

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CASE NO: CCT 52/21**

In the matter between:

**SECRETARY OF THE JUDICIAL COMMISSION OF  
INQUIRY INTO ALLEGATIONS OF STATE  
CAPTURE, CORRUPTION AND FRAUD IN THE  
PUBLIC SECTOR INCLUDING ORGANS OF STATE**

Applicant

and

**JACOB GEDLEYIHLEKISA ZUMA**

First Respondent

**MINISTER OF POLICE**

Second Respondent

**NATIONAL COMMISSION OF THE  
SOUTH AFRICAN POLICE SERVICE**

Third Respondent

and

**HELEN SUZMAN FOUNDATION**

Application for  
admission as *Amicus  
Curiae*

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**THE HELEN SUZMAN FOUNDATION'S WRITTEN SUBMISSIONS**

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**INTRODUCTION**

1. What faces this Court is the unprecedented situation in our democracy where a former President of the Republic, Mr. Jacob Gedleyihlekisa Zuma ("Mr. Zuma") has deliberately, vocally and *mala fide* elected not to comply with an

order of this Court, and has disparaged the judiciary through his conduct and statements.

2. Presidents bear an enormous constitutional responsibility. As stated by this Court:

*"The President is the Head of State and Head of the national Executive. His is indeed the highest calling to the highest office in the land. He is the first citizen of this country and occupies a position indispensable for the effective governance of our democratic country. Only upon him has the constitutional obligation to uphold, defend and respect the Constitution as the supreme law of the Republic been expressly imposed. The promotion of national unity and reconciliation falls squarely on his shoulders. As does the maintenance of orderliness, peace, stability and devotion to the well-being of the Republic and all of its people. Whoever and whatever poses a threat to our sovereignty, peace and prosperity he must fight.... Unsurprisingly, the nation pins its hopes on him to steer the country in the right direction and accelerate our journey towards a peaceful, just and prosperous destination, that all other progress-driven nations strive towards on a daily basis. He is a constitutional being by design, a national pathfinder, the quintessential commander-in-chief of State affairs and the personification of this nation's constitutional project."<sup>1</sup>*

3. Presidents and, axiomatically, ex-Presidents, must be ready to account for their fulfilment of such responsibility.
4. The constitutional vision of a society in which the quality of life of all citizens is improved and the potential of each person is freed<sup>2</sup> has been gravely imperiled by the heightened levels of corruption and state capture which blighted South Africa during the years in which Mr. Zuma was in office as the President of the Republic of South Africa. This court recognised that corruption poses a real

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<sup>1</sup> *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) ("EFF I") excerpts from para 20

<sup>2</sup> Preamble to the Constitution.

danger to our developing democracy and undermines the ability of the government to meet its constitutional commitments.<sup>3</sup>

5. The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State ("the Commission") was established to uncover the truth about state capture, corruption and fraud, and to make recommendations on these matters so as to ensure that these crimes cease and are not repeated. It performs, *inter alia*, a truth-finding exercise of national importance.
6. Although Mr. Zuma is effectively at the centre of the allegations being investigated by the Commission, he has persistently and unlawfully refused to appear and give evidence before the Commission. He has refused to respect the lawful coercive powers of the Commission and defied the summonses and directives issued by the Commission.
7. This forced the Commission to approach this Court for relief in *Commission v Zuma*,<sup>4</sup> in which this Court ordered Mr. Zuma to obey all summonses and directives lawfully issued by the Commission, and to appear and give evidence before the Commission on the dates determined by it.<sup>5</sup>
8. However, Mr. Zuma has persisted in his refusal to appear and give evidence before the Commission even in defiance of a court order issued by the highest court in the land. More than this, Mr. Zuma has embarked on a campaign to

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<sup>3</sup> *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 57.

<sup>4</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* [2021] ZACC 2 ("**Commission v Zuma**"). In awarding costs against Mr. Zuma, in spite of his election not to participate in the proceedings, this Court recognised that the Commission was compelled to approach it for relief because of Mr. Zuma's "*reprehensible conduct*" towards the Commission in ignoring the Commission's summonses and directives.

<sup>5</sup> Ibid at paras 4 and 5 of the order.

attack the integrity of the judges of this Court, this Court itself, the Commission and the judiciary as a whole in an attempt to justify his non-compliance.

9. The Commission has, accordingly, made application to this Court for an order declaring that Mr. Zuma is guilty of contempt of court in that he intentionally and unlawfully disobeyed this Court's order in *Commission v Zuma*. The Commission seeks an order sentencing Mr. Zuma to imprisonment for a term of two years for his contempt.
10. The Helen Suzman Foundation ("HSF") intervened as *amicus curiae* in *Commission v Zuma* in order to make submissions on the public's collective right to the truth about state capture, corruption and fraud, which is gravely undermined by Mr. Zuma's refusal to provide evidence to the Commission.
11. In these proceedings,<sup>6</sup> the HSF seeks to emphasise that Mr. Zuma's contempt of this Court's order seriously impedes the functioning of the Commission and undermines its ability to fulfil its crucial truth-seeking mandate, which will result in the setting of a dangerous precedent in a young democracy which has prided itself in its respect of the rule of law since the end of the apartheid regime. The HSF seeks to highlight the importance of the Commission's truth-seeking work in achieving a just outcome in this case.
12. The HSF advances arguments different to those raised by the Commission, and it does so by drawing attention to this Court's and other courts' jurisprudence and comparative cases that are not advanced by the Commission. Its written submissions address the following topics:

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<sup>6</sup> After the handing down of this Court's directions dated 19 March 2021, the Commission – on 23 March 2021 – confirmed that it had no objection to the HSF joining as *amicus curiae*. A copy of the relevant email is annexed marked "A".

- 12.1 The requirements of equality before the law and the values of accountability and the rule of law in relation to the duty to comply with court orders. There are no exceptions or exemptions permitted to former Presidents or any other categories or classes of persons in relation to the duty to comply with court orders.
- 12.2 The factors that must be taken into account in determining the appropriate sanction for Mr. Zuma's contempt of this Court's order. In particular, the exceptionality of Mr. Zuma's contempt, which has given rise to a constitutional moment possibly unprecedented since the dawn of our democracy. The extraordinariness of Mr. Zuma's contempt arises from three features.
- 12.2.1 His former role as President of the Republic, and the heightened obligation of compliance that arises from his continuing constitutional duty and oath to uphold the Constitution;
- 12.2.2 His contempt not only of this Court's order, but of the important truth-seeking work of the Commission. The obligation to comply with the summonses and directives of the Commission, which this Court sought to enforce in its order, is intimately connected to the truth-seeking purpose of the Commission, and ultimately to the constitutional values of accountability and openness. Mr. Zuma's conduct threatens to undermine the Commission's effective performance of its mandate and our country's international law obligations; and
- 12.2.3 His scandalising attacks against the judges of this Court, this Court and the judiciary. The harm of these attacks must be assessed in

light of the historical context surrounding the judiciary and the importance of public trust in the judicial process and the courts.

- 12.3 An appropriate sanction for Mr. Zuma's contempt of this Court's order. A sanction for contempt of court must serve dual and interlinking punitive and coercive purposes. The extreme conduct by Mr. Zuma justifies a punitive sanction for his failure to cooperate with the Commission and to obey this Court's order. But the public interest in and right to the uncovering of the truth dictates in favour of the imposition of a sanction that seeks also to coerce Mr. Zuma to comply with this Court's order, and to appear and give evidence before the Commission. A sanction should be crafted that not only vindicates the dignity of this Court, but also assists the Commission in uncovering the truth.

#### **MR. ZUMA IS EQUAL BEFORE THE LAW**

13. In *Commission v Zuma*, the HSF made written submissions before this Court on the requirements of the principle of equality before the law in that case. The HSF contended that no exception or exemption from the duty to comply with the Commission's subpoenas could be permitted for Mr. Zuma. This, it argued, is because equality before the law, and the values of accountability and the rule of law, require that everyone be treated equally when it comes to compliance with subpoenas.
14. This argument found favour with this Court. The Court chastened the Commission for "*treating [Mr. Zuma] differently*" and with "*a measure of deference*" despite "*the constitutional injunction of equal protection and benefit*

*of the law*.<sup>7</sup> The Court confirmed that everyone must be treated equally in respect of the obligation to comply with subpoenas.

15. This Court affirmed that no one is above the law, including Mr. Zuma whose previous position does not grant him immunity from obeying the law.<sup>8</sup> It said:

*The respondent's conduct in defying the process lawfully issued under the authority of the law is antithetical to our constitutional order. We must remember that this is a Republic of laws where the Constitution is supreme. Disobeying its laws amounts to a direct breach of the rule of law, one of the values underlying the Constitution and which forms part of the supreme law. In our system, no one is above the law. Even those who had the privilege of making laws are bound to respect and comply with those laws. For as long as they are in force, laws must be obeyed.*<sup>9</sup> (our emphasis).

16. This finds equal force in this case. Mr. Zuma, like everyone else, is subject to the laws of the Republic of South Africa – including the laws of contempt of court. He does not, within the context of this matter, fall within an exempt or excluded category that allows for special treatment.
17. The Constitution provides that an order or decision issued by a court binds “*all persons to whom it applies*”.<sup>10</sup> Indeed, in *Nyathi*<sup>11</sup> this Court was faced with determining the constitutionality of state liability in South Africa which had been statutorily introduced in terms of the Crown Liabilities Act 1 of 1910. At issue in that case was whether statutory provisions that prevented the attachment of

<sup>7</sup> *Commission v Zuma* above n 4 at para 58.

<sup>8</sup> *Ibid* at para 87.

<sup>9</sup> *Ibid*.

<sup>10</sup> Section 165(5) of the Constitution.

<sup>11</sup> *Nyathi v MEC for Department Health, Gauteng* 2008 (5) SA 94 (CC).

assets of the State when executing against successful court orders, were constitutional. This Court recognised that the statute in question “*was in line and compatible with the doctrine of parliamentary supremacy... (and it was)... a relic of a legal regime which was pre-constitutional and placed the State above the law: a State that operated from the premise that 'the king can do no wrong'*”.<sup>12</sup> In rejecting a state of affairs that ensured that the State, and by parity of reasoning its officials, could not be held accountable for their actions, this court opined that “*(d)eliberate non-compliance with or disobedience of a court order by the State detracts from the 'dignity, accessibility and effectiveness of the courts'*”,<sup>13</sup> the statutory provision in issue “*places the State above the law*”<sup>14</sup> and concluded that the statutory provision “*limits the right to equality before the law and the right to equal protection and benefit of the law guaranteed by s 9(1)*”.<sup>15</sup>

18. No exception or exemption can be made for any person, not the State, not its officials and by extension not even a former President, when it comes to compliance with court orders.
19. This is patently what is required by equality before the law. In its written submissions before this Court in *Commission v Zuma*, the HSF traversed the South African jurisprudence on equality before the law.<sup>16</sup> While it does not seek to repeat this jurisprudence here, it draws attention to the recent case of *Vance*

<sup>12</sup> Ibid at paras 17-18.

<sup>13</sup> Ibid at para 43.

<sup>14</sup> Ibid at para 44.

<sup>15</sup> Ibid at para 47.

<sup>16</sup> See, for instance, *Prinsloo v Van der Linde* 1997 (3) SA 1012; *Weare v Ndebele NO* [2008] ZACC 20; 2009 (1) SA 600 (CC); 2009 (4) BCLR 370 (CC); and *City Council of Pretoria v Walker* [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257.

decided by the Supreme Court of the United States, which offers salutary guidance in this case.<sup>17</sup>

20. In *Vance*, the Supreme Court reaffirmed an age old principle that a sitting President is not “*absolutely immune from state criminal subpoenas*”.<sup>18</sup> Mr. Trump, former President of the United States of America, argued that he was entitled to “*absolute immunity from state criminal process*” during the time that he occupied the office of the Presidency.<sup>19</sup> However, the Supreme Court disagreed, and held that it could “*not conclude that absolute immunity is necessary or appropriate*”.<sup>20</sup> Of particular import, the Supreme Court recognised that “*every man’ has included the President of the United States*” and that in its “*judicial system*”, ‘*the public has a right to every man’s evidence*’.<sup>21</sup> Like our Constitutional Court, the Supreme Court recalled what Marshall CJ had previously decided: “*a king is born to power and can ‘do no wrong.’ The President, by contrast, is ‘of the people’ and subject to the law.*”<sup>22</sup> Similarly, in our own constitutional setting, “*any person*” in section 165(5) of the Constitution includes the President, both whilst in office and after stepping down.
  
21. Moreover, it would be antithetical to the value of accountability if those who hold or have held high office are not bound by court orders applicable to them. One of the key functions of an independent judiciary is to “*review the exercise*

<sup>17</sup> *Trump v Vance* 591 U.S. (2020) at 21.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid at 2.

<sup>20</sup> Ibid at 17.

<sup>21</sup> Ibid at 1.

<sup>22</sup> Ibid at 4, where Chief Justice Roberts cited the findings of Marshall CJ in *United States v. Burr* 25 F.Cas. 30, 33–34 (No. 14,692d) (CC Va. 1807).

*of any power by State functionaries, from the lowest to the highest ranking officials.*<sup>23</sup> Allowing an exemption for a former President from the obligation to comply with court orders – particularly in the context of an investigation into abuses of power – would serve to foster impunity, and seriously undermine the value of accountability.

22. It would similarly be antithetical to the rule of law to allow any exception or exemption for Mr. Zuma from the duty to comply with court orders. As explained by this Court, per Khampepe J, in *Tasima I*<sup>24</sup>—

*"The obligation to obey court orders 'has at its heart the very effectiveness and legitimacy of the judicial system'. Allowing parties to ignore court orders would shake the foundations of the law, and compromise the status and constitutional mandate of the courts. The duty to obey court orders is the stanchion around which a state founded on the supremacy of the Constitution and the rule of law is built."*<sup>25</sup>

23. It was precisely this deliberate defiance of court orders that the Johannesburg High Court abhorred in *Southern African Litigation Centre*<sup>26</sup> when it cautioned that—

*"a democratic state based on the rule of law cannot exist or function, if the government ignores its constitutional obligations and fails to abide by court orders. A court is the guardian of justice, the cornerstone of a democratic system based on the rule of law. If the state, an organ of state or state official does not abide by court orders, the democratic edifice will crumble stone by stone until it collapses and chaos ensues".*<sup>27</sup>

<sup>23</sup> *Mukaddam v Pioneer Foods (Pty) Ltd* [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) ("Mukaddam") at para 29.

<sup>24</sup> *Department of Transport v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) ("Tasima I").

<sup>25</sup> Ibid at para 183.

<sup>26</sup> *Southern African Litigation Centre v Minister of Justice and Constitutional Development* 2015 (5) SA 1 (GP).

<sup>27</sup> Ibid at para 37.2.

This is not a caution to be taken lightly. The defiance shown by Mr. Zuma, left unchecked, is the road towards the rule of chaos.

24. As will be further explained below, Mr. Zuma's former position as President of the Republic, rather than exempting him from compliance with court orders, places a heightened obligation on him to be exemplary in his compliance.<sup>28</sup>
25. Mr. Zuma's defiance of the subpoena requiring him to appear before the Commission as well as his defiance of an order of this Court is a flagrant disregard of the rule of law, supremacy of the Constitution and an absolute signal that he is above the law. An exception or exemption for Mr. Zuma from the duty to comply with court orders, in this case, would violate equality before the law and the values of accountability and the rule of law.
26. An order by this Court declaring Mr. Zuma guilty of contempt will reinforce the constitutional principle that no one is above the law.

#### **FACTORS TO BE TAKEN INTO ACCOUNT IN DETERMINING AN APPROPRIATE SANCTION**

27. The Commission contends that Mr. Zuma is guilty of the offence of contempt of court in that he, willfully and with *mala fides*, refused to comply with this Court's order in *Commission v Zuma*. The Commission further contends that Mr. Zuma's attacks against this Court, the judiciary and the Commission are aggravating factors, which ought to be taken into account in determining the appropriate sentence.

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<sup>28</sup> See 'Mr. Zuma's heightened obligation arising from his former role as President' below.

28. The HSF agrees that this is no ordinary case of contempt of court. Mr. Zuma's conduct constitutes the height of contempt. The exceptionality of this case lies not only in Mr. Zuma's scandalising insults and attacks, but also in his breach of a heightened obligation to comply with this Court's order. Mr. Zuma's heightened obligation arises from:

- 28.1 First, his position as the former President of the Republic; and
  - 28.2 Second, the nature of this Court's order, and its close connection to the constitutional values of accountability and openness, underpinned by the public interest in and right to the truth.
29. The HSF contends that Mr. Zuma's breach of his heightened obligation to comply with this Court's order is also a factor that must be taken into account in determining an appropriate sanction.

#### **Mr. Zuma's heightened obligation arising from his former role as President**

- 30. The Constitution provides that an order or decision of a court binds *all persons* to whom it applies.<sup>29</sup> A refusal to comply with a court order by *any person*, therefore, threatens judicial authority and the rule of law. However, there is a heightened obligation on holders of high office to be exemplary in their compliance with court orders.
- 31. This Court has recognised that organs of state – including the President of the Republic as the head of state and the head of the national executive<sup>30</sup> – have a *special duty* to comply with court orders. In addition to *Nyathi*, the Constitutional Court, in *Mamabolo*, held that servants of the state are “*obliged*

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<sup>29</sup> Section 165(5) of the Constitution.

<sup>30</sup> Definition of organ of state in section 239 of the Constitution.

*to be exemplary in their obedience to court orders*".<sup>31</sup> It further opined that "[i]t strikes at the very foundations of the rule of law when government servants presume to disregard orders of court."<sup>32</sup>

32. In *Pheko II*, the Constitutional Court confirmed that organs of the state are constitutionally bound to comply with court orders.<sup>33</sup> It endorsed the remarks of Justice Brandeis in *Olmstead et al v United States*<sup>34</sup> that "*[i]f the government becomes a law-breaker, it breeds contempt for the law; it invites every man [or woman] to become a law unto himself [or herself]; it invites anarchy.*"<sup>35</sup>
33. In *Tasima I*, the majority of the Constitutional Court held that organs of state have "*a duty, above and beyond that of the average litigant, to comply with the court orders*" and that this is demanded by the integrity of the Constitution.<sup>36</sup>
34. This imposes a duty on government, especially those in high office, to lead by example through exemplary compliance with court orders. There are few office-bearers of greater constitutional importance than that of the President.<sup>37</sup> The Constitution places certain obligations on the President.<sup>38</sup> In *EFF I*,<sup>39</sup> this

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<sup>31</sup> *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) ("**Mamabolo**") at para 63.

<sup>32</sup> *Ibid* at para 65.

<sup>33</sup> *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) ("**Pheko II**") at 67.

<sup>34</sup> 277 US 438 (1928) at 485.

<sup>35</sup> *Pheko II* above n 33 at para 66 (emphasis added by the Constitutional Court). These remarks were previously endorsed by the Constitutional Court in *Mamabolo* above n 31.

<sup>36</sup> *Tasima I* above n 24 at para 187.

<sup>37</sup> See *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) at para 30.

<sup>38</sup> Section 83 of the Constitution provides that the President "*must uphold, defend and respect the Constitution as the supreme law of the Republic*" and "*promotes the unity of the nation and that which will advance the Republic*".

<sup>39</sup> *Economic Freedom Fighters*, *supra*, para 26.

Court, per Mogoeng CJ, explained the nature of the constitutional obligations imposed upon the President. It said:

*"An obligation is expressly imposed on the President to uphold, defend and respect the Constitution as the law that is above all other laws in the Republic. As the Head of State and the Head of the national executive, the President is uniquely positioned, empowered and resourced to do much more than what other public office-bearers can do. It is, no doubt, for this reason that section 83(b) of the Constitution singles him out to uphold, defend and respect the Constitution. . . . This requires the President to do all he can to ensure that our constitutional democracy thrives. He must provide support to all institutions or measures designed to strengthen our constitutional democracy. More directly, he is to ensure that the Constitution is known, treated and related to, as the supreme law of the Republic. It thus ill-behoves him to act in any manner inconsistent with what the Constitution requires him to do under all circumstances. The President is expected to endure graciously and admirably and fulfil all obligations imposed on him, however unpleasant."*<sup>40</sup>

35. In addition, the President of the Republic is required to make an oath or solemn affirmation. The President is required to swear or solemnly affirm that he or she will "*obey, observe, uphold and maintain the Constitution*".<sup>41</sup> This necessarily includes section 165 of the Constitution, which provides that court orders are binding on all, protects the courts from interference, and imposes an obligation on organs of state to protect and assist the courts to ensure, among other things, the dignity and effectiveness of the courts.
  
36. It is clear that the President holds a special and heightened duty to obey court orders. Although Mr. Zuma is no longer the President of the Republic, his conduct flies in the face of the obligation that he held as President and the oath that he took to uphold the Constitution. Mr. Zuma is actively undermining the

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<sup>40</sup> Ibid at para 26.

<sup>41</sup> Section 1 of Schedule 2 of the Constitution.

dignity and effectiveness of the courts, and thereby actively undermining the Constitution itself – both through his refusal to obey this Court’s order and his contemptuous statements impugning the integrity of the judges of this Court, this Court and the judiciary.

37. Contempt of court by a former President poses a unique threat to the courts, the administration of justice and the rule of law. Having been imbued with constitutional authority whilst in office, a former President retains moral authority and continues to wield influence in society even after leaving office. It is for this reason that a former President must continue to honour the duty and oath to uphold the Constitution even after stepping down. A contrary holding would pose a real threat to our constitutional democracy. This is because conduct by a former President defying the courts is likely to be *particularly harmful*.<sup>42</sup>
38. The High Court of Australia, the apex court in that country, in a case concerning a contempt of scandalising the court committed by a trade union leader, held that it could be taken into account when determining the sanction to be imposed that the leader was well known to the public, held an important office in a large national trade union and that some members of the public might have been more ready to accept the assertions of the leader as true.<sup>43</sup>

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<sup>42</sup>In *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877, the Constitutional Court was confronted with a contemptuous statement made by then Minister of Local Government (Western Cape) at a political gathering. The statement was to the effect that the Court might hand down a judgment guided by political considerations. Referring to this statement, the Constitutional Court said:

*“It undermines not only this Court, but constitutionalism itself, of which this Court is a guardian. Having regard to the high political office held by the [Minister], the consequences of a statement impugning the integrity of this Court might have been particularly harmful.”*

<sup>43</sup> *Gallagher v Durack* (1983) 45 ALR 53 at 244.

39. There is, therefore, nothing unusual in this Court having regard to the high office that was held by Mr. Zuma. While Mr. Zuma no longer holds the position of President of the Republic, he is still a public figure wielding immense influence within South Africa. It follows that contemptuous conduct on his part poses a real and significant threat of harm to the courts. In any event, his contemptuous conduct relates to his duty to account for the time that he was in office: it is thus inextricably linked to his constitutional obligations as a public official. As a former President, Mr. Zuma also remains on the public payroll.<sup>44</sup> The HSF therefore contends that Mr. Zuma's flagrant breach of his constitutional duty and oath to uphold the Constitution is a relevant factor, which must be taken into account in determining the appropriate sanction.

**Mr. Zuma's heightened obligation arising from the Commission's important truth-seeking work**

40. As highlighted at the outset, with reference to *Glenister*, it has long been accepted by this Court that corruption is a cancer threatening our constitutional and human rights values. That makes the work that the Commission is carrying out vitally important, deserving of protection and obliging recognition as a valid and necessary response to the scourge of corruption.

41. In a unanimous judgment in *SS v VVS*,<sup>45</sup> the Constitutional Court explained that while all court orders must be complied with diligently, there is a

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<sup>44</sup> Remuneration of Public Office Bearers Act 92 of 1998, section 2(5)(a).

<sup>45</sup> *SS v VVS* [2018] ZACC 5; 2018 (6) BCLR 671 (CC). In *SS v VVS*, this Court was confronted with a failure by the applicant to fulfil his court ordered basic maintenance obligations. This Court held that there was a heightened obligation because the court order touched upon interests connected to the protection of children's rights and the "collective ability of our nation to 'free the potential of each person' including its children."

*heightened obligation* where court orders touch upon interests closely connected to the constitutional vision for our society. This Court said:

*"All court orders must be complied with diligently, both in form and spirit, to honour the judicial authority of courts. There is a further and heightened obligation where court orders touch interests lying much closer to the heart of the kind of society we seek to establish and may activate greater diligence on the part of all."*<sup>46</sup>

42. Similarly, in a unanimous judgment in *Pheko II*, involving the constitutional right to housing, the Constitutional Court said that cases of contempt of court are particularly troubling where constitutional rights and obligations are in issue.<sup>47</sup> Failures to comply with court orders that seek to enforce constitutional rights and obligations "*have real and serious consequences for those whose interest they are there to serve*".<sup>48</sup>
43. This Court's order in *Commission v Zuma* clearly touches upon interests "*lying close to the heart of the kind of society*" that the Constitution envisions. This Court's order sought to enforce Mr. Zuma's clear legal duty to comply with the summonses issued by the Commission by appearing and giving evidence before the Commission.<sup>49</sup> In doing so, the order gives effect to the founding values of accountability and openness enshrined in section 1,<sup>50</sup> and the constitutional vision of a "*democratic and open society*" contained in the Preamble.<sup>51</sup>

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<sup>46</sup> Ibid at para 23.

<sup>47</sup> *Pheko II* above n 33 at para 27.

<sup>48</sup> Ibid.

<sup>49</sup> *Commission v Zuma* above n 4 at paras 4 and 5 of the order.

<sup>50</sup> Section 1(d) of the Constitution.

<sup>51</sup> Preamble to the Constitution.

44. This Court has said that the values of accountability and openness are of “singular importance in South Africa coming – as we do – from a past where governance and administration were shrouded in secrecy”.<sup>52</sup>
45. As emphasised by Sachs J in *Matatiele Municipality I*, “[T]he Constitution requires candour on the part of government. What is involved is not simply a matter of showing courtesy to the public and to the courts, desirable though that always is. It is a question of maintaining respect for the constitutional injunction that our democratic government be accountable, responsive and open”.<sup>53</sup>
46. The Commission is a constitutional mechanism for accountability and openness through truth-seeking. In *Magidiwana I*,<sup>61</sup> a case broadly concerning victim participation in the Marikana commission of inquiry, this Court explained the truth-seeking purpose of commissions of inquiry. It said:

*"The power to appoint a commission of inquiry is mandated by the Constitution. It is afforded to the President as part of his executive powers. It is open to the President to search for the truth through a commission. The truth so established could inform corrective measures, if any are recommended, influence future policy, executive action or even the initiation of legislation. A commission's search for truth also serves indispensable accountability and transparency purposes. Not only do the victims of the events investigated and those closely affected need to know the truth: the country at large does, too."*<sup>54</sup> (Our emphasis).

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<sup>52</sup> *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC), majority judgment of Madlanga J, at para 65.

<sup>53</sup> *Matatiele Municipality v President of the Republic of South Africa (1)* [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC) (“**Matatiele Municipality I**”) at para 107.

<sup>54</sup> *Magidiwana v President of the Republic of South Africa* 2013 (11) BCLR 1251 (CC) at paras 14-6.

47. In its terms of reference, the Commission is tasked with inquiring into, making findings on and reporting on matters of public and national interest concerning allegations of state capture, corruption and fraud.<sup>55</sup> The public has a clear and direct interest in the Commission's important work to uncover of the truth concerning these serious allegations.
48. This Court, in *Commission v Zuma*, clearly recognised that the matters being investigated by the Commission constitute matters in which the public has an interest.<sup>56</sup>
49. In deciding to grant the Commission's application for direct access to the Court, it said:

*"[Mr. Zuma] is firmly placed at the centre of those investigations which include an allegation that he had surrendered constitutional powers to unelected private individuals. If those allegations are true, his conduct would constitute a subversion of this country's constitutional order.*

*It must be plainly stated that the allegations investigated by the Commission are extremely serious. If established, they would constitute a huge threat to our nascent and fledgling democracy. It is in the interests of all South Africans, [Mr. Zuma] included, that these allegations are put to rest once and for all. It is only the Commission which may determine if there is any credence in them or to clear the names of those implicated from culpability."*<sup>57</sup>

50. Mr. Zuma's conduct, in defying this Court's order and in refusing to appear and give evidence before the Commission in accordance with the Commission's summonses, seriously impedes the functioning of the Commission and threatens to undermine its ability to fulfil its crucial truth-seeking mandate. In

<sup>55</sup> The Commission's terms of reference.

<sup>56</sup> *Commission v Zuma* above n 4 at para 19, in which this Court said: "In view of the nature of the allegations which are being investigated by [the Commission], there can be no doubt that they constitute matters of public concern" as envisaged in the Commissions Act.

<sup>57</sup> Ibid at paras 69-70.

*Commission v Zuma*, this Court recognised that Mr. Zuma is at the centre of the Commission's investigation, that some matters connected to the investigation fall within his personal knowledge, and that these matters may not be properly investigated without his participation.<sup>58</sup> This Court further recognised that Mr. Zuma's conduct “seriously undermined the Commission’s investigation” since the investigation includes matters on which Mr. Zuma may be the “only witness with personal knowledge.”<sup>59</sup>

51. Three of the nine ‘heads of investigation’ in the Terms of Reference<sup>60</sup> directly make Mr. Zuma the subject of the investigations in that the Commission’s mandate is to establish whether:
  - 51.1 the President (Mr Zuma) had any role in the alleged offers of Cabinet positions to Mr. Mcebisi Jonas and Ms. Mentor by the Gupta family as alleged;
  - 51.2 the appointment of any member of the National Executive, functionary and / or office bearer was disclosed to the Gupta family or any other unauthorized person before such appointments were formally made and / or announced, and if so, whether the President or any member of the National Executive is responsible for such conduct;

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<sup>58</sup> Ibid at paras 21-2. This Court said:

*[The Commission’s] terms of reference place the former President at the centre of the investigation. They seek to establish whether he abdicated his constitutional power to appoint Cabinet members to a private family and whether he had acted unlawfully. These are all matters of public concern as defined above and some of them fall particularly within the personal knowledge of the ex-President. . . . Some of those matters may not be properly investigated without his participation.”*

<sup>59</sup> *Commission v Zuma* above n 4 at para 114.

<sup>60</sup> Terms of Reference attached as a Schedule to Proclamation 3 of 2018 by the President of the Republic of South Africa, published in Government Gazette No. 41403, dated 25 January 2018.

- 51.3 the President or any member of the present or previous members of his National Executive or public official or employee of any state owned entities (“SOEs”) breached or violated the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders by SOE’s or any organ of state to benefit the Gupta family or any other family, individual or corporate entity doing business with government or any organ of state.
52. Some of the evidence led before the Commission to date implicates Mr. Zuma in the remaining ‘heads of investigation’. For example, during October 2020 it was reported that Mr. Zuma wanted Transnet to pay R8 million for a phantom contract.<sup>61</sup> This evidence emanates from the Commission’s mandate to investigate “*the nature and extent of corruption, if any, in the awarding of contracts, tenders to companies, business entities or organisations by public entities under Schedule 2 of the Public Finance Management Act No. 1 of 1999 as amended*”.
53. In respect of many of these matters, Mr Zuma is the *only* or the most important person who can provide the Commission with the necessary information.<sup>62</sup> His testimony is therefore essential for the Commission’s performance of its mandate and it is of compelling public interest that the information within Mr. Zuma’s exclusive personal knowledge be obtained and that he be compelled to provide it to the Commission.

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<sup>61</sup> Loyiso Sidimba ‘Jacob Zuma wanted Transnet to pay R8m for phantom contract, Zondo commission hears’, published 14 October 2020, IOL, available at [iol.co.za](http://iol.co.za).

<sup>62</sup> A clear example in this regard was provided by this Court in *Commission v Zuma* at para 114— “[A]s the President at the relevant time, [Mr. Zuma] was the only person who could appoint and dismiss Ministers from Cabinet. And the Commission was mandated to investigate issues relating to the appointment and dismissal of Ministers from Cabinet during the respondent’s presidency.”

54. Mr. Zuma's compliance is also critical to ensure the efficacy of the investigations of the Commission more generally: if Mr Zuma (as a principal party before the Commission) is allowed to evade his statutory responsibilities in respect of this Commission, all witnesses subpoenaed to give testimony before the Commission could adopt similar dilatory and uncooperative tactics, safe in the knowledge that the court system is unable to ensure effective and punctilious compliance with the law. Indeed, some witnesses have already adopted this unlawful tactic and refused to appear and / or abide by the Commission's subpoenas. This calls for an order with a special deterring effect in this case in order to safeguard the integrity of the Commission's investigations.
55. Mr Zuma's conduct is not only contemptuous of this Court's order, but also of the Commission's important truth-seeking work. His conduct has seriously frustrated the work of the Commission, and has stymied the public interest in the uncovering of the truth.
56. His contempt undermines accountability and openness, and threatens to keep the allegations concerning state capture, corruption and fraud shrouded in secrecy. His conduct has real and serious consequences for the public, whose interest this Court's order sought to serve, and who will be kept in the dark while the truth remains concealed.<sup>63</sup>

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<sup>63</sup> See *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) at para 17 where Mahomed DP says:

*"Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. . . . Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history."*

57. In *Commission v Zuma*,<sup>64</sup> the HSF contended that the public has not only an *interest* in the truth about state capture and corruption, but a *collective right* to the truth in terms of the Constitution,<sup>65</sup> underlined by our country's international law commitments in respect of truth-seeking.<sup>66</sup> The HSF further contended that, as a mechanism for truth-seeking, the Commission plays a vital role in fulfilling the public's right to the truth, and that Mr. Zuma's conduct, in snubbing the Commission, undermines this fundamental right.
56. The HSF reiterates that commissions of inquiry are a key mechanism for fulfilment of the obligation to provide the public with the truth – not only in South Africa but internationally too.<sup>67</sup> There has been a wave of commissions of inquiry to uncover the truth about serious human rights violations around the world, demonstrating the “*near-universal value*” placed on truth-seeking.<sup>68</sup> South Africa, of course, has been at the forefront of these developments, with the TRC providing a model for truth commissions throughout the world. The Commission's work into state capture is a natural continuation of that important trend. It exemplifies South Africa's response to years of state abuse and corruption, in search of a truth to which the public is entitled.

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<sup>64</sup> Above n 4.

<sup>65</sup> The HSF contended that a right to the truth can be inferred from the right to dignity, the right to an effective remedy and the right of access to information, among others.

<sup>66</sup> There is a principle of customary international law that recognises a collective right to the truth about serious human rights violations, which is held by the public. The HSF set out the state practice and opinio juris upon which this customary norm is founded in its written submissions in *Commission v Zuma*, and does not repeat them here.

<sup>67</sup> See, for instance, the United Nations Research Guide on Commissions of Inquiry, available at [unog.ch](http://unog.ch).

<sup>68</sup> Groome “Principle 2: The Inalienable Right to Truth” in Handleman and Unger (eds) *United Nations Principles to Combat Impunity: A Commentary* (Oxford University Press, Oxford 2018) at 64.

57. For so long as Mr. Zuma is able to evade his obligation to give evidence to the Commission in defiance of this Court's order, the Commission will be hamstrung in its work and the public's right to the truth will remain unmet.

### **Mr. Zuma's contemptuous scandalising of this Court and the judiciary**

58. In addition to defying this Court's order, Mr. Zuma has published contemptuous statements attacking the integrity of the judges of the Constitutional Court, the Court as an institution and the judiciary as a whole.
59. This conduct, in itself, constitutes contempt of court in a different form, namely that of scandalising the court – which is “*committed by the publication, either in writing or verbally, of words calculated to bring a court, a judge of a court, or the administration of justice through the courts generally, into contempt.*”<sup>69</sup>
60. Although the Commission does not seek an order declaring Mr. Zuma guilty of contempt of court for scandalising the courts in these proceedings, the Commission is correct to contend that the statements published by Mr. Zuma are an aggravating factor in his contempt.
61. The Commission details the contemptuous statements made by Mr. Zuma about this Court and the judiciary in its written submissions,<sup>70</sup> and the HSF does not repeat them here. In support of the Commission's contention that these attacks should be treated as an aggravating factor, the HSF draws attention to the particularly serious harm caused by these contemptuous statements.

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<sup>69</sup> *In re: Chinamasa* 2000 (12) BCLR 1294 (ZS) at p 1302; citing *Chokolingo v Attorney General of Trinidad and Tobago* [1981] 1 All ER 244 (PC) at 248f per Lord Diplock.

<sup>70</sup> Commission's written submissions at paras 69 and 72.

62. The constitutionality of the offence of scandalising the court was unanimously upheld by the Constitutional Court in *Mamabolo*.<sup>71</sup> In reaching that conclusion, the Constitutional Court explained why scandalising the court remains an offence under our constitutional democracy. It is because “[t]he judiciary cannot function properly without the support and trust of the public.”<sup>72</sup> It said:

“[I]t is the people who have to believe in the integrity of their judges. Without such trust, the judiciary cannot function properly; and where the judiciary cannot function properly the rule of law must die.”<sup>73</sup>

63. The Constitutional Court further explained that the real offence is “the wrong done to the public by weakening the authority and influence” of the courts.<sup>74</sup>
64. In *Zugić v Croatia*, the European Court of Human Rights (“ECtHR”) was confronted with a case in which a losing litigant disrespectfully attacked the professionalism of the judge. The ECtHR, while acknowledging that courts are not immune from criticism and that parties before a court are allowed to comment on the administration of justice in order to protect their rights, held

<sup>71</sup> *Mamabolo* above n 31. However, the Constitutional Court explained at para 45 that:

“Having regard to the founding constitutional values of human dignity, freedom and equality, and more pertinently the emphasis on accountability, responsiveness and openness in government, the scope for a conviction on this particular charge must be narrow indeed if the right to freedom of expression is afforded its appropriate protection. The threshold for a conviction on a charge of scandalising the court is now even higher than before the superimposition of constitutional values on common law principles; and prosecutions are likely to be instituted only in clear cases of impeachment of judicial integrity.”

<sup>72</sup> *Ibid* at para 18.

<sup>73</sup> *Ibid* at para 19-20. Similarly, the High Court of Australia, in *Gallagher v Durack* (1983) 152 CLR 238 at 234, said that “[t]he authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges.”

<sup>74</sup> *Ibid* at para 24; citing *R v Davies* [1906] 1 KB 32 at 40.

that their criticism “*must not overstep certain bounds*”.<sup>75</sup> A distinction must be drawn between “*criticism and insult*”.

65. The ECtHR went on to say that courts have a fundamental role to play in the maintenance of the rule of law and need to enjoy public confidence in order to fulfill that role. Courts, therefore, should be “*protected against unfounded attacks*”.<sup>76</sup> The sanction imposed upon the disgruntled litigant was justified.
66. This Court itself had opportunity to comment on the propensity to attack the judge when a party is dissatisfied with the outcome of a case. In *SARFU II*,<sup>77</sup> this Court commented on the attacks against De Villiers J, after he made an order reviewing and setting aside the decision of then President Mr. Mandela to appoint a commission of inquiry into certain financial and administrative aspects of the South African Rugby Football Union.<sup>78</sup> This Court strongly deplored the fact the De Villiers J had been “*denigrated in the media and in particular by government officials*.<sup>79</sup>
67. This Court said:

*“Success or failure of the government or any other litigant is neither grounds for praise nor for condemnation of a court. . . There is an unfortunate tendency for decisions of courts with which there is disagreement to be attacked by impugning the integrity of the judges, rather than by examining the reasons for the judgment. . . Decisions of our courts are not immune from criticism. But political discontent or dissatisfaction with the outcome of a case is no*

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<sup>75</sup> Zugić v Croatia, Application no. 3699/08, judgment of 31 May 2011 (ECtHR) at para 45.

<sup>76</sup> Ibid.

<sup>77</sup> President of the Republic of South Africa v South African Rugby Football Union [1999] ZACC 9; 1999 (4) SA 147; 1999 (7) BCLR 725 (“*SARFU II*”).

<sup>78</sup> Ibid at paras 67-9.

<sup>79</sup> Ibid at para 67.

*justification for recklessly attacking the integrity of judicial officers.*<sup>80</sup> (Our emphasis).

68. Mr. Zuma's conduct – in refusing to comply with this Court's order and, at the same time, directing scurrilous attacks against the integrity of the judges of this Court, this Court and the judiciary – undermines public trust in the judicial process and in the courts, without which the courts will not be able to attend to the administration of justice.<sup>81</sup>
69. Mr. Zuma's conduct, viewed holistically, is likely to damage the administration of justice.<sup>82</sup> More than this, Mr. Zuma's conduct poses a “*real and direct threat*” to the administration of justice. It can be seen as part of a wider campaign to challenge the legitimacy of the judiciary and constitutionalism in order to achieve impunity for serious crimes.<sup>83</sup>
70. In understanding the potential harm done to the judiciary by Mr. Zuma attacks, the historical context is key. The courts in South Africa have not always

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<sup>80</sup> Ibid at para 68.

<sup>81</sup> *Mamabolo* above n 31 at para 32.

<sup>82</sup> It is not necessary in these proceedings for the Constitutional Court to determine whether Mr. Zuma's conduct meets the elements of the offence of scandalising the court. If this were in issue, however, the HSF contends that Mr. Zuma's conduct would meet the elements even on the stricter test proposed by Justice Sachs in *Mamabolo*. The test for scandalising the court expounded at para 45 in the majority judgment per Kriegler J in *Mamabolo* is “whether the offending conduct, viewed contextually, really was likely to damage the administration of justice.” In his concurring judgment at para 75, Sachs J proposes a stricter test. He says: “[T]o meet the constitutional standards of reasonableness and justifiability, prosecutions should be based not simply on the expression of words likely to bring the administration of justice into disrepute, but on the additional ingredient of provoking real prejudice. In its context such expression must be likely to have an impact of a sufficiently serious and substantial nature as to pose a real and direct threat to the administration of justice.”

<sup>83</sup> See the concurring judgement of Sachs J at para 75, quoted directly above.

enjoyed the trust of the public. This is an historical legacy from which this Court itself has not shied away. In *Sonke*,<sup>84</sup> the majority per Theron J said:

*"Under the racist authoritarian regime of apartheid, the legal system administered injustice, as the courts were required to implement increasingly oppressive laws. Far from being guardians of fundamental rights, the Judiciary came to represent the gateway to unjust imprisonment and punishment without purpose. The majority of the South African population came to regard the machinations of justice with suspicion and mistrust. As the late Mahomed DP observed, '[t]he legitimacy of law itself was deeply wounded as the country haemorrhaged dangerously in the face of this tragic conflict which had begun to traumatised the entire nation'."*<sup>85</sup>

71. In SARFU II, this Court said: "*During the present period of institution-building, unjustified and unreasonable attacks on individual members of the judiciary, whatever their background or history, are especially to be deplored.*"<sup>86</sup> This statement is still pertinent as we move towards the constitutional vision of healing the divisions of our past, and overcoming the years of state capture.
72. The potential harm of Mr. Zuma's virulent attacks against the integrity of the judges of this Court, this Court and the judiciary must be assessed with this historical context and the importance of maintaining the public trust in the courts in mind. Mr. Zuma's reckless attacks against the judges of this Court, this Court and the judiciary are indeed a serious aggravating factor in his contempt.

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<sup>84</sup> *Sonke Gender Justice NPC v President of the Republic of South Africa* [2020] ZACC 26; 2021 (3) BCLR 269 (CC) ("Sonke") at para 23.

<sup>85</sup> Ibid at para 23.

<sup>86</sup> SARFU II above n 77 at para 69.

## AN APPROPRIATE SANCTION FOR MR. ZUMA'S CONTEMPT

73. It is well established that contempt of court in the form of failing or refusing to comply with a court order, willfully and with *mala fides*, may justify the imposition of a sentence of imprisonment. Contempt of court, whether it is civil or criminal, is an offence that may be punishable as a crime.<sup>87</sup>
74. In *Pheko II*, the Constitutional Court explained that “[t]he object of contempt proceedings is to impose a penalty that will vindicate the court’s honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order”.<sup>88</sup> A sanction for contempt is, therefore, intended to serve two purposes. First, compelling compliance with a court order (the coercive purpose). And second, vindicating the dignity of the court (the punitive purpose).<sup>89</sup>
75. In its submissions on an appropriate sanction for Mr. Zuma’s contempt, the Commission says that it is seeking “a punitive order in the form of an unsuspended term of imprisonment, which in its nature, would not permit Mr. Zuma to avoid imprisonment by undertaking to comply”.<sup>90</sup> A successful litigant who is frustrated by the other party’s non-compliance with a court order generally seeks a coercive order to compel compliance.<sup>91</sup> However, in this case, the successful litigant – the Commission – seeks a purely punitive order

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<sup>87</sup> *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) at paras 50-52.

<sup>88</sup> *Pheko II* above n 33 at para 28, our emphasis.

<sup>89</sup> *Ibid* at para 30.

<sup>90</sup> Commission’s Heads of Argument at para 73

<sup>91</sup> *Pheko II* above n 33 at para 30.

and appears to have abandoned any hope of compelling Mr. Zuma to comply with this Court's order.

76. While the order of committal sought by the Commission will effectively serve the punitive purpose of the sanction, the HSF contends that it does not serve the coercive purpose at all. This is because no further opportunity is provided to Mr. Zuma to cure his contempt by appearing and giving evidence before the Commission.
77. The HSF agrees with the Commission that a suspended sentence will serve no purpose in this case. More importantly, it will not fulfil the punitive purpose of the sanction. An order of committal for *at least* some period is necessary to vindicate the dignity of this Court, and to serve the public interest in "*obedience to court orders and the maintenance of the rule of law*".<sup>92</sup> Indeed, the extraordinary seriousness of Mr. Zuma's contempt compels an order of committal.
78. However, the HSF contends that an appropriate sanction in this case should serve the twin purposes of a contempt of court order that is punitive and coercive. The HSF leaves the details of the order in the hands of this Court, but suggests that these twin purposes may best be reflected in an order that provides for a period of committal *and* allows (or possibly even requires) Mr. Zuma to cure his contempt.
79. For example, the HSF suggests that an appropriate sanction for Mr. Zuma's contempt may be an order for his committal for a minimum compulsory period, but coupled with:

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<sup>92</sup> Ibid at para 34

- 79.1 an order which would curtail any further period of imprisonment if Mr Zuma voluntarily complies with the requirement to testify before the Commission; or
- 79.2 an order that the sheriff of the High Court be directed to bring Mr. Zuma to the Commission to testify.
80. There is an urgency to such an order that is bound up with the time left for the Commission to complete its work, which has recently been extended until 30 June 2021.<sup>93</sup> The Secretary of the Commission has indicated that the Commission will take steps to ensure that relief granted by this Court is possible and effective, including making special arrangements to hear Mr. Zuma's evidence before the end of the lifespan of the Commission.<sup>94</sup>
81. The following advantages attach to a sanction that seeks to serve a coercive, as well as punitive, purpose:
- 81.1 First, a sanction that seeks to ensure Mr. Zuma's compliance with this Court's original order will better promote the Commission's important truth-seeking work. It will do so while also signalling the serious nature of Mr. Zuma's contempt and vindicating the dignity of this Court.
- 81.2 The purpose of the Commission's subpoenas directing Mr. Zuma to appear and give evidence before it – and this Court's order seeking to enforce those subpoenas – was to arrive at the truth concerning serious

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<sup>93</sup> Karyn Maughan 'Zondo commission gets 3-month extension after court grants chair's urgent application' published on 23 February 2021, News24, available at [news24.com](http://news24.com).

<sup>94</sup> Commission's founding affidavit at para 20. The Commission explained that special arrangements could be made to hear Mr. Zuma's evidence during the period of extension if this Court grants a suspension of the order of imprisonment on condition that Mr. Zuma appears and gives evidence before the Commission.

allegations of state capture, corruption and fraud. This truth-seeking purpose has not disappeared. It remains heightened now as the Commission's lifespan nears its end.

81.3 Second, coercive sanctions are commonly used in contempt proceedings in respect of recalcitrant witnesses to “*coerce the recalcitrant witness into complying with the subpoena*”.<sup>95</sup> The primary purpose of a sanction imposed upon a recalcitrant witness, as described by this Court in *De Lange v Smuts*, is to acquire the information that may be required from the witness.<sup>96</sup> Because the detention will come to an end when the witness furnishes the information required of them, it is said that such witnesses “*carry the keys of their prison in their own pockets*”.<sup>97</sup> This is not to suggest that there is a perfect parallel between ordinary cases involving recalcitrant witnesses and the present case. The extraordinary nature of Mr. Zuma’s contempt compels a punitive response.

81.4 Third, compelling Mr. Zuma to appear and give evidence before the Commission may indeed serve to counter impunity for serious crimes. The Commission’s Regulations were amended before the Commission commenced to allow evidence given before the Commission to be used in subsequent criminal proceedings, with the sole exception of self-

<sup>95</sup> *Nel v Le Roux* NO [1996] ZACC 6; 1996 (4) BCLR 592; 1996 (3) SA 562 (“**Nel**”) at para 22.

<sup>96</sup> *De Lange v Smuts* NO [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779 (“**De Lange**”) at para 33.

<sup>97</sup> *De Lange*, ibid, at para 36 and *Nel* above n 95 at para 11. See also the American jurisprudence cited by this Court in *Nel: In re Nevitt* 117 F 448, 461 (CA 8th Cir 1902); and *Shillitani v United States* 384 US 364 (1966) 368.

incriminating statements or answers.<sup>98</sup> As this Court acknowledged, many serious allegations concerning state capture, corruption and fraud fall within Mr. Zuma's exclusive personal knowledge. Moreover, as recently confirmed by this Court, Mr. Zuma's obligation to answer questions lawfully put to him at such appearance would be subject to the privilege against self-incrimination, but not to the right to remain silent.<sup>99</sup> The evidence that Mr. Zuma is compelled to give before the Commission may, therefore, prove crucial in future proceedings, where persons involved in state capture, corruption and fraud may be held accountable for their misdeeds.

81.5 Fourth: a sanction that seeks to compel Mr. Zuma to comply with this Court's order, and to appear and give evidence before the Commission, is in the public's interest (not only that of the Commission as the successful litigant in the earlier proceedings). As discussed above, this

Court has affirmed the interest that the public has in the Commission's investigations into the allegations of serious crimes against Mr. Zuma.<sup>100</sup>

81.6 The public interest in a complete and effective investigation by the Commission into serious allegations of state capture, corruption and

<sup>98</sup> Proclamation 8 of 2018, Amendment of the Regulations of the Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, published in Government Gazette No. 41522, dated 23 March 2018 at section 2. The legal position concerning the use of evidence given before the Commission in subsequent criminal proceedings is incorrectly recorded at para 24 of this Court's judgment in *Commission v Zuma*.

<sup>99</sup> *Commission v Zuma* above n 4 at paras 6 and 7 of the order.

<sup>100</sup> *Commission v Zuma* above n 4 at para 69.

fraud should weigh heavily in favour of a sanction that will effectively coerce or incentivise Mr. Zuma to cooperate with the Commission.

81.7 Fifth: contempt of court was described by the Supreme Court of Appeal in *Meadow Glen* as a “*blunt instrument*”.<sup>101</sup> It follows that a sanction for contempt that more effectively coerces or incentivises compliance with court orders will promote the spirit, purport and objects of the Bill of Rights.<sup>102</sup> As stated by this Court in *SS v VVS*, an order which inadequately addresses the contempt by a party or which does not appropriately incentivise or coerce compliance—

“*will dilute the potency of the judicial authority and it will send a chilling message to litigants that orders of court may well be ignored with no consequence. At the same time, it will signal to those who are the beneficiaries of such orders that their interests may be secondary and that the value and certainty that a court order brings counts for little.*”<sup>103</sup>

82. The HSF, therefore, respectfully contends that the coercive purpose of a sanction for contempt ought to be accorded proper weight in a case, such as this one, where the defied court order lies close to the heart of the constitutional vision for our society and compliance with the court order is of the utmost importance.

<sup>101</sup> *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* [2014] ZASCA 209; 2015 (2) SA 413 (SCA) (“**Meadow Glen**”) at para 35.

<sup>102</sup> Indeed, our courts have previously called for development of the common law of contempt to provide for more effective remedies. The Full Court in *Burchell v Burchell* [2005] ZAECHC 35 at para 27, per Froneman J (as he was then) sought to develop ancillary civil sanctions for contempt of court. Froneman J sought to develop civil sanctions for where contempt of court was proven on a balance of probabilities and a criminal sanction, therefore, could not be applied. Froneman J’s development of the common law in this regard was looked upon with approval by this Court in *Matjhabeng Local Municipality* above n 87 at para 51.

<sup>103</sup> *SS v VVS* above n 45 at para 35.

83. The appropriateness of a sanction that also serves a coercive purpose in this case is further justified by this Court’s broad powers under section 172(1)(b) of the Constitution to make “*any order that is just and equitable*”.<sup>104</sup> In *Hoërskool Ermelo*,<sup>105</sup> this Court confirmed that the wide discretion to make just and equitable orders is available whenever a court is adjudicating a constitutional matter. This Court confirmed that the exercise of the section 172(1)(b) discretion is not dependent on a prior finding of constitutional invalidity of a law or conduct under section 172(1)(a), but is available to the Courts in the resolution of all constitutional disputes.<sup>106</sup>
84. A flagrant contempt of court of this nature by the former President of the Republic of South Africa is clearly a constitutional matter – imperiling, as it does, constitutional supremacy, the effective administration of justice by the courts and the maintenance of the rule of law. This Court’s power to make a just and equitable order is, therefore, engaged.
85. This Court is, thus, not tied to the order sought in the Commission’s notice of motion. It may exercise its discretion to craft an appropriate sanction, which it considers will achieve a just and equitable result in the circumstances of this case. This Court, in *EFF II*, confirmed that the section 172(1)(b) power is “so

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<sup>104</sup> Section 172(1)(b) of the Constitution. See for example *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* 2018 (2) SACR 442 (CC) (“**Corruption Watch**”) at para 68; *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); *Allpay Cons Inv Holdings (Pty) Ltd v CEO, SA Social Security Agency* 2014 (4) SA 179 (CC); *Modderfontein Squatters, Greater Benoni CC v Modderklip Boerdery (Pty) Ltd (Agri SA & Legal Resources Centre, Amici Curiae)*; *President of the RSA v Modderklip Boerdery (Pty) Ltd (Agri SA & Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA).

<sup>105</sup> *Head of Department : Mpumalanga Department of Education and Another v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC) ; 2010 (3) BCLR 177 (CC) (“**Hoërskool Ermelo**”).

<sup>106</sup> Ibid at para 97.

*wide and flexible*" that courts may grant relief that has not been pleaded.<sup>107</sup> In *AmaBhungane Centre*, this Court recently confirmed that the "*outer limits of a remedy are bounded only by considerations of justice and equity*".<sup>108</sup> It went on to say that a remedy may "*come in different shapes and forms dictated by the many and varied manifestations in respect of which the remedy may be called for*" and that certain cases "*may require a singularly creative remedy*".<sup>109</sup>

86. Courts are empowered to forge an order that would "*place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements*".<sup>110</sup>
87. The underlying dispute between the parties in this case is Mr. Zuma's refusal to appear and give evidence before the Commission. This Court's order should be aimed at resolving this underlying dispute in a manner consistent with the constitutional requirements of accountability and the rule of law. This Court should accordingly craft a sanction aimed at securing Mr. Zuma's testimony before the Commission. As indicated earlier, given that the Commission's term has recently been extended until 30 June 2021, it would be just and equitable for any such order to be bounded within that timeframe, so that the work of the

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<sup>107</sup> *Economic Freedom Fighters v Speaker of the National Assembly* [2017] ZACC 47; 2018 (2) SA 571 (CC); 2018 (3) BCLR 259 (CC) ("EFF II") at para 211. This Court said:

*"The power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading."*

<sup>108</sup> *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC* [2021] ZACC 3 at para 143; majority judgment of Madlanga J.

<sup>109</sup> Ibid.

<sup>110</sup> *Hoërskool Ermelo* above n 105 at para 97.

Commission may be completed and finality achieved inclusive of Mr. Zuma's testimony.

88. That might be done by this Court, for example, ordering that Mr. Zuma be committed to prison for a minimum period of two months, and that Mr. Zuma shall remain in prison for a further period of 22 months unless Mr. Zuma voluntarily complies with the requirement to testify before the Commission in time for the Commission to complete its work by 30 June 2021 (or any such further period of extension that the Commission may be granted).
89. While generally an amicus is not permitted to “*expand the relief sought or introduce new relief*”,<sup>111</sup> this Court has previously accepted submissions by amicus on the factors that had to be taken into account in the determination of appropriate relief,<sup>112</sup> and has been guided by *amici* on what would constitute a just and equitable remedy in a particular case.<sup>113</sup> Moreover, it is submitted that the primary relief sought is a finding as to whether Mr Zuma is in contempt of

<sup>111</sup> *Commission v Zuma* above n 4 at para 76. This Court was referring to the application for admission as amicus curiae of Ngalwana SC. The application was refused because Ngalwana SC sought relief that was “*materially different*” from that sought by the Commission, and constituted a “*different substantive application for different relief*”. By contrast, the HSF does not seek any relief in these proceedings or propose a sanction that flows from a “*different substantive*” application to that of the Commission.

<sup>112</sup> *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) at para 53-4.

<sup>113</sup> *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (Corruption Watch and another as amici curiae)* 2014 (1) BCLR 1 (CC) at para 96. The Centre for Child Law made submissions before the Court in relation to the appropriate remedy in order to protect the rights of child grant beneficiaries. These submissions led to the Court calling for further information to enable it to make a just and equitable order. See also *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 (4) SA 179 (CC), in which the Court accepted submissions from the Centre for Child Law on the appropriate remedy in that case. See also *Johncom Media Investments Limited v M* 2009 (4) SA 7 (CC) and *Gumede (born Shange) v President of the Republic of South Africa* 2009 (3) SA 152 (CC); and *Ex Parte Women's Legal Centre: In Re Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC) at para 3, in which the Court engaged with amicus' proposals on appropriate orders.

court – the sanction which flows therefrom is quintessentially an issue in this Court's discretion and on which the Court should be open to submissions from amici intended to assist in the exercise of such discretion.

90. Moreover, this Court has cited with approval<sup>114</sup> the decision of the High Court in *Engelbrecht*,<sup>115</sup> a criminal case in which the court admitted an *amicus*, who intended to make submissions on the factors to be taken into account in the exercise of the court's sentencing discretion, because it would ensure that the court would be able to consider “*a wider range of options when coming to a decision on the appropriate sentence*”.<sup>116</sup> Indeed, this Court recognised that *amici* play an important role in promoting and protecting the public interest by ensuring that “*courts consider a wide range of options*”.<sup>117</sup>
91. The HSF seeks to assist the Court by submissions on the considerations that should be taken into account in crafting an appropriate sanction. The final terms of any such sanction are within the Court's hands, and the HSF merely advances submissions on the principles that might inform those terms, and its example of what that order might look like (in para 79) is advanced respectfully as an illustration.
92. Moreover, the exceptional circumstances of this case permit the Court to be “urged” in this direction (to use the word of Moseneke DCJ in *OUTA*<sup>118</sup>):

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<sup>114</sup> *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp* 2013 (2) SA 620 (CC).

<sup>115</sup> *S v Engelbrecht (Centre for Applied Legal Studies intervening as Amicus Curiae)* 2004 (2) SACR 391 (W).

<sup>116</sup> *Ibid* at para 56.

<sup>117</sup> *Children's Institute* above n 114 at para 26.

<sup>118</sup> Moseneke DCJ in *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) (“**OUTA**”) at para 13 explained that: “[A]n *amicus* must make submissions that will be useful to the court, and which differ from those of the parties. In other words, the submissions must be directed at assisting the court to

- 92.1 the question of what a just and equitable sanction entails is likely to be best served by submissions beyond those of the Commission alone;
- 92.2 the submissions about an appropriate sanction flow from the submissions by the HSF about the importance of truth-telling as a constitutional and international law priority, and are advanced with a view towards what is best in the public interest, which this Court has already identified in its judgment in *Commission v Zuma* – being the importance of Mr. Zuma appearing before the Commission by honouring the summons. It is accordingly clear that the submissions are not advanced to further any sectarian or partisan interest. While the HSF urges a particular result, it does so only in order that this Court may achieve a just outcome;<sup>119</sup>
- 92.3 it remains open for the Commission to explain whether it accepts the principles underlying the HSF's proposed sanction, recalling in particular that any such sanction appears possible on the evidence before the Court, since the Commission's founding affidavit explained that special arrangements could be made to hear Mr. Zuma's evidence during the period of extension.<sup>120</sup>
93. The HSF contends that this is a case of contempt that calls out for an effective combination of a punitive and coercive sanction, within the remit of this Court's

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*arrive at a proper and just outcome in a matter in which the friend of the court does not have a direct or substantial interest as a party or litigant. This does not mean an amicus may not urge upon a court to reach a particular outcome. However, it may do so only in the course of assisting a court to arrive at a just outcome and not to serve or bolster a sectarian or partisan interest against any of the parties in litigation".* (Our emphasis).

<sup>119</sup> See again the quote from Mosenike DCJ in OUTA above n 118.

<sup>120</sup> Commission's founding affidavit at para 20.

broad powers to issue just and equitable orders, and which is aimed at ensuring that Mr. Zuma appears and gives evidence before the Commission.

## CONCLUSIONS

94. The HSF advances different submissions to those already made by the Commission and has attempted to assist this Court by referencing different and comparative case law. The HSF highlights the underlying importance of the Commission's truth-seeking work, the public interest in and right to the uncovering of the truth through a complete and effective investigation by the Commission, and the extraordinary nature of Mr. Zuma's contempt (emphasising the heightened duty of compliance that he bears by virtue of his former role as well as the constitutional and international law importance of the obligations sought to be enforced in the defied order). The HSF sheds light on the aggravating factor of Mr. Zuma's scandalising attacks by raising the all-important historical context surrounding public trust in the judiciary.
95. The HSF seeks, in light of these different contentions, respectfully to suggest that this Court's determination of an appropriate sanction may well include what the Commission has requested. However, to the extent that the Court is in agreement with the HSF's submissions on contempt of court serving both punitive and coercive ends, then it remains open for this Court to consider a different sanction, which may better achieve justice and equity in this most exceptional of cases.

**Max du Plessis SC  
Jabu Thobela-Mkhulisi  
Catherine Kruyer  
Counsel for the Helen Suzman Foundation**

Chambers  
Sandton and Durban  
23 March 2021

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**Dee-dee Qolohle**

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**From:** Van Schalkwyk Johannes <JohVanSchalkwyk@justice.gov.za>  
**Sent:** 23 March 2021 08:34  
**To:** Daniel Rafferty <Daniel.Rafferty@webberwentzel.com>  
**Subject:** FW: Amicus curiae - SCC // JG Zuma  
**Importance:** High

Dear Sir,

The subject matter refers.

Our client, the Secretary of the State Capture Commission, has indicated that he does not have objection for your client to join as amicus curiae in the abovementioned matter.

Warm regards

Johan van Schalkwyk  
B.JURIS(NWU);L.L.B(UP)  
Senior Assistant State Attorney (P45)  
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