mr Zuma. I disagree with the view expressed in paragraph 38 of the first judgment the power that is vested in the President to remit certain sentences is cast upon him through a constitutional mandate to ensure that some public purpose may

require fulfilment by a grant of remission in appropriate cases and that this is how the exercise of power by the President when he or she grants remission of sentences under s 84(2)(j) of the Constitution should be understood. S 84(2)(j) does not qualify the President's power to remit sentences. What matters is the legal effect of the remission, which I have elaborately addressed in the preceding sub-heading.

[84] For that reason, I also disagree with the view in the first judgment that the MK Party's reliance on *Masemola* is misplaced because Mr Masemola received a full pardon with conditions that were specific to him. The fact that the facts in *Masemola* and the present case are distinguishable is of no moment. The legal effect of presidential acts in terms of s84(2)(j) remains applicable.

[85] For these reasons, I find that Mr Zuma's effective sentence, as reduced by the remission, does not bring him within the ambit of s 47(1)(e) of the Constitution.

LT MODIBA
JUDGE OF THE ELECTORAL COURT

YACOOB AJ:

[86] I have had the advantage of reading the judgment prepared by the Chairman of this court, Zondi JA ("the first judgment"), and that prepared by my sister Modiba J ("the second judgment"). I agree with the order issued by this court on 9 April 2024. I agree with the first judgment, save for the conclusion it reaches regarding the effect of a Presidential remission of sentence on a sentence imposed by a Court in the context of the doctrine of separation of powers. I agree also with the second judgment, in particular regarding the interplay between section 84(2)(j) and the doctrine of separation of powers.

[87] I cannot, however, agree with the conclusion that the remission of sentence proclaimed by the President of the Republic in terms of s 84(2)(j) of the Constitution on 11 August 2023 means the sentence that was ultimately imposed on Mr Zuma was a sentence of three months, not fifteen months, so that he does not fall within the disqualifying exception set out in s 47(1)(e) of the Constitution.

[88] The primary basis on which the second judgment reaches the conclusion that the remission has the legal effect that the effective sentence imposed on Mr Zuma was one of three months is that, reading the section as a whole, the remission absolved Mr Zuma completely from the legal consequences of his sentence. Factually, it remains the case that Mr Zuma has had a fifteen month sentence imposed on him, but, because of the remission, the legal consequences of the sentence imposed are reduced. This is why the completion date of his sentence for purposes of calculating the end of the disqualification would be the date on which the remission absolved him from any further legal consequences.

[89] It is trite that the text of a section has to be interpreted as a whole. But the manner in which the section is grammatically constructed also has to be taken into account. The ending of the disqualification is provided for in a completely separate grammatical sentence. That has to have some significance. It is clear to me that this means it applies to the factual and legal end of the serving of the sentence. In this case, as a result of the Presidential remission, as a matter of fact, everyone who benefited from the remission has completed their sentence on the day on which they were released with no obligation to complete any further punishment related requirements, that is 11 August 2023. That is the clear legal effect of the remission, for the purposes of the obligation to complete a sentence, and therefore on the completion of the sentence. I do not believe that this has any necessary bearing on the effect of the remission on the sentence that was *imposed* by the court, having considered the offence and the circumstances of the person. I disagree that this means that one has to ignore this portion of the section in order to make sense of the section.

[90] I accept the argument submitted on behalf on the MK Party that the section concerns itself with the “ultimate sentence”. For convenience I reproduce the relevant part of the section here:

‘anyone who ... [is] sentenced to more than 12 months’ imprisonment without the option of a fine ... but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired.’

[91] There was some suggestion that the fact that Mr Zuma was convicted of contempt of court is relevant. It is not. It was perfectly possible for him to have been convicted of contempt and sentenced to three months’ imprisonment without the option of a fine. This would still show a lack of respect for the rule of law that one may not wish for in a lawmaker. But it would not disqualify that person, because the court which sentenced him did not consider his offence to be serious enough to sentence him for a period longer than twelve months. That is the benchmark set by the Constitution. That the court convicting and sentencing the person considered their conduct so serious that the court imposed, considering all the relevant factors, a sentence of direct imprisonment longer than twelve months without the option of a fine.

[92] But, and this part of the argument of the MK Party I found sensible and persuasive in the Constitutional context, the limitation of a person’s right to political participation is drastic. There is also the risk that a person may be convicted and sentenced maliciously to prevent their political participation. To prevent this, and to protect the hard-won political participation which is part of the Founding Provisions of the Constitution, there is the proviso.

[93] This is the “ultimate sentence” proviso – that no one may be regarded as having been sentenced until an appeal has been determined. The section requires a consideration of the sentence and a possible reduction of what was imposed, so that the seriousness of the person’s conduct is reconsidered and the consequences of the conduct are also reconsidered. Where an appeal is not available, it means the person is deprived of this reconsideration, and where s 47(1)(e) is implicated, deprived of political participation at first and last instance, without the benefit of this

issue having been considered by anyone at all except the court imposing the sentence. This would in my view be unduly drastic and unjustifiable.

[94] It is also why I take the view that, had there been a successful application to the President, and a remission been granted to Mr Zuma (or any other person) after his specific facts had been considered, that remission would have fulfilled the requirements of the proviso, and resulted in the “ultimate sentence” imposed having been reduced.

[95] Therefore, in circumstances where the remission was a general one which only reduced the amount of time any sentenced person was obliged to serve, but did not consider and change the sentenced *imposed*, I cannot agree that it had the legal effect found by Modiba J.

[96] The “ultimate sentence” the section is concerned with is one imposed specifically on the person, either by a court, an appeal court, or in special circumstances, when a pardon or remission is granted to that person when their own circumstances are considered. It cannot refer to a blanket remission that is granted to all sentenced offenders, parolees and persons under correctional supervision without exception or particularity, regardless of their circumstances, where each person has not been directly considered. This kind of remission is a decision that the sentence imposed does not have to be served, not that the sentence was not properly imposed or that a different sentence ought to have been imposed, which is what section 47(1)(e) is concerned with.

[97] These, then, are my reasons for concurring in the order granted by this court.

S YACOOB

ACTING JUDGE OF THE ELECTORAL COURT

Appearances

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