IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT52/21

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA	Applicant

and

SECRETARY OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE	First respondent
RAYMOND MNYAMEZELI ZONDO N.O.	Second Respondent
MINISTER OF POLICE	Third Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Fourth Respondent
THE HELEN SUZMAN FOUNDATION	Fifth Respondent

HELEN SUZMAN FOUNDATION'S (FIFTH RESPONDENT'S) HEADS OF ARGUMENT

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I. WHERE WE ARE AND HOW WE GOT HERE

1. We are here because, as enshrined in the Constitution[1] and proclaimed by those who founded our constitutional democracy, this Court must "*stand on guard not only against direct assault on the principles of the Constitution, but against insidious corrosion.*"[2]

2. In its capacity as the "*ultimate guardian*" of our constitutional order and its foundational values,[3] this Court found Mr Zuma in contempt of court and ordered him to prison. It was compelled to do so, because "*[n]ever before has the legitimacy of this Court, nor the authority vested in the rule of law, been subjected to the kind of sacrilegious attacks that Mr Zuma, no less in stature than a former President of this Republic, has elected to launch. Never before has the judicial process, nor the administration of justice, been so threatened. It is my earnest hope that they never again will.*"[4]

3. In the face of such attack and the threat it heralded to the very heart of our hard-won constitutional democracy, this Court held that the only way to safeguard our democracy and do its duty, was to exercise its jurisdiction to act as the court of first and final instance, and to order the immediate, and unappealable, imprisonment of Mr Zuma for 15 months.[5] This was

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[1] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) (***SARFU II***) para 72.

[2] Address by former President Nelson Mandela at the inauguration of the Constitutional Court, 14 February 1995), quoted by *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* (CCT 52/21) [2021] ZACC 18 (29 June 2021) (***Secretary of the Judicial Commission of Inquiry***) para 1.

[3] *SARFU II* para 72; *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) *(**Doctors for Life**)* para 38; *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (***Pharmaceutical Manufacturers***) para 55.

[4] See *Secretary of the Judicial Commission of Inquiry* para 138.

[5] *Secretary of the Judicial Commission of Inquiry* para 92, 102, 141.

constitutionally permissible and necessary to vindicate the rule of law and the legitimacy of the administration of justice.

4. Had it failed so to order, it would have "*effectively sentenced the legitimacy of the Judiciary to inevitable decay*."[6]

5. Mr Zuma, unrepentant and brazen in his continued contempt for this Court's authority and the rule of law, refused to obey. He now races to the very Court he dismissed, absent any basis in law, under the guise of a rescission application. The irony is constitutionally unbearable: he effectively demands a rehearing of the merits of the final and binding decision and order of this Court, all because of his disdain for this Court's authority in the first place.

6. His application is not only ill-conceived and bereft of legal merit. It is a renewed and flagrant attempt to tear asunder the rule of law, the administration of justice, and the authority of this Court.

7. The rule of law, our Constitution's foundational principle, requires the law to speak with one voice. That is the voice of this Court. Once it has finally spoken, by the majority of its justices, all other voices must be still.

8. But Mr Zuma refuses to listen and to show appropriate constitutional respect. By his application to this Court, through its tone,[7] and through his intolerable

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[6] *Secretary of the Judicial Commission of Inquiry* para 102.

[7] For example, Mr Zuma's insinuation that the Court had a political motive ("*Imprisonment will* ***not serve any constitutional value but may be a political statement of exemplary punishment which does nothing to affirm the court as the supreme custodian of our constitutional rights***" – FA 19: 10); his self-help statements ("*So,* ***I did not comply with the orders of the Constitutional Court because I believed that they were unlawful***' – FA para 54: 25); his continued denigration of the Court (his refusal to appear before the Court "*was certainly never intended to attract or provoke* ***such acerbic judicial ire***" – FA 13:8; and the Constitutional Court "*must bow to the supremacy of our constitution and not use its very powerful position* ***to denigrate and demean litigants simply because they dared to hold genuine views about a judgment of the court or a judge***" – FA para 50: 24).

criticisms of the judgment he continues to undermine this Court's authority and the rule of law which is its predicate.

9. This Court must dismiss his application. The legitimacy of this Court and our constitutional administration of justice requires nothing less. To do otherwise would be to invite the very "*decay*" in the legitimacy of the judiciary that this Court foresaw.[8] We respectfully submit that this Court must dismiss Mr Zuma's application for three mutually reinforcing reasons:

9.1 *First*, Mr Zuma has perempted any right to apply for rescission, and has remained defiant and contemptuous of this Court;

9.2 *Second*, Mr Zuma has met none of the well-established and extraordinary requirements for rescission of final orders granted by this Court.

9.3 *Third*, it is in the interests of justice for this Court to dismiss his application.

10. Mr Zuma seeks the rescission and/or setting aside of paragraphs 3, 4, 5 and 6 of the order of this Court (*the Order*) made in this Court's judgment of 29 June 2021 (*the Judgment*). These are the substantive paragraphs declaring him in contempt of court, sentencing him to imprisonment, and providing for that imprisonment to occur. Notably, he does not seek the rescission of the punitive costs order against him, made in paragraph 7. So he must accept that his conduct, as described by the Court in exercising its discretion on costs, was worthy of punitive sanction.

11. Mr Zuma was afforded every opportunity to participate before this Court in

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[8] *Secretary of the Judicial Commission of Inquiry* para 102.

relation to the proceedings which resulted in this Court's Judgment and Order.[9] As this Court held, it "*afforded Mr Zuma multiple opportunities to place relevant material before it. He has dismissed those opportunities with disdain*."[10] Mr Zuma was even afforded the further extraordinary opportunity to make submissions to this Court after the hearing of the contempt case, which opportunity he elected to decline. Instead, he wrote a letter which, was not only "*totally irrelevant*" but once again made "*inflammatory statements intended to undermine this Court's authority*."[11]

12. Thus, Mr Zuma not only elected not to participate in this Court's proceedings,[12] but proceeded publicly to scandalise the Court and impugn the judiciary, repeatedly.[13]

13. In a detailed judgment that considered all aspects of the case, including the very legal issues Mr Zuma now belatedly raises, this Court found Mr Zuma guilty of contempt of court and sentenced him to 15 months' imprisonment.[14]

14. But we are sadly brought to this place (as a nation) and this matter (as litigants) because Mr Zuma remains unrepentant and unbowed. Mr Zuma's case and conduct strike at the heart of our constitutional democracy, seeking to subvert Orders of the highest court in the land in the context of a profoundly important project, namely uncovering corruption and state capture at the State Capture Commission. Mr Zuma wrongly and optimistically contends that because his views differ with those of the majority of judges in this Court, or because they

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[9] See e.g. *Secretary of the Judicial Commission of Inquiry* paras 72 and 73.

[10] *Secretary of the Judicial Commission of Inquiry* para 79.

[11] *Secretary of the Judicial Commission of Inquiry* paras 72.

[12] RA para 9: 584.

[13] *Secretary of the Judicial Commission of Inquiry* para 72.

[14] *Secretary of the Judicial Commission of Inquiry* para 142.

did not take into account facts that he deliberately chose not to place before them, its Order can and should be rescinded. That is anathema to our law and the rule of law.

15. We have now explained where we are and how we got here (because of Mr Zuma's continued and flagrant assault on the rule of law and this Court's authority). We turn next to explain why we should not be here.

II. WHY WE SHOULD NOT BE HERE

A. Mr Zuma should not be permitted to approach this Court

1. He has perempted his right to approach this Court

16. The principles in relation to peremption were, as accepted by this Court,[15] well-articulated by Innes CJ in *Dabner v South African Railways and Harbours.*[16] As Innes CJ held:

> "The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the *onus* of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven".[17]

17. In *SARS v CCMA*, this Court held that where "*[p]eremption [has] taken place, the only relevant consideration remaining is whether there are overriding constitutional considerations that justify appealability or the non enforcement of peremption. The broader policy considerations that would establish*

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[15] *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* 2017 (1) SA 549 (CC*)* (***SARS v CCMA***) para 26.

[16] 1920 AD 583 (***Dabner****)*.

[17] *Dabner* at p 594.

peremption are that those litigants who have unreservedly jettisoned their right of appeal must for the sake of finality be held to their choice in the interests of the parties and of justice".[18] This Court has already in its judgment carefully explained why Mr Zuma had unreservedly jettisoned his right to make representations to the Court before sentence and for the sake of finality must be held to that choice.

18. That finding of finality by this Court, cannot now be undone by Mr Zuma through rescission. Multiple cases from our courts confirm that. The Supreme Court of Appeal recently underlined that even the failure to oppose the relief sought in the Court *a quo* or an election to abide the decision of that Court leads to peremption and to the perempted party losing standing to appeal.[19]

19. The rule of peremption, whilst having its origins in appeals, equally applies to applications for rescission. As was held by Rogers J in *Nkata*, "*[t]he principles of peremption apply not only to appeals but also to the remedy of rescission …. The general principle is that 'no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate'. In order to show that a person has acquiesced in a judgment, the court must be satisfied upon the evidence 'that he has done an act which is necessarily inconsistent with his continued intention to have the case reopened or to appeal' (Hlatshwayo v Mare and Deas 1912 AD 242 at 259*)".[20]

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18 *SARS v CCMA* para 26.

19 *Cilliers NO and Others v Ellis and Another* (200/2016) [2017] ZASCA 13 (17 March 2017) paras 22-23.

20 *Nkata v Firstrand Bank Limited and* [2014] ZAWCHC 1; 2014 (2) SA 412 (WCC) para 30. The case ultimately served in this Court, on a different aspect of the matter under the National Credit Act. But the finding on peremption as applicable to rescission applications was not upset.

20. In this matter, Mr Zuma evidently perempted his right to seek rescission.

21. Mr Zuma has – unequivocally – indicated that he refused to recognise this Court's jurisdiction and would not participate before it. He did not oppose and did not file answering papers. The final salvo in this regard was the 21-page letter Mr Zuma addressed to this Court in response to the 9 April 2021 directive inviting him to make submissions regarding sanction for contempt and, if committal was deemed appropriate, "*the nature and the magnitude of the sentence that should be imposed, supported by reasons*."[21]

22. Mr Zuma elected not to file the requested affidavit, and instead filed a 21-page letter.[22] This letter was widely circulated throughout the country. In this letter, Mr Zuma indicated that his position was that this Court's proceedings lacked legitimacy; the directions were a sham; this Court was embarking upon "*political gimmicks*" and engaging in "*political or public management*" of a decision already made; that the proceedings constituted "*an extraordinary abuse of judicial authority to advance politically charged narratives*" etc.[23]

23. Significantly, Mr Zuma recorded, unequivocally, the following:

> "[10] It is a matter of record that I filed no notice to oppose. Nor did I file an answering affidavit or written submissions. I also did not request or brief counsel to appear on my behalf to address the Court on the issues raised by Chairperson Zondo on matters arising from the Commission of Inquiry. I was content to leave the determination of the issues in the mighty hands of the Court. If the Court is of the view, as it does, that it can impose a sanction of incarceration without hearing the "accused" I still leave the matter squarely in its capable hands."

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21 HSF AA annex "**AA3**".

22 HSF AA para 47: 325, read with annex "**AA4**"

23 Ibid.

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"[62] This Court must know that it will imprison me for exercising my constitutional rights and for that I leave it to you and your court. Clearly, this Court deems it appropriate and lawful to impose a criminal sanction of incarceration of a person without hearing oral evidence from such an accused person. Contrary to popular sentiment, peddled by sponsored legal analysts and editors, I do not seek to undermine our Constitution or to create any constitutional crises. I have accepted that my stance has consequences…"[24]

24. Two crucial consequences arise:

24.1 First: Mr Zuma indicated, unequivocally, that he left it to this Court to decide the issue, without his representations. Having made and communicated that election, he cannot back-track, criticise the Court for not affording him an opportunity to make submissions and now – belatedly – attempt to make the very submissions asked of him on 9 April 2021. Quite simply, he publicly and with great fanfare washed his hands of the case and stated that he left the matter for this Court to deal with. He also accepted that this stance may have consequences.

24.2 This was a public election by Mr Zuma that this Court would indeed deal with the matter, and would do so in the face of his objections and without his further submissions.

24.3 He has confirmed that again in his founding affidavit before this Court: stating that through "*that letter I address basically many issues including why I had **elected** not to file or participate in the proceedings of the Court*".[25] He casually repeats his contumacy, saying this: "*So, I did not*

[24] HSF AA annex "**AA4**".

[25] FA para 53: 25 (emphasis added).

*comply with the orders of the Constitutional Court because **I believed that they were unlawful***'.[26]

24.4 It is thus not open to him to re-open the matter. By his own conduct he is perempted from now seeking to re-open the matter, through rescission, and to make submissions. His refusal to participate, coupled with his acceptance of the consequences of his stance, means that he lacks standing to bring the rescission application and even if he had standing, it is not in the interests of justice to permit him to re-open the case.

24.5 Second: Mr Zuma repeatedly complains that he was not afforded an opportunity to make submissions and he has been convicted without a trial. This Court in its judgment has made it plain that he was afforded the very opportunity he complains he was denied – namely a right to make representations pertaining to sanction (and the merits). He was afforded this opportunity twice: once in the ordinary course, as a litigant, and then again through the directive. But he elected twice not to participate. Having refused to appear or participate, he cannot now raise his own non-participation as a ground of rescission for the order of contempt made against him.

25. Therefore, Mr Zuma should not be allowed to bring his rescission application, as his previous position, publicly communicated, amounts to a peremption of any right to seek to rescind the CC Order. There can be no doubt that in refusing to appear before this Court and subsequently approaching the same Court to be heard on an urgent basis, Mr Zuma has blown hot and cold and has reprobated and approbated.

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[26] FA para 54: 25 (emphasis added).

26. Linked to this, Mr Zuma, as we discuss in the next section, has remained in continued contempt of this Court's Orders.

2. Mr Zuma failed to purge his contempt and remains openly contemptuous

27. Mr Zuma has throughout remained in open and defiant contempt of this Court and its Orders. In all material senses, he has refused to purge his contempt of court.

28. As this Court has held:

"It can only be described as unconscionable when a party seeks to invoke the authority and protection of this Court to assert and protect a right it has, but in the same breath is contemptuous of that very same authority in the manner in which it fails and refuses to **honour and comply** with the obligations issued in terms of a court order. The High Court, in *Di Bona*, supports the view that a court may refuse to hear a party until they have purged themselves of the contempt by coming to the following conclusion:

'The consequences of the rule are that anyone who disobeys an order of [c]ourt is in contempt of [c]ourt and may be punished by arrest of his person and by committal to prison and, secondly, that no application to the [c]ourt by a person in contempt will be entertained until he or she has purged the contempt.' "[27]

29. So court orders must be both honoured and complied with. The judicial authority vested in courts obliges them to ensure compliance with court orders to safeguard and enhance their integrity, efficiency, and effective functioning. This Court has made clear, "*[a]ll 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*

[27] *SS v VV-S* [2018] ZACC 5; 2018 (6) BCLR 671 (CC) (***SS***) para 31, emphasis added.

much closer to the heart of the kind of society we seek to establish and may activate greater diligence on the part of all."[28]

30. In the present matter, this Court's Orders touch interests that lie at the very heart of our constitutional democracy. Indeed, this Court stressed in making the Order that Mr Zuma now wants to set aside, that: "*Never before has the judicial process, nor the administration of justice, been so threatened*".

31. Despite this, Mr Zuma deliberately has continued with his ongoing defiance of this Court's Orders.

31.1 To this day, Mr Zuma has failed to testify before the Commission, as required of him by this Court in its judgment and order of 28 January 2021.

31.2 As to the sentence orders he has both failed to honour them and his compliance therewith had to be enforced by threat of arrest. In terms of paragraph 5 of the Order Mr Zuma was meant to hand himself over to the Police within 5 calendar days from 29 June 2021, being by Sunday, 4 July 2021. This he deliberately refused to do. His open defiance plunged the country into a constitutional crisis that forced the Police to do their duty under paragraph 6 of the Order.

31.3 Mr Zuma's ongoing and wilful contumacy of this Court's Order was brazen and lasted from Sunday 4 July until when the Police arrived at his home to arrest him (as they were required to do under the Order, if he violated his obligation to hand himself in), on Wednesday night 7 July.

[28] *SS* para 23.

He thus refused to undergo imprisonment or submit himself to the Police ongoingly.

31.4 As to the declaratory Order (in paragraph 4 of this Court's order) that Mr Zuma is guilty of contempt of court, he remains openly and ongoingly in contempt of that finding too. He has repeatedly refused either to honour or to comply with this Court's orders,[29] both in respect of his appearance before the Commission, and his consequential contempt of court.

31.5 That is apparent firstly from public statements made by his foundation, the Jacob Zuma Foundation (from which Mr Zuma has not distanced himself), after this Court issued its order on 29 June 2021.[30] In that statement, the Jacob Zuma Foundation "*denounces Judge Kampempe (sic) judgment as judicially emotional & angry and not consistent with our Constitution*". Mr Zuma has elected not to distance himself from or disown the statements made on his behalf through his eponymous foundation.[31] He chose expressly not to disavow them in his papers in this Court. This is itself contemptuous and scandalous of the Court.

31.6 Mr Zuma's strident and ongoing defiance is secondly apparent from what he publicly stated and confirmed on affidavit before the Pietermaritzburg High Court last Tuesday on 6 July – namely, that there should be no investigation into corruption at all. In this regard, we refer to *The Citizen* newspaper on 4 July 2021 and highlight the following remarks made

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[29] Including this Court's Order 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 Zuma* (CCT 295/20) [2021] ZACC 2

[30] HSF AA para 31: 322, and a copy of the statement, dated 30 June 2021, is annexure "**AA2**" to the HSF AA.

[31] HSF AA para 31: 322. Not engaged with or denied by Mr Zuma in his replying affidavit at paras 43 to 45: 597 to 598.

during an address outside his Nkandla home the day before: (which remarks Mr Zuma has confirmed he made, and defended his right to make):[32]

31.6.1 "*It will be difficult for me to hand myself over for imprisonment when I have done nothing wrong*";

31.6.2 "*This to me is a clear indication that lawmakers, and even maybe those that are in power do not have an idea of what it means to be in power and to be in charge of taking care of the laws*"

31.6.3 "*your support has been immensely important and hopefully, it will make those that are in power to realise that they are ruling over human beings and they cannot just take decisions lightly*"[33]

31.7 Thirdly, Mr Zuma's continued defiance is on display even in his rescission application, where he contends that "*[t]o issue an order that I should appear before a biased Commission of Inquiry and to obey its instructions was fundamentally flawed*";[34] and that he is "*entitled to express strong views **against an oppressive system***"[35] – the very system that the Constitutional Court had sanctioned and ordered him to comply with. This is consistent with his attitude throughout. He would not attend at the Commission and would not be giving effect to this Court's Order of 28 January 2021 to the contrary. And he furthermore defiantly and candidly tells this Court why he did not do so. As we highlighted earlier, his views under oath are: "*So, I did not comply with the orders of the Constitutional*

[32] AA para 29: 589.

[33] HSF AA para 29: 320 and annexure "**AA1**".

[34] FA para 54, pleadings 25.

[35] FA para 54, pleadings 25.

Court ***because I believed that they were unlawful***'.[36] This is self-help by contempt upon contempt.

His continuous flouting of this Court's authority, continuing contempt of its Orders, and continuing insistence that he has done no wrong, impede the cause of justice and imperils the rule of law. Given this, how is judicial authority to be enforced and upheld? It must be done by finding that Mr Zuma's conduct disentitles him from now seeking to bring this application seeking to set aside the very Order that this Court carefully designed to vouchsafe the rule of law, the legitimacy of this Court, and the hard-won value of our constitutional democracy.[37]

B. Rescission application is meritless

32. Mr Zuma's application to rescind or set aside the substantive orders of this Court's Order is fatally defective. It is procedurally unsound and unsustainable on the merits. His application fails to meet any of the jurisdictional requirements to obtain rescission.

33. This Court has confirmed that, as a general rule, once a court has finally determined a matter and granted judgment, it becomes *functus officio*.[38] Similarly, the principle of the finality of litigation dictates that the power of the Court should necessarily come to an end once it has pronounced itself finally on an issue, because "*[t]he parties must be assured that once an order of court has been made, it is final and they can arrange their affairs in accordance with that order*."[39] This is an essential incident of the rule of law. In relation to this, it should be noted that a court's inherent jurisdiction does not include the right

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36 FA para 54, pleadings 25, emphasis added.

37 See *Secretary of the Judicial Commission of Inquiry* paras 92, 102, 138, and 141.

38 *Daniel v President of the Republic of SA* 2013 (11) BCLR 1241 (CC) para 5. *See also Zondi v MEC for Traditional and Local Govt Affairs and Others* 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC) (***Zondi***) paras 28 and 29.

39 *Zondi* para 27.

to interfere with such principle of the finality of judgments, except in very limited circumstances as provided for in the Uniform Rules of Court or the common law.[40]

34. Uniform Rule 42 (which is made applicable in this Court pursuant to Rule 29 of this Court's Rules) makes provision for these very limited exceptions, in which a Court may vary or rescind its final judgments.

35. Uniform Rule 42(1) provides:

"The court may, in addition to any other powers it may have mero motu or upon the application of any party affected, rescind or vary—

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties."

36. The purpose of this rule is to correct an obviously wrong judgment or order. It does not permit the affected person to re-argue his case on the merits in circumstances where he believes the court has erred in granting the order.

37. Rule 42 provides for only three distinct bases for rescission or variation:

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[40] *De Wet v Western Bank Ltd* 1977 (4) SA 770 (T) at 780H–781A (***De Wet***); *Swart v Absa Bank Ltd* 2009 (5) SA 219 (C) at 221B–D and 223A–B (***Swart***).

37.1 the order or judgment was erroneously sought or erroneously granted in the absence of any party affected thereby;

37.2 there is an ambiguity, or a patent error or omission, in the order or judgment but only to the extent of such ambiguity, error or omission;

37.3 the order or judgment was granted as the result of a mistake common to the parties.

38. Although he at times runs his grounds and argument together, Mr Zuma appears to base his rescission application on the first ground (that the judgment was erroneous granted in the absence of any party affected) and the second ground (that there is a patent error or omission in the judgment).[41] But he does not meet either of these jurisdictional prerequisites for rescission. Moreover, he has no other valid ground for rescission.

1. The first ground fails: the Order was not erroneously granted in the absence of the party affected

39. Mr Zuma was admittedly, contemptuously and by his own election, absent from the proceedings before this Court. However, this was not due to a service or citation failure, but due to Mr Zuma's deliberate decision not to participate. Indeed even in his replying affidavit before this Court he unrepentantly proclaims that: "*I have never denied that I took a decision not to oppose the Constitutional Court contempt application for the reasons articulated in the founding affidavit, but also as a protest and conscientious objection against perceived abuse and bias.*"[42]

[41] FA paras 73 to 99: 29 to 34.

[42] RA para 9: 584.

40. A decision not to participate (despite repeated opportunities to do so) does not suffice to qualify as "*absent*" under Rule 42(1)(a). This Court has already finally determined in its judgment that Mr Zuma made an election not to appear before it ("*Mr Zuma had every right and opportunity to defend his rights, but he chose, time and time again, to publicly reject and vilify the Judiciary entirely*")[43], and the consequences of that election, being that he stood to be committed to prison for contempt.

41. The Supreme Court of Appeal has confirmed this view in *Freedom Stationery (Pty) Limited and Others v Hassam and Others*.[44] It held that where an affected party "*took the considered decision not to participate*", "*they reconciled themselves with the reasonable prospect that the court could*" make an adverse order against them. And, therefore, such an order cannot be rescinded, because it *was* "*not erroneously made in their absence*."[45]

42. The same applies in the present matter. Mr Zuma took "*a considered and deliberate decision*" not to participate and file answering papers before this Court.[46] He clearly reconciled himself to the reasonable prospect that the Court (as sought by the Commission) would exercise its discretion to order his imprisonment for contempt. The Court indeed made that order. He cannot now claim that the order was erroneously granted in his absence.

43. Moreover, the order was not erroneously granted. This Court was, through Mr Zuma's letter, aware of his contentions as to the procedural hurdles which, according to Mr Zuma, prevented him from being committed absent a trial. Plainly, as elucidated in its detailed and carefully reasoned judgment, this

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[43] *Secretary of the Commission of Inquiry* para 73.

[44] [2018] ZASCA 170; 2019 (4) SA 459 (SCA) (30 November 2018).

[45] *Freedom Stationery* para 32.

[46] RA para 9: 584.

Court was aware of and grappled with these issues, but determined, as our highest Court, that its order was procedurally sound and both constitutionally compliant and constitutionally necessary to safeguard the administration of justice. This Court expressly dealt with the procedural issues Mr Zuma now raises, and the absence of a trial. It gave a binding judgment determining the constitutionally compliant position in our law. It is not for Mr Zuma now to try re-open those findings through a rescission application.

44. Mr Zuma further contends that this Court may have erred as it failed to consider certain factors, such as his age, health, the effect of Covid-19 or what imprisonment could mean for an ex-President's constitutional rights. These are not grounds for rescission. They are not new facts arising after judgment. If Mr Zuma felt strongly about these factors, he should have made representations when this Court gave him that opportunity. This Court correctly decided the matter on the evidence placed before it, given Mr Zuma's election not to oppose or participate in the matter.

45. Mr Zuma was given every opportunity to place whatever evidence he deemed necessary before this Court. But, as he admits, he deliberately decided not to do so.[47] This Court, of its own accord, and despite Mr Zuma's contemptuous refusal to file any papers dealing with sanction (which "*left this Court in the lurch*") expressly took account of Mr Zuma's advanced age and the frailties that usually accompany such age.[48] But held that it was "*ultimately unpersuaded that the cumulative effect of these factors does anything to*

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47 RA para 9: 584.

48 *Secretary of the Commission of Inquiry* para 124.

counterbalance the profound and significant impact of the aggravating factors."[49]

46. In *Lodhi*, the Supreme Court of Appeal made clear that the very rare instances where the Court will consider evidence outside of the record in a rescission application are restricted to instances where there is a failure to give notice of proceedings, and it is necessary to go outside the record to demonstrate such failure.[50] But the SCA emphasised that: "*However, a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the Judge who granted the judgment, as he was entitled to do, was unaware, as was held to be the case by Nepgen J in Stander. See in this regard Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) ([2003] 2 All SA 113) in paras 9 - 10 in which an application in terms of Rule 42(1)(a) for rescission of a summary judgment granted in the absence of the defendant was refused notwithstanding the fact that it was accepted that the defendant wanted to defend the application but did not do so because the application had not been brought to the attention of his Bellville attorney. This Court held that no procedural irregularity or mistake in respect of the issue of the order had been committed and that it was not possible to conclude that the order had erroneously been sought or had erroneously been granted by the Judge who granted the order.*"[51]

47. The Supreme Court of Appeal went on to explain that, in addition, "*in a case where a plaintiff is procedurally entitled to judgment in the absence of the*

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[49] *Secretary of the Commission of Inquiry* para 124.

[50] *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* [2007] ZASCA 85; 2007 (6) SA 87 (SCA) (***Lodhi***) para 24.

[51] *Lodhi* para 25, emphasis added.

defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment."[52]

48. Moreover, this Court has held that when an applicant relies on Rule 42 to argue that an order was erroneously granted, "*[t]he applicant is required to show that, but for the error he relies on, this Court could not have granted the impugned order. In other words, the error must be something this Court was not aware of at the time the order was made and which would have precluded the granting of the order in question, had the Court been aware of it*."[53]

49. Therefore, the Court requires three elements to be established (in addition to there being absence): (1) an error, (2) the error must be something the Court was not aware of at the time of the order, and importantly (3) the error would have "*precluded*" the granting of the order (not merely been a factor taken into account).

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[52] *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* [2007] ZASCA 85; 2007 (6) SA 87 (SCA) para 27, emphasis added.

[53] *Daniel* para 6, read with para 5, emphasis added.

50. Mr Zuma has failed to demonstrate any of these elements in the present matter. There is simply no issue (let alone an error), which this Court was not aware of, that would have precluded the Order it granted.

51. Finally, as the Supreme Court of Appeal made clear in *Seale*,[54] in rejecting a broader interpretation of the Rule 42(1)(a) ground of rescission: "*The granting of this latter order [a costs order that had been sought] amounted to a mis-exercise of the court a quo's discretion because it unjustifiably disregarded the tender made by the province,* ***but*** *that renders the order appealable; the order was not 'erroneously sought' or 'erroneously granted' within the meaning of the rule. The submission by counsel representing the TYC that the rule [42(1)(a)] should be interpreted, 'because of its plain and grammatical meaning', as covering orders wrongly granted, is inconsistent with the interpretation given to the rule in numerous cases, has not a shred of authority to support it and requires no further consideration*."

52. Thus, the Supreme Court of Appeal has confirmed that even if it could be shown that a Court mis-exercised its discretion in granting an order, and that therefore the order was wrongly granted, that would **not** mean that the order was 'erroneously granted' and therefore would not meet the jurisdictional requirement for rescission.

2. The second ground fails: There is no patent error or omission in the Order

53. There is no ambiguity in the Order, and no patent error or omission. A patent error or omission does not mean that a subject of the order believes that the Court erred on the merits and should have reached a different substantive

54 *Seale v Van Rooyen NO and Others* 2008 (4) SA 43 (SCA) at 52, emphasis added.

decision. Instead, in the context of rescissions, patent error refers to an error by the Court whereby the judgment obviously (patently) does not reflect the Court's intention.[55]

54. But nothing that Mr Zuma has alleged would come close to meeting this test, in respect of the rescission that Mr Zuma contends for (a complete setting aside of paragraphs 3 to 6 of the Order). This Court said precisely what it meant, in the clearest terms:

54.1 Paragraph 3 of the Order is a declaration that Mr Zuma is guilty of the crime of contempt of court for failing to comply with this Court order of 28 January 2021. The issue of contempt was indeed the central issue facing the Court. The judgment assesses this question from paragraph 37, under the heading "*Is Mr Zuma in contempt of court?*". The Court goes about assessing the requirements for contempt and held that "*[o]n the evidence placed before this Court, there can be **no doubt** that Mr Zuma is in contempt of Court*".[56] There can thus be **no doubt** that the Court intended to make paragraph 3 of the Order on its terms. There is no error or omission.

54.2 Paragraph 4 of the Order is an order that Mr Zuma is sentenced to undergo 15 months' imprisonment. This order is the sanction that was ordered by the Court pursuant to the finding of contempt. The Court dealt in detail with the issue of the appropriate sanction in the circumstances of the case. The Court dealt in particular with whether a coercive order or punitive order was appropriate in the circumstances.[57] The Court

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[55] *First National Bank of Southern Africa Ltd v Van Rensburg NO* 1994 (1) SA 677 (T) at 680J–681B.

[56] *Secretary of the Commission of Inquiry* para 37.

[57] *Secretary of the Commission of Inquiry* paras 48 to 124.

specifically found that a coercive order was inappropriate in the circumstances. On consideration of the relevant issues, such as the importance of ensuring court orders are obeyed, Mr Zuma's constitutional rights in respect of sanction and his unique position, including as a former President of South Africa, the Court determined that a punitive sanction of imprisonment was the only appropriate sanction.[58] The Court found that "*[t]he cumulative effect of these factors is that Mr Zuma has left this Court* ***with no real choice****.* ***The only appropriate sanction*** *is a direct, unsuspended order of imprisonment. The alternative is to effectively sentence the legitimacy of the Judiciary to inevitable decay*".[59] On a consideration of the judgment, there can be no doubt that the Court intended to order a punitive sanction of imprisonment – it was the **only appropriate sanction**. There is thus no error or omission in order 4.

54.3 Paragraphs 5 and 6 of the Order are measures to ensure that the sanction in Paragraph 4 of the Order is enforced and that Mr Zuma does indeed carry out the punitive sanction. Thus, in the context of Paragraph 4, it is clear that there is no error or omission in the granting of Paragraphs 5 and 6. Indeed, Paragraphs 5 and 6 of the Order were clearly necessary, as the Police were indeed forced to proceed to arrest Mr Zuma because he contemptuously refused to comply with Paragraph 4 of the Order and hand himself over for imprisonment by 4 July 2021. The Police acted under paragraph 6 precisely because Mr Zuma failed to hand himself

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[58] *Secretary of the Commission of Inquiry* paras 102 (having exhaustively traversed the issues and facts in a detailed analysis in paras 48 to 101).

[59] *Secretary of the Commission of Inquiry* paras 102.

over under paragraph 5. There is no error or omission: everyone knew exactly what was required of them.

55. There is thus no error or omission in the Order. On the contrary, it reflects the clear intention of the Court. The Order was made based on the reasoning in the judgment. There can be no doubt that Paragraphs 3 to 6 of the Order were the orders that the Court intended to make.

56. More broadly, this Court expressly dealt with the procedural issues Mr Zuma now raises, and the absence of a trial.[60] It is not for Mr Zuma now to try re-open those findings through a rescission application. The Constitutional Court has already determined the very constitutional and procedural challenge he prefaces in making the Order.

57. It is precisely for this reason that the significant reliance that Mr Zuma's counsel seek to place on the recent Supreme Court of Appeal decision in *De Beer*,[61] as somehow supporting their submissions that this Court erred in ordering Mr Zuma's imprisonment,[62] is misplaced.

57.1 *First*, the circumstances in *De Beer* were completely distinguishable. Unlike, in Mr Zuma's matter there was no contempt application where a finding of contempt and imprisonment was specifically sought. That is why in this case, unlike in *De Beer*, the legal and constitutional requirements for finding contempt and ordering imprisonment generally and given the specific circumstances of this case, were considered in careful detail in a majority judgment that ran to 66 pages and 142 paragraphs. In contrast, the SCA's treatment of what to do about Mr De

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60 See e.g. *Secretary of the Commission of Inquiry* para 74 to 86.

61 *Minister of COGTA v De Beer* [2021] ZASCA 95 (1 July 2021) (***De Beer***).

62 See e..g. Zuma's Heads of Argument at paras 3 to 8.

Beer's conduct was traversed in only 3 paragraphs. Of course this was so because in *De Beer*, Mr De Beer's contempt was auxiliary to the case, arose after the hearing and shortly before judgment, and was not the subject matter of the application at any stage.

57.2 *Second,* given those circumstances in *De Beer*, the Supreme Court of Appeal did not, in fact, find him guilty of contempt of court, nor did it call upon him to file papers dealing with whether he was in contempt. Rather, given the circumstances in which the issue arose (after the hearing in correspondence with the court), the Supreme Court of Appeal simply referred the matter to the National Director of Public Prosecutions for her attention.

57.3 *Third,* in doing so, the Supreme Court of Appeal specifically references, in its footnotes, this Court's judgment finding Mr Zuma in contempt and ordering his imprisonment.[63] It was aware of this Court's judgment, and was not either expressly or by implication adopting any conflicting or inconsistent position.

57.4 *Fourth,* this Court is the highest Court. It is the ultimate guardian of the Constitution and its foundational values. Its judgments bind all lower courts. Even if there was any irreconcilable inconsistency in the approach taken by the SCA in *De Beer* and that taken by this Court (which there most definitely is not), all that would mean is that the SCA was incorrect, in light of this Court's judgment.

58. We have already explained, in the previous section, why none of the facts as to Mr Zuma's personal circumstances (such as his age and health) that he

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[63] *De Beer* para 119, referring to *Secretary of the Judicial Commission of Inquiry* para 138.

alleges the Constitutional Court failed to consider (because he refused to place them before them when invited) gives rises to an error in the Order for the purposes of rescission.

59. Therefore, in the circumstances, Mr Zuma cannot ground this application for the rescission of Paragraphs 3 to 6 on any patent error or omission.

3. There is no other basis for rescission

60. The only other basis for rescission under Rule 42 is if it is alleged that there was a mistake common to the parties. In this matter, Mr Zuma does not plead any mistake common to the party, nor seek to rely on this ground of rescission. However, for the sake of completeness, we note that to fall within this jurisdictional requirement, there must be (a) "*a common mistake...where both parties are of one mind and share the same mistake; they are, in this regard, ad idem*",[64] and (b) "*there must be a causative link between the mistake and the grant of the order or judgment*".[65] The Court was faced with specific prayers from the Commission for a purely punitive sanction. Mr Zuma was well aware that the case against him involved a possible punitive sanction of incarceration. The Court considered the merits and appropriateness of both the punitive and coercive sanctions and found that the appropriate sanction in the circumstances was a punitive sanction. There is no mistake between the parties and no error by the Court in handing down the Order on its precise terms.

61. Mr Zuma's application for rescission is primarily premised on Rule 42, but he also seeks in the alternative to rely on the common law.[66] For the reasons set

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[64] *Tshivhase Royal Council and Another v Tshivhase and Another*; *Tshivhase and Another v Tshivhase and Another* 1992 (4) SA 852 (A) (***Tshivhase Royal Council)*** at 862G--863C.

[65] *Tshivhase Royal Council ibid.*

[66] FA para 101 and 103: 35.

out above, he has not met the jurisdictional requirement for rescission under Rule 42. Moreover, even if this Court were to consider his rescission application under the common law, the wilful default that Mr Zuma has demonstrated in that Court means he is not entitled to rescission under common law either. It is settled law that whilst the absence of 'wilful default' which is characterised by indifference as to what the consequences would be rather than of wilfulness to accept them, does not appear to be an express requirement under the common law, "*[i]t is, however, clear law that an enquiry whether sufficient cause has been shown is inextricably linked to or dependent upon whether the applicant acted in wilful disregard of Court rules, processes and time limits. While wilful default may not be an absolute or independent ground for refusal of a rescission application, a display of wilful neglect or deliberate default in preventing judgment being entered would sorely co-exist with sufficient cause.*"[67] In the face of Mr Zuma's deliberate decision to delegitimise this Court by not participating in the applications before it, Mr Zuma was in wilful default. He, therefore, cannot make out any case for the rescission of orders to which he has demonstrated utter indifference.

62. Finally, Mr Zuma vaguely, but unconvincingly, suggests in reply that because of the wording of CC Rule 29, when it incorporates Uniform Rule 42, this should mean that this Court has a new further right to grant rescission in cases where there are "*constitutional errors and/or omissions*".[68] This is no authority for this proposition, and it is directly contrary to this Court's existing jurisprudence on rescission applications before this Court under Rule 42, read with Rule 29.[69]

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67 *Harris v Absa Bank Ltd T/A Volkskas* 2006 (4) SA 527 (T) para 6**.**

68 RA para 15: 585, and FA para 71: 29.

69 See e.g. *Daniel* para 4; *Minister for Correctional Services and Another v Van Vuren and Another; In re Van Vuren v Minister for Correctional Services and Others* 2011 (10) BCLR 1051 (CC); *University of Witwatersrand Law Clinic v Minister of Home Affairs and Another* [2007] ZACC

It is also unclear how this 'test" could exist in circumstances where the Constitutional Court has already finally pronounced on the constitutional compliance of the procedure and sanction in question: the new "test" calls for a substantive reconsideration of the very question already settled, which is appeal terrain and undermines the most fundamental distinction between rescissions and appeals.

63. The approach that Mr Zuma seeks to establish is not only anathema to the rule of law and judicial authority, but is one that would paralyse the judiciary:

63.1 first, a party could elect not to participate in litigation (despite being cited and served with papers), but then – should she lose the matter – demand an opportunity to make submissions thereafter;

63.2 second, any party whose matter is heard directly by this Court – when it affords a party the extraordinary right of direct access – would be entitled to bring a rescission application because (1) no appeal exists and (2) the litigant believes that this Court erred or acted unconstitutionally; and

63.3 third, the meaning of "patent error" under Rule 42 would be transformed to mean substantive error, such that it would essentially encompass appeal grounds being brought to the same court.

64. The above are, with good reason, not the tests for rescission, and are expressly why the tests for rescission exist in the form that they do. Mr Zuma's application and relief is an invitation for chaos. Mr Zuma's "test" would simply

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8; 2008 (1) SA 447 (CC) footnote 1; *Minister for Justice and Constitutional Development v Chonco and Others* 2010 (7) BCLR 629 (CC) para 11; *Ex Parte MEC for Local Government, Environmental Affairs and Development Planning, Western Cape Province: In re Minister for Mineral Resources v Swartland Municipality and Others; Maccsand (Pty) Ltd v City of Cape Town and Others (Chamber of Mines of South Africa and Another as Amici Curiae)* 2012 (9) BCLR 947 (CC) and *Nkabinde and another v Judicial Service Commission and others* 2016 (11) BCLR 1429 (CC).

allow for a never-ending stream of disguised appeals, as well as this Court – and every other court - repeatedly having to decide matters twice or thrice or any number of times until litigants are exhausted of funds. This is detrimental to the rule of law and destructive of the principle of the finality of judgments, which flows therefrom. Indeed, to use the words of this Court, it would "*effectively sentence the legitimacy of the Judiciary to inevitable decay*."[70]

65. In any event, even on Mr Zuma's new test, he would need to show that the majority of the Court was actually wrong. It was not. The fact that the courts have always retained the right to hear contempt of court applications (having criminal and civil elements) and to grant punitive and coercive sanctions is not, with respect, in any doubt. The majority judgment illustrates this constitutional proposition and traverses the relevant law. This Court was plainly empowered to proceed as it did and need not have referred any aspect to the National Prosecuting Authority. Once that is so, how the Court exercised its sentencing discretion in the specific circumstances of this case is not something that can be the subject of any error of constitutional principle and certainly does not found any rescission claim.

66. Furthermore, whatever the ambit of this new "*constitutional error*" ground for rescission raised by Mr Zuma in reply, we explain in the next section why it would not be in the interest of justice to grant rescission.

C. It is not in the interests of justice for this Court to rescind its Order

67. When a Court determines a rescission application, it has a discretion whether to grant rescission.[71] If the jurisdictional factors in Rule 42(1) are not met (as

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70 *Secretary of the Judicial Commission of Inquiry* para 102.

71 *De Wet* at 777F–G; *Theron NO v United Democratic Front (Western Cape Region)* 1984 (2) SA 532 (C) (***Theron NO***) at 536G; *Topol v L S Group Management Services (Pty) Ltd* 1988 (1) SA

they are not met in this matter), then the Court must not grant rescission.[72] As this Court has held, "*[t]he jurisdictional facts in subrule (1) must, however, be established by the party seeking variation before a court may exercise its discretion to set aside the order or to amend it.*"[73] But even if they are met, this Court may retain a residual discretion to refuse rescission.[74]

68. In this matter, in addition to all the other and definitive reasons why the application must be dismissed, we further submit that this Court must, to the extent necessary, exercise any residual discretion whether under Rule 42, or under any broad interests of justice ground, to dismiss Mr Zuma's rescission application because it is not in the interests of justice to grant it. This is so for the reasons given in the previous section, and the reasons set out below.

69. Mr Zuma openly contends that the Court should re-hear his case on the merits by way of a rescission application. In his papers before the Pietermaritzburg High Court (where he sought urgently to suspend this Court's Order) he stated as follows:

> "[37] I am unable to appeal to any Court because the Constitutional Court is the final court for which there is no appeal for a convicted person in my position. That is why I seek to approach that same court to rescind the order and also hopefully to reconsider whether it is lawful to treat me differently to any criminal accused."
>
> "[60.2] I have nowhere to appeal, hence my application to have the same Constitutional Court that convicted and sentence without a civil or criminal trial

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639 (W) at 650G–I; *Tshivhase Royal Council v Tshivhase* 1992 (4) SA 852 (A) at 862J–863A; *First National Bank of Southern Africa Ltd v Van Rensburg NO* 1994 (1) SA 677 (T) (***First National Bank***) at 681F; *Van der Merwe v Bonaero Park (Edms) Bpk* 1998 (1) SA 697 (T) (***Van der Merwe***) at 703G.

72 *Van der Merwe* at 702H. See also *Swart* at 222B–C.

73 *Minister for Correctional Services and Another v Van Vuren and Another; In re Van Vuren v Minister for Correctional Services and Others* 2011 (10) BCLR 1051 (CC) (***Van Vuren***) para 7.

74 See *Van der Merwe* at 702G-H; *Tshivhase Royal Council* at 862J–863A; *First National Bank* at 681; and *Theron NO* at 536G. But see *Mutebwa v Mutebwa* 2001 (2) SA 193 (Tk) at 199I–J, where the Court held that Rule 42 "*should, therefore, be construed to mean that once it is established that the judgment was erroneously granted in the absence of a party affected thereby, a rescission of the judgment should be granted.*"

reconsider, vary or rescind its orders. Yet the Constitutional Court erroneously declared that "the right of appeal does not arise" in my case."[75]

70. In his papers before this Court, Mr Zuma continues this theme, stating:

70.1 "*In my view, the Constitutional Court must reconsider its order that completely strips me of [alleged rights]... I am entitled to hold and express the view that Courts are wrong… and should revisit this grave injustice and unconstitutional conduct."*[76]

70.2 "*The violation of my right of appeal ought properly to have been examined*".[77]

71. The rescission application is thus nothing less than an appeal by stealth and is impermissible. What Mr Zuma is doing is to request the Court to reassess the merits of the matter and reconsider its order. He states as follows in this founding affidavit:

"I am advised that … it will not be futile to make one last attempt to invite the Constitutional Court to relook [at] its decision and to merely reassess whether it has acted within the Constitution or, erroneously, beyond the powers vested in the court by the Constitution."[78]

72. Ultimately, as we explain above, Mr Zuma fails to trigger any of the jurisdictional prerequisites for rescission. He lost before this Court and, like every losing party, wishes for a second bite at the cherry. This is not permitted, nor would it be in the interests of justice, or the rule of law, to permit it.

73. Mr Zuma is essentially advising this Court that it is wrong in both its judgments and that it must rather accept – or at least consider – his reasoning.

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75 HSF AA para 78: 335.

76 FA para 49: 23.

77 FA para 85: 32.

78 FA para 14: 8.

74. In the circumstances of this case, this impermissible approach is a further indication of the ongoing contempt with which Mr Zuma holds the authority of this Court to grant final and binding judgments.

75. Importantly, as explained above, this Court's Judgment and Order are vital to the defence of our constitutional democracy. They are the constitutionally necessary consequence of Mr Zuma's ongoing, long-held and publicly stated defiance of his constitutional obligations and his attack on the rule of law and judicial legitimacy. Having seemingly hoped that his absence from proceedings would present an insurmountable hurdle to this Court or the Commission, Mr Zuma now attempts to backtrack on that failed strategy, to argue the merits of the case which, from inception, he was repeatedly invited to do. Having refused to do so, that opportunity is gone: he cannot ask this Court to treat its Order and proceedings as a dress rehearsal and now start again.

76. Moreover, Mr Zuma's continuing contumacy is extraordinary and constitutionally abhorrent, particularly coming as it does from the former President of the country:

76.1 He swore an oath to "*obey, observe, uphold and maintain the Constitution*".[79] Thus, the head of the Republic must be beyond reproach. He must personify our constitutional democracy and its values. Of all our

[79] Constitution Schedule 2, part 1.

nation's citizens, it is he who bears the greatest responsibilities, and it is he who is the most accountable to the law.[80]

76.2 These observations apply equally to Mr Zuma, as the former head of state. This is particularly so since at the heart of this matter, and Mr Zuma's contempt, is his refusal to appear before the State Capture Inquiry in relation to his time as President.

76.3 As this Court emphasised, when finding Mr Zuma guilty of contempt, and ordering his imprisonment, "*Mr Zuma is no ordinary litigant. He is the former President of the Republic, who remains a public figure and continues to wield significant political influence, while acting as an example to his supporters. … He has a great deal of power to incite others to similarly defy court orders because his actions and any consequences, or lack thereof, are being closely observed by the public. If his conduct is met with impunity, he will do significant damage to the rule of law*."[81]

76.4 Instead of upholding his oath and responsibilities, Mr Zuma defied and vilified the law and the judicial branch, which is tasked with interpreting and giving life to the law. This application stripped to its essence is of a piece with this defiance and contempt of this Court's authority and the rule of law. Mr Zuma now seeks to avoid any accountability. But the very safeguarding of our constitutional democracy requires that accountability.

77. For all of these reasons, and the ones traversed earlier, it is not in the interest of justice for this Court to grant Mr Zuma's rescission application. Instead, as

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[80] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) para [20].

[81] See *Secretary of the Judicial Commission of Inquiry* para 97, emphasis added.

this Court has held, the defence of the Constitution requires, and continues to require, that Mr Zuma be declared to be in contempt of court and sanctioned with 15 months' imprisonment.

III. HOW THIS SHOULD END

78. As we have explained, we are here because:

78.1 in order to guard our constitutional democracy, this Court was compelled to find Mr Zuma in contempt of court and sentence him to imprisonment. It did so in a carefully reasoned and detailed judgment where it considered why it was constitutionally appropriate and necessary to order his committal to imprisonment. Sensitive to his constitutional rights, and after affording Mr Zuma every conceivable opportunity to participate and make representations, this Court handed down the Judgment and Order and finally determined the constitutionality of committing Mr Zuma to prison.

78.2 Mr Zuma elected not to participate or make any submissions to this Court, other than writing a letter to the Court that was not only "*totally irrelevant*" but once again made "*inflammatory statements intended to undermine this Court's authority*."[82] Yet now he, in a contemptuous and remarkable last-gasp effort, approaches this Court, which has already definitely and finally spoken, to effectively reconsider and set aside its Order on the merits.

79. We went on to explain why we should not be here:

79.1 Mr Zuma has perempted any right to seek rescission;

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[82] *Secretary of the Judicial Commission of Inquiry* para 72.

79.2 he has remained a constitutional delinquent who, to this day, is in open defiance and contempt of this Court's authority and Orders;

79.3 Mr Zuma does not meet any of the jurisdictional requirements to ground a rescission application;

79.4 it is, in any event, not in the interest of justice for this Court to grant a rescission application. The rule of law and finality require Mr Zuma to serve the sentence that this Court determined to be constitutionally necessary to defend our constitutional democracy.

80. Therefore, we come, in the final analysis, to how this matter and Mr Zuma's ongoing attack on our constitutional democracy should end. We respectfully submit:

80.1 Mr Zuma's application is meritless and ill-conceived. But more than that, it is, by its very nature, an ongoing contemptuous affront to this Court's authority and the legitimacy of the rule of law.

80.2 It must be dismissed.

80.3 Given that Mr Zuma's application is an abuse of process and in view of his contumelious conduct, Mr Zuma should be mulcted in a punitive costs order.[83]

80.4 Mr Zuma cited the HSF as a respondent in this litigation. Accordingly, if Mr Zuma's application is dismissed, as it should be, then the HSF should

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[83] See this Court's findings as to why punitive costs were warranted in *Secretary of the Judicial Commission of Inquiry* paras 130 to 136.

be awarded its costs.[84]

MAX DU PLESSIS SC
ANDREAS COUTSOUDIS
JABU THOBELA-MKHULISI

HSF's Counsel
Ubunye Chambers, Durban
9 July 2021

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[84] To the extent that Mr Zuma was in any way successful, HSF should not be ordered to pay any costs, given the *Biowatch* principle and that its affidavits and arguments were clearly advanced by it as an NGO in the public interest and in good faith. *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC).