

**IN THE HIGH COURT OF SOUTH AFRICA
KWA ZULU NATAL DIVISION, PIETERMARITZBURG**

Case No: _____/2021

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA	Applicant
and	
THE MINISTER OF POLICE	1 st Respondent
NATIONAL COMMISSIONER FOR THE SOUTH AFRICAN POLICE SERVICE	2 nd Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	3 rd Respondent
THE SECRETARY OF THE JUDICIAL COMMISSION OF INQUIRY INTO STATE CAPTURE, FRAUD AND CORRUPTION IN THE PUBLIC SECTOR, INCLUDING ORGANS OF STATE	4 th Respondent
RAYMOND MNYAMEZELI ZONDO NO	5 th Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	6 th Respondent

FOURTH AND FIFTH RESPONDENTS' ANSWERING AFFIDAVIT



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I, the undersigned,

ITUMELENG MOSALA

hereby state under oath:


1. I am an adult male and am employed as the Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State ("**Commission**"). The Commission's main place of business situated at Hillside House, 17 Empire Road, Parktown, Johannesburg.
2. My appointment as Secretary was with effect from 1 October 2020. I am duly authorised to depose to this affidavit on behalf of the fourth and fifth respondents. Unless specified, reference to the Commission in this affidavit is also reference to fourth and fifth respondents.
3. Save where the context indicates to the contrary, or where it is otherwise stated, the facts in this affidavit are within my personal knowledge or are contained in records of the Commission under my control. They are, to be best of my knowledge and belief, both true and correct. Where I make legal submissions, I do so on the advice of the Commission's legal representatives. I accept such advise as correct.
4. I have read the founding affidavit deposed to by the applicant **Mr Jacob Gedleyihlekisa Zuma** and respond to it as below. I note that the application comprises two parts: Part A is brought on an urgent basis.
5. The Commission opposes the relief sought by the applicant in Part A of the Notice of Motion, for the following reasons:


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- 5.1. The first is that this Court lacks the requisite jurisdiction to entertain this matter.
- 5.2. The second is that the applicant has failed to satisfy the test for rescission, both under rule 42 of the Uniform Rules of Court, as well as under the common law.
- 5.3. Thirdly, understanding this application within the context of its full factual history reveals that it (the application) is a continuation of the pattern of abuse by the applicant of the court process. Courts should not entertain such abuse any longer.
- 5.4. Finally, the applicant does not satisfy the requirements for an interim interdict.

THIS COURT HAS NO JURISDICITON TO HEAR THE APPLICATION

6. The applicant seeks an order in terms of which this Court stays the execution of the order of a higher Court – the Constitutional Court. I am advised that this Court, with respect, has no jurisdiction to grant the relief that the applicant seeks.
7. While the Court does have jurisdiction to stay or suspend court orders, this jurisdiction extends only to its own orders. It cannot rescind, vary or stay the execution of orders issued by any other court, particularly a higher court. To suggest otherwise would wholly undermine the hierarchy of our court system, as prescribed in the Constitution. The natural flow of what the applicant proposes is


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a situation where courts interfere with and undermine each other's orders, under the guise of exercising their inherent powers. That cannot be.

8. Moreover, the applicant's contention that the Court has inherent power to stay the execution of the order of a higher court is contradicted by section 173 of the Constitution. It reads as follows:

"The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice." [Underlining added].

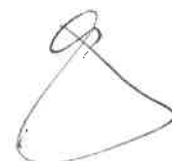
9. It should be clear from that provision that courts' inherent power does not extend to getting involved with the powers and processes of any other court.
10. In the context of this case, Constitutional Court must be left to assert its authority, as well as to deal with the applicant's persistent attempts to undermine that Court and the judicial system as a whole. In the Constitutional Court proceedings in point, Khampepe ADCJ observed (in paragraph 29 of the judgment) that:

the matter is self-evidently extraordinary. It is thus in the interests of justice to depart from ordinary procedures. Never before has this Court's authority and legitimacy been subjected to the kinds of [attacks] that Mr Zuma has elected to launch against it and its members. Never before has the judicial process been so threatened. Accordingly, it is appropriate for this Court to



exercise its jurisdiction and assert its special authority as the apex Court and ultimate guardian of the Constitution, to the exclusion of the aegis of any other court. . . .” [Underlining added].

11. Only the Constitutional Court has the jurisdiction to grant the order that the applicant invites this Court to grant in Part A of his Notice of Motion.
12. It cannot seriously be argued that the order sought is for the stay of execution of the Constitutional Court’s order, and not of that order itself. The two are exactly the same thing. The Constitutional Court ordered the applicant’s imprisonment. This Court’s ordering the stay of the execution of that order would in effect be an order for the stay of the Constitutional Court’s order.
13. On that basis, this I am advised and submit that this Court does not have jurisdiction to entertain the application presently before it.
14. In terms of section 173 of the Constitution, read with rule 12 of the Constitutional Court Rules, the Constitutional Court has the power to suspend its own orders. The applicant is hereby invited to approach the Constitutional Court, before the lapse of the period set out in the Constitutional Court’s order, for the relief that he seeks from this Court in Part A of his Notice of Motion. In the event that the applicant takes that route, the Commission might adopt a different approach.




TEST FOR RESCISSION IS NOT SATISFIED

15. To bring a rescission application under rule 42 of the Uniform Rules of Court, the applicant must demonstrate that the Constitutional Court's order for his committal to prison was sought and or granted in error, and in his absence (as party affected by that order). Absence from the proceedings under that rule means that the party simply did not know about the proceedings. The applicant's version is that he was fully aware of the proceedings before the Constitutional Court but elected not to participate in them. That election places him outside the scope of the rule 42 rescission.

16. To bring an application for the rescission of a judgement at common law, the applicant will have to show one of the following:
 - 16.1. that the order/judgment was obtained as a result of fraud on the part of the successful party and the evidence before the Court was not correct;
 - 16.2. the Court committed a *justus error*;
 - 16.3. new documents were discovered after the judgment was handed down/the order was obtained; or
 - 16.4. the judgment/order was granted by default

17. The applicant does not show these grounds. His rescission application bears not prospects of success because it does not even get out of first blocks. This application for a stay should therefore not be entertained. It is, in its bare form, just stratagem on the applicant's part to avoid the inevitable – serving his prison sentence. Further submissions will be advanced at the hearing of this matter.


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NO GOOD REASON GIVEN FOR THIS APPLICATION

18. In his founding affidavit, the applicant provides an incomplete account of the facts that led to the order of the Constitutional Court in question. Should this Court find that it has the requisite jurisdiction to entertain the application, then I submit that such an enterprise requires a full and proper account of all of the relevant facts. I set these out below.

The initial summons issued by the Commission

19. In the course of its inquiry into allegations of state capture, corruption and fraud, the Commission issued summons for the applicant to appear before it for examination from 16 to 20 November 2020. The purpose of this summons (attached as annexure "AA1") was for the applicant to give evidence and be questioned on various matters that are the subject matter of the Commission's investigation. He was also required to respond to the evidence of certain witnesses, which evidence implicates or may implicate the applicant of certain acts of wrongdoing.
20. It is important to note in this regard that much of the alleged corruption and acts which might constitute state capture occurred during the applicant's term of office as the President of the Republic of South Africa. As such, I am advised that the applicant was and remains constitutionally obliged to account for how he exercised the public power vested in him and performed his constitutional duties as the President. This obligation includes him being required to appear before the Commission.



21. The applicant attended the proceedings on 16 November 2020. On that day, his legal representatives moved an application for the Chairperson's recusal. The application was brought more than two years after the commencement of the Commission's hearings and the invitation to the applicant to give evidence. It was also brought more than three years after the appointment of the Chairperson, by the applicant, in his capacity as President of the Republic.

22. At the end of argument on the recusal application, which took up a full day, the Chairperson indicated that he would give his ruling the following day. However, on 17 November 2020, the Chairperson announced that the ruling would be given on 18 November 2020, at which stage the applicant's legal representative informed him that the applicant was unavailable on 18 November 2020 and would return to the Commission's proceedings on 19 November 2021.

23. On 19 November 2020, the Chairperson dismissed the recusal application. A copy of that ruling is attached as "**AA2**".

24. At that stage, the Head of the Commission's Legal Team, Adv Paul Pretorius, was prepared to commence questioning the applicant, in accordance with the summons that had been issued. However, the applicant's then legal representative, Adv Sikhakhane SC, informed the Chairperson of the applicant's decision to "excuse himself" from the proceedings. The allegation in the founding affidavit that the applicant understood that he was excused by the Chairperson is simply not true.



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25. Adv Sikhakhane SC also informed the Chairperson of the applicant's decision to take the recusal ruling on review, and to report the Chairperson to the Judicial Service Commission on the basis that, by deciding the applicant's recusal application, he had adjudicated a matter to which he was a party.
26. Despite being advised that he was not entitled to leave the proceedings and that his absence would constitute a criminal offence, the applicant left the proceedings during the tea adjournment, without the permission of the Chairperson. He further did not appear on 20 November 2020 as required by the summons.

The first application to the Constitutional Court

27. Given the applicant's refusal to comply with the summons issued by the Commission, the Commission approached the Constitutional Court for an order:

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- 27.1. declaring that the applicant, as the former President, is obliged to account before the Commission for his exercise of public power and performance of his constitutional obligations whilst holding that office, in respect of the matters under investigation by the Commission;
- 27.2. declaring the applicant's failure to remain in attendance at the Commission on 19 November and to appear on 20 November 2020 unlawful;



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- 27.3. directing the applicant to appear before the Commission whenever served with a summons validly issued by the Secretary of the Commission unless he has an excuse valid in law for not complying with such summons;
- 27.4. directing the applicant to give evidence and answer any questions that may be put to him once sworn in, subject only to the privilege against self-incrimination;
- 27.5. directing the applicant to comply with the fresh summons issued by the Commission, directing him to appear and be examined under oath on 18 to 22 January 2021 and 15 to 19 February 2021, all dates inclusive (copies of which are attached as “AA3” and “AA4” respectively);
- 27.6. directing the applicant to answer the allegations that witnesses at the Commission have made against or that concern him at the time that he held the office of the President of the Republic;
- 27.7. directing the applicant to comply on or before 10 January 2021 with directives already issued against him by the Chairperson of the Commission in terms of Regulation 10(6) of the Regulations of the Commission which has already been served on him by delivering the affidavit(s) contemplated in those directives; and



- 27.8. directing with any directives that the Chairperson may validly issue against him in the future under regulation 10(6) of the Regulations of the Commission in connection with matters being investigated by the Commission.
28. A copy of the notice of motion in that application is attached as “AA5”.
29. The application was argued before the Constitutional Court on 29 December 2020. The applicant was duly served with the papers but elected not to oppose the application. Instead of filing answering papers or an explanatory affidavit before the Constitutional Court, he caused his attorneys of record to address a letter to the Commission indicating that he would not be participating in those proceedings “at all”. A copy of that letter is attached as “AA6”.

The applicants’ refusal to appear in January 2021

30. By 11 January 2021, the Constitutional Court had not yet delivered its judgment. In terms of the fresh summons that was served on the applicant, however, he was required to appear before the Commission a week later, on 18 January 2021. The Commission accordingly wrote to the applicant’s attorneys, advising the applicant that he was required to comply with the summons and appear before the Commission from 18 to 22 January 2021, notwithstanding the fact that the Constitutional Court had not yet delivered its judgment. The summons requiring him to appear on those dates remained valid and binding, as it had not been withdrawn, set aside or suspended. A copy of that letter is addressed as “AA7”.



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31. On 15 January 2021, the applicant's attorneys addressed a letter to the Commission, recording that the applicant would not be appearing between 18 and 22 January 2021. Two reasons were given for this: (a) that "*President Zuma can only be legally obliged to appear after his review application has been determined*"; and (b) that "*the Commission must await the decision of the Constitutional Court which has a bearing on President Zuma's appearance*". A copy of that letter is attached as "**AA8**". [Underlining added].
32. The applicant did not appear at the Commission between 18 and 22 January 2021 as directed.

The Constitutional Court's first judgment

33. The Constitutional Court delivered its judgment on 28 January 2021. It declared that the applicant was obliged to comply with all summonses lawfully issued by the Commission and directed him to do so. For the convenience of this Court, a copy of that judgment is attached as annexure "**AA9**". After delivery of that judgment, and on 15 February 2021, the applicant caused his then attorneys of record, Mabuza Attorneys, to address a letter to the Commission stating that he would not be presenting himself at the Commission. A copy of that letter is attached as annexure "**AA9.1**".
34. The question of the review application and its impact on the summonses was fully canvassed in the founding affidavit in that application. The applicant elected not to deal with it then. Importantly, the Constitutional Court granted its order,



notwithstanding the fact that the review application was pending before the High Court.

35. The Constitutional Court also emphasised the public importance of the applicant's evidence before the Commission. It records as follows in paragraphs 21 and 22 of the judgment:

[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 . . . and some of them fall particularly within the personal knowledge of the ex-President. . . .Sight must not be lost of the fact that it was he who was the subject of the investigation and who drew up the terms of reference that placed him at the heart of the investigation. Some of those matters may not be properly investigated without his participation. Indeed, the terms of reference require all organs of state to cooperate fully with the Commission and extend the application of the Commissions Act to it, including the power to secure and compel witnesses to appear before the Commission for the purposes of giving evidence."

36. The Court remarked further (in paragraphs 69 to 70) that:

"the respondent is firmly placed at the centre of those investigations which include the 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, the respondent 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 clear the names of those implicated from culpability."

37. The Constitutional Court accordingly ordered the applicant to comply with the summons and directives issued by the commission, and to appear and give evidence before the Commission on the dates determined.
38. Both the Constitutional Court's judgment and order were served on the applicant by Sheriff on 5 February 2021, at his residences in both Forest Town and Nkandla, as per the attached returns of service marked "AA10" and "AA11".

The applicant's continued refusal to appear before the Commission

39. On 1 February 2021, the applicant issued a public statement in his own name, entitled "*Statement on Constitutional Court Decision Compelling Me to Appear before the Commission of Inquiry into Allegations of State Capture.*" A copy of that statement is attached as "AA12". In it, the applicant informed the public that:

"The Commission into Allegations of State Capture led by the Deputy Chief Justice, has followed in the steps of the former Public Protector in how it has also continued with creating a special and different approach to specifically deal with Zuma. The chairperson of the commission, unprovoked, has


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called special press conferences to make specific announcements about Zuma. This has never happened for any other witness. Recently the commission ran to the Constitutional Court on an urgent basis to get the Constitutional Court to compel me to attend at the commission and to compel me to give answers at the commission, effectively undermining a litany of my constitutional rights including the right to the presumption of innocence. I have never said that I do not want to appear before the commission but have said that I cannot appear before the Deputy Chief Justice Zondo because of a well-founded apprehension of bias and a history of personal relationships between the Deputy Chief Justice and myself. I have taken the decision by the Deputy Chief Justice not to recuse himself on review as I believe his presiding over the proceedings does not provide me with the certainty of a fair and just hearing.

The recent decision of the Constitutional Court also mimics the posture of the commission in that it has now also created a special and different set of circumstances specifically designed to deal with Zuma by suspending my Constitutional rights rendering me completely defenceless against the commission. . . . The Commission . . . should have been rightly named the Commission of Inquiry into Allegations of State Capture against Jacob Zuma as it has been obviously established to investigate me specifically.

. . .
It is clear that the laws of this country are politicised even at the highest court in the land. Recently at the State Capture Commission, allegations made against the judiciary have been overlooked and suppressed by the chairperson himself. It is also patently clear to me that I am being singled out for different and special treatment by the judiciary and the legal system as a whole. I therefore state in advance that the Commission into Allegations of State Capture can expect no further co-operation from me in any of their processes going forward. If this stance is considered to be a violation of their law, then let their law take its course.

I do not fear being arrested, I do not fear being convicted, nor do I fear being incarcerated . . .


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In the circumstances, I am left with no other alternative but to be defiant against injustice as I did against the apartheid government. I am again prepared to go to prison to defend the Constitutional rights that I personally fought for and to serve whatever sentence that this democratically elected government deems appropriate as part of the special and different laws for Zuma agenda. [Underlining added].

40. On 15 February 2021, and despite being summoned to do so, the applicant failed to attend the Commission. Instead, his lawyers addressed a letter to the Commission to inform it “as a matter of courtesy” that he would not be appearing between 15 and 19 February. Again, the letter cited two reasons:

40.1. First, that the Constitutional Court did not consider, determine and/or adjudicate the application to review the Chairperson’s decision not to recuse himself, and that appearing before the Commission “*would undermine and invalidate the review application.*” This claim, however, was without merit, in part because the applicant had had the opportunity to oppose the order sought from the Constitutional Court, including on the basis of his pending review application, and elected not to do so. It was therefore not open to him to use the pending review application as a basis to defy the Court’s order.

40.2. Secondly, the applicant’s attorneys contended that the summons issued to the applicant to appear on 15 to 19 February 2021 was “*irregular and not in line with the Fourth order of the Constitutional Court*”. This contention was not substantiated at all.



41. A copy of this letter is attached as "AA13".
42. Accordingly, on 15 February 2021 and after being informed of the applicant's refusal to comply with the summons and appear before the Commission, the Chairperson announced that the Commission would institute contempt of court proceedings for a punitive order holding the applicant in contempt of court.
43. On the same day, the applicant issued a further public statement, attached as "AA14", and entitled "*Final Statement on Constitutional Court Decision Compelling Me to Appear before the Commission of Inquiry into Allegations of State Capture and my Refusal to Appear before the Zondo Commission*". This statement included the following assertions:

"I have accepted that Deputy Chief Justice Zondo and due process and the law are estranged;

...

My lawyers, as a courtesy, advised the Constitutional Court that I would not participate in the proceedings, the judges of the Constitutional Court concluded that my election not to waste their time deserved a cost order against me. It has become common place for some of our courts to make these costs orders against me in order to diminish my constitutional right to approach courts.

...

It is not the authority of the Constitutional Court that I reject, but its abuse by a few judges. It is not our law that I defy, but a few lawless judges who have left their constitutional post for political expediency. . . . I protest against those in the judiciary that have become an extension of political forces that seek to destroy and control our country.



...

None can claim not to see that the recent judgment of the Constitutional Court is a travesty of justice.

...

I protest against our black, red and green robes, dressing up some individuals that have long betrayed the Constitution and their oath of office. . . . It is a protest against some in the judiciary that have sold their souls and departed from their oath of office.”

44. These statements confirm the applicant’s defiant attitude to the order issued by the Constitutional Court on 28 January 2021. It also goes further to scandalise not only the Constitutional Court, but also all other courts that have issued orders against him. It is evidently calculated to undermine public confidence in the integrity of the Constitutional Court and the judiciary more broadly. It exposes fully the allegations in the founding affidavit for what they are – untruths.

The contempt of court application

45. Given the applicant’s persistent refusal to appear before the Commission, despite a Constitutional Court order compelling him to do so, as well as his egregious undermining of the rule of law and authority of the courts, the Commission applied to the Constitutional Court on an urgent basis for an order in the following terms:

- 45.1. declaring that the applicant is guilty of contempt of court in that, in disobedience of paragraphs 4 and 5 of the Constitutional Court’s order of 28 January 2021 under case number CCT 295/20, he –



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- 45.1.1. Intentionally and unlawfully failed to appear before the Commission on 15 to 19 February 2021 in compliance with the summons issued by me on 20 November 2020, which directed him to appear and give evidence before the Commission on the said dates; and
- 45.1.2. Intentionally and unlawfully failed or refused to furnish the Commission with affidavits in compliance with the directives issued by the Chairperson of the Commission under regulation 10(6) of the Regulations of the Commission on 27 August 2020 and 8 September 2020;
- 45.2. The applicant is sentenced to imprisonment for a term of two (2) years.
- 45.3. The Minister of Police and the National Commissioner of the South African Police Service are ordered to take all such steps as may be required to give effect to the order in paragraph 45.2 above; and
- 45.4. The applicant is directed to pay the costs of the application on an attorney and own client scale, including the costs of two counsel.
46. A copy of the notice of motion in that application is attached as **“AA15”**.
47. The Chief Justice was requested to issue directions for the further conduct of the matter, which he did on 1 March 2021. A copy of these directions is attached as **“AA16”**. As per these directions, the applicant was invited to file an answering



affidavit, if any, by Monday 8 March 2021 and to file written submissions on or before Friday 19 March 2021.

48. On 19 March 2021, and in the attached directions issued by the Chief Justice marked “**AA17**”, the applicant was invited to file written submissions in response to the submissions of the amicus curiae, namely the Helen Suzman Foundation.

49. On 6 April 2021, and after the hearing of the application, the Chief Justice issued a further set of directions (attached as annexure “**AA18**” to this affidavit) giving the applicant a further opportunity to make submissions to the Constitutional Court. Those directions invited the applicant to file an affidavit dealing with the following issues:

49.1. In the event that he was found to be guilty of the alleged contempt of court, what constitutes the appropriate sanction; and

49.2. In the event that the Constitutional court deemed committal to be appropriate, the nature and magnitude of sentence that should be imposed, supported by reasons.

50. The applicant did not file any affidavit as requested. Rather, he responded via a letter (“**AA18.1**”) as follows:

“I received your directions dated 9 April 2021 in which you direct me to “file an affidavit of no longer than 15 pages on or before Wednesday, 14 April 2021” to address two theoretical questions relating to sanction.

...




I have thought long and hard about the request in your directives. I have also been advised that addressing a letter of this nature to the court is unprecedented as a response to a directive to file an affidavit. However, given the unprecedented nature of my impending imprisonment by the Constitutional Court, we are indeed in unprecedented terrain.

The purpose of this letter is two-fold. First, although I am directed to address in 15 pages and within three court days my submissions on sanction in the event, I am found guilty of contempt of court and "in the event that this court deems committal to be appropriate, the nature and magnitude of the sentence supported by reasons.", I wish to advise you that I will not depose to an affidavit as presently directed. Second, I wish to advise that my stance in this regard is not out of any disrespect for you or the Court, but stems from my conscientious objection to the manner in which I have been treated. Accordingly, I set out in this letter my reasons for not participating and deem it prudent, for the record, to appraise you of my objections.

At the outset, I must state that I did not participate in the proceedings before the Constitutional Court and view the directives as nothing but a stratagem to clothe its decision with some legitimacy. Further, in directing me to depose to an affidavit, the Chairperson of the Commission, as the applicant, and some politically interested groups styled as amicus curie are given the right of rebuttal. That is in my view not a fair procedure in circumstances where my rights under sections 10, 11 and 12 of the Constitution are implicated. I am resigned to being a prisoner of the Constitutional Court because it is clear to me that the Constitutional Court considers the Zondo Commission to be central to our national life and the search for the national truth on the state of governance during my presidency. It has also become clear to me that even though the Constitutional Court has no jurisdiction Deputy Chief Justice Zondo was determined to place the matter before judges who serve as his subordinates in order to obtain the order he wants

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The directions took me by surprise in their breadth and scope. I understand them to be your attempt at giving me a right to hearing only on the question


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of sanction in the alleged theoretical or hypothetical basis that I am found guilty of contempt of court. That is of significant concern to me firstly because the Court would have known that I had decided not to participate in the proceedings of the Court. I did not ask for this right to hearing and since it is an invention of the Chief Justice I would have expected the Chief Justice to have been concerned about the motive of seeking my participation in mitigating by speculating about a decision concealed from me.

...

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.

...

My decision not to participate in the contempt of court proceedings was based on my belief that my participation would not change the atmosphere of judicial hostility and humiliation reflected in its judgment against me. It is my view or my feeling that the judges of the Constitutional Court do not intend to ensure that they address disputes involving me in a manner that accords with the independence, impartiality, dignity, accessibility, and effectiveness of the Court.

...

Your directive, Chief Justice provides that I must answer the questions in a 15- page affidavit within 3 days. Regrettably, if I accede to your request, I purge my conscientious objection for having not participated in the proceedings of the Constitutional Court. So, please accept this letter as the only manner in terms of which I am able to convey my conscientious objection to the manner in which your Constitutional Court Justices have abused their power to take away rights accorded to me by the Constitution.



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I invite you to share this letter with them as it is relevant to the directions that you have issued . . .”

51. This left the Constitutional Court with no choice but to proceed on the strength of submissions from the Commission and the *amicus curiae*, which went unchallenged by the applicant.

52. The Constitutional Court issued the order that forms the subject matter of this application.

Conclusion on the historical context

53. The following may be gleaned from the above facts:
 - 53.1. the applicant's suggestions that he has not had the opportunity to present his case are to be denied. The applicant has persistently and belligerently refused to recognise and engage in the court processes leading up to the order holding him in contempt of court and imposing a sanction of imprisonment.

 - 53.2. the applicant has instead chosen to make public statements in which he deliberately and vexatiously undermines the dignity and authority of the courts and the rule of law; and suggests that members of public should do the same.

 - 53.3. the intention expressed by the applicant in his founding affidavit in this application not to comply with the order of the Constitutional Court is only one of a series of orders which he has refused to comply with. The applicant


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has gone to great lengths to avoid the consequences of his actions and to undermine the foundational values of the Constitution. This cannot be condoned any longer.

54. Accordingly, his current application is not a *bona fide* effort to assert his rights. He had various opportunities to assert these rights in courts but either defied or turned them all down. The applicant simply refuses to comply with orders lawfully issued against him. That is his *modus operandi*.

REQUIREMENTS FOR AN INTERDICT HAVE NOT BEEN MET

55. I am advised that an applicant for interdictory relief must show:

55.1. a *prima facie* right;

55.2. a reasonable apprehension of irreparable harm;

55.3. that the balance of convenience favours the granting of an interim interdict; and

55.4. the applicant has no other remedy available to him.

56. I am also advised that in the context of this case, where an interim interdict is sought against organs of state, the applicant is required to demonstrate that exceptional circumstances exist warranting the granting of an interdict.

57. I submit that the applicant has failed to meet these requirements, for the reasons that follow.

58. In an attempt to establish a *prima facie* right, the applicant relies on a series of rights that he ought to have asserted in the proceedings before the Constitutional



Court, that culminated in the order that forms the subject matter of this application. He deliberately and expressly declined the opportunities to do so. I submit therefore, that to the extent that any of the applicant's rights are implicated by the Constitutional Court's order, that result is of his own making and could easily have been avoided through his participation in those proceedings.

59. The applicant was expressly invited to make submissions on the appropriate sanction for contempt of court, and, if a custodial sentence were to be imposed, what the appropriate length of the sentence would be. He ignored that invitation.
60. I deny that the minority judgment of the Constitutional Court, penned by the Honourable Madam Justice Theron J, can in any way ground the *prima facie* right that the applicant claims. The applicant is bound by the majority judgment of the Constitutional Court and cannot undermine that through reliance on a decision that is not binding.
61. The applicant's contentions in relation to his reasonable apprehension of harm amount to contentions as to why he ought not to be committed to prison, and not why he ought to be granted an interim stay of the execution of the Constitutional Court's order. The applicant was afforded several opportunities – including an express invitation – to persuade the Constitutional Court as to why he ought not to be committed to prison, and he persistently refused to participate in the court process. It is accordingly not permissible for him to raise these issues at this stage.
62. Moreover, I am advised that the applicant's concerns about his age, health and conditions in prison are all matters he is entitled to raise with the Correctional



AD PARAGRAPHS 4 – 12

67. The contents of these paragraphs are admitted.

AD PARAGRAPHS 13 – 16

68. I deny that this Court has the requisite jurisdiction to entertain this matter.

69. I further deny that the applicant's constitutional rights are at stake. He has had ample opportunity to assert his constitutional rights and has deliberately elected not to do so. The only inference here is that he is abusing the processes of this court to avoid going to prison.

AD PARAGRAPHS 17 – 23

70. I note the purpose of this application as stated by the applicant. I deny that he has made out a case for the relief that he seeks under Part A of the Notice of Motion.

AD PARAGRAPH 24

71. I deny that the applicant has established an entitlement to the hearing of this matter on an urgent basis. To the extent that this matter is urgent, the urgency was created by the applicant himself.

AD PARAGRAPHS 25 – 38

72. I have provided the Court with a full exposition of the history of the interaction between the applicant and the Commission and also the Constitutional Court.

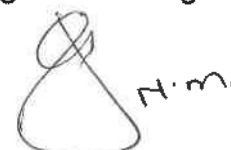


Allegations in these paragraphs that are inconsistent with what I set out above are denied.

73. The applicant's account of the facts leading up to this application is not complete and does not provide an adequate explanation as to why he has not until now sought to participate in court proceedings. It is not open to the applicant to take a deliberate decision to ignore the authority of the courts and decline the opportunity to assert his rights, only to subsequently seek to assert those rights after the conclusion of the proceedings against him.

74. It is also not open to the applicant to seek to blame his legal representatives for the fact that he has now been found guilty of contempt of court and sentenced to imprisonment for 15 months. The applicant has all along challenged the authority of both the Commission and the courts in his personal capacity, through the issue of a series of public statements. I deny that the applicant's approach to the proceedings before the Commission and the Constitutional Court was informed only by legal advice which he accepted with no question. The evidence makes clear that the applicant himself deliberately sought to undermine the authority of those processes.

75. It is relevant to note that the applicant's application for the rescission of the order against him has been set down for hearing in the Constitutional Court on 12 July 2021. I refer in this regard to the attached directions issued by the Chief Justice marked "AA16". The applicant has not, however, made out a case for the stay of execution of the order sought to be rescinded pending the hearing of that



application. In any event, as I have addressed above, I submit with respect that this Court does not have the requisite jurisdiction to grant such an order.

AD PARAGRAPHS 39 – 45

76. I deny that the applicant has made out a case for the rescission, reconsideration or variation of the order of the Constitutional Court. I further deny that this Court has the requisite jurisdiction the rescind or vary an order granted by the Constitutional Court, or to stay the execution of that order.

77. I also deny that the applicant has effectively been sentenced to a term of imprisonment without trial. He has been afforded multiple opportunities to put his case before the Courts, but he has refused on each occasion to do so. At no stage did he seek to have any matter referred to oral evidence, nor did he make any submissions as to the constitutional validity of contempt of court proceedings. Having failed to do so when given the opportunity, the applicant cannot now raise these arguments as a poorly disguised attempt to undermine the courts once again.

AD PARAGRAPHS 46 – 53

78. I reiterate that the applicant was given ample opportunity to persuade the Constitutional Court not to hold him in contempt of court, not to order a sanction of imprisonment and to impose a lesser period of imprisonment on him. He was at that stage entitled to raise any arguments regarding how his constitutional rights would be affected by the order of the Court. he was also entitled at that



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stage to raise the question of the constitutional validity of contempt of court proceedings.

79. The applicant, however, refused to participate in those proceedings. He cannot be permitted to use this deliberate choice to undermine the order granted by the Constitutional Court .

AD PARAGRAPHS 54 – 59


80. I deny that the applicant has established a prima facie right, for the reason set out more fully above.

81. I further submit that any right that the applicant may assert to approach this Court for the relief sought in Part A of the Notice of Motion is negated by the fact that this Court does not have the requisite jurisdiction to grant such an order.

AD PARAGRAPHS 60 – 62

82. I deny that the applicant has demonstrated any reasonable apprehension of harm. I have noted above that to the extent that he is concerned about conditions of imprisonment at his age and state of health, he is entitled to raise these with the Correctional Services authorities, including in an application for early parole. This is the route that all others sentenced to a period of imprisonment would be required to follow.

83. As indicated above, the applicant was afforded multiple opportunities to make submissions to the Court regarding his constitutional rights and the

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constitutionality of contempt of court proceedings. He deliberately refused to take up the opportunities when they arose and cannot be permitted to do so now.

AD PARAGRAPHS 63 – 66

84. The contents of these paragraphs are denied. The applicant had ample alternative remedies available to him. He decided not to pursue them.

AD PARAGRAPHS 67 – 72

85. I deny that the balance of convenience favours the granting of the relief sought in Part A of the applicant's Notice of Motion.

AD PARAGRAPHS 73 – 74

86. I deny that the applicant has good prospects of success in his application, for the reasons set out above. Indeed, his application amounts to an abuse of the court process and a further attempt to undermine the rule of law.

AD PARAGRAPHS 75 – 81

87. I deny that the applicant has made out a case for this matter to be heard on an urgent basis. I have addressed this issue above. To the extent that the allegations in these paragraphs are inconsistent with what has been set out above, they are denied.

88. I further deny that the applicant's fundamental rights are under direct and imminent threat. His refusal to participate in the proceedings that culminated in



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the order of the Constitutional Court, during which proceedings he was afforded ample opportunity to assert those rights, was a deliberate choice.

WHEREFORE the fourth and fifth respondents seek an order dismissing the application with costs, including the costs of two counsel.

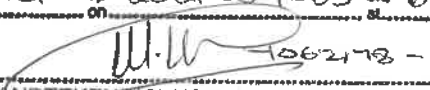

DEPONENT

I HEREBY CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Garsfontein on this the 05 day of **JULY** 2021, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Garsfontein on this the 05 day of JULY 2021, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Garsfontein on this the 05 day of JULY 2021, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

at Pretoria op 2021-07-05 om 07 15


(HANDTEKENING) KOMMISSARIS VAN EDE
(SIGNATURE) COMMISSIONER OF OATHS

Meluhudza Masiagwala
VOLLE VOORNAME EN VAN IN DRUKSKRIF
FULL FIRST NAMES AND SURNAME IN BLOCK LETTERS

277 Johnny Claassens Street
BESIGHEIDSAFRES (STRAATAFRES)
BUSINESS ADDRESS (STREET ADDRESS)

Garsfontein 10042

Sgt
SA POLICE SERVICE



 N.M.



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

**SUMMONS TO:
APPEAR AS A WITNESS**

In terms of section 3(2) of the Commissions Act of 1947, read with:

- **Proclamation 3 published in Government Gazette No. 41403 on 25 January 2018**
- **Government Notice No. 105 published in Government Gazette No. 41436 on 9 February 2018 (as amended)**
- **Rules of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State published in Government Gazette No. 41774 on 16 July 2018**

Tracking reference:	SPS17(g)/1181/PJP
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 N.M.

To the sheriff or his/her deputy Johannesburg North

INFORM:

MR. JACOB GEDLEYIHLEKISA ZUMA
c/o MR T SIBUYI / MR ET MABUZA

OF

MABUZA ATTORNEYS
1st FLOOR
83 CENTRAL STREET
HOUGHTON
JOHANNESBURG
2198

Tel: (011) 483 2387 / (011) 483 0476

that he is hereby summoned to:

appear before the Commission personally at the Civic Centre, 158 Civic Boulevard, Braamfontein, Johannesburg from **16 November 2020 to 20 November 2020 (both dates inclusive)** at **10h00am on each such day** for the purpose of giving evidence before the Commission and being questioned about any matter being investigated by the Commission, and in particular matters arising from the affidavits or statements listed in Annexure 'A' hereto.

Please take notice that should you make appropriate arrangements with the Commission prior to the dates referred to above to give evidence via video link, and you subsequently give evidence on those days via video link, that will be deemed to be sufficient compliance with this summons.

Your failure to comply with the above without sufficient cause constitutes an offence under section 6(1) of the Commissions Act 8 of 1947.

DATED at Parktown on this 29th day of OCTOBER 2020.



Prof. Itumeleng Mosala
SECRETARY:

**Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud
in the Public Sector including Organs of State**

 N. m.

Annexure 'A'

1. Themba Mveli James Maseko : 22 June 2017; 24 August 2017; 04 September 2019
2. Mabel Patronella Mentor : 25 July 2018
3. Nhlanhla Musa Nene : 01 October 2018
4. Pravin Gordhan : 11 October 2018
5. Barbara Hogan : 30 July 2018; 08 October 2018
6. Ngoako Abel Ramatlhodi : 07 November 2018
7. Mahlodi Sam Muofhe : 16 November 2018
8. Fikile Mbalula : 18 March 2019
9. Angelo Agrizzi : 15 January 2019; 26 March 2019
10. Mxolisi Sandile Oliver Nxasana : 11 June 2019
11. Brent Adrian Simons : 09 August 2019
12. Abegnigo Hlungwani : 22 August 2019
13. Meliswe Mildred Oliphant : 07 October 2019
14. Makaringe Richard Baloyi : 11 October 2019
15. Yasmin Duarte : 07 October 2019; 07 October 2019
16. Samson Gwede Mantashe : 07 October 2019; 07 October 2019
17. Zwelini Lawrence Mkhize : 08 October 2019
18. Rajesh Sundaram : 05 April 2019; 29 April 2019
19. Miriam Phumla Williams : 16 August 2018; 22 February 2019
20. Siphwe Nyanda : 02 November 2018; 11 December 2019
21. Trevor Andrew Manuel : 11 October 2018; 14 February 2019
22. Johan Wessel Booyesen : 02 April 2019; 09 April 2019; 15 April 2019
23. Nonkululeko Sindane : 16 May 2019
24. Kobus Demeyer Roelofse : 27 August 2019
25. Lizo Njenje : 01 August 2019; 20 August 2019
26. Rieaz Shaik : 21 November 2019
27. Ronald Shingange : 12 December 2019
28. Mr Y : 28 January 2020
29. Abdurrazack "Zackie" Achmat : 13 February 2020
30. Popo Simon Molefe : 17 February 2020



7.3.

The said affidavits or statements have been provided to your present legal representatives on 24 April 2020 and 30 April 2020.

Your former legal representatives were provided with all affidavits or statements until the date on which your present legal representatives confirmed their mandate to represent you on 21 April 2020.



N.M.

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

In the matter between:

Jacob Gedleyihlekisa Zuma

Applicant

In re: Application for recusal of the Chairperson of the Commission

Ruling / Judgment: 19 November 2020

ZONDO DCJ, Chairperson

Introduction

1. This is an application brought by Mr Jacob Gedleyihlekisa Zuma for my recusal as Chairperson of this Commission or for my recusal from hearing any evidence that may be given by him or any member of his family in this Commission. Mr Zuma, to whom I shall refer in this ruling/judgment as the applicant, is a former President of the Republic of South Africa. On 22 October 2020 the applicant was served with a summons issued and signed by the Secretary of the Commission requiring or compelling him to appear before the Commission at 10h00 on 16 to



20 November 2020 for the purpose of giving evidence and being questioned by an evidence leader in the Commission. The scope of his evidence was to cover about 35 affidavits or so of certain witnesses who have already testified before the Commission.

2. On Wednesday, 11 November 2020 the applicant lodged with the Commission an application for my recusal. The application was set down for hearing before me. It was opposed by the Secretary of the Commission. He delivered an answering affidavit during the weekend of the 14 November 2020. A replying affidavit by the applicant was delivered in the evening on Sunday 15 November 2020. Under circumstances that will be apparent from this judgment or ruling later, I read a certain statement into the record at the commencement of the proceedings on Monday, 16 November 2020. A copy thereof was given to the applicant's attorneys as well as the Commission's Legal Team. Subsequently, the applicant delivered another affidavit on Wednesday 18 November 2020. I heard oral argument from counsel for the applicant, Mr Sikhakhane SC, who was assisted by Mr T Masuku SC, as well as argument from Mr PJ Pretorius SC, the Head of the Commission's Legal Team. Before I proceed, it is necessary to set out the background to this application.

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Background

3. It is not necessary to set out the background to the establishment of the Commission in any great detail because that background is well-known. It suffices to point out that, in accordance with its name, the Commission was established to investigate, and, report on, allegations of State Capture, corruption and fraud in the public sector including organs of state. It was established by the applicant in January 2018 when he was still the President of the country. He did so pursuant to an order of the High Court, Pretoria, which gave effect to the then Public Protector's remedial action. In accordance with the Public Protector's remedial action and the order of the High Court, Pretoria I was selected by the Chief Justice and appointed by the applicant, as the then President of the Republic, as the Judge who would chair this Commission. My appointment was announced by the applicant in January 2018.

4. I am the sole member of the Commission. The Commission has a secretary who heads the Secretariat of the Commission. It also has its Legal Team as well as the Investigation Team. The Legal Team consists of a number of practising attorneys and advocates. The Investigation Team consists of various investigators.




N. M.

5. The terms of reference of this Commission – which were approved by the applicant when he was still President - include, apart from the provision that the Commission must investigate allegations of state capture, corruption and fraud in the public sector including organs of state, that the Commission must investigate and report on:

“1.1. whether, and to what extent and by whom attempts were made through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including Deputy Ministers), office bearers and /or functionaries employed by or office bearers of any state institution or organ of state or directors of the boards of SOE's. In particular, the commission must investigate the veracity of allegations that former Deputy Minister of Finance, Mr Mcebisi Jonas and Ms Mentor were offered Cabinet positions by the Gupta family;

1.2. whether the President had any role in the alleged offers of Cabinet positions to Mr Mcebisi Jonas and Ms Mentor by the Gupta family as alleged;

1.3. whether the appointment of any member of the National Executive, functionary and /or office bearer was disclosed to the Gupta family or any other unauthorised 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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1.4. whether the President or any member of the present or previous members of his National Executive (including Deputy Ministers) 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;

1.5. the nature and extent of corruption, if any, in the awarding of contracts, tenders to companies, business entities or organizations by public entities listed under Schedule 2 of the Public Finance Management Act No. 1 of 1999 as amended;

1.6. whether there were any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts, mining licenses, government advertising in the New Age Newspaper and any other governmental services in the business dealings of the Gupta family with government departments and SOE's;

1.7. whether any member of the National Executive and including Deputy Ministers, unlawfully or corruptly or improperly intervened in the matter of the closing of banking facilities for Gupta owned companies;

1.8. whether any advisers in the Ministry of Finance were appointed without proper procedures. In particular, and as alleged in the complaint to the Public Protector, whether two senior advisers who were appointed by Minister Des Van Rooyen to the National Treasury were so appointed without following proper procedures;

1.9. the nature and extent of corruption, if any, in the awarding of contracts and tenders to companies, business entities or organizations by Government Departments, agencies and entities. In particular, whether any member of the National Executive (including the President), public official, functionary of any organ of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest.”

6. Paragraph 3 of the terms of reference reads:

“All organs of State will be required to cooperate fully with the Commission.”

7. There are two ways in which a person may be compelled to appear before the Commission for purposes of giving evidence. The one is the issuing of a summons against such a person in terms of section 3(1)¹ read with (2)² of the

¹ Section 3(1) reads:

“(1) For the purpose of ascertaining any matter relating to the subject of its investigations, a commission shall in the Union have the powers which a Provincial Division of the Supreme Court of South Africa has within its province to summon witnesses, to cause an oath or affirmation to be administered to them, to examine them, and to call for the production of books, documents and objects.”

² Section 3(2) reads:

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Commission's Act, 1947. The other is by the issuing of a directive by the Chairperson in terms of Regulation 10(6)³ of the Regulations of the Commission. In terms of Regulation 10(6) the Chairperson also has the power to issue a directive to anybody to depose to an affidavit or affirmed declaration for the purposes of the investigations of the Commission. I have already said that the applicant was served with a summons to appear before the Commission this week. I have previously also issued two directives in terms of Regulation 10(6) against the applicant to furnish the Commission with affidavits dealing with certain matters. I will have reason to revisit this subject later in this ruling.

8. The Commission has been hearing oral evidence since August 2018 except for certain breaks it has taken. I understand that it has heard about 257 witnesses.
9. By way of an order of the High Court, Pretoria, the Commission's lifespan has been extended to the end of March 2021. Pursuant to an invitation extended to

"A summons for the attendance of a witness or for the production of any book, document or object before a commission shall be signed and issued by the secretary of the commission in a form prescribed by the chairman of the commission and shall be served in the same manner as a summons for the attendance of a witness at a criminal trial in a superior court at the place where the attendance or production is to take place."

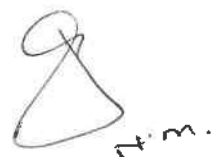
³ Regulation 10(6) reads:

"(6) For the purposes of conducting an investigation the Chairperson may direct any person to submit an affidavit or affirmed declaration or to appear before the Commission to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on the matter being investigated, and may examine such person."

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the applicant to appear before the Commission from 15 to 20 July 2019, the applicant appeared before the Commission for two and a half days or so. He gave evidence and was given an opportunity to present his side of the story and was questioned. However, while the applicant was being questioned, he objected to further questioning on the basis that he was being cross-examined. As a result of that objection a discussion ensued in terms of which an agreement was reached between the applicant's legal team and the Commission's Legal Team aimed at addressing the applicant's concerns regarding how he was questioned.


10. I announced the terms of the agreement at the hearing. One of the terms was that the Commission's Legal Team would, by 30 July 2019, furnish the applicant's legal team with a document that identified areas of interest in each affidavit in regard to which the applicant was required to provide his version. Another term was that the two teams would seek to agree the date by which the applicant would deliver his affidavits but that, if the two teams did not reach agreement, the matter would be brought to my attention and I would, after hearing both sides, determine the period within which the applicant would deliver his affidavits. Prior to the Commission's Legal Team reaching agreement with the applicant's legal team, the applicant informed the Commission through his legal team that the applicant had decided to terminate his participation in the Commission due to his dissatisfaction with how he had been questioned. However, the agreement that

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was reached included an undertaking by the applicant that he would continue to participate in the Commission and would, therefore, return on a later date to continue with his testimony.

11. Subsequent to the applicant's appearance before the Commission in July 2019, the Commission's Legal Team furnished the applicant's legal team with a document identifying "areas of interest" in various affidavits in respect of which the applicant was required to provide affidavits containing his versions. In other words, the Commission's Legal Team complied with its obligations under the agreement of July 2019. The applicant failed to agree with the Commission's Legal Team a period within which he would furnish the affidavits he had undertaken to furnish the Commission. Ultimately, I fixed a date by which the applicant had to deliver his affidavits. Nevertheless, the applicant failed to deliver those affidavits. Between July 2019 and mid December 2019 the Commission set aside various weeks for the applicant's appearance before the Commission but the attempts were unsuccessful.

12. Towards the end of 2019 the dates of 26 – 31 January 2020 were set aside for the applicant's appearance before the Commission and the applicant was notified. In December 2019 the Commission's Legal Team served the applicant with an

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application for an order to be made by me authorising the issuing of a summons to compel the applicant to appear before the Commission on the specified dates in January 2020. The applicant delivered opposing affidavits. The application was set down for hearing. On the date when the application was to be heard, it was adjourned on the basis that another date would be allocated for argument. The application was adjourned because it appeared that, owing to medical reasons, the applicant was not going to be available to appear before the Commission until after March 2020. Also, the Commission's Legal Team needed time to prepare a replying affidavit to the applicant's answering affidavit in that application. The replying affidavit was delivered by the Commission's Legal Team in due course. Before the application could be set down for hearing, the state of national disaster was declared and the national lockdown was instituted with effect from 26 March 2020 to deal with Covid-19. From that time to 28 June 2020 the Commission did not have hearings. It resumed its hearings during the week of 29 June 2020.

13. By the beginning of the national lockdown, there was a great number of witnesses who had testified before the Commission in respect of whose evidence the applicant had been served with Rule 3(3) notices in terms of the Rules of the Commission. These are notices which are served on a person who is either implicated or who may be said to be implicated in a witness' statement.

14. During August 2020 the applicant was notified that 21 – 25 September 2020 had been set down as the dates for the applicant to appear before the Commission. By the last week of August 2020 the applicant had not furnished the Commission with the affidavits he had undertaken in July 2019 to furnish to the Commission. On 27 August 2020 I signed the first ever Regulation 10(6) directive against the applicant which was issued soon thereafter and later served on the applicant. Through the Regulation 10(6) directive I sought to compel the applicant to deliver an affidavit or affidavits giving his version in response to the affidavits of Mr Popo Molefe in regard to the Commission’s investigations into certain matters at PRASA. Around 11 September 2020 I signed another Regulation 10(6) directive seeking to compel the applicant to furnish the Commission with an affidavit giving his version to the affidavits of Mr Zola Tsotsi and Mr Nick Linnell with regard to a meeting that is alleged to have been held in the President’s official residence in Durban on 8 March 2015.

15. On 1 September 2020 the applicant’s attorneys wrote to the Acting Secretary of the Commission and said that the applicant would not be able to appear before the Commission on 21 to 25 September 2020. The reasons advanced were that:

- (a) the applicant’s attorneys of record had been recently appointed as the applicant’s attorneys and needed more time in order to familiarise

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(e) the applicant was also engaged in several other cases which required his full attention.

16. In that letter the applicant's attorneys also noted that notice had been given of the intention of the Commission's Legal Team to proceed with the application for the authorisation of a summons to be issued against the applicant to compel him to appear before the Commission. The applicant's attorneys then said:

"It should follow that we must await the outcome of that application before we can discuss the possible appearance of [the applicant] at the Commission. We trust that the Commission will engage with us regarding the dates for the hearing of the application."

17. The applicant's attorneys emphasised that dates should have been discussed with them as the applicant's new legal team. They requested that future dates be discussed with them.

18. On the 21st September 2020, which had been meant to be the first day of the applicant's appearance before the Commission that week, I made an announcement at the commencement of the proceedings of the Commission. Since the applicant's attorneys had made it clear that the applicant was not going

to appear before the Commission during the week of 21 to 25 September 2020, the Commission made alternative arrangements in order to ensure that that week was not wasted.

19. The announcement that I made was that:

(a) the application for the authorisation of summons against the applicant was set down for hearing on 9 October 2020;

(b) if the applicant or his lawyers did not appear on the 9th October 2020 and did not provide good reasons why there was no appearance, the matter would proceed with or without them;

(c) the dates 16 to 20 November 2020 had been determined as the dates for the next appearance of the applicant before the Commission.

20. The applicant was to subsequently say that I had called a media conference and made this announcement at a media conference. That was not true as I had made the announcement at the commencement of the day's proceedings in the Commission.

21. On the 28th September 2020 the applicant's attorneys wrote a letter to me in which, for the first time, the applicant said that he would be seeking my recusal as the Chairperson of the Commission. The applicant's attorneys said that they had been instructed to seek my recusal "on the ground that [the applicant] reasonably apprehends that you have already adopted a biased disposition towards him and cannot bring an impartial mind to [bear on] the issues and evidence that relate to him."

22. The applicant's attorneys went on to say that the applicant's conclusion that I was no longer capable of exercising an independent and impartial mind was fortified by what he viewed "as the unwarranted public statements made by the Chairperson at the said media briefing."

23. The applicant's attorneys went on to say that the applicant has "always expressed his willingness to cooperate with the Commission". They confirmed:

"This is in spite of his reservations about the legality of the Commission and, in particular, about your suitability as Chairperson, given your personal relations with him. However, the conduct of the Chairperson towards him has left [the applicant] with no choice but to take this step in order to defend his rights as a

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citizen. [The applicant] believes that the Chairperson's conduct has stripped this Commission of its much required and vaunted legitimacy."

24. The applicant's attorneys also stated in the letter:

"Viewed in the context of previous media statements, the conduct of the Chairperson and treatment of [the applicant] by the Commission, the Chairperson's utterances have left [the applicant] with the distinct impression that the Chairperson seeks to target him for special treatment and public humiliation."

25. In paragraph 9 of the letter, the applicant's attorneys wrote:

"[The applicant] believes that the source of the Chairperson's bias against him stems from the fact that [the applicant] and the Chairperson have historical personal, family and professional relations that ought to have been publicly disclosed by the Chairperson before accepting his appointment."⁴

26. This sentence in the applicant's attorneys' letter of 28 September 2020 makes it clear that, at least as at that time, the applicant believed that the source of my

⁴ What the applicant was saying in this sentence in his attorney's letter of 28 September 2020 was that the Chairperson was biased against him because of the alleged historical, personal and family relationship. However, in his founding affidavit the applicant said that he and the Chairperson are friends, and he does not understand why the Chairperson is now hostile to him. However, no evidence of hostility was provided by the applicant.

alleged bias against him stemmed from “the fact that [the applicant] and the Chairperson have historical personal, family and professional relations that ought to have been publicly disclosed by the Chairperson before accepting his appointment.”

27. In paragraph 10.3 of the letter the applicant’s attorneys wrote:

“[The applicant] is of the firm view that the Chairperson’s bias against him is a result of personal matters and strained relations that the Chairperson ought to have disclosed right at the beginning of the Inquiry.”⁵

28. In the letter of 28 September 2020 the applicant’s attorneys also listed what they said were “some of the other reasons to be set out in greater detail in the affidavit relating to the recusal application”. These were given as:

“10.1 The Chairperson’s election to reserve media conferences for [the applicant] attests to the fact that he seeks to portray him as uncooperative and belligerent in the eyes of the public. No other witness has been subjected to such public rebuke through the media;

10.2 It has become commonplace for the Commission to parade a particular narrative through witnesses and to treat certain witnesses, particularly those who

⁵ In the founding affidavit the applicant did not provide any evidence of the allegedly “strained relations”.

implicate [the applicant], with deference. It is apparent to [the applicant] that the Commission seeks to entrench a narrative that portrays him as guilty at all costs;


10.3 [The applicant] is of the firm view that the Chairperson's bias against him is a result of personal matters and strained relations that the Chairperson ought to have disclosed right at the beginning of the Inquiry;

10.4 The Chairperson, in his engagements with witnesses testifying before him, has already prejudged the very issues he is tasked to investigate. In particular, he has already made prejudicial statements about [the applicant] while addressing some witnesses who had made no reference to [the applicant].

10.5 The Chairperson refused to believe that [the applicant's] failure to appear before the Commission early this year was due to his travel to seek medical treatment, again publicly portraying him as a liar, and

10.6 The Chairperson has joined the narrative that seeks to present [the applicant] as the cause of all the corruption he is tasked to investigate."

29. Before I proceed, I need to deal immediately with 10.5 above where it is said that "the Chairperson refused to believe that [the applicant's] failure to appear before the Commission early this year was due to his travel to seek medical treatment, again publicly portraying him as a liar". I want to indicate that there is absolutely no evidence in the papers supporting this allegation against the Chairperson.

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30. The applicant's attorneys also pointed out that until the applicant's recusal had been determined, the applicant would not take any part in the Commission.

The recusal application

31. In his founding affidavit the applicant provides what he refers to as the synopsis of the grounds upon which he seeks my recusal. He says that those grounds may be summarised as follows:

“15.1 Given our personal relations, the background of which is set out fully below, Deputy Chief Justice Zondo ought to have declined to chair the Commission, whose terms of reference indicated that I was to be the main implicated person;

15.2 In my absence, the Chairperson has made several comments whose effect is the suggestion that I am already guilty of 'state capture'. Many of these comments carried with them a miscellany on insinuations about my involvement in the unlawful capture of our State while I was President; I am advised that it is not uncommon for judges to hear testimonies that may well outrage them but they remain composed in order to create a safe forum even for the accused. In this regard, they are guarded in the comments they make while hearing testimonies;

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15.3 The Chairperson has singled me out for public announcements relating to me through the media. I am the only witness in respect of whom so many press statements have been issued by the Chairperson;

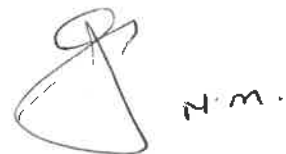
15.4 The Chairperson clearly doubts my *bona fides*. On two occasions he questioned or doubted my statement that I had travelled to seek medical attention; and

15.5 The Commission has tended to call only those witnesses, particularly members of my Cabinet, that implicate me in some way or are disgruntled that at some point I may have removed them from their Cabinet posts.”

The law

32. Counsel for the applicant submitted that the applicant’s case for my recusal is that the applicant has a reasonable apprehension that I will not bring an impartial mind to bear on the issues involving the applicant. He made it clear, however, that the applicant’s case was not based on actual bias.

33. In *President of Republic of South Africa & Others 1999 (2) BCLR 725 (CC)* the Constitutional Court had this to say about the importance of the impartial adjudication of disputes:

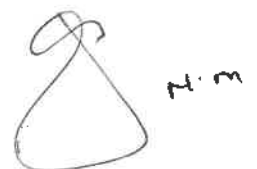
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“A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes.”⁶

34. The test for the determination of a reasonable apprehension of bias was set out in these terms by the Constitutional Court in *SARFU*:

“The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time,

⁶ SARFU at p170.



36. In *SARFU*⁸ the Court made it clear that an unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for an application for recusal and that the apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application. Courts are hesitant to make a finding of bias or to conclude that there is a reasonable apprehension of bias in the absence of convincing evidence to that effect.⁹

37. Both Mr M Sikhakhane SC and Mr PJ Pretorius SC were agreed that the test as set out above is the test for the determination of a reasonable apprehension of bias but they differed on the application of that test. No benefit will be derived from referring to other cases because I am satisfied that the application of the test to the facts of this case does not present any problem in deciding this application.

38. The first ground upon which the applicant relied in support of his application for my recusal was that he and I are friends and have been friends for many years. In this regard he said that, when the Chief Justice gave him my name as the Judge whom the Chief Justice had selected to chair this Commission, he was concerned

⁸ Para 45.

⁹ See *SACCAWU & others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (8) BCLR 886 (CC) at par 12 where the Constitutional Court said that "the presumption of judicial impartiality is not easily dislodged. It requires 'cogent' or 'convincing' evidence to be rebutted."

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that, because of that friendship, I could be disqualified. He admits that he did not raise his concerns with the Chief Justice. He says that the reason why he did not raise his concerns about me with the Chief Justice was that he feared that, if he raised his concerns, he could be seen as seeking to influence the selection of the Judge who was going to chair the Commission when the Public Protector's remedial action had made it clear that the Judge to chair the Commission should be selected by the Chief Justice.

39. After becoming aware that this was one of the grounds relied upon by the applicant, I followed the precedent of the Constitutional Court in *SARFU* and read into the record a statement which set out the facts relating to my relationship with the applicant. This was on Monday 16 November 2020. Yesterday morning the applicant furnished the Commission with an affidavit responding to my statement. In my statement I stated that, although the applicant and I have known each other since the early 1990s and have a cordial relationship, we are not friends. The applicant maintains that our relationship was that of friends. What is important, however, is that the applicant does not dispute the various matters listed in paragraph 7 of the statement I read into the record except paragraph 7(e)¹⁰.

¹⁰ Paragraph 7 of my statement reads:

"7. Although Mr Zuma and I have a cordial relationship and have over the years interacted with each other pleasantly wherever we met, mostly in government functions, Mr Zuma's statement that we are friends is not accurate. In this regard I highlight the following:

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40. With regard to paragraph 7(e) the applicant points out that it is not accurate because I did meet with him for a briefing at his official residence after the Chief Justice had given him my name as the Judge he had selected to chair this Commission. The applicant is correct that such a meeting took place but he errs in so far as he suggests that such a meeting should have been mentioned in paragraph 7(e). Paragraph 7(e) appears under the heading: "Personal relationship between myself and Mr Zuma." That topic excludes official meetings. The meeting I had with the applicant after the Chief Justice had given him my name was an official meeting. I was not paying him a personal visit. Indeed, I was

-
- (a) Mr Zuma has never been to any of the houses in which I have lived with my family since the early 1990s and I have never invited him. He only met my wife at the opening of Parliament or other government function. He has also never been to any of the places in Gauteng in which I have lived over the past 23 or 24 years since my appointment as a Judge in 1997.
 - (b) Mr Zuma and I do not socialise, and, have never socialised, together. I accept that there are functions – especially government functions - which he attended and I attended and that on such occasions we would greet each other and have brief conversations. After I had been elevated to the Bench in 1997, in January 1998 my law firm held a gala dinner in Durban for my farewell from my law firm and many people were invited including His Majesty King Goodwill Zwelithini but Mr Zuma was not among those who were invited. I have never invited Mr Zuma to any family function including my birthdays since I met him in the early 1990s. He has also never invited me to any of his birthday parties since we got to know each other.
 - (c) Mr Zuma does not get told when there is a death in my family. As a result, he has never attended any of the family funerals we have had since I got to know him even though, from the early 1990s to-date, I have lost four siblings and my mother. I have never attended the funeral of any member of the Zuma family nor does Mr Zuma inform me when there has been any death in his family.
 - (d) To the best of my recollection since the 1990s I have never shared any private meals with Mr Zuma.
 - (e) I have never been to Mr Zuma's Presidential Office when he was President nor did I go to his official residence."

Another matter in my statement that the applicant does not dispute in his subsequent affidavit of 18 November 2020 is the following statement in paragraph 4:

"4. As far as I recall, I never had any one-on-one meeting with Mr Zuma throughout the period of nine (9) years when he was President."

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informed by the Chief Justice that the applicant had asked that whichever Judge the Chief Justice selected should come and see him. Furthermore, in paragraph 7(e) I had in mind the Pretoria official residence of the President, hence the reference to the Presidential Office in that paragraph.

41. In the light of the fact that the applicant does not dispute most of the facts set out in paragraph 7 of my statement, I am of the opinion that on the undisputed facts there was not the kind of relationship between myself and the applicant that would disqualify me from chairing this Commission nor is it a proper ground for me to recuse myself.

42. In any event I am of the opinion that, if the applicant was of the view that I should not chair this Commission when the Chief Justice gave him my name, he should have raised the matter with the Chief Justice. The view he expresses that he would have been seen to be interfering with the selection of the Judge to chair the Commission is not sound. If the Chief Justice had given him the name of a Judge about whom he (i.e. the applicant) had reports of corruption which he was planning to pass on to the Chief Justice, would he have kept quiet? I do not think so. After all the Chief Justice would not have been bound by the applicant's opinion. He would have applied his mind to the disclosure and either stood by the name of the Judge he had chosen or selected another Judge. In my view, there

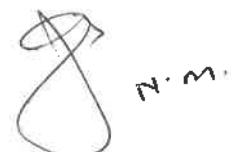
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was no sound reason why the applicant only raised the issue of a personal relationship between myself and himself close to three years after my appointment to chair this Commission. The applicant cannot be allowed to raise this issue so late in the day.¹¹

43. The applicant also contended that the manner in which the Commission called its witnesses at the beginning gave rise to a reasonable apprehension of bias because many of them appeared to be persons who had an axe to grind with him. In this regard he referred to some of the Ministers who testified before this Commission. There is no merit on this point. The Commission was free to use whatever witnesses were available as long as in the end the applicant was himself afforded a fair opportunity to come before the Commission and deal with whatever evidence such witnesses may have given against him.


44. The applicant also contended that, after he had come before the Commission and testified last year, the Commission ignored the matters that he raised during his evidence. The fact of the matter is that the applicant had not completed his evidence when he left the Commission in July 2019 and it was agreed that he

¹¹ In *Bernert v ABSA Bank Ltd* 2011 (3) SA 92 (CC) at paras 69-77 the Constitutional Court held it not to be "in the interests of justice, at this late stage, to permit the applicant to raise a complaint of bias based on shareholding by Cachalia JA". In this present case Mr Zuma failed to raise the issue of apprehension of bias for close to three years. He did not raise the concern even in July 2019 when he appeared before the Commission and testified before me.

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would come back to continue his evidence. Since then, it is now more than a year and the Commission has been trying to get the applicant to come back to the Commission to continue his evidence but the applicant has had to be compelled by way of a summons to appear before the Commission. Indeed, the Commission has served the applicant with two directives in terms of Regulation 10(6) of its Regulations compelling him to furnish the Commission with affidavits but the applicant has not complied with these directives. Indeed, the applicant has to date not furnished the Commission with affidavits he undertook in July last year he would provide to the Commission. In these circumstances it cannot lie in the applicant's mouth to say that the Commission has ignored the matters he raised in his evidence.

45. Counsel for the applicant contended that I made various comments when certain witnesses gave evidence which suggested that I thought that the applicant was guilty of state capture. I have read all the comments quoted in the founding affidavit. I do not propose to refer to any one of them. I am satisfied that the applicant's contention has no merit. As Mr Pretorius SC submitted, I am entitled and, sometimes, actually obliged, to ask witnesses questions and to seek clarification on their evidence because the Commission seeks to establish the truth on the matters that it is investigating.

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46. Even a Judge in a court of law is entitled to ask questions and seek clarifications in a trial. The main difference between the applicant's approach to the comments I make and my approach – indeed Mr Pretorius' approach - is that the applicant appears to expect me to be very passive when witnesses give evidence before me. I do not agree. I believe that, provided I keep an open mind and act fairly, there is no difficulty in me seeking clarification from witnesses and testing their evidence. What is important is to strike the right balance. I am of the view that that balance has been correctly struck in regard to most, if not all, the comments about which the applicant complains.¹²

47. In the end I conclude, having had regard to all the points raised by the applicant, including the points relating to press statements and media conferences the he has referred to in his affidavit, that the applicant has failed to meet the test for a reasonable apprehension of bias. Accordingly, I conclude that the application for my recusal falls to be dismissed and it is accordingly dismissed.

ZONDO DCJ, Chairperson of the Commission

¹² See the following cases in the context of a Judge in a Court: *Take and Save Trading CC and others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) at paras 3-6; *Sager v Smith* 2001 JDR 0212 (SCA)

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

**SUMMONS TO:
APPEAR AS A WITNESS**

In terms of section 3(2) of the Commissions Act of 1947, read with:

- **Proclamation 3 published in Government Gazette No. 41403 on 25 January 2018**
- **Government Notice No. 105 published in Government Gazette No. 41436 on 9 February 2018 (as amended)**
- **Rules of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State published in Government Gazette No. 41774 on 16 July 2018**

Tracking reference:	SPS17(g)/1181/PJP
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To the sheriff or his/her deputy of Nkandla HL

INFORM:

MR. JACOB GEDLEYIHLEKISA ZUMA

OF

KWADAKWADUNUSE HOMESTEAD,

KWANXAMALALA, NKANDLA,

KING CHETSWAYO DISTRICT,

KWAZULU-NATAL

AND

8 EPPING ROAD, FOREST TOWN,

PARKTOWN,

JOHANNESBURG (ERF 889 PARKTOWN)

that he is hereby summoned to:

appear before the Commission personally at the Civic Centre, 158 Civic Boulevard, Braamfontein, Johannesburg from **18 January 2021 to 22 January 2021 (both dates inclusive)** at 10h00am on each such day for the purpose of giving evidence before the Commission and being questioned about any matter being investigated by the Commission, and in particular matters arising from the affidavits or statements listed in Annexure 'A' hereto and any other affidavits or statements that the Commission may serve on him or his attorneys not later than 15 December 2020 and that, should Mr Zuma make appropriate arrangements with the Commission prior to the dates referred to above to give evidence via video link, and he subsequently gives evidence on those days via video link, that will be deemed to be sufficient compliance with this summons.

Your failure to comply with the above without sufficient cause constitutes an offence under section 6(1) of the Commissions Act 8 of 1947.


DATED at Parktown on this 26 day of NOVEMBER 2020.



Prof. Itumeleng Mosala

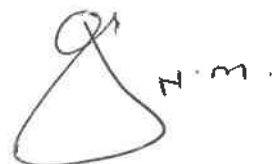
SECRETARY:

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

 N.3.

Annexure 'A'

1. Themba Mveli James Maseko : 22 June 2017; 24 August 2017; 04 September 2019
2. Mabel Patronella Mentor : 25 July 2018
3. Nhlanhla Musa Nene : 01 October 2018
4. Pravin Gordhan : 11 October 2018
5. Barbara Hogan : 30 July 2018; 08 October 2018
6. Ngoako Abel Ramatlhodi : 07 November 2018
7. Mahlodi Sam Muofhe : 16 November 2018
8. Fikile Mbalula : 18 March 2019
9. Angelo Agrizzi : 15 January 2019; 26 March 2019
10. Mxolisi Sandile Oliver Nxasana : 11 June 2019
11. Brent Adrian Simons : 09 August 2019
12. Abegnigo Hlungwani : 22 August 2019
13. Meliswe Mildred Oliphant : 07 October 2019
14. Makaringe Richard Baloyi : 11 October 2019
15. Yasmin Duarte : 07 October 2019; 07 October 2019
16. Samson Gwede Mantashe : 07 October 2019; 07 October 2019
17. Zwelini Lawrence Mkhize : 08 October 2019
18. Rajesh Sundaram : 05 April 2019; 29 April 2019
19. Miriam Phumla Williams : 16 August 2018; 22 February 2019
20. Sipiwe Nyanda : 02 November 2018; 11 December 2019
21. Trevor Andrew Manuel : 11 October 2018; 14 February 2019
22. Johan Wessel Booyesen : 02 April 2019; 09 April 2019; 15 April 2019
23. Nonkululeko Sindane : 16 May 2019
24. Kobus Demeyer Roelofse : 27 August 2019
25. Lizo Njenje : 01 August 2019; 20 August 2019
26. Rieaz Shaik : 21 November 2019
27. Ronald Shingange : 12 December 2019
28. Mr Y : 28 January 2020
29. Abdurrazack "Zackie" Achmat : 13 February 2020
30. Popo Simon Molefe : 17 February 2020



The said affidavits or statements have been provided to your present legal representatives on 24 April 2020 and 30 April 2020.

Your former legal representatives were provided with all affidavits or statements until the date on which your present legal representatives confirmed their mandate to represent you on 21 April 2020.

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

**SUMMONS TO:
APPEAR AS A WITNESS**

In terms of section 3(2) of the Commissions Act of 1947, read with:

- **Proclamation 3 published in Government Gazette No. 41403 on 25 January 2018**
- **Government Notice No. 105 published in Government Gazette No. 41436 on 9 February 2018 (as amended)**
- **Rules of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State published in Government Gazette No. 41774 on 16 July 2018**

Tracking reference:	SPS17(g)/1285/PJP
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To the sheriff or his/her deputy of Nkandla HL and Johannesburg North HL

INFORM:

MR. JACOB GEDLEYIHLEKISA ZUMA

OF

KWADAKWADUNUSE HOMESTEAD,

KWANXAMALALA, NKANDLA,

KING CHETSWAYO DISTRICT,

KWAZULU-NATAL

AND

8 EPPING ROAD, FOREST TOWN,

PARKTOWN,

JOHANNESBURG (ERF 889 PARKTOWN)

that he is hereby summoned to:

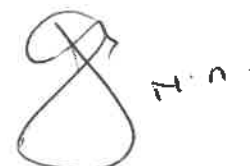
appear before the Commission personally at the Civic Centre, 158 Civic Boulevard, Braamfontein, Johannesburg from 15 February 2021 to 19 February 2021 (both dates inclusive) at 10h00am on each such day for the purpose of giving evidence before the Commission and being questioned about any matter being investigated by the Commission, and in particular matters arising from the affidavits or statements listed in Annexure 'A' hereto and any other affidavits or statements that the Commission may serve on him or his attorneys not later than 15 December 2020 and that, should Mr Zuma make appropriate arrangements with the Commission prior to the dates referred to above to give evidence via video link, and he subsequently gives evidence on those days via video link, that will be deemed to be sufficient compliance with this summons.

Your failure to comply with the above without sufficient cause constitutes an offence under section 6(1) of the Commissions Act 8 of 1947.

DATED at Parktown on this 30th day of NOVEMBER 2020.



Prof. Kameheng Mosala

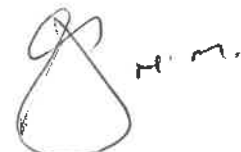


SECRETARY:

**Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud
in the Public Sector including Organs of State**

Annexure 'A'

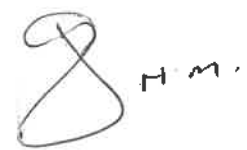
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The said affidavits or statements have been provided to your present legal representatives on 24 April 2020 and 30 April 2020.

Your former legal representatives were provided with all affidavits or statements until the date on which your present legal representatives confirmed their mandate to represent you on 21 April 2020.



001

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO:

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

Respondent

NOTICE OF MOTION

TAKE NOTICE THAT on a date to be determined by the Registrar of the above Honourable Court the Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, the applicant herein, intends to apply on an urgent basis to the above Honourable Court on the basis of this Honourable Court's exclusive jurisdiction under section 167(4)(e) of the Constitution, alternatively under section 167(6)(a) of the Constitution and rule 18 of the Rules of the above Honourable Court, for an order in the following terms:

- 1 In terms of rule 12 of the Rules of this Honourable Court leave is hereby granted that this application be heard as one of urgency, the rules and forms

 N.M.

of service dispensed with in accordance with any directions that the Chief Justice may issue.

2 In terms of section 172(1)(a) of the Constitution it is declared that:

2.1 Mr Jacob Gedleyihlekisa Zuma (**"the respondent"**), in his capacity as the former President and head of the national executive of the Republic of South Africa, is constitutionally obliged to appear before the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (**"the Commission"**) and account by giving evidence and answering the allegations that concern his alleged failure as President and head of the national executive to fulfil his constitutional obligations, in terms of sections 1(d), 83(b), 83(c), 96 and 182(1)(c) of the Constitution and his oath of office.

2.2 The respondent is obliged to comply with any summons signed and issued by the Secretary of the Commission served on the respondent, in accordance with section 3(2) of the Commissions Act 8 of 1947.

2.3 The respondent's conduct in excusing himself and leaving the venue of the Commission hearing on 19 November 2020 without the permission of the Chairperson is unlawful and breaches section 3(1) of the Commissions Act 8 of 1947.

2.4 The respondent's failure to appear before the Commission on 20 November 2020 in accordance with the summons issued and

served on him, without seeking and/or obtaining the permission of the Chairperson, is unlawful and breaches section 3(1) of the Commissions Act.

- 3 The respondent is ordered to comply with the summons issued by the Secretary of the Commission directing him to appear before the Commission on 18 to 22 January 2021 (both dates inclusive) and 15 February 2021 to 19 February 2021 (both dates inclusive) at 10h00 on each day, unless directed otherwise by the Chairperson.
- 4 It is ordered that, when appearing before the Commission and after he has taken the oath or affirmation, the respondent shall answer any questions put to him by the designated Evidence Leader(s) and the Chairperson of the Commission, subject to the privilege against self-incrimination, and may not rely on the right to remain silent.
- 5 Unless excused by the Chairperson, the respondent is ordered to remain in attendance at the Commission from 10h00 on 18 to 22 January 2021 (both dates inclusive) and from 10h00 on 15 to 19 February 2021 (both dates inclusive), or any other date, in respect of which a summons has been issued and served on the respondent.
- 6 The respondent is ordered to comply with the Directives issued by the Chairperson of the Commission under regulation 10.6 of the Regulations of the Commission ("the Regulations") on 27 August 2020 and 08 September 2020, and any further directives under regulation 10.6, by submitting his affidavits on the matters contemplated in those directives, by no later than 10 January 2021.

- 7 The respondent is ordered to comply with any directives that the Chairperson may validly issue in the future against the respondent in respect of matters being investigated by the Commission.
- 8 The respondent is ordered to pay costs of this application, on the scale of attorney and own client.

TAKE NOTICE FURTHER THAT, if the respondent intends to oppose the relief sought in this application he is required, given the urgency of the matter, within five (5) days of the date of this notice of motion, to notify the Registrar of this Court and the applicant in writing of his intention to do so, and further that he is required to appoint in such notification an address at which he will accept notice and service of all documents in these proceedings.

TAKE NOTICE FURTHER THAT the Court is requested to issue directions to the parties, should the respondent give notice to oppose, regarding:

- (a) the filing of answering and replying affidavits;
- (b) the filing of written submissions;
- (c) any further matters it may require to be addressed by the parties.

TAKE NOTICE FURTHER THAT the applicant has appointed the State Attorney, Johannesburg, as his attorney of record and his address, as set out below, as the address where he will accept notice and service of all documents in these proceedings.

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TAKE NOTICE FURTHER THAT the accompanying affidavit of the applicant will be used in support of this application.

DATED AT JOHANNESBURG ON THIS 3rd DAY OF DECEMBER 2020

STATE ATTORNEY, JOHANNESBURG

95 Albertina Sisulu Road
10th Floor North State Building
Johannesburg

Per: Mr Johan van Schalkwyk

+27 71 401 6235

Ref: 1544/18/P45

Email: johvanschalkwyk@justice.gov.za

TO: THE REGISTRAR OF THE CONSTITUTIONAL COURT

Private Bag X1

Constitutional Hill

Braamfontein, 2017

Johannesburg

By email: generaloffice@concourt.org.za

AND TO: MR JACOB GEDLEYIHLEKISA ZUMA

Respondent

Kwadakwadunuse Homestead, KwaNxamalala, Nkandla, King
Cetshwayo District, Kwazulu-Natal



006

CARE OF: **MABUZA ATTORNEYS**

1st Floor

83 Central Street

Houghton, 2198

Johannesburg

Ref: Mr E T Mabuza

By email: eric@mabuzas.co.za
zondiwe@mabuzas.co.za
rudolph@mabuzas.co.za

By hand and By email



N.M.



Att: Mr Dunisani Mathiba
Acting Registrar
Constitutional Court of South Africa
Constitution Hill
1 Hospital Street
Johannesburg

1st Floor
83 Central Street
Houghton
2198
PO Box 55045
Northlands 2116
Tel: +27 11 483-2387/483-0476
Fax: +27 11 728 - 0145
Direct e-mail: eric@mabuzas.co.za

Email: Mathiba@concourt.org.za
GeneralOffice@concourt.org.za

Your Ref:
Our Ref: Mr ET Mabuza/Mr RN Baloyi/Ms Z Longwe
Date: Monday, December 14, 2020

Dear Acting Registrar,

Judicial Commission of Inquiry into Allegations of State Capture and Fraud in the Public Sector Including Organs of State / President JG Zuma - Case Number: CCT295/20

We are instructed by our client, President JG Zuma that he will not be participating in these proceedings at all.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Eric T. Mabuza', written over a large, light-colored scribble.

MABUZA ATTORNEYS

CC: The State Attorney, Johannesburg
Attorneys for the Applicant
Email: johvanschalkwyk@justice.gov.za

Eric T Mabuza B.Proc (Unin) LLB (Wite) ◀ Senior Associates: Rudolph N Baloyi LLB (UL) ◀ Zondwe Longwe LLB (Wfs) ◀ Thomas Sibuyi LLB (UNISA) LLM (UNISA)
◀ Mzuphela GM Yeko B.Proc (UNITRA)

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17 Empire Road,
Parktown
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2193
Tel (International): +27 (10) 214-0651
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Web: www.sastatecapture.org.za

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

11 January 2021

To: Former President Jacob Gedleyihlekisa Zuma
C/O: Mabuza Attorneys

By hand: **KWADAKWADUNUSE HOMESTEAD,
KWANXAMALALA, NKANDLA,
KING CHETSWAYO DISTRICT,
KWAZULU-NATAL**
and
**8 EPPING ROAD, FOREST TOWN,
PARKTOWN,
JOHANNESBURG (ERF 889 PARKTOWN)**

By e-mail: thomas@mabuzas.co.za
eric@mabuzas.co.za
rudolph@mabuzas.co.za

Dear Former President Zuma

**RE: THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE
CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING
ORGANS OF STATE ("THE COMMISSION")**

YOUR APPEARANCE BEFORE THE COMMISSION ON 18 – 22 JANUARY 2021

Page 1 of 2

N. M.

1. The Commission wishes to make sure that there is no confusion on your part about your obligation to comply with the summons requiring you to appear before it on 18-22 January 2021.
2. As you know, on 29 December 2020 the Constitutional Court reserved its judgment in the application I brought in that Court for, inter alia, an order that you comply with the summonses requiring you to appear before the Commission on 18-22 January 2021 and on 15-19 February 2021. It is possible that the Constitutional Court might not have handed down its judgment by the 18th January 2021 when, in terms of the summons, you are supposed to appear before the Commission.
3. The Commission wishes to make it clear to you that, even if the Court has not handed down its judgment by 18 January 2021, you are obliged to comply with the summons and appear before it because the summons remains valid and binding on you since it has not been withdrawn, set aside or suspended. Therefore, the Commission wishes to make it clear to you that any failure on your part, without sufficient cause, to appear before it on the 18th to 22nd January 2021 will constitute a criminal offence.

Yours faithfully



PROF. ITUMELENG MOSALA

Secretary

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





**Att: Professor Itumeleng Mosala
Secretary of the Judicial Commission of Inquiry
into Allegations of State Capture, Corruption
and Fraud in the Public
Sector including Organs of State
2nd Floor, Hillside House
17 Empire Road
Parktown**

1st Floor
83 Central Street
Houghton
2198
PO Box 65045
Northlands 2116
Tel: +27 11 483-2387/483-0476
Fax: +27 11 728 - 0145
Direct e-mail: eric@mabuzas.co.za

Email: BoipeloR@commissionsc.org.za

Your Ref:
Our Ref: Mr ET Mabuza/Mr RN Balozi/Ms Z Longwe
Date: Friday, January 15, 2021

Dear Professor Mosala,

President JG Zuma's appearance before the Commission on 18 - 22 January 2021

1. We refer to your letter dated 11 January 2021 addressed to President Zuma.
2. We respectfully disagree with the Commission's view that President Zuma is obliged to appear on 18-22 January 2021 on the basis set out in your letter.
3. The Commission is aware that President Zuma has instituted an application to review and set aside the refusal by Deputy Chief Justice Zondo to recuse himself from hearing matters concerning him and his family. The review application is yet to be determined by the court. In our respectful view, President Zuma can only be legally obliged to appear after his review application has been determined.
4. We remind the Commission that it deemed appropriate to approach the Constitutional Court on an extremely urgent basis to compel President Zuma to comply with the very same summons that the Commission now wants to enforce

Eric T Mabuza B.Proc (Univ) LLB (Mts) ⚡ Senior Associates: Rudolph N Balozi LLB (UL) ⚡ Zondiso Longwe LLB (Wits) ⚡ Thomas Sibuyi LLB (UNISA) LLM (UNISA)

⚡ Maphahle GM Yeko B.Proc (UNTRA)

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and to forego some of his most fundamental rights. The Commission must therefore await the outcome of the decision of the Constitutional Court.

5. We further wish to remind the Commission respectfully that its application to the Constitutional Court did not only deal with the appearance of President Zuma but included amongst others a request for an order that President Zuma should not be allowed to exercise his constitutional right to remain silent.
6. It is therefore obvious that before any suggestion can be made about the appearance of President Zuma, the Commission must await the decision of the Constitutional Court which has a bearing on President Zuma's appearance.
7. In the circumstances, the summons purporting to compel President Zuma to appear before his review is finally determined and even before the Constitutional Court has delivered judgment on the question of his constitutional rights cannot be legally enforced at this stage.
8. We again place on record what we have previously stated regarding how the Commission continues to display conduct that shows clear bias against President Zuma. In this instance, the Commission now seeks to undermine a pending Constitutional Court judgment in pursuance of President Zuma.
9. Please be reminded that President Zuma enjoys no lesser rights than any other citizen of this country and the Commission has no powers whatsoever to act in a way that undermines President Zuma's constitutional rights.
10. It is for all the reasons mentioned above that we respectfully submit that President Zuma will not be appearing before the Commission on 18-22 January 2021. Accordingly, Counsel will not be briefed to appear.
11. The above should never be construed to suggest any disrespect or defiance of a legal process.
12. All our client's rights are reserved.

 N.M.

Yours faithfully

A handwritten signature in black ink, appearing to be 'S. Mabuza', written over a horizontal line.

MABUZA ATTORNEYS

A handwritten signature in black ink, appearing to be 'N.M.', written over a horizontal line.

N.M.



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 295/20

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 GEDLEYHLEKISA ZUMA

Respondent

and

**COUNCIL FOR THE ADVANCEMENT OF THE
SOUTH AFRICAN CONSTITUTION**

First Amicus Curiae

VUYANI NGALWANA SC

Second Amicus Curiae

THE HELEN SUZMAN FOUNDATION

Third Amicus Curiae

Neutral citation: *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma* [2021] ZACC 2

Coram: Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ

Judgments: Jafta J (unanimous)

Heard on: 29 December 2020

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Decided on: 28 January 2021

Summary: Section 3 of the Commissions Act 8 of 1947 — the power of a commission to compel a witness to appear before it — urgent application — direct access — privileges of a witness before a commission

ORDER

On application for direct access to the Constitutional Court on an urgent basis:

1. The application for direct access is granted.
2. Advocate Vuyani Ngalwana SC is not admitted as *amicus curiae*.
3. The Council for the Advancement of the South African Constitution and the Helen Suzman Foundation are admitted as *amici curiae*.
4. Mr Jacob Gedleyihlekisa Zuma is ordered to obey all summonses and directives lawfully issued by the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (Commission).
5. Mr Jacob Gedleyihlekisa Zuma is directed to appear and give evidence before the Commission on dates determined by it.
6. It is declared that Mr Jacob Gedleyihlekisa Zuma does not have a right to remain silent in proceedings before the Commission.
7. It is declared that Mr Jacob Gedleyihlekisa Zuma is entitled to all privileges under section 3(4) of the Commissions Act, including the privilege against self-incrimination.
8. Mr Jacob Gedleyihlekisa Zuma must pay the Commission's costs in this Court, including costs of two counsel.



A handwritten signature, possibly 'N.M.', is written in the bottom right corner of the page.

JUDGMENT

JAFTA J (Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring):

Introduction

[1] This matter concerns the interpretation and application of the provisions of the Commissions Act¹ and regulations made under that Act.² The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (Commission) instituted this application as a matter of urgency. The application was launched in December when this Court was on recess. The Commission sought to approach this Court directly on alternative bases. In the main, it contended that the matter falls within the exclusive jurisdiction of this Court. Alternatively, the Commission sought direct access to this Court for purposes of determining its application.

[2] Commissions of inquiry are investigative tools which the President may invoke for purposes of investigating matters of public concern or for gathering information considered necessary for formulating policy. The power to establish these commissions vests in the President and may be exercised by him or her in his or her capacity as the Head of State. It is a power expressly conferred by the Constitution.³

¹ 8 of 1947.

² Regulations of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State published in the Government Gazette number 41436 of 9 February 2018.

³ Section 84 of the Constitution provides:

- “(1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.
- (2) The President is responsible for—

[3] In *SARFU III*⁴ this Court construed section 84(2)(f) of the Constitution in terms of which the President is empowered to appoint commissions of inquiry. This Court observed that it was an executive power that was subject only to constraints of legality and those specifically mentioned in the Constitution.⁵

[4] Notably in *SARFU III* it was emphasised that the findings and recommendations made by a commission established in terms of section 84(2)(f) do not bind the President. The President is free to reject them in their entirety or select recommendations he wishes to implement. In this regard the Court said:

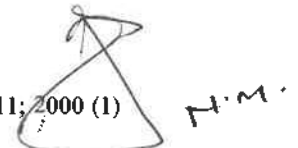
“In the case of the appointment of commissions of inquiry, it is well-established that the functions of a commission of inquiry are to determine facts and to advise the President through the making of recommendations. The President is bound neither to accept the commission’s factual findings nor is he or she bound to follow its recommendations.”⁶

-
- (a) assenting to and signing Bills;
 - (b) referring a Bill back to the National Assembly for reconsideration of the Bill’s constitutionality;
 - (c) referring a Bill to the Constitutional Court for a decision on the Bill’s constitutionality;
 - (d) summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business;
 - (e) making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive;
 - (f) appointing commissions of inquiry;
 - (g) calling a national referendum in terms of an Act of Parliament;
 - (h) receiving and recognising foreign diplomatic and consular representatives;
 - (i) appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives;
 - (j) pardoning or relieving offenders and remitting any fines, penalties or forfeitures; and
 - (k) conferring honours.”

⁴ *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) (*SARFU III*).

⁵ *Id* at para 148.

⁶ *Id* at para 146.



[5] In addition to the function of advising the President, a commission of inquiry may also serve the purpose of holding a public inquiry in respect of a matter of public concern. The purpose of a public hearing under those circumstances is to restore public confidence in the institution in which the matter that caused concern arose. Here the focus is not what the President decides to do with the findings and recommendations of a particular commission. Instead, the objective is to reveal the truth to the public pertaining to the matter that gave rise to public concern. Affirming this purpose in *Minister of Police*, this Court stated:

“In addition to advising the executive, a commission of inquiry serves a deeper public purpose, particularly at times of widespread disquiet and discontent.”⁷

[6] However, it is not every commission of inquiry that serves “a deeper public purpose”. As mentioned, the President is free to appoint a commission of inquiry, even for purposes of gathering information he or she may use to formulate policy. Ordinarily a commission that was established to gather information does not need coercive powers to force individuals to furnish it with information. But if it is a fact-finding commission, it may be necessary for it to compel witnesses to testify or produce documentary evidence.

[7] Section 84(2)(f) of the Constitution does not, however, authorise the President to confer upon the commission he or she establishes in terms of that section, the power to compel witnesses to appear before the commission. The President derives the power to do so from the Commissions Act.

The Commissions Act

[8] This is a pre-Constitution piece of legislation that came into force in April 1947. It is a short Act comprising seven sections. Section 1 deals with the application of the Act to a commission. It does not automatically apply to a

⁷ *Minister of Police v Premier, Western Cape* [2013] ZACC 33; 2014 (1) SA 1 (CC); 2013 (12) BCLR 1365 (CC) at para 45.

commission upon its establishment by the President. The section requires the President to declare that the Act will apply to the commission subject to conditions he or she may specify.⁸ The declaration must be made in the form of a proclamation in the Gazette.

[9] The section also empowers the President to make regulations that govern the effective operation of the commission in question. These regulations may confer additional powers upon the commission and spell out the procedure to be followed by the commission in conducting an investigation. The regulations may also protect the integrity of the commission and insulate it against external influences. All this may be achieved by criminalising conduct which may prevent a proper investigation.⁹ Section 1(2) prescribes amounts of fines and periods of imprisonment which may be

⁸ Section 1(1) of the Commissions Act provides:

“Whenever the Governor-General has, before or after the commencement of this Act, appointed a commission (hereinafter referred to as a ‘commission’) for the purpose of investigating a matter of public concern, he may by proclamation in the Gazette—

- (a) declare the provisions of this Act or any other law to be applicable with reference to such commission, subject to such modifications and exceptions as he may specify in such proclamation; and
- (b) make regulations with reference to such commission-
 - (i) conferring additional powers on the commission;
 - (ii) providing for the manner of holding or the procedure to be followed at the investigation or for the preservation of secrecy;
 - (iii) which he may deem necessary or expedient to prevent the commission or a member of the commission from being insulted, disparaged or belittled or to prevent the proceedings or findings of the commission from being prejudiced, influenced or anticipated;
 - (iv) providing generally for all matters which he considers it necessary or expedient to prescribe for the purposes of the investigation.”

⁹ Section 1(2) of the Commissions Act provides:

“Any regulation made under paragraph (b) of subsection (1) may provide for penalties for any contravention thereof or failure to comply therewith, by way of—

- (a) in the case of a regulation referred to in subparagraph (i), (ii) or (iv) of the said paragraph, a fine not exceeding two hundred rand or imprisonment for a period not exceeding six months;
- (b) in the case of a regulation referred to in subparagraph (iii) of the said paragraph, a fine not exceeding one thousand rand or imprisonment for a period not exceeding one year.”

imposed as penalties for breach of the regulations. The offences created by the regulations may be tried in the magistrate's court.¹⁰

[10] Of importance for present purposes are sections 3 and 6, in addition to section 1. Section 3 provides:

“(1) For the purpose of ascertaining any matter relating to the subject of its investigations, a commission shall in the Union have the powers which a Provincial Division of the Supreme Court of South Africa has within its province to summon witnesses, to cause an oath or affirmation to be administered to them, to examine them, and to call for the production of books, documents and objects.

(2) A summons for the attendance of a witness or for the production of any book, document or object before a commission shall be signed and issued by the secretary of the commission in a form prescribed by the chairman of the commission and shall be served in the same manner as a summons for the attendance of a witness at a criminal trial in a superior court at the place where the attendance or production is to take place.

(3) If required to do so by the chairman of a commission a witness shall, before giving evidence, take an oath or make an affirmation which oath or affirmation shall be administered by the chairman of the commission or such official of the commission as the chairman may designate.

(4) Any person who has been summoned to attend any sitting of a commission as a witness or who has given evidence before a commission shall be entitled to the same witness fees from public funds, as if he had been summoned to attend or had given evidence at a criminal trial in a superior court held at the place of such sitting, and in connection with the giving of any evidence or the production of any book or document before a commission, the law relating to privilege as applicable to a witness giving evidence or summoned to produce a book or document in such a court, shall apply.”

¹⁰ Section 1(3) reads:

“Notwithstanding anything to the contrary in any other law contained, a magistrate's court shall have jurisdiction to impose any penalty prescribed by any such regulation.”

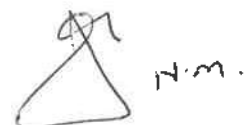
[11] This provision vests commissions with powers equal to those enjoyed by the High Court with regard to summoning witnesses; taking their evidence under oath or affirmation and demanding the production of documents and other objects which constitute evidentiary material. Section 3(2) authorises the secretary of a commission to issue a summons which must be in the form prescribed by the commission's Chairperson.

[12] What is apparent from the text of section 3(2) is that if the attendance of a witness is sought, a summons should be issued, directing the witness to appear before the commission on a specified date. Under the section the authority to issue the summons vests in the commission's secretary who should sign the summons presented to him or her if it is in the prescribed form. No substantive application on affidavit is required for that purpose. Nor is the witness to be summoned entitled to a hearing or an opportunity to make representations before the summons is issued.

[13] Once a summons is duly signed by the secretary, it should be served upon the witness in the manner similar to the process followed when summonses are served for the attendance of witnesses at a criminal trial before the High Court. The person on whom the summons is served is obliged to appear at a sitting of the commission on the designated date. Subject to the law relating to privilege applicable to a witness giving evidence in a criminal trial in the High Court, the witness summoned to the commission is obliged to give evidence and answer all questions put to him or her.

[14] Should the witness fail to attend the inquiry on the date and place specified in the summons or to remain in attendance until the conclusion of the inquiry or until he or she is excused by the Chairperson of the commission from further attendance, he or she would be guilty of an offence. Upon conviction he or she would be liable to a fine or a period of imprisonment not exceeding six months or to both such fine and imprisonment.¹¹

¹¹ Section 6 of the Commissions Act provides:



[15] It cannot be gainsaid that the Commissions Act authorises serious limitations of fundamental freedoms and rights guaranteed by the Bill of Rights. To mitigate the intrusion upon individual rights, the Act restricts its application to a commission established “for the purpose of investigating a matter of public concern”. In view of this impact of the Act on fundamental rights, the duty imposed by section 39(2) of the Constitution when legislation is interpreted, is activated during the construction of the provisions of the Commissions Act. This duty requires this Court to interpret the Act in a manner that promotes the rights and freedoms safeguarded by the Bill of Rights.¹²

[16] The phrase “a matter of public concern” is subject to an objectively ascertainable standard. It does not mean what the President in his or her mind views as public interest. Instead, it refers to the concern that the general public had in respect of the matter to be investigated by the Commission vested with coercive powers in the Commissions Act.

-
- “(1) Any person summoned to attend and give evidence or to produce any book, document or object before a commission who, without sufficient cause (the onus of proof whereof shall rest upon him) fails to attend at the time and place specified in the summons, or to remain in attendance until the conclusion of the enquiry or until he is excused by the chairman of the commission from further attendance, or having attended, refuses to be sworn or to make affirmation as a witness after he has been required by the chairman of the commission to do so or, having been sworn or having made affirmation, fails to answer fully and satisfactorily any question lawfully put to him, or fails to produce any book, document or object in his possession or custody or under his control, which he has been summoned to produce, shall be guilty of an offence and liable on conviction to a fine not exceeding fifty pounds or to imprisonment for a period not exceeding six months, or to both such fine and imprisonment.
- (2) Any person who after having been sworn or having made affirmation, gives false evidence before a commission on any matter, knowing such evidence to be false or not knowing or believing it to be true, shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred pounds or to imprisonment for a period not exceeding twelve months, or to both such fine and imprisonment.”

¹² *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at paras 49-50. See also *Van Vuren v Minister of Correctional Services* [2010] ZACC 17; 2012 (1) SACR 103 (CC); 2010 (12) BCLR 1233 (CC) at para 47; *Chagi v Special Investigating Unit* [2008] ZACC 22; 2009 (2) SA 1 (CC); 2009 (3) BCLR 227 (CC) at para 14; *Daniels v Campbell N.O.* [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at paras 43-5 of Ngcobo J’s concurring judgment and paras 81-3 of Moseneke J’s dissenting judgment; and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 72.

[17] With regard to the objective test and the proper approach to the interpretation of the phrase, this Court said in *SARFU III*:

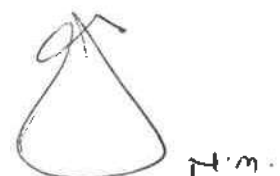
“In determining whether the subject-matter of the commission’s investigation is indeed a ‘matter of public concern’, the test to be applied is an objective one. The legally relevant question is not whether the President thought that the subject-matter of the inquiry was a matter of public concern, but whether it was objectively so at the time the decision was taken. Whether or not the matter is one of public concern is a question for the courts to determine and not a matter to be decided by the President within his own discretion. In this context, the Constitution requires that the notion of ‘public concern’ be interpreted so as to promote the spirit, purport and objects of the Bill of Rights and to underscore the democratic values of human dignity, equality and freedom. The purpose of the requirement that a matter be one of public concern is, on the one hand, to protect the interests of individuals by limiting the range of matters in respect of which the President may confer powers of compulsion upon a commission and, on the other, to protect the interests of the public by enabling effective investigation of matters that are of public concern.”¹³

[18] In the context of the Commissions Act, a matter is of public concern if it evokes public anxiety or worry and interest. The presence of one or the other of these features does not constitute public concern. With the help of a dictionary meaning, this Court in *SARFU III* stated:

“The Oxford English Dictionary defines the term ‘concern’ as ‘anxiety or worry; or matter of interest or importance to one’. The first meaning given is the meaning of ‘worry or anxiety’. The second meaning is a matter of interest or importance. In our view, ‘public concern’, as it is used in the Commissions Act, should be interpreted in a way which involves both the notion of ‘anxiety’ and ‘interest’. A matter of public concern is, therefore, not a matter in which the public merely has an interest, it is a matter about which the public is also concerned. ‘Public concern’ in this context is therefore a more restricted notion than that of public interest.”¹⁴

¹³ *SARFU III* above n 4 at para 171.

¹⁴ *Id* at para 174.



[19] In view of the nature of the allegations which are being investigated by the present Commission, there can be no doubt that they constitute matters of public concern envisaged in the relevant Act. As it appears in the Proclamation¹⁵ under which the Commission was appointed, its purpose is “to investigate allegations of state capture, corruption and fraud in organs of state”. In part, the Commission’s terms of reference read:

“A Judicial Commission of Inquiry (‘the Commission’) is hereby appointed in terms of section 84(2)(f) of the Constitution of the Republic of South Africa, 1996. The Commission is appointed to investigate matters of public and national interest concerning allegations of state capture, corruption and fraud.”¹⁶

¹⁵ Proc R3 GG 41403 of 25 January 2018.

¹⁶ The Terms of Reference read:

“1. The Commission shall inquire into, make findings, report on and make recommendations concerning the following, guided by the Public Protector’s state of capture report, the Constitution, relevant legislation, policies, and guidelines, as well as the order of the North Gauteng High Court of 14 December 2017 under case number 91139/2016:

- 1.1 whether, and to what extent and by whom attempts were made through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including Deputy Ministers), office bearers and /or functionaries employed by or office bearers of any state institution or organ of state or directors of the boards of SOEs. In particular, the commission must investigate the veracity of allegations that former Deputy Minister of Finance, Mr Mcebisi Jonas and Ms Mentor were offered Cabinet positions by the Gupta family;
- 1.2 whether the President had any role in the alleged offers of Cabinet positions to Mr Mcebisi Jonas and Ms Mentor by the Gupta family as alleged;
- 1.3 whether the appointment of any member of the National Executive, functionary and /or office bearer was disclosed to the Gupta family or any other unauthorised 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;
- 1.4 whether the President or any member of the present or previous members of his National Executive (including Deputy Ministers) 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 SOEs 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;
- 1.5 the nature and extent of corruption, if any, in the awarding of contracts, tenders to companies, business entities or organizations by public entities listed under Schedule 2 of the Public Finance Management Act No. 1 of 1999 as amended;
- 1.6 whether there were any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts, mining licenses, government advertising in the New Age Newspaper and any other governmental services

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[20] The terms of reference proceed to explicitly tabulate matters to be investigated. These include allegations that “Mr Mcebisi Jonas and Ms Mentor were offered Cabinet positions by the Gupta family”. And in particular whether the then President had any role in those offers or in informing that family about appointments to Cabinet, before those appointments were formally made. Another issue for investigation was whether the former President had unlawfully facilitated the awarding of tenders by state-owned entities to the Gupta family or any other person or company.

[21] These 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.

[22] Sight must not be lost of the fact that it was he who was the subject of the investigation and who drew up the terms of reference that placed him at the heart of the investigation. Some of those matters may not be properly investigated without his participation. Indeed, the terms of reference require all organs of state to cooperate fully with the Commission and extend the application of the Commissions Act to it, including the power to secure and compel witnesses to appear before the Commission

in the business dealings of the Gupta family with government departments and SOEs;

- 1.7 whether any member of the National Executive and including Deputy Ministers, unlawfully or corruptly or improperly intervened in the matter of the closing of banking facilities for Gupta owned companies;
- 1.8 whether any advisers in the Ministry of Finance were appointed without proper procedures. In particular, and as alleged in the complaint to the Public Protector, whether two senior advisers who were appointed by Minister Des Van Rooyen to the National Treasury were so appointed without following proper procedures;
- 1.9 the nature and extent of corruption, if any, in the awarding of contracts and tenders to companies, business entities or organizations by Government Departments, agencies and entities. In particular, whether any member of the National Executive (including the President), public official, functionary of any organ of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest.”

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for purposes of giving evidence. The terms of reference also mention that regulations would be made in terms of the Commissions Act to enable the Commission “to conduct its work meaningfully and effectively and to facilitate the gathering of evidence by conferring on the Commission powers as necessary”.

Regulations

[23] On 9 February 2018, the former President signed the regulations in question. These regulations permit legal representation for any person appearing before the Commission. Regulation 8 obliges witnesses to answer all questions put to them except only those which fall within the scope of section 3(4) of the Commissions Act.¹⁷ It will be recalled that this section affords witnesses before the Commission protections enjoyed by witnesses in a criminal trial. The regulation permits cross-examination of witnesses subject to authorisation by the Chairperson.

[24] In exchange for compelling witnesses to testify before the Commission, regulation 8(2) prohibits the use in any criminal proceedings of evidence adduced at the Commission. This prohibition does not apply to a trial relating to an offence under section 6 of the Commissions Act or regulation 12. The prohibition extends to derivative evidence that may come to light as a result of the witness’s testimony before the Commission. That evidence is inadmissible in criminal proceedings.¹⁸

[25] Regulation 10 empowers officials of the Commission to enter any premises and seize evidentiary material relevant to the Commission’s investigation.¹⁹ But this entry

¹⁷ Regulation 8(1) provides:

“No person appearing before the Commission may refuse to answer any question on any grounds other than those contemplated in section 3(4) of the Commissions Act, 1947 (Act No. 8 of 1947).”

¹⁸ Regulation 8(2) provides:

“No evidence regarding questions and answers contemplated in sub-regulation (1), and no evidence regarding any fact or information that comes to light in consequence of any such questions or answers, shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned is charged with an offence in terms of section 6 of the Commissions Act, 1947 (Act No. 8 of 1947), or regulation 12.”

¹⁹ Regulation 10(1) reads:

must be authorised by a search warrant issued by a Judge of the High Court within whose jurisdiction the premises concerned are located.²⁰ But where it is justified, a Judge may issue a warrant for the search of premises situated outside his or her area of jurisdiction.²¹

[26] While section 3 of the Commissions Act empowers the Commission's secretary to issue a summons for attendance at a hearing by witnesses, regulation 10(6) bestows the power upon the Chairperson to secure the same attendance by means of a direction. This regulation provides:

"For the purposes of conducting an investigation the Chairperson may direct any person to submit an affidavit or affirmed declaration or to appear before the Commission to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on the matter being investigated, and may examine such person."

[27] The regulation enables the Chairperson, acting on his or her own accord, to call any witnesses he considers necessary to give evidence or call upon such witness to submit a sworn statement or produce any document that has a bearing on a matter under investigation by the Commission. It bears emphasis that the process regulated by regulation 10(6) differs from that which is governed by section 3 of the Commissions Act. The regulation 10(6) process does not require a summons to be

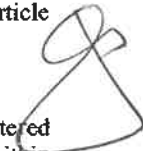
"The Chairperson or any officer may, with a warrant, for the purposes of the inquiry, at all reasonable times and without prior notice or with such notice as he or she may deem appropriate enter and inspect any premises and demand and seize any document or article which is on such premises."

²⁰ Regulation 10(3) provides:

"Subject to sub-regulation (4), the premises referred to in sub-regulation (1) may be entered only by virtue of a warrant issued in chambers by a judge of the area of jurisdiction within which the premises are situated."

²¹ Regulation 10(4) reads:

"A warrant referred to in sub-regulation (1) may be issued by a judge in respect of premises situated in another area of jurisdiction, if he or she deems it justified."



issued but a direction only. Failure to comply with that direction may, in appropriate circumstances, constitute an offence.²²

[28] It is against this legislative backdrop that the present claim by the Commission must be adjudicated. This is so because the Proclamation under which the Commission was established explicitly states that the Commission was established in terms of section 84(2)(f) of the Constitution.²³ And in the Government Gazette of 9 February 2018, the provisions of the Commissions Act were extended to apply to the Commission.²⁴

Factual background

[29] It must be mentioned at the outset that the facts placed before this Court were furnished only by the Commission. Former President Jacob Gedleyihlekisa Zuma (respondent) has decided not to participate in these proceedings. This means that the matter will be determined on the basis of the version provided by the Commission, which is the applicant here. The facts as set out in the Commission's papers are not disputed and as a result they will be taken as correct.

²² Regulation 12(2) provides:

"Any person who wilfully hinders, resists or obstructs the Chairperson or any officer in the exercise of any power contemplated in regulation 10 is guilty of an offence."

²³ The Proclamation states:

"In terms of section 84(2)(f) of the Constitution of the Republic of South Africa of 1996, I hereby appoint a Commission of Inquiry to investigate allegations of state capture, corruption and fraud in the Public Sector including organs of state with the terms of reference in the Schedule attached hereto and appoint Honourable Mr Justice Raymond Mnyamezeli Mlungisi Zondo, Deputy Chief Justice of the Republic of South Africa, as its Chairperson."

²⁴ Government Notice No 105 of 9 February 2018 reads:

"Under the powers vested in me by section 1 of the Commissions Act, 1947 (Act No. 8 of 1947) (the Act), I hereby--

- (a) declare that the provisions of the said Act shall be applicable to the Judicial Commission of Inquiry into allegations of state capture, corruption and fraud in the Public Sector including Organs of State established in terms of Proclamation No.3 of 2018 published in Gazette No. 41403 dated 25 January 2018; and
- (b) make the regulations in the Schedule with reference to the said Commission."



[30] Following remedial action issued by the Public Protector to the effect that a commission of inquiry be appointed to investigate certain allegations that were made to her during an investigation, the respondent who was then the sitting President of the Republic, established the Commission. As mentioned, he was exercising the power conferred on him by section 84(2)(f) of the Constitution. On the recommendation of the Chief Justice, the respondent appointed the Deputy Chief Justice as the Chairperson of the Commission.

[31] Among the allegations which the Public Protector ordered be investigated by a commission were matters which implicated the respondent in his capacity as President of the Republic. These included offers of appointment to Cabinet made to certain individuals by the Gupta family and whether the President and members of his Cabinet were involved in the facilitation of the awarding of tenders unlawfully by state-owned entities. Commendably the respondent, having established the Commission, drew up terms of reference which covered the allegations flagged by the Public Protector, despite the fact that he was implicated as one of the culprits. Effectively the respondent, by so doing, made himself the subject of the Commission's investigation.

[32] It must have come as no surprise to him that the Commission required his attendance in the course of its investigation. At that point the respondent, having resigned from office, was no longer President of the Republic. During September 2018 the respondent was requested to furnish the Commission with an affidavit, responding to the evidence by two witnesses, Ms Mentor and Mr Maseko, which implicated him. The respondent, through his attorneys, informed the Commission that he had sought certain records from the office of the President. The records in question had, it was stated, information relevant to matters the respondent needed to include in the requested affidavit.

[33] However, no affidavit was submitted by the respondent. More than seven months later, the Commission addressed a query to the respondent's attorneys

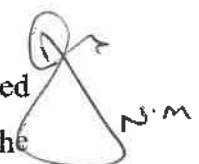
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expressing concern that no affidavit had been submitted. The respondent's attorneys responded immediately and took issue with the assertion that he had "failed to deliver an affidavit as requested". They pointed out that the Presidency had furnished them with incomplete information on 24 April 2019. They recorded their rejection of a suggestion that the respondent did not cooperate with the Commission, even though the Commission's letter under reply made no suggestion of that sort. That letter merely recorded the Commission's concern over the delay. The respondent's attorneys proceeded to lump the Commission and the Presidency together and accused them of lack of cooperation with the respondent by their failure to furnish him with information. They concluded by insisting that their client needed the full information in order to submit an affidavit and mentioned that their client's rights on the issue were reserved.

[34] On 30 April 2019, and by means of a letter, the Commission invited the respondent to appear before it from 15 to 19 July 2019. The letter stated that the purpose of the appearance was to afford the respondent an opportunity "to give his side of the story" in relation to evidence of witnesses who implicated him and also to answer questions from the Commission. The letter asked for a written confirmation that the respondent would appear before it.

[35] Following an exchange of correspondence between the Commission and the respondent, the former President appeared before the Commission on 15 July 2019. He testified for two and half days before declining to answer questions and objecting to being questioned in a manner that he said amounted to cross-examination. The respondent took the decision that he would no longer participate in the proceedings of the Commission. He did not complain only about the questioning, but also expressed misgivings about how the Commission had secured his attendance.

[36] The Commission's lawyers refuted the respondent's complaints. They pointed out that the Chairperson had authority to call witnesses to testify before the Commission and that the respondent was "invited" in the exercise of that power.




They drew the respondent's attention to the provisions of regulation 8(1) and pointed out that he was obliged to answer questions, except those in respect of which he was exempted from answering by section 3(4) of the Commissions Act. The lawyers for the Commission also refuted that the respondent was subjected to cross-examination. They concluded by asserting that the respondent's procedural objections, complaints and misgivings were not valid.

[37] This impasse prompted the Chairperson to invite the lawyers on both sides to a discussion in chambers. On 19 July 2019, an agreement was reached on the respondent's continued participation in the Commission's hearings. He withdrew the decision not to participate and promised to cooperate with the Commission.

[38] The agreement included the Commission's lawyers providing the respondent with a list of issues in respect of which he was required to testify, within two weeks from 19 July 2019. Thereafter, the respondent would furnish the Commission with an affidavit, setting out his version on those issues. The parties had contemplated that once these steps had occurred, the respondent would testify before the Commission.

[39] On 30 July 2019, the Commission's lawyers emailed a list of issues to the respondent's attorneys and concluded their message by recording that the Chairperson had directed that the respondent should return to the hearing from 14 to 25 October 2019 and from 11 to 15 November 2019. The respondent's attorneys took umbrage at the directive fixing dates on which the respondent was required to return to the Commission. They requested the Commission's lawyers to inform the Chairperson that they regarded those dates as a proposal which may be changed at the instance of either party. Further correspondence was exchanged between the lawyers of both sides. In one of the letters, the Commission's lawyers pointed out that what informed the decision on the dates in question was the fact that the lifespan of the Commission would terminate at the end of February 2020.



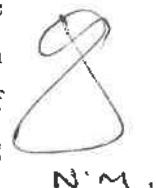
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[40] Notably the Commission disputed that it was a term of the agreement of 19 July 2019 that dates on which the respondent would return to the Commission, would be arranged by consensus between the parties. However, the Commission excused the respondent from appearing before it from 14 to 25 October 2019 as those dates clashed with his appearance before a criminal court in Pietermaritzburg. With regard to the dates in November, the respondent's attorneys pointed out that he and his legal team would not be available as they would be attending to another case in which he unsuccessfully sought an order for a permanent stay of prosecution. In a subsequent letter, they informed the Commission that the respondent was sick and that he was admitted in hospital. Consequently, he could not come to the Commission in November 2019.

[41] Meanwhile the respondent had also failed to meet the deadline agreed to on 19 July 2019 for submitting an affidavit, and no explanation was furnished to the Commission for his failure. This was a second occasion that he failed to do so. On the first occasion he complained that the Presidency had given him incomplete information. To date not a single affidavit has been presented by him to the Commission.

[42] In December 2019 the Commission's lawyers took a decision that the Commission's powers of compulsion should be invoked in order to force the respondent to attend and testify. Having sketched out in detail in their letter to the respondent's attorneys the chronology of the respondent's failures and their impact on the Commission's investigation, they concluded:

"The above record of events is a matter of material concern for the legal team of the Commission. First, the inability of the Commission to secure the attendance of Mr Zuma to continue evidence before the Commission is hampering the work of the Commission. Second, and in particular, the refusal or failure to submit an affidavit in response to the 'areas of interest' communication of 30 July 2019 is a breach of arrangement agreed and referred to above. Third, the loss of three weeks hearing time is something the Commission can ill afford both in relation to time and the costs



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involved. Finally it is noted that despite the Chairperson's various directives, you have failed or refused to approach him by way of formal applications to seek rulings excusing non-compliance with his directives."

[43] But for reasons that are not apparent from the record, the Commission's lawyers, rather than following the Commissions Act and seeking that a summons be issued, chose to give notice to the respondent, advising him that they contemplate making an application for authorisation of a summons by the Chairperson. A substantive application on affidavit was filed and served on 19 December 2019. It was to be heard on 14 January 2020. The relief sought was an order authorising and directing the Commission's secretary to issue summons against the respondent. The notice of application afforded the respondent up to 6 January 2020 to give notice to oppose and deliver an affidavit setting out the grounds of opposition. On 6 January 2020, the respondent's attorneys filed a notice to oppose and promised to file the opposing affidavit on 10 January 2020.

[44] However, on that date the respondent's attorneys informed the Commission that their client had undergone a surgery on 6 and 9 January 2020 and promised to file the affidavit on or before 14 January 2020. On 13 January 2020, the respondent filed an affidavit of 105 pages, excluding annexures. As the Commission's lawyers sought to file a reply, the application was not heard on 14 January 2020. The matter was postponed indefinitely for a reply.

[45] It was only on 28 August 2020 that the Commission issued a notice setting down the application for 9 September 2020. The respondent's attorneys responded on 30 August 2020 and pointed out that due to prior commitments the respondent's counsel were not available. They asked that the hearing be rescheduled. They also objected to dates which were fixed by the Commission for the appearance of the respondent from 21 to 25 September 2020, before the application for the issuance of summons was heard. These dates were fixed by means of a letter of 10 August 2020. The respondent's attorneys demanded to be consulted before dates were fixed.

[46] On 18 September 2020 the Commission by letter informed the respondent's attorneys that the hearing of the application for summons had been rescheduled for 9 October 2020. The Commission suggested that argument on that application may even be presented "remotely". Alternatively, the application could be determined on written submissions only. In a second letter with no date, the Commission's secretary informed the respondent's attorneys that 16 to 20 November 2020 were the new dates for the respondent's appearance at the Commission. It is not clear whether the Commission excused the respondent from attending from 21 to 25 September 2020 at the behest of his attorneys.

[47] But what is evident is that the respondent's attorneys took offence at the fixing of the new dates. They responded by informing the Commission that they were instructed to bring an application for the Chairperson's recusal.

[48] Meanwhile the Chairperson had issued two directions in terms of regulation 10(6). The first was issued on 27 August 2020 and required the respondent to respond by way of an affidavit to the evidence of Messrs Tsotsi, Linnell and Matona. The second was issued on 8 September 2020 and directed him to respond to the evidence of Mr Popo Molefe by affidavit. The respondent did not comply with both directions.

[49] On 9 October 2020, the application for the issuance of the summons was heard, in the absence of the respondent. The Commission's secretary was later authorised to issue summons which was issued on 20 October 2020. The summons required the respondent to appear before the Commission from 16 to 20 November 2020. This summons was duly served on the respondent's attorneys.

[50] On 16 November 2020, the respondent appeared before the Commission but his counsel moved the application for the Chairperson's recusal. Full argument was presented by both sides. The Chairperson took time to consider the submissions and

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made his ruling on 19 November 2020. In a fully reasoned ruling, the recusal application was dismissed. Following the ruling, the respondent's counsel informed the Commission that his client will leave the hearing as he intends taking the ruling on review.

[51] The Commission took a short adjournment and it was during that adjournment that the respondent and his legal team left the hearing. When the hearing resumed, the Chairperson was informed that the respondent had left without being excused from further attendance. Unimpressed by the turn of events, the Chairperson instructed the secretary to lay a criminal charge against the respondent and to launch an urgent application in this Court, hence the current one.

[52] But litigants do not approach this Court, which is the apex court, as of right. They require the Court's permission to do so, particularly if the relief sought can be obtained in the courts below. The exception to this rule applies where a matter falls within the exclusive jurisdiction of this Court. If a litigant establishes exclusive jurisdiction, it is entitled to approach this Court directly as the matters falling within this Court's exclusive jurisdiction cannot be entertained by other courts. Here, the Commission approached this Court on two grounds. First, it contended that the matter fell within the Court's exclusive jurisdiction. Second, the Commission sought to be granted direct access. Any one of these grounds, if successfully established, would entitle the Commission to a hearing by this Court. However, at the hearing of the matter, counsel for the Commission addressed the Court on direct access only. He submitted that if the Commission succeeds on it, it will not be necessary for the Court to determine whether its exclusive jurisdiction was engaged. Therefore, the point on direct access will be considered first.

Direct access

[53] In order to determine whether direct access should be granted, it is helpful first to identify the standard against which the request for direct access must be assessed. It is by now trite that when this Court grants direct access, it exercises a discretionary

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power.²⁵ Like all discretions, the power must be exercised judicially. What this means is that the Court must not misdirect itself in relation to the relevant facts and the applicable law. Should an incorrect legal standard be applied, it cannot be said that the discretion was properly exercised.

[54] Section 167(6) of the Constitution empowers litigants to bring cases directly to this Court if it is in the interests of justice to do so and leave is granted.²⁶ Consistent with this provision, rule 18 of the rules of this Court prescribes the procedure to be followed when cases are brought directly to this Court.²⁷ The rule requires that these cases be brought on notice of motion, supported by an affidavit that sets out fully the facts upon which the applicant relies for relief. The rule obliges the applicant to describe grounds on which the request for direct access is based.

Grounds for direct access

[55] The Commission's mainstay for seeking direct access is urgency. It pointed out that the Commission's lifespan is to come to an end on 31 March 2021. Building

²⁵ *Tsoetsi v Mutual and Federal Insurance Co Ltd* [1996] ZACC 19; 1997 (1) SA 585 (CC); 1996 (11) BCLR 1439 (CC) at paras 11-2.

²⁶ Section 167(6) of the Constitution provides:

“National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—

- (a) to bring a matter directly to the Constitutional Court; or
- (b) to appeal directly to the Constitutional Court from any other court.”

²⁷ Rule 18 provides:

- “(1) An application for direct access as contemplated in section 167(6)(a) of the Constitution shall be brought on notice of motion, which shall be supported by an affidavit, which shall set forth the facts upon which the applicant relies for relief.
- (2) An application in terms of subrule (1) shall be lodged with the Registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out—
 - (a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted;
 - (b) the nature of the relief sought and the grounds upon which such relief is based;
 - (c) whether the matter can be dealt with by the Court without the hearing of oral evidence and, if it cannot;
 - (d) how such evidence should be adduced and conflicts of fact resolved.”

on this, the Commission argued that very little time remains for it to complete hearings and compile a report. Had it not lost three months of its time to the Covid-19 lockdown, the Commission could have concluded oral hearings at the end of December 2020. As a result, the Commission now aims at completing hearings at the end of February 2021. The Commission pointed out that it has the period of January to February 2021 to hear evidence from the respondent which is pivotal to its investigation.

[56] It concluded by submitting that in these circumstances, it is urgent that this Court makes a final determination of the issues because if it were to approach the High Court, the appeal process which may ensue would defeat the objective of compelling the respondent to testify before the Commission. The Commission argued that the normal procedures are not appropriate in view of the impending termination of its existence. As mentioned, the bedrock of the Commission's argument is that anything other than direct access to this Court would result in its tenure coming to an end without hearing the respondent's testimony.

[57] Of course, this would be a cogent reason if this situation was not caused by the Commission's own conduct.²⁸ We are told that the Commission has sought the respondent's attendance at its hearings since 2018. We are also told that to date the Commission has issued no less than 2526 summonses, but we are not informed why a summons was not issued against the respondent until October 2020.

[58] Despite the constitutional injunction of equal protection and benefit of the law,²⁹ of which the Commission was aware, for reasons that have not been explained the Commission treated the respondent differently and with what I could call a measure of deference. He was only subjected to compulsion by summons when it was

²⁸ *AParty v Minister of Home Affairs; Moloko v Minister of Home Affairs* [2009] ZACC 4; 2009 (3) SA 649 (CC); 2009 (6) BCLR 611 (CC) at paras 57-9.

²⁹ Section 9(1) of the Constitution provides: "[e]veryone is equal before the law and has the right to equal protection and benefit of the law."

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too late in the day. On the occasion of the respondent's withdrawal without permission from the Commission in November 2020, the Chairperson stated:

“Given the seriousness of Mr Zuma’s conduct and the impact that his conduct may have on the work of the Commission and the need to ensure that we give effect to the Constitutional provisions that everyone is equal before the law, I have decided to request the Secretary of the Commission to lay a criminal complaint with the South African Police against Mr Zuma, so that the police can investigate his conduct and in this regard the Secretary would make available to the police all information relevant as well as make information available to the National Prosecuting Authority.”

[59] This is a classic example of the Commission invoking its coercive powers. The question that arises is whether the current situation in which the Commission finds itself would have arisen if it had timeously invoked its powers of compulsion. This requires us to look at steps taken by the Commission over time.

[60] When the respondent appeared before the Commission in July 2019, he refused to answer questions that made him uncomfortable and effectively withdrew his participation, raising complaints which the Commission viewed as lacking merit. This must have signaled to the Commission that the use of its coercive powers may be necessary. However, an agreement between the respondent and the Commission’s lawyers was brokered. Although the Commission’s lawyers kept their side of the bargain, the respondent did not. He failed to submit an affidavit he had promised to file. He took offence to the Chairperson fixing dates for his future appearance without consulting his lawyers.

[61] But of more importance is the fact that in December 2019, the Commission was convinced that a summons should be issued against the respondent. However, instead of asking that the summons be issued immediately by the Commission’s secretary, the Commission’s lawyers chose to give the respondent notice, informing him that they planned to make a substantive application to the Chairperson for authorisation of the summons. Shortly thereafter, they launched the application which was served upon

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the respondent. All of this appears not to be required by any law. And the Commission was aware that it had limited time within which to conduct hearings. As to why it did not follow the law in relation to issuing summons, we are not told.

[62] Having opted for a formal application, the Commission did not pursue and ripen it for hearing diligently. The notice of application required the respondent to file a notice to oppose and his opposing affidavit on or before 6 January 2020. On that day notice was filed without accompanying affidavits. The respondent's attorneys promised to file affidavits on 10 January 2020. The application was set down for hearing on 14 January 2020. On the eve of the hearing, the respondent filed a long affidavit. Since the Commission's lawyers wanted to file a reply the matter was postponed without fixing a date.

[63] The respondent indicated that he would be going abroad for medical treatment and that he would be back at the end of March 2020. The Chairperson exempted him from attendance during that period. But this did not mean that the application could not be heard in his absence. The Commission failed to set the matter down from 14 January 2020 up to the end of March 2020, when the national lockdown was declared. There is no explanation as to why this did not happen. In fact, that application was only set down for 9 September 2020. Again this long delay is not explained. The Commission merely says that it lost three months of its time due to the Covid-19 lockdown. The lockdown commenced on 26 March 2020. The three months lost by the Commission must be April to June 2020. It is not clear from the Commission's papers why the application was set down for 9 September 2020. The period July to August 2020 is not accounted for by the Commission.

[64] When the respondent pointed out that 9 September 2020 did not suit his legal team, the hearing of the application was rescheduled for 9 October 2020. It was only on that day that a summons against the respondent was authorised and issued. It required the respondent to appear in November 2020. During his appearance then,

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the respondent moved an application for the Chairperson's recusal. When this failed, he unilaterally withdrew from the hearing and left the Commission's venue.

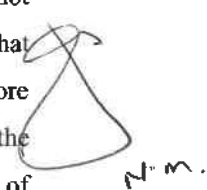
[65] By then the Commission was left with almost no time to compel the respondent to appear before it by means of laws at its disposal, hence the urgent application it launched in this Court in December 2020. Had the Commission acted diligently and in accordance with the relevant law, the present situation could have been avoided.

[66] It is not true that it was only during the respondent's walk-out in November 2020 that the Commission realised that intervention by a Court was necessary. The red lights started flashing in July 2019 when the respondent unilaterally decided to withdraw from further attendance. Later in September 2020, having berated the Chairperson for not consulting his attorneys, he made it plain that he will not participate in the hearings unless the Chairperson recused himself. This was a build up to what happened in November 2020.

[67] However, the Commission's maladroit conduct described above is not decisive of the interests of justice issue. This factor must be weighed against other factors including those that are in favour of granting direct access. These include enabling the Commission to conduct a proper investigation of matters it is tasked to determine; the fact that the matter is not opposed and that it bears reasonable prospects of success.

[68] With regard to reasons for direct access, the Commission averred:

"One of the most compelling reasons for direct access lies in the pressing public importance of the matter and prejudice to the public interest if jurisdiction is not assumed. Given the importance of Mr Zuma's role as former President, I submit that it is in the public interest that urgent steps are taken to secure his appearance before the commission. It is in the public interest to require Mr Zuma to appear before the Commission to give answers to the matters under investigation as part of his duty of

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accountability. I refer also to what I have stated about importance of the subject of the Commission's investigation."

[69] It is apparent from these reasons that a dismissal of the application for direct access would prejudice the public interest in the Commission's investigations. The respondent 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.

[70] 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, the respondent 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.

[71] The public, whose interest would be frustrated if direct access is refused, is not responsible for the blunders of the Commission's lawyers. As a result, the lack of diligence on the lawyers' part cannot be attributed to the public. In all these circumstances I am persuaded that direct access should be granted.

[72] This conclusion renders it unnecessary to determine whether the matter falls within the exclusive jurisdiction of this Court.

Applications for admission as amici

[73] Three parties applied to be admitted as amici curiae (friends of the Court). The first applicant was Advocate Vuyani Ngalwana SC, the second was the Council for the Advancement of the South African Constitution (CASAC) and the third was the Helen Suzman Foundation (Foundation). The Commission opposed the application by Ngalwana SC only and supported that of CASAC. This Court issued directions

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requiring these applicants to file their written submissions on or before 28 December 2020 which was the eve of the hearing of the main application by the Commission.³⁰

[74] Those directions informed the relevant applicants that rulings on their respective applications would be made at the time of deciding the main application. This was necessitated by the fact that this Court was still to decide whether it would entertain the main application. If direct access were to be refused, the applications for admission as amicus would have fallen away, as there would have been no matter into which the applicants could have been admitted.

[75] It is now settled that the role of an amicus is to help the Court in its adjudication of the proceedings before it. To this end, the applicant for that position must, in its application, concisely set out submissions it wishes to advance if admitted. It must also spell out the relevance of those submissions to the proceedings in question and furnish reasons why the submissions would be helpful to the Court.³¹ For the applicant's argument to be useful, it must not repeat submissions already made by other parties.³²

³⁰ The directions of 23 December 2020 read:

1. Council for the Advancement of the South African Constitution, Advocate Vuyani Ngalwana SC and the Helen Suzman Foundation are directed to file written submissions not later than 13h00 on Monday, 28 December 2020.
2. The decision on whether these parties should be admitted as amici curiae will be taken and communicated in the Court's judgment.
3. The parties mentioned in paragraph 1 will not present oral argument at the hearing on 29 December 2020.
4. The Commission may file a response to submissions referred to in paragraph 1, if it so wishes, on 30 December 2020."

³¹ Rule 10(6) of the rules of this Court provides:

- "An application to be admitted as an amicus curiae shall—
- (a) briefly describe the interest of the amicus curiae in the proceedings;
 - (b) briefly identify the position to be adopted by the amicus curiae in the proceedings; and
 - (c) set out the submissions to be advanced by the amicus curiae, their relevance to the proceedings and his or her reasons for believing that the submissions will be useful to the Court and different from those of the other parties."

³² Rule 10(7) of the rules of this Court provides:

[76] It is not generally permissible for an amicus to plead new facts which did not form part of the record or adduce fresh evidence on which its argument is to be based. Nor can the amicus expand the relief sought or introduce new relief.³³ This is because an amicus is not a party in the main proceedings and its role is restricted to helping the Court to come to the right decision.

[77] The application by Ngalwana SC does not meet the relevant requirements. He seeks relief that differs materially from that sought by the Commission and which may not be established by the facts already on record. He claims to be acting in the public interest in terms of section 38(1)(d) of the Constitution. It will be recalled that this provision confers legal standing on a party that seeks to enforce rights in the Bill of Rights by asking for appropriate relief for the breach of those rights.

[78] Accordingly, the application by Ngalwana SC must fail. It cannot be brought under the guise of an amicus application. It is a different substantive application for different relief. It should have been instituted as a separate application, provided it met the requirements of approaching this Court directly.

[79] Although the applications by CASAC and the Foundation raise in part argument that is not relevant to the issues we are called to decide, they do contain submissions which are relevant to some of the issues. And those submissions differ from those advanced by the Commission. At face value the relevant submissions look useful. Consequently, CASAC and the Foundation should be admitted as amici curiae.

“An amicus curiae shall have the right to lodge written argument, provided that such written argument does not repeat any matter set forth in the argument of the other parties and raises new contentions which may be useful to the Court.”

³³ Rule 10(8) of the rules of this Court provides:

“Subject to the provisions of rule 31, an amicus curiae shall be limited to the record on appeal or referral and the facts found proved in other proceedings and shall not add thereto and shall not present oral argument.”

Merits

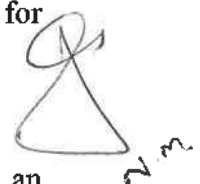
[80] The central issue that arises on the merits is whether the respondent should be compelled to appear before the Commission and testify. The subtext of this issue is whether upon appearing, he is obliged to answer all questions put to him. This requires the determination of rights held by witnesses who testify before a commission like the present one.

[81] In searching for answers to these issues, the right place at which to begin is the Commissions Act. The summonses which the Commission seeks this Court to enforce are issued in terms of the Act. Section 3(2) of the Act empowers the Commission's secretary to sign and issue summons for the attendance of witnesses at hearings by the Commission. Once a summons is issued in terms of the section and served on a prospective witness, that witness is obliged to comply. If it requires him or her to appear before the Commission on a fixed date, the witness must do so, regardless of his or her status or standing in the community.

[82] Compliance in this regard does not mean that the witness may just show his or her face at the Commission and thereafter leave at the time convenient to him or her. The obligation on the witness is to remain in attendance until the proceedings are concluded or he or she is excused by the Chairperson of the Commission from attendance. A breach of this duty constitutes an offence under section 6 of the Commissions Act.

[83] The undisputed facts here are that the respondent failed to remain in attendance after his application for recusal was dismissed on 19 November 2020. As a result, the Commission was impeded from continuing with the hearing that was scheduled for further dates in November 2020.

[84] In fact, as far back as 28 September 2020, the respondent had shown an intention not to appear before the Commission for purposes of testifying. In a letter addressed by his attorneys to the Chairperson, the respondent berated him for fixing

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the dates of 16 to 20 November 2020 for the respondent's appearance at the Commission without first discussing those dates with his lawyers. In that letter the respondent continued to question the lawfulness of the Commission which he himself had established in terms of section 84(2)(f) of the Constitution.

[85] He made it quite clear that he would not comply with the process issued by the Commission and dared the Chairperson to take whatever steps he considered appropriate. In paragraph 12 of that letter, the respondent's attorneys stated:

"Until this application for your recusal is finally determined, President Zuma will take no further part in this Commission and the Chairperson is entitled to take any such steps as he deems lawful and appropriate. We reiterate that President Zuma has questioned the lawfulness of the establishment of this Commission. He persists with this issue and reserves all his rights in this regard."

[86] The summons was not the only process from the Commission which was ignored by the respondent. In August and September 2020, the Chairperson issued two notices under regulation 10(6) of the Commission's regulations. These notices required the respondent to file affidavits with the Commission within specified periods. To date the respondent has failed to comply with those directions. It is remarkable that the respondent would flout regulations made by him whilst he was still President of the Republic.

[87] 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.

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[88] In these circumstances, I am satisfied that the claim for compelling the respondent to obey process from the Commission and testify before it, has been established.

Witnesses' rights

[89] Before leaving the Commission on 19 November 2020, counsel for the respondent cautioned that if his client were compelled to attend he would take the witness stand but would not testify. On this issue counsel said:

“If you blow us, today, you do not agree with us – as I have said, I have a mountain to climb – what happens? Do we get Mr Zuma here as a guarantee? No, no, if we are approached that way, we will just – even if we lose, we will review you, we will go as far as wherever and that is not helpful. If you force me to bring him here without the climate being created for him to believe that he is not being charged. Well, I put him there, Chair, and he will exercise his right to say nothing.”

[90] Although clumsily put, it is apparent that the respondent and his legal team believe that he has a right to remain silent during the proceedings before the Commission. However the right to remain silent that I am aware of is the one guaranteed by section 35(1)³⁴ and (3)³⁵ of the Constitution and under the common law.

³⁴ Section 35(1) of the Constitution provides:

“Everyone who is arrested for allegedly committing an offence has the right—

- (a) to remain silent;
- (b) to be informed promptly—
 - (i) of the right to remain silent; and
 - (ii) of the consequences of not remaining silent;
- (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
- (d) to be brought before a court as soon as reasonably possible, but not later than—
 - (i) 48 hours after the arrest; or
 - (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
- (e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and

N.M.

But that right is evidently available to arrested and accused persons only. When he appears before the Commission, the respondent's status is that of a witness. He is not an arrested person. Nor is he an accused person. Moreover, a witness in a criminal trial has no right to remain silent.

[91] There are cogent considerations that militate against permitting witnesses to invoke the right to remain silent before the Commission. The first is that such a proposition is contrary to the plain text of the Commissions Act. It is implicit that the Act requires witnesses to answer all questions, barring the issues covered by section 3(4) which I will address in a moment. Section 6 of that Act makes it a criminal offence to refuse to answer lawfully put questions fully and satisfactorily.

-
- (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.”

³⁵ Section 35(3) of the Constitution provides:

“Every accused person has a right to a fair trial, which includes the right—

- (a) to be informed of the charge with sufficient detail to answer it;
- (b) to have adequate time and facilities to prepare a defence;
- (c) to a public trial before an ordinary court;
- (d) to have their trial begin and conclude without unreasonable delay;
- (e) to be present when being tried;
- (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
- (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
- (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
- (i) to adduce and challenge evidence;
- (j) not to be compelled to give self-incriminating evidence;
- (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
- (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
- (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
- (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
- (o) of appeal to, or review by, a higher court.”

N.M.


[92] The other consideration is that allowing witnesses before a commission to invoke the right to remain silent would seriously undermine commissions and frustrate their purpose to investigate matters. This would include, as here, matters of public concern and interest. In *Magidiwana* this Court observed:

“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. So ordinarily, a functionary setting up a commission has to ensure an adequate opportunity to all who should be heard by it. Absent a fair opportunity, the search for truth and the purpose of the Commission may be compromised.”³⁶

[93] I conclude that witnesses who appear and testify before the Commission have no right to remain silent. On the contrary, they are obliged to give evidence and answer all questions lawfully put to them, except only questions that address matters falling within the ambit of section 3(4) of the Commissions Act.

The exception

[94] Section 3(4) affords witnesses before a commission the protections which are enjoyed by witnesses in a criminal trial. This section extends the application of laws relating to privilege, to the hearings of commissions. Therefore, for a witness in a commission hearing to lawfully decline to answer a question, it must be shown that the refusal is based on legal privilege which would have been upheld if the proceedings amounted to a criminal trial.

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³⁶ *Magidiwana v President of the Republic of South Africa (Black Lawyers Association Amicus Curiae)* [2013] ZACC 27; 2013 JDR 1788 (CC); 2013 (11) BCLR 1251 (CC) at para 15.

[95] Witnesses at a criminal trial enjoy a statutory privilege against self-incrimination.³⁷ This is a codification of the common law principle to the effect that no one may be compelled to give evidence that incriminates himself or herself. They cannot be forced to do so before or during the trial.³⁸ This principle was affirmed by this Court in *Ferreira* where it was observed that it forms part of the fair trial rights guaranteed by the predecessor to section 35 of the Constitution.³⁹

[96] In *Ferreira* this Court was concerned with the question whether a person summoned to an inquiry under section 417 of the Companies Act⁴⁰ enjoyed the privilege not to answer questions which would incriminate him or her in the commission of an offence. Ackermann J and Chaskalson P (writing for the majority) had no difficulty in locating such a right in the interim Constitution. In this regard, Ackermann J said:

“I conclude that the right of a person not to be compelled to give evidence which incriminates such person is inherent in the rights mentioned in section 25(2) and (3)(c) and (d). The fact that such rights are, in respect of an accused person, included (implicitly or otherwise) in section 25(3) of the Constitution, does not for that reason preclude the Court from giving residual content to section 11(1) and holding that section 11(1) protects rights similar to those in section 25(3)(c) and (d) in contexts and in respect of persons other than those there mentioned.”⁴¹

[97] It is evident from this statement that Ackermann J held the view that the rights in section 25(3) of the interim Constitution did not apply to persons summoned in terms of section 417 of the Companies Act to an inquiry because those persons are not accused persons. However, he held that their right to freedom guaranteed by

³⁷ Section 203 of the Criminal Procedure Act 51 of 1977 provides:

“No witness in criminal proceedings shall, except as provided by this Act or any other law, be compelled to answer any question which he would not . . . , have been compelled to answer by reason that the answer may expose him to a criminal charge.”

³⁸ *R v Camane* 1925 AD 570 at 575.

³⁹ *Ferreira v Levin N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 79 and 186.

⁴⁰ 61 of 1973.

⁴¹ *Ferreira* above n 39 at para 79.



section 11(1) of the interim Constitution, included the “right not to be compelled to give evidence against oneself in a section 417 enquiry”.⁴²

[98] On the contrary, Chaskalson P located the right against self-incrimination in section 25 of the interim Constitution. He did not see any difficulty in accepting that persons summoned under section 417 could invoke fair trial rights of accused persons in section 25 of the interim Constitution to challenge the validity of section 417. He observed:

“Ackermann J has demonstrated that the rule against being compelled to answer incriminating questions is inherent in the right to a fair trial guaranteed by s 25(3). Because he held that the applicants could not rely on s 25(3) he analysed the issues in the present case in terms of s 11(1). The reasoning that led him to conclude that s 417(2)(b) is inconsistent with s 11(1) would also have led him to conclude that it is inconsistent with s 25(3). It seems to me to be clear that this is so. To some extent his reasons are shaped by the fact that the issue is treated as one implicating freedom and not the right to a fair trial. In substance, however, they can be applied to a s 25(3) analysis and I have nothing to add to them, nor to his reasons for the conclusion that the issue of derivative evidence is one that ought properly to be decided by a trial Court.”⁴³

[99] A proper reading of *Ferreira* reveals that the majority accepted that in appropriate cases, the privilege against self-incrimination may be located in section 11(1). In making this concession, Chaskalson P said:

“Against this background I can see no objection to accepting provisionally that s 11(1) is not confined to the protection of physical integrity and that in a proper case it may be relied upon to support a fundamental freedom that is not otherwise protected adequately under chap 3.”⁴⁴

⁴² Id at para 80.

⁴³ Id at para 186.

⁴⁴ Id at para 185.



[100] Section 11 of the interim Constitution entrenched the rights in section 12 of the Constitution. Chief among them is the right to freedom and security of the person. It is this right which the minority in *Ferreira* concluded encompasses the privilege against self-incrimination.

[101] Although witnesses before the Commission may not assert the rights in section 35(1) and (3) which are reserved for arrested and accused persons, those witnesses may invoke the rights guaranteed by section 12 of the Constitution. The latter provision protects, among others, the right to freedom and security of the person which, on the authority of *Ferreira*, includes the privilege against self-incrimination.

[102] It is evident from this analysis that a statutory provision that compels witnesses to give self-incriminating evidence would be inconsistent with section 12 of the Constitution. As a result, when that statute is interpreted, the obligation imposed on courts by section 39(2) of the Constitution is triggered.⁴⁵ The Commissions Act is such a statute.

[103] Section 39(2) obliges us to interpret section 3(4) of the Commissions Act in a manner that promotes the objects of the Bill of Rights. In *Makate* this Court held:

“The objects of the Bill of Rights are promoted by, where the provision is capable of more than one meaning, adopting a meaning that does not limit a right in the Bill of Rights. If the provision is not only capable of a construction that avoids limiting rights in the Bill of Rights but also bears a meaning that promotes those rights, the court is obliged to prefer the latter meaning.”⁴⁶

[104] Here section 3(4) clearly bears a meaning that promotes the right not to be compelled to give self-incriminating evidence, guaranteed by section 12 of the Constitution.⁴⁷ According to our jurisprudence, we are bound to prefer the meaning of

⁴⁵ *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 88

⁴⁶ *Id* at para 89.

⁴⁷ Section 12(1) of the Constitution provides:

section 3(4) which protects witnesses who testify before a commission, against self-incrimination.

[105] Contrary to all this, CASAC argued that section 3(4) must be construed as excluding the privilege against self-incrimination but retaining all other privileges. This interpretation, CASAC submitted, is consistent with section 3(4) itself and section 35 of the Constitution. The flaw in this argument lies in its foundation. There is nothing in the language of section 3(4) which suggests that the privilege against self-incrimination is excluded whilst the other privileges enjoyed by witnesses in a criminal trial are retained. There is no textual foundation for contending that the interpretation advanced by CASAC is consistent with section 3(4).

[106] In addition, it is wrong to suggest that CASAC's interpretation is consistent with section 35 of the Constitution. As mentioned, section 35 confers rights on arrested and accused persons. It does not safeguard rights of witnesses, even in criminal proceedings. Yet section 3(4) affords protection to witnesses who testify before a commission of inquiry.

[107] Reliance on the regulations to buttress CASAC's interpretation is misplaced for a number of reasons. First, in our law a regulation cannot be used to interpret a provision in the statute, let alone to give a restrictive meaning to the language bearing a wider meaning.⁴⁸ Second, the regulations themselves acknowledge that a witness before a commission may decline to answer a question on the ground of a privilege envisaged in section 3(4) of the Commissions Act. Third, the fact that regulation 8(2) refers also to a self-incriminating answer does not mean that a witness is not entitled

"Everyone has the right to freedom and security of the person, which includes the right—

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way."



⁴⁸ *Road Accident Fund v Masindi* [2018] ZASCA 94; 2018 (6) SA 481 (SCA) at para 9.

to the privilege against self-incrimination. Regulation 8(2) must be read together with regulation 8(1) which permits witnesses to invoke section 3(4) privileges. Read in this way, what regulation 8(2) means is that if the privilege is not claimed and a self-incriminating answer is given, that answer will not be admissible as evidence against that witness in criminal proceedings. Lastly, section 203 of the Criminal Procedure Act protects witnesses not only against the use of their own incriminating evidence at criminal trials but also from answering questions which would expose them to criminal charges. For all these reasons, the interpretation advanced by CASAC cannot be sustained.

[108] The privilege against self-incrimination is not the only privilege witnesses before a commission are entitled to. There may be others. The test is whether such a privilege would have applied to a witness in a criminal trial, for it to be covered by section 3(4) of the Commissions Act.

[109] However, it lies with a witness before a commission to claim privilege against self-incrimination. In the event of doing so, the witness must raise the question of privilege with the Chairperson of the Commission and must demonstrate how an answer to the question in issue would breach the privilege. If the Chairperson is persuaded, he or she may permit the witness not to answer the question.⁴⁹ Privilege against self-incrimination is not there for the taking by witnesses. There must be sufficient grounds that in answering a question, the witness will incriminate himself or herself in the commission of a specified crime.

Remedy

[110] Section 172(1)(b) of the Constitution vests wide remedial powers on courts when deciding constitutional matters. The flexibility of these powers enables courts to craft orders suitable to the resolution of actual disputes between parties. Sometimes

⁴⁹ *S v Carneson* 1962 (3) SA 437 (T) at 439H.

a court is required to forge an order that addresses the underlying dispute between parties.⁵⁰

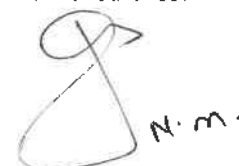
[111] Here the real dispute is about the respondent's attendance at the Commission's hearing for purposes of testifying and answering questions lawfully put to him. Consequently, it is just and equitable to direct him to obey all summonses and directives lawfully issued by the Commission. For the sake of certainty, declarators defining the parties' rights during the hearing at the Commission must be added to the order to be issued.

Costs

[112] Although the respondent has not opposed the relief sought, the Commission asked for costs against him. The Commission contended that it was the unlawful conduct on the part of the respondent which forced it to approach and seek relief from this Court. If the respondent had obeyed the process lawfully issued by the Commission, continued the argument, the Commission would not have been compelled to institute and fund litigation whose purpose was to stop the respondent's unlawful conduct.

[113] The rule that a private party that loses in constitutional litigation against organs of state should be spared from liability to pay costs, does not apply here. This rule was designed to protect private parties which raised genuine constitutional issues. This is not such a case. Indeed, *Biowatch* cautioned:

“At the same time, however, the general approach of this Court to costs in litigation between private parties and the state, is not unqualified. If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not



⁵⁰ *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at para 97.

expect that the worthiness of its cause will immunise it against an adverse costs award.”⁵¹

[114] This holds true also in respect of respondents who raise frivolous defences or whose unlawful conduct has forced the state to litigate. Like the applicants described above, they do not enjoy any immunity against adverse costs orders. But here the costs order is justified by the reprehensible conduct of the respondent towards the Commission. By ignoring process from the Commission, he did not only contravene the Commissions Act but he also breached regulations made by him for the effective operation of the Commission. His conduct seriously undermined the Commission’s investigation, that included matters on which the respondent may be the only witness with personal knowledge. For example, as the President at the relevant time, the respondent 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. These facts outweigh the respondent’s decision not to oppose the relief sought.

Order

[115] In the result the following order is made:

1. The application for direct access is granted.
2. Advocate Vuyani Ngalwana SC is not admitted as amicus curiae.
3. The Council for the Advancement of the South African Constitution and the Helen Suzman Foundation are admitted as amici curiae.
4. Mr Jacob Gedleyihlekisa Zuma is ordered to obey all summonses and directives lawfully issued by the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State (Commission).

⁵¹ *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 24 (*Biowatch*).

JAFTA J

5. Mr Jacob Gedleyihlekisa Zuma is directed to appear and give evidence before the Commission on dates determined by it.
6. It is declared that Mr Jacob Gedleyihlekisa Zuma does not have a right to remain silent in proceedings before the Commission.
7. It is declared that Mr Jacob Gedleyihlekisa Zuma is entitled to all privileges under section 3(4) of the Commissions Act, including the privilege against self-incrimination.
8. Mr Jacob Gedleyihlekisa Zuma must pay the Commission's costs in this Court, including costs of two counsel.

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For the Applicant:

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instructed by State Attorney,
Johannesburg

For the First Amicus Curiae:

MM Le Roux and O Motlhasedi
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For the Second Amicus Curiae:

V Ngalwana SC

For the Third Amicus Curiae:

M du Plessis SC, J Thobela-Mkhulisi
and C Kruyer instructed by Webber
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N.M.



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Email: BoiPeloR@commissionsc.org.za

Your Ref:
Our Ref: Mr ET Mabuza/Mr RN Baloyi/Ms Z Longwe
Date: Monday, February 15, 2021

Dear Professor Mosala,

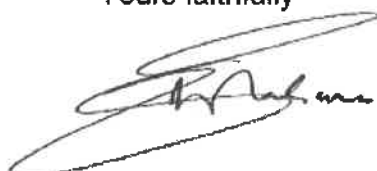
President JG Zuma's appearance before the Commission on 15 -19 February 2021

1. We refer to the above matter.
2. We formally inform the Commission, as a matter of courtesy, that our client will not be appearing before the Commission on 15-19 February 2021, for the reasons set out below.
3. The Commission is aware that the review application which President Zuma has instituted to set aside the refusal by Deputy Chief Justice Zondo to recuse himself from hearing matters concerning him and his family is yet to be determined by the court.
4. The Summons issued for our client to appear on 15-19 February 2021 is irregular and not in line with the Fourth Order of the Constitutional Court judgment of 28 January 2021.

A handwritten signature in black ink, appearing to be "N.M.", is located in the bottom right corner of the page.

5. Appearing before DCJ Zondo in the circumstances, would undermine and invalidate the review application over his decision not to recuse himself.
6. We also place on record that the review application was not before the Constitutional Court and, accordingly, was not considered, determined and/or adjudicated by that court.
7. We reiterate that the above should not be construed to suggest any defiance of a legal process.
8. All our client's rights are reserved.

Yours faithfully



MABUZA ATTORNEYS



The Judicial Commission of Inquiry into allegations of State Capture, Corruption and the Johannesburg

NO CASE NO

In the matter between:

THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE CORRUPTION AND FRAUD

Case No - Saak No

Plaintiff

and:

MR JACOB GELDLEYIHLEKISA ZUMA

Defendant


and:

Return in accordance with the provisions of the Supreme Court Act 10 of 2013, as amended

RETURN OF SERVICE - ORDER OF THE CONSTITUTIONAL COURT AND JUDGEMENT

On this 05 day of February 2021 at 14:33 I served this ORDER OF THE CONSTITUTIONAL COURT AND JUDGEMENT upon MRS Z MAHLABA, HOUSEKEEPER, ostensibly a responsible person and not less than 16 years of age, of and in control of and at the place of residence of MR JACOB GELDLEYIHLEKISA ZUMA at 8 EPPING RD, FOREST TOWN, PARKTOWN, JHB, the lastmentioned being temporarily absent and by handing to the firstmentioned a copy thereof after explaining the nature and exigency of the said process. RULE 4(1)(a)(ii) The original return together with the original abovesentioned process is dispatched to the mandator.

10
16

Sheriff Fees Rajugukile	Date Datum	09.02.2021	Tax Invoice Number Belastingfaktuur Nr.	I 62477					
			Description	Qty	Vat	Amount	M Schoenfeldt Deputy Sheriff T A Kruger Sheriff - Raju Johannesburg North - Noord Tel 011 334 4320 Fax 011 334 4320 Cell 082 442 1952 P O Box 9125 Johannesburg 2001 info@sheriffnorth.co.za Payments - Betalings		
			Email Correspondence	1	2.85	19.00	Bank: Absa Bank Code: 632005 Name: Sheriff Johannesburg North Acct No: 0660 140 867		
			SERVICE	1	10.58	79.50	4226 VatReg NO REF		
			TRAVELLING	1	13.50	90.00	1631747Christine/2		
			Registration	1	1.65	11.00	Registrar: Johannesburg		
			RETURN	1	9.63	37.50			
			Urgency fee	1	67.50	450.00			
			TELEPHONE	1	2.70	18.00			
			COLLECTION	1	2.20	8.00			
			VAT / BTW 15%			105.60			
VAT Reg No BTW Reg Nr.	4250141902	Excludes errors and omissions. Further costs may be charged. You may require this account to be taxed and vouched. Foutre en weglings is gestel. Verdere kostes mag gehel word. U kan versoek dat hierdie rekening getoets en gestel word.		Total Totaal		809.60			
COMMISSION OF INQUIRY COLLECTION		Account No. • Rekening Nr. Your Reference • U Verwysing My Reference • My Verwysing Rét: 1631747Christine/2		4226 VatReg NO REF					

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

Case No - Saak No CCT295/20

In the matter between:

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

Applicant

and:

JACOB GEDLEYIHLIKISA ZUMA

Respondent

and:

Return in accordance with the provisions of Rule 54 (6)(b) of the Uniform Rules of Court, as amended.

On this 05 day of FEBRUARY 2021 at 13:42 I served the JUDGMENT AND ORDER OF 28 JANUARY 2021 upon JACOB GEDLEYIHLIKISA ZUMA at KWADAKWADUNUSE HOMESTEAD, KWANKAMALALA, NKANDLA by handing a copy thereof to Ntoeng Sekhoto, Personal Assistant, a person apparently older than 16 years of age and employed at the Respondent given address of Residence. I further explained the nature and exigency of the process to the said person. Rule 54(6)(b)

Informed by Ntoeng Sekhoto, Personal Assistant, Mr Zuma is in a meeting. Therefore served documents on the Personal Assistant.

Sheriff Fees Baljugseld	Date Datum	05.02.2021	Tax Invoice Number Belastingfabriek No.	I 11922	
			Description.....	Qty	Vat Amount
			Registration	1	1.65 11.00
			Return & Copy	1	4.28 24.50
			Service Fee	1	10.65 71.00
			Cost of Copies	50	48.75 325.00
			Travelling	200	180.00 1200.00
			Send/rec Email	1	2.05 19.00
			Postage	1	3.75 25.00
			Urgency Fee	1	105.00 700.00
			VAT / BTW		356.93
			Total Totaal		2736.43
VAT Reg No. BTW Reg. Nr.	4310289923		You may require this account to be taxed and vouched before payment. U kan versoek dat hierdie rekening getakskeer en gosaak word voor betaling		1013 VatReg
COMMISSION OF ENQUIRY 2ND FLOOR, HILLSIDE HOUSE 17 EMPIRE ROAD, PARKTOWN, JOHANNESBURG 2193			Account No. + Rekening Nr. Your Reference + U Verwysing My Reference + My Verwysing Ret: 112606/FOPS/2		1544/18/P45
			Registrar: JOHANNESBURG		Barcode

S. NGEMA
Deputy Sheriff
S. Chetty
Sheriff - Baljo
Melmoth, Eshowe,
Munzini & Nkandla
P O Box 605
Melmoth
3635
Tel: 035 450 0001
Fax: 035 450 0002
sheriffmelmoth@gmail.com
Eshowe
Bank: Standard Bank
Name: Sheriff Melmoth
Business Account
BCode: 57728
AcNo: 031013678

Form Design © Sheriff Office System (Pty) Ltd 1996 - 2013

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JACOB GEDLEYIHLEKISA ZUMA

KwaDakwadunase Homestead
KwaNxamalah, Nkandla
King Cetshwayo District
KwaZulu Natal

STATEMENT ON CONSTITUTIONAL COURT DECISION COMPELLING ME TO APPEAR BEFORE THE COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE

I have received an overwhelming number of messages of support from members of the African National Congress and the public at large following the recent extraordinary and unprecedented decision of the Constitutional Court where it effectively decided that I as an individual citizen, could no longer expect to have my basic constitutional rights protected and upheld by the country's Constitution. With this groundswell of messages, I felt moved to publicly express solidarity with the sentiments and concerns raised with me about a clearly politicized segment of the judiciary that now heralds an imminent constitutional crisis in this country.

When the former Public Protector, Advocate Madonsela, stipulated the terms upon which the President would establish a commission of inquiry to look into allegations of state capture, she had recommended that the chairperson of the inquiry be appointed by the Chief Justice and not the president as is the normal and correct legal procedure. As the President at the time, I legally challenged this approach by the Public Protector stating that she was overstepping the powers of her office by imposing the decision to appoint a commission of inquiry on the president and by imposing how the head of that commission of inquiry should be appointed. The Public Protector stated that she made the recommendation of the appointment of a commission of inquiry because her term of office was ending and she would not have had sufficient time to complete her investigation into the complaints that had been lodged. This in itself was also legally problematic in that, the investigation was carried out by her office and not her as an incumbent in that office. Her successor



N. M.

would have carried on with the work she had started as the work is that of the office of Public Protector and not the individual serving as the Public Protector at the time. She did not leave that office having completed every single investigation that was before her when her term ended but deemed it necessary that this particular investigation be referred to a commission of inquiry and not the other investigations that she had not completed at the time. It was clear then as is clear now that; given that this matter contained specific allegations against Zuma, it needed a different and special approach that would deviate from the law and the Constitution to ensure that Zuma was dealt with differently.

The High Court in Pretoria decided in favor of the Public Protector in that legal challenge stating, amongst other things, that the commission of inquiry as recommended by the Public Protector would be different in that it would only have such powers as are directly equal to the powers of the office of the Public Protector. What has subsequently transpired with the establishment and functioning of the Commission of Inquiry Into Allegations of State Capture is completely at odds with what the court stated as the envisaged purpose of this commission.

The Commission Into Allegations of State Capture led by the Deputy Chief Justice, has followed in the steps of the former Public Protector in how it also has continued with creating a special and different approach to specifically deal with Zuma. The chairperson of the commission, unprovoked, has called special press conferences to make specific announcements about Zuma. This has never happened for any other witness. Recently the commission ran to the Constitutional Court on an urgent basis to get the Constitutional Court to compel me to attend at the commission and to compel me to give answers at the commission, effectively undermining a litany of my constitutional rights including the right to the presumption of innocence. I have never said that I do not want to appear before the commission but have said that I cannot appear before Deputy Chief Justice Zondo because of a well-founded


A handwritten signature in black ink, consisting of a large, stylized loop, followed by the initials "N.M." written in a simple, sans-serif font.

apprehension of bias and a history of personal relations between the Deputy Chief Justice and myself. I have taken the decision by the Deputy Chief Justice not to recuse himself on review as I believe his presiding over the proceedings does not provide me the certainty of a fair and just hearing.

The recent decision of the Constitutional Court also mimics the posture of the commission in that it has now also created a special and different set of circumstances specifically designed to deal with Zuma by suspending my Constitutional rights rendering me completely defenceless against the commission. This conjures up memories of how the apartheid government passed the General Laws Amendment Act 37 in 1963 which introduced a new clause of indefinite detention specifically intended to be used against then PAC leader, Robert Sobukwe. The parallels are too similar to ignore given that Sobukwe was specifically targeted for his ideological stance on liberation. I on the other hand am the target of propaganda, vilification and falsified claims against me for my stance on the transformation of this country and its economy. The Commission of Inquiry Into Allegations of State Capture should have been rightly named the Commission of Inquiry into Allegations of State Capture against Jacob Zuma as it has been obviously established to investigate me specifically.

With the recent decision of the Constitutional Court one cannot help but wonder why it is that Chief Justice Mogoeng initially informed me that this commission would be chaired by Judge Desai but shortly thereafter changed this decision and informed me that the commission would be chaired by Deputy Chief Justice Zondo instead.

Deputy Chief Justice Zondo in dismissing the application to recuse himself was again frugal and expedient with the truth in how he contextualized and defined the nature of the personal relationship we had. Perhaps by western culture's standard of defining kinship he may be correct if the yardstick is of family events attended or family invitations issued. I had relied on his own

 N. M.

personal integrity, which now seems very compromised, to disclose to the public the extent to which I have repeatedly intervened financially in matters pertaining to the maintenance of the child whose details he has already divulged. I had relied upon his own sense of integrity as a person and a judicial officer to remember that he had on several occasions asked people such as Mr. Manzi to speak to me on his behalf regarding his judicial appointments and personal aspirations to be considered by me as president for his elevation to higher courts during my tenure as president. I had relied upon his own sense of integrity as a person and a judicial officer to remember that we had met at my Forest Town residence to discuss the nature of our relationship and the risks that were inherent in the public knowledge of our past association given the offices we both occupied at the time. I had relied upon his own sense of integrity as a judicial officer to be mindful of the fact that he and my estranged wife Thobeka are very close confidants and that I am a point of convergence in key aspects of their lives respectively. I had relied on his own sense of integrity as a judicial officer not to be a witness and judge in an application where he is central to the dispute. He literally created a dispute of fact in an application about him and continued to adjudicate the matter where his version was being contested by me. Again, a special and different set of legal norms were employed because they were targeting Zuma. This violation of sacrosanct legal principles went unnoticed simply because it was being used against Zuma.


It is clear that the laws of this country are politicized even at the highest court in the land. Recently at the State Capture Commission, allegations made against the judiciary have been overlooked and suppressed by the chairperson himself. It is also patently clear to me that I am being singled out for different and special treatment by the judiciary and the legal system as a whole. I therefore state in advance that the Commission Into Allegations of State Capture can expect no further co-operation from me in any of their processes going forward. If this stance is considered to be a violation of their law, then let their law take its course.

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I do not fear being arrested, I do not fear being convicted nor do I fear being incarcerated. I joined the struggle against the racist apartheid government and the unjust oppression of black people by whites in the country at a very young age. As a result, I was sentenced in December 1963 to serve 10 years on Robben Island at the age of 21. Thereafter, I continued to be at the forefront of the liberation struggle within the ranks of the African National Congress and Umkhonto weSizwe in exile until my return to South Africa in the early 90's. In all the years of struggle, I had never imagined that there would come a time when a democratic government in South Africa built on Constitutional values would behave exactly like the apartheid government in creating legal processes designed to target specific individuals in society. Witnessing this carries a much more amplified pain when realizing that it is now a black liberated government behaving in this way against one of their own. The notion of divide and conquer against the ANC has never been a more apposite truism than in the current politics of South Africa. This brings to mind what the great Pan Africanist philosopher Frantz Fanon wrote of post-colonial nations in his work titled *The Wretched of the Earth* saying:

"If this suppressed fury fails to find an outlet, it turns into a vacuum and devastates the oppressed creatures themselves. In order to free themselves they even massacre each other. The different tribes fight between themselves since they cannot face the real enemy- and you can count on the colonial policy to keep up their rivalries"

The wrath visited upon me as an individual knows no bounds as my children and those known to be close to me have been specifically targeted and harassed to the extent that they all have had their bank accounts closed for no particular reason other than that they are known to be associated to me. The government and the justice system have turned a blind eye to these and many other injustices simply because they target Zuma. Anything bearing the name Zuma can enjoy no legal rights or protection in this country as the grand

 N. M. .

agenda to have special and different laws that only apply to Zuma continues to manifest.

In the circumstances, I am left with no other alternative but to be defiant against injustice as I did against the apartheid government. I am again prepared to go to prison to defend the Constitutional rights that I personally fought for and to serve whatever sentence that this democratically elected government deems appropriate as part of the special and different laws for Zuma agenda.

JG ZUMA

1 FEBRUARY 2021



N. M.



**Att: Professor Itumeleng Mosala
Secretary of the Judicial Commission of Inquiry
into Allegations of State Capture, Corruption
and Fraud in the Public
Sector including Organs of State
2nd Floor, Hillside House
17 Empire Road
Parktown**

1st Floor
83 Central Street
Houghton
2198
PO Box 65045
Northlands 2118
Tel: +27 11 483-2387/483-0476
Fax: +27 11 728 - 0145
Direct e-mail: eric@mabuzas.co.za

Email: BoipeloR@commissionsc.org.za

Your Ref:
Our Ref: Mr ET Mabuza/Mr RN Baloyi/Ms Z Longwe
Date: Monday, February 15, 2021

Dear Professor Mosala,


President JG Zuma's appearance before the Commission on 15 -19 February 2021

1. We refer to the above matter.
2. We formally inform the Commission, as a matter of courtesy, that our client will not be appearing before the Commission on 15-19 February 2021, for the reasons set out below.
3. The Commission is aware that the review application which President Zuma has instituted to set aside the refusal by Deputy Chief Justice Zondo to recuse himself from hearing matters concerning him and his family is yet to be determined by the court.
4. The Summons issued for our client to appear on 15-19 February 2021 is irregular and not in line with the Fourth Order of the Constitutional Court judgment of 28 January 2021.


A handwritten signature in black ink, appearing to be 'M. M.', is written over a faint circular stamp or watermark.

5. Appearing before DCJ Zondo in the circumstances, would undermine and invalidate the review application over his decision not to recuse himself.
6. We also place on record that the review application was not before the Constitutional Court and, accordingly, was not considered, determined and/or adjudicated by that court.
7. We reiterate that the above should not be construed to suggest any defiance of a legal process.
8. All our client's rights are reserved.

Yours faithfully



MABUZA ATTORNEYS



JACOB GEDLEYIHLEKISA ZUMA

KwaDakwadunuse Homestead
KwaNramatjala, Nkandla
King Cetshwayo District
KwaZulu Natal

15 FEBRUARY 2021

FINAL STATEMENT ON CONSTITUTIONAL COURT DECISION COMPELLING ME TO APPEAR BEFORE THE COMMISSION OF INQUIRY INTO STATE ALLEGATIONS OF STATE CAPTURE AND MY REFUSAL TO APPEAR BEFORE THE ZONDO COMMISSION

1. On 1 February 2021 I issued a statement in which I set out my position and attitude towards what I referred to as an unprecedented decision of the Constitutional Court, which effectively stripped me off my constitutional right as a citizen and created, as some of our courts have been doing to me, jurisprudence that only applies to Jacob Gedleyihlekisa Zuma.
2. I took this extra-ordinary step not to undermine the Constitution but to vindicate it, in the face of what I view as a few in the judiciary that have long left their constitutional station to join political battles. I took it after my observation that there are some concerning tendencies slowly manifesting in the judicial system that we should all fear. It is my political stance and mine alone.
3. Today, unprovoked, Deputy Chief Justice Zondo decided to propagate some political propaganda against me. In my absence he and Pretorius SC decided

1

N.M.

on what they have always sought to do, turn all the narratives against me into evidence. In his long-prepared speech, Pretorius SC presented what Deputy Chief Justice Zondo literally called evidence against me. Realizing that they had forfeited the opportunity to present the evidence to me, they did what has become their hallmark at the Commission in making submissions to each other and playing politics to influence public opinion.

4. That Deputy Chief Justice Zondo could mislead to the nation is something that should concern us all. In justifying his position earlier, he stated that it was my legal team that said I would come and exercise my right to silence. Those who know the truth will know that when my legal team made this reference, it was in the context of an example and suggestion of how a more responsible way forward could be found.
5. His conduct today fortifies my resolve and belief that he has always sought to prejudice me. In what seemed like Pretorius SC's closing argument, it appeared that the script thereof was already written for the report of the Commission. In his typical approach, he smuggled new allegations about me that were obviously intended to ambush me. He has prejudiced my children, my family as he presented his version that he always sought to place in Commission's report.
6. The Deputy Chief Justice concluded by saying my contempt constitute grounds for him to approach to the Constitutional Court to seek a sentence. Ofcourse he will get it. I am not certain that ordinarily that is how contempt

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proceedings would commence, but I have accepted that Deputy Chief Justice Zondo and due process and the law are estranged.

7. Now that it seems that my role in the Commission has come to an end, I wait to face the sentence to be issued by the Constitutional Court. Accordingly, I stand by my statement of 1 February 2021 and no amount of intimidation or blackmail will change my position as I firmly believe that we should never allow for the establishment of a judiciary in which justice, fairness and due process are discretionary and are exclusively preserved for certain litigants and not others.
8. Many in our society have watched this form of judicial abuse but choose to look the other way merely because of their antipathy towards me. They choose to lay the blame at my doorstep and fail to confront head-on the judicial crisis that is unfolding in our country.
9. The Zondo Commission has today again showed how it is short of the attributes necessary to conduct an independent, fair and impartial investigation or hearings that involve me or that contradict their script on state capture. Judge Zondo has today again displayed questionable judicial integrity, independence and open-mindedness required in an investigation of this magnitude. Upon being advised by my legal team in open proceedings that it would have been more prudent to have more than one person preside over a commission of this nature, Judge Zondo answered that he could not do this since he risked a dissenting voice when the report is written. What judge says this as a reason and justification not to be assisted in such a mammoth



task? What type of society accepts such an explanation from a Deputy Chief Justice who sits in the apex court with ten other judges in order to enrich, sometimes by dissent, the quality of judgments?

10. What society looks the other way when a judge adjudicates a matter involving his own disputed facts? What judicial system tolerates a judge admitting that he concealed a fact in his statement relating to whether he had ever met with me during my tenure as President? I invite all of those who care to look closely at my replying affidavit in the recusal application as well as the Deputy Chief Justice's delayed admission that his statement had not been accurate. Indeed, as this admission stared us in the face, all looked the other way in their consistent attempts to conceal or downplay the obvious errors of the Chairperson of the Commission.

11. Although my statement was a response to the judgment of the Constitutional Court, my reservations about the Commission and its lawfulness are well recorded. I stand by my reservations and that the Commission was conceptualized as part of the campaign and sponsored multi-sectoral collaboration to remove me from office. Faced with this obvious unlawful appointment of the Commission, the Chief Justice endorsed it. Later, and indeed unsurprisingly, Judge President Mlambo also endorsed this unprecedented breach of the principle of separation of powers between the executive and the judiciary. No matter how long we deny it or ignore it, the illegality of that decision to allocate to the judiciary a constitutional function of the President will stubbornly stare us in the face.

A handwritten signature consisting of a stylized, looped scribble, followed by the initials 'N.M.' written in a simple, hand-drawn font.

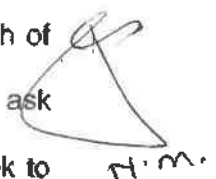
12. The Commission approached the Constitutional Court in total disregard of the fact that I was taking its ruling on the recusal application on review. This calculated stratagem was to frustrate my chances of even challenging their subpoenas in our courts. The Commission obviously ran to seek a licence to act with impunity. I still persist that there was no basis or dispute necessitating the Commission to approach the Constitutional Court and that there was no factual basis for presumption that I would defy the subpoena. I have already presented myself to the Commission on two occasions when called upon to do so.

13. Fed with absolute lies, the Constitutional Court assumed that I or my legal team had threatened that I would defy or refuse to answer. You only have to peruse the records of the date of the recusal application to know that my legal team was at pains to suggest a responsible way forward. The submission by the Commission that a threat was made that I would defy or refuse to answer is a blatant falsehood fabricated on behalf of the Commission and entertained by the judges of the Constitutional Court.

14. My lawyers, as a courtesy, advised the Constitutional Court that I would not participate in the proceedings. The judges of the Constitutional Court concluded that my election not to waste their time deserves a cost order against me. It has become common place for some of our courts to make these costs orders against me in order to diminish my constitutional right to approach courts.

A handwritten signature consisting of a large, stylized loop, followed by the initials 'N.M.' written in a simple, blocky font.

15. It was submitted on behalf of the Commission, something it seem to have been accepted by the Constitutional Court that; I am "accused No 1" at the Commission. Labelling me in this fashion is deeply offensive to me but is also clear evidence that the Commission treats me as an accused, not a witness.
16. The Constitutional Court went further, accepting as a fact, the Commission's submissions that I had a constitutional duty to account to it (for the wrongdoing). I have followed the evidence of many witnesses at the Commission, including those alleged to have implicated me and elected that none of them had any case of substance against me. However, the Commission sought to deliver me at all costs and in this endeavour is prepared to break every rule of justice and fairness.
17. It is that type of judicial conduct that I protest against, not our law or our Constitution. It is not the authority of the Constitutional Court that I reject, but its abuse by a few judges. It is not our law that I defy, but a few lawless judges who have left their constitutional post for political expediency. I respect the law and have subjected myself even to its abuse for the past 20 years. I have presented myself to the Zondo Commission twice and therefore there was no factual justification for the order given by the Constitutional Court. None whatsoever.
18. I protest against those in the judiciary that have become an extension of political forces that seek to destroy and control our country. I seek no special treatment from the judiciary. I ask them to remain true only to their oath of office and their duty to treat everyone as equal before the law. I do not ask them or any of them or you to develop any affection for me. I only seek to



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vindicate what we fought for so that even when society is in turmoil, as it will from time to time, we will have a judiciary that refuses to join the lynching mobs.

19. As it has become common place in our country in cases that relate to me, my statement has been met with the bigotry that has become the hallmark of our sponsored opinion makers. Instead of pausing to consider whether the so-called constitutional crisis may be emerging from the conduct of some of our courts themselves, the debate has been conducted in the usual binary, simplistic and biased terms, seeking to shield what I regard as a few in the judiciary that have forsaken their oath of office to **"...uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law."**

20. I do so not to undermine the Constitution or the law, but to express my own protest about those in the judiciary that have turned their back on their fundamental task in society. I take this stance because I believe that judges should never become agents of ruling classes in society.

21. So, I take this stance not because I refuse to accept that my Presidency like any other was not perfect, but because we continue to allow some in the judiciary to create jurisprudence and legal inconsistencies that only apply to me. To date, nothing has been said about Judge President Mlambo's contradictory rulings on the powers and remedies of the Office of the Public



N. M.

Protector, not because none can see the contradictions, but because they care less about the Constitution than they do about seeing me lynched and punished.

None can claim not to see that the recent judgment of the Constitutional Court is a travesty of justice. That we accept a judgment based on mere conjecture and speculation about my future conduct is a betrayal of the Constitution that many refuse to confront as they scapegoat me for every malady in society.

22. The debate has tended to focus on me, with many suggesting that I regard myself as above the law or that I do not recognize our Constitution and our law. They know as well as I do, that is not the case. Some have argued that if I do not appear before the Zondo Commission I must be jailed or stripped of presidential benefits or pension. Well, for the record, I am the one that suggested that I do not mind defending myself against the sanction that accompanies my principled stance. Secondly, it should naturally please them that, should I fail to defend myself before the relevant contempt forum, I will face jail term.

23. The suggestion that I would be enticed with pension and benefits to abandon my principled stance against what I see as bias by a few in the judiciary, can only come from people who believe that money can buy everything. When I joined the ANC and fought for democracy, I did not do so for money and benefits. This, to me, is a foreign tendency to some of us who have been freedom fighters.



N.M.

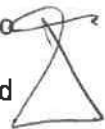
24. I am grateful however, to many comrades, who have sought to hear my side of the story and have understood my frustration. I am grateful for their support and their courage to stand with me rather than to appease, at my expense, those who seek to control our economy, judiciary and our country.

25. Some in our so called intelligentsia have become blinded by their prejudice towards me, they agree that the court may take away my right to remain silent, yet they fail to recognize that the Zondo Commission has already extended this right to at least three witnesses that appeared before it. Where is the consistency in this approach?

26. I demand no more than justice, fairness and impartiality, all of which are attributes we should not have to remind some of our judges to possess. They promised the country they possessed these attributes the day they applied for judicial office and took their oath of office. We should not have to remind some of them of this.

27. If we paused, in any case that involves me, and asked whether many of the decisions taken, and attitudes adopted are not merely driven by the antipathy towards me. What legacy are some of our judges leaving for future generations?

28. When Judge President Mlambo can flip flop on the same principle simply to punish me, what kind of judges do we have? What justice are we serving and what law will be followed when I am long gone. I know that instead of



N.M.

confronting these questions I am raising, many will resort to sarcasm, and seek a response that blames me. In any event, that is what has led us to this point. The failure to see our law beyond one individual we seek to punish.

29. We sit with some judges who have assisted the incumbent President to hide from society what on the face of it seem to be bribes obtained in order to win an internal ANC election. We sit with some judges who sealed those records simply because such records may reveal that some of them, while presiding in our courts, have had their hands filled with the proverbial 30 pieces of silver.
30. I repeat, it is not the law against which I protest, as I refuse to subject myself to Zondo Commission. I protest against our black, red and green robes, dressing up some individuals that have long betrayed the Constitution and their oath of office. It is those who allow it and look the other way that must do some reflection. You do not have to like me to do this reflection. It is a choice we must make because this country and our law will and must outlive Jacob Zuma.
31. Finally, I restate that my statement is no breach of the law. It is a protest against some in the judiciary that have sold their souls and departed from their oath of office. It is my respect for the law that obliges me to reject the abuse of law and judicial office for political purposes. The law I respect, its abuse I will not.

A handwritten signature consisting of a stylized, looped shape, followed by the initials "N.M." written in a simple, cursive style.

32. I restate that my review of the recusal ruling remains undetermined and this is part of my reservation about presenting myself to the very presiding officer whose decision I am taking on review. I have no doubt that I will lose it like many other cases. Be that as it may, I am entitled to have it determined or at least recognized.

33. Ordinarily I should have the faith to approach the Chairperson of the Commission or our courts to seek whatever remedy would stay the proceedings until my review is determined. However, the antipathy of some of the courts and the Commission towards me has made it futile for me to exercise my constitutionally guaranteed access to courts. Not only will I be dismissed, but I will also be punished with punitive costs for approaching the courts.

34. I am in the process of revising all matters I have before our courts, except the criminal matter, as it has become clear to me that I will never get justice before some of the current crop of our judges in their quest to raise their hands to seek political acceptance at my expense. I have observed in hearings how some of our judges have directed their antipathy towards my counsel in hearings and am grateful that my legal team, under testing circumstances have kept their professional composure.

35. I am aware that that our judiciary and magistracy have a number of men and women of integrity, many of whom are shunned when matters are allocated. I respect them and must not be understood not to recognize them or that I am

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tainting all of them with the same brush. Unfortunately, many of them, for their refusal to be part of the syndicate or to forsake their oath of office, they will never be allocated matters wherein pre-determined outcomes are demanded.

36. I respect our citizens and our law. History will soon reveal that it is only some in our courts that have been captured to serve political ends and to undermine the Constitution, which is the supreme law of the land. I will not join those who seek to do this.

37. As you sharpen your pens to condemn me, I reiterate that I stand by my earlier statement and will not appear before a process that is not impartial. I stand by the decision not to forsake the law and our Constitution. I choose to protest in order to restore our constitutionally enshrined principle of an independent judiciary.

ISSUED BY:

JACOB GEDLEYIHLEKISA ZUMA



N. M

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: _____

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 COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE**

Third Respondent

NOTICE OF MOTION

TAKE NOTICE THAT the Applicant intends to apply to the above Honourable Court under section 167(6)(a) of the Constitution and rule 18 of the Rules of the Constitutional Court for an order in the following terms:

- 1 In terms of rule 12 of the Rules of this Honourable Court leave is hereby granted that this application be heard as one of urgency, and the rules and forms of service dispensed with in accordance with any directions that the Chief Justice may issue.

 N.m.

2 It is declared that Mr Jacob Gedleyihlekisa Zuma is guilty of contempt of court in that, in disobedience of paragraphs 4 and 5 of this Court's order of 28 January 2021 under case number CCT 295/20, he –

2.1 intentionally and unlawfully failed to appear before the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (“the Commission”) on 15 to 19 February 2021 in compliance with the summons issued by the Secretary of the Commission on 30 November 2020, which directed him to appear and give evidence before the Commission on the said dates; and

2.2 intentionally and unlawfully failed or refused to furnish the Commission with affidavits in compliance with the directives issued by the Chairperson of the Commission under regulation 10(6) of the Regulations of the Commission on 27 August 2020 and 8 September 2020.

3 Mr Jacob Gedleyihlekisa Zuma is sentenced to imprisonment for a term of two (2) years.

4 The Second and Third Respondents are ordered to take all such steps as may be required to give effect to the order in paragraph 3.



N. M.

5 Mr Jacob Gedleyihlekisa Zuma is directed to pay the costs of this application on the attorney and own client scale, including the costs of two counsel.

6 Further and/or alternative relief.

TAKE NOTICE FURTHER THAT the Chief Justice is requested to issue directions for the further conduct and disposal of the matter, in accordance with Rule 12 of the Constitutional Court.

TAKE NOTICE FURTHER THAT the Applicant has appointed the State Attorney, Johannesburg, as its attorney of record and his address, as set out below, as the address where it will accept notice and service of all documents in these proceedings.

TAKE NOTICE FURTHER THAT the accompanying affidavit of the Applicant will be used in support of this application.

DATED AT JOHANNESBURG ON THIS DAY OF FEBRUARY 2021.



N. M.



STATE ATTORNEY, JOHANNESBURG

Attorneys for the Applicant

10th Floor, North State Building
95 Albertina Sisulu Str, Cnr Kruis Str
Private Bag x9, Docex 688
JOHANNESBURG, 2000

Per: Mr Johan van Schalkwyk

Cell: 071 401 6235

Ref: J Van Schalkwyk/1544/18/P45

Email: JohVanSchalkwyk@justice.gov.za

TO: THE REGISTRAR OF THE CONSTITUTIONAL COURT

Private Bag X1
Constitutional Hill
Braamfontein, 2017
Johannesburg

AND TO: MR JACOB GEDLEYHLEKISA ZUMA


Respondent
Kwadakwadunuse Homestead, KwaNxamalala, Nkandla, King
Cetshwayo District, Kwazulu-Natal

Care of Mabuza Attorneys

1st Floor
83 Central Street
Houghton, 2198
Johannesburg
Ref: Mr E T Mabuza

By hand &

By email: eric@mabuzas.co.za



N.m.

AND TO: **STATE ATTORNEY**

PRETORIA


Per: Mr I Chowe

IChowe@justice.gov.za

**ATTORNEY FOR THE MINISTER OF POLICE AND NATIONAL
COMMISSIONER OF POLICE**

C/o General E Groenewald

Email: GroenewaldD@saps.gov.za

 N.M.



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case 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 COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE**

Third Respondent

DIRECTIONS DATED 1 MARCH 2021

The Chief Justice has issued the following directions:

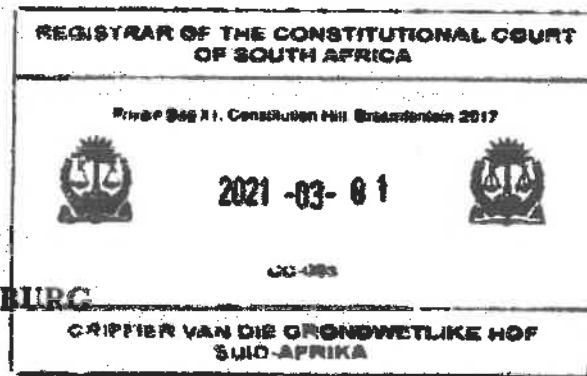
1. The application is set down for hearing on Thursday, 25 March 2021 at 10h00.
2. The respondents must file answering affidavits, if any, by Monday, 8 March 2021.
3. The applicant must file a replying affidavit, if any, by Friday, 12 March 2021.
4. Written submissions must be lodged by—

N.M.

- a) the applicant, on or before Monday, 15 March 2021; and
 - b) the respondents, on or before Friday, 19 March 2021.
5. The hearing will take place on a virtual platform.
6. Further directions may be issued.



MR DUNISANI MATHIBA
ACTING REGISTRAR
CONSTITUTIONAL COURT



TO: STATE ATTORNEY, JOHANNESBURG

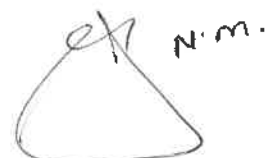
Attorneys for the Applicant
Tenth Floor, North State Building
95 Albertina Sisulu Road
JOHANNESBURG
Tel: 071 401 6235
Email: johvanschalkwyk@justice.gov.za
Ref: J Van Schalkwyk/1544/18/P45

AND TO: MR JACOB GEDLEYIHLEKISA ZUMA

First Respondent
c/o **MABUZA ATTORNEYS**
First Floor
83 Central Street
Houghton
JOHANNESBURG
Email: eric@mabuzas.co.za
Ref: Mr E T Mabuzas

AND TO: STATE ATTORNEY, PRETORIA

Attorneys for the Second and Third Respondents
316 Thabo Sehume Street
Pretoria Central
PRETORIA
Email: ichowe@justice.gov.za
Ref: Mr I Chowe



c/o GENERAL E GROENEWALD

Email: groenewaldd@saps.gov.za

A handwritten signature consisting of a large, stylized loop with a crossbar, followed by the initials 'E.M.' in a simple, blocky font.



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case 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 GEDLEYHLEKISA ZUMA

First Respondent

MINISTER OF POLICE

Second Respondent

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

Third Respondent

DIRECTIONS DATED 19 MARCH 2021


The Chief Justice has issued the following directions:

1. The Helen Suzman Foundation is directed to serve and file written submissions not later than Tuesday, 23 March 2021.
2. Any party wishing to respond to the written submissions referred to in paragraph 1 must serve and file written submissions not later than Thursday, 1 April 2021.
3. Further directions may be issued.

A handwritten signature in black ink, consisting of a stylized 'S' shape followed by the letters 'N.M.'.



**MR DUNISANI MATHIBA
ACTING REGISTRAR
CONSTITUTIONAL COURT**

REGISTRAR OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA	
P/Bag X1, Constitution Hill, Braamfontein 2017	
	2021-03-19
CC-001	
REGISTRAR OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA	

TO: WEBBER WENTZEL INCORPORATED

Attorneys for the Helen Suzman Foundation

90 Rivonia Road

Sandton

JOHANNESBURG

Tel: 011 530 5867

Tel: 011 530 6867

Email: viad.movshovich@webberwentzel.com / pooja.dela@webberwentzel.com

dylan.cron@webberwentzel.com / daniel.rafferty@webberwentzel.com

dee-dee.qolohle@webberwentzel.com

Ref: V Movshovich / P Dela / D Cron / D Rafferty / D Qolohle

AND TO: STATE ATTORNEY, JOHANNESBURG

Attorneys for the Applicant

Tenth Floor, North State Building

Albertina Sisulu Road

JOHANNESBURG

l: 071 401 6235

mail: johvanschalkwyk@justice.gov.za

f: J Van Schalkwyk/1544/18/P45

AND TO: MABUZA ATTORNEYS INCORPORATED

Attorneys for the First Respondent

First Floor

83 Central Street

Houghton

JOHANNESBURG

Email: eric@mabuzas.co.za

Ref: Mr E T Mabuza

AND TO: STATE ATTORNEY, PRETORIA

Attorneys for the Second and Third Respondents

316 Thabo Sehume Street



N.M.

Pretoria Central

PRETORIA

Email: ichowe@justice.gov.za

Ref: Mr I Chowe

c/o GENERAL E GROENEWALD

Email: groenewaldd@saps.gov.za



N.M.



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case 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 COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE**

Third Respondent

HELEN SUZMAN FOUNDATION

Amicus Curiae

DIRECTIONS DATED 9 APRIL 2021

The Chief Justice has issued the following directions:

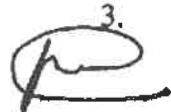
1. The first respondent is directed to file an affidavit of no longer than 15 pages on or before Wednesday, 14 April 2021 on the following issues:
 - a) In the event that the first respondent is found to be guilty of the alleged contempt of court, what constitutes the appropriate sanction; and

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b) In the event that this Court deems committal to be appropriate, the nature and magnitude of sentence that should be imposed, supported by reasons.

2. Only in the event that this Court receives an affidavit from the first respondent in terms of paragraph 1 above, the applicant, second and third respondents and the amicus curiae are directed to file affidavits of no longer than 15 pages in response to the affidavit referred to in paragraph 1, if they so wish, on or before Friday, 16 April 2021.

3. Further directions may be issued.



**MR DUNISANI MATHIBA
ACTING REGISTRAR
CONSTITUTIONAL COURT**


TO: STATE ATTORNEY, JOHANNESBURG

Attorneys for the Applicant
Tenth Floor, North State Building
95 Albertina Sisulu Road
JOHANNESBURG

Tel: 071 401 6235

Email: johvanschalkwyk@justice.gov.za

Ref: J Van Schalkwyk/1544/18/P45

REGISTRAR OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA	
P Reg 11, Constitution Hill, Braamfontein 2017	
	2021-04-09
CC-001	
REGISTRAR OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA	

AND TO: MR JACOB GEDLEYHLEKISA ZUMA

First Respondent

Kwadakwadunuse Homestead

KwaNxamalala, Nkandla

King Cetshwayo District

KwaZulu-Natal

c/o MABUZA ATTORNEYS

Attorneys for the First Respondent

First Floor

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Houghton

JOHANNESBURG

Email: eric@mabuzas.co.za

Ref: Mr E T Mabuzas



N.m.

AND TO: STATE ATTORNEY, PRETORIA

Attorneys for the Second and Third Respondents

316 Thabo Sehume Street

Pretoria Central

PRETORIA

Email: ichowe@justice.gov.za

Ref: Mr I Chowe

c/o GENERAL E GROENEWALD

Email: groenewaldd@saps.gov.za

AND TO: WEBBER WENTZEL INCORPORATED

Attorneys for the Amicus Curiae

90 Rivonia Road

Sandton

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Tel: 011 530 5867

Tel: 011 530 6867

Email: vlad.movshovich@webberwentzel.com / pooja.dela@webberwentzel.com /

dylan.cron@webberwentzel.com / daniel.rafferty@webberwentzel.com /

dee-dee.qolohle@webberwentzel.com

Ref: V Movshovich / P Dela / D Cron / D Rafferty / D Qolohle

A handwritten signature, possibly 'V. M.', is written in the bottom right corner of the page. The signature is a simple, stylized scribble.

JACOB GEDLEYIHLEKISA ZUMA

KwaDakwadunuse Homestead
KwaNxamalala, Nkandla
King Cetshwayo District
KwaZulu Natal

14 April 2021

RE: DIRECTIONS DATED 9 APRIL 2021: CASE NO. CCT 52/21

Dear Chief Justice

1. I received your directions dated 9 April 2021 in which you direct me to "file an affidavit of no longer than 15 pages on or before Wednesday, 14 April 2021" to address two theoretical questions relating to sanction.
2. The questions are framed on the presumption that the Court that heard the application of the Chairperson of the Commission of Inquiry into State Capture, Fraud and Corruption in Public Entities ("Zondo Commission") has not determined the merits of whether I am guilty of contempt of court.
3. I have thought long and hard about the request in your directives. I have also been advised that addressing a letter of this nature to the court is unprecedented as a response to a directive to file an affidavit. However, given the unprecedented nature of my impending imprisonment by the Constitutional Court, we are indeed in unprecedented terrain.



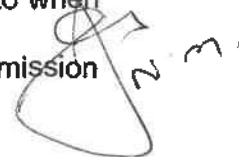
4. The purpose of this letter is two-fold. First, although I am directed to address in 15 pages and within three court days my submissions on sanction in the event, I am found guilty of contempt of court and *"in the event that this court deems committal to be appropriate, the nature and magnitude of the sentence supported by reasons."*, I wish to advise you that I will not depose to an affidavit as presently directed. Second, I wish to advise that my stance in this regard is not out of any disrespect for you or the Court, but stems from my conscientious objection to the manner in which I have been treated. Accordingly, I set out in this letter my reasons for not participating and deem it prudent, for the record, to appraise you of my objections.

5. At the outset, I must state that I did not participate in the proceedings before the Constitutional Court and view the directives as nothing but a stratagem to clothe its decision with some legitimacy. Further, in directing me to depose to an affidavit, the Chairperson of the Commission, as the applicant, and some politically interested groups styled as *amicus curie* are given the right of rebuttal. That is in my view not a fair procedure in circumstances where my rights under sections 10, 11 and 12 of the Constitution are implicated. I am resigned to being a prisoner of the Constitutional Court because it is clear to me that the Constitutional Court considers the Zondo Commission to be central to our national life and the search for the national truth on the state of governance during my presidency. It has also become clear to me that even though the Constitutional Court has no jurisdiction Deputy Chief Justice Zondo was determined to place the matter before judges who serve as his subordinates in order to obtain the order he wants.

12.3.



6. This is despite the fact that by doing so, he ignores the review I have launched regarding his refusal to recuse himself.
7. The directions took me by surprise in their breadth and scope. I understand them to be your attempt at giving me a right to hearing only on the question of sanction in the alleged theoretical or hypothetical basis that I am found guilty of contempt of court. That is of significant concern to me firstly because the Court would have known that I had decided not to participate in the proceedings of the Court. I did not ask for this right to hearing and since it is an invention of the Chief Justice I would have expected the Chief Justice to have been concerned about the motive of seeking my participation in mitigating by speculating about a decision concealed from me.
8. As currently framed the directions – to the extent they purport to give me a right to a hearing on the question of sanction – it is a sham and an attempt to sanitise the gravity of the repressive manner in which the Court has dealt with my issues. It is disappointing and fortifies my concerns, when our apex court engages in what clearly is political or public management of a decision they have already taken.
9. In my view, these political gimmicks do not belong in the bench. It is apparent that the Constitutional Court is attempting to correct its rather incorrect decision in hearing a matter relating to a summons or the non-compliance thereto when the Commissions Act contains an internal provision as to how a commission should deal with such an eventuality.

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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.

11. My position in respect of the contempt of court proceedings is a conscientious objection to what I consider to be an extraordinary abuse of judicial authority to advance politically charged narratives of a politically but very powerful commercial and political interests through the Zondo Commission. My objection is legitimate, as it is sourced directly from the Constitution itself and what it promises. The Constitution is the pillar of our celebrated constitutional order.

12. South Africa's nascent democratic order is built against the background of a painful past, a blatant disregard for human rights by the apartheid political order. The new South Africa was built on an anti-thesis of an unjust system, a system that had no regard for human rights and justice. Our Constitution cured this apartheid injustice and engraved, as foundational principles, "human dignity, the achievement of equality and the advancement of human rights and freedoms." To ensure the inviolability of these principles, our Constitution made it a mandatory constitutional requirement on every state institution (the courts included) to "respect, protect, promote and fulfil the rights in the Bill of Rights." The Bill of Rights was given the supreme status as the cornerstone of democracy

N.M.

in South Africa, enshrining the rights of all people in our country and affirming the democratic values of human dignity, equality, and freedom. In s 8 of the Constitution, the Bill of Rights applies to all and binds the legislature, the executive, the judiciary, and all organs of state.


13. This means that both the Zondo Commission (acting as the executive arm of government) and the Constitutional Court are bound by the “democratic values of human dignity, equality and freedom.
14. The Constitutional Court was to be the enduring monument of our constitutional order, representing our victory over the apartheid system. It is the only innovation by the founders of our constitutional order in the structure of our judiciary that was established to champion a judicial system that would be the bulwark against injustice and oppression.
15. It was established to represent an irrevocable covenant between the people and their government of human dignity, the achievement of equality and the advancement of human rights and freedoms.
16. In order to ensure that our new system of constitutional democracy would have an enduring constitutional legacy, we decided that we would only appoint worthy arbitrators, whose historical experience and sense of humanity would connect with the spirit and ethos of our constitutional system. This is because our Constitutional Court would not have to be prompted to perform its central constitutional mission.

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17. The Constitutional Court would represent freedom for everyone, and with it, I believed that we would be safe from the unjust and oppressive political narratives that had routinely found credibility in the courts of oppression. It is no secret that dominant narratives come from the dominant and moneyed classes in our society.
18. Ideally, such narratives should not sway our apex court on how to deal with a particular litigant.
19. The men and women who were to serve on it would not conduct the affairs of the Court with arrogance and oppressive tendencies. In the words of our national hero Nelson Mandela on 14 February 1995 at the inauguration of the Constitutional Court, on behalf of the people of South Africa he said to the then Chief Justice Arthur Chaskalson:

“yours is the most noble task that could fall to any legal person. In the last resort, the guarantee of the fundamental rights and freedoms for which we fought so hard, lies in your hands. We look to you to honor the Constitution and the people it represents. We expect from you, no, we demand of you, the greatest use of your wisdom, honesty, and good sense – no short cuts, no easy solutions. Your work is not only lofty, but also a lonely one.”

20. At the signing of the Constitution on 10 December 1996, President Mandela characterized the Constitutional Court as the *“true and fearless custodian of our constitutional agreements.”* Why we needed an independent judiciary is to ensure that the courts are transformed into unwavering and uncompromising custodians of our constitutional democracy and the freedoms through an



adjudicative system that is based on the recognition of the inherent dignity of each individual.

21. I was particularly disappointed that our apex court even considered it prudent that it had jurisdiction to consider a custodial sanction as a court of first instance when no trial has been conducted to determine whether or not there has been contempt of court. Although I am not a lawyer, I have read the Constitutional Court ruling and its attempt to fudge the issue of jurisdiction and I was left none the wiser as to its reasoning about jurisdiction.
22. I also watched the proceedings of the Court on 28 December 2020 – in which I was addressed in very unkind words, labelled “accused number 1” at the Commission by the Commission lawyers, a defiant against the authority of the Commission. These unkind comments were not met with judicial disapproval and in fact found validation in the ruling of the Constitutional Court delivered by Justice Jafta on February 2021.
23. I was sad to see the Constitutional Court fail to uphold elementary constitutional standards of human dignity, advancement of rights and freedom. I was particularly shocked to learn that the Constitutional Court found it consistent with its constitutional mission to – in support of the Zondo Commission – to strip me of constitutional rights guaranteed in our Constitution. It was not only the right to be presumed innocent, to remain silent and not to testify during proceedings – guaranteed in section 35(3)(h) of the Constitution. My right to equality before the law and to the equal protection of the law was taken away from me. Many

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witnesses at the Zondo Commission, where it was deemed appropriate, could assert their rights in section 35(3)(h) of the Constitution, with approval by the Chairperson, while he sought to limit mine. The Constitutional Court ordered that I should not assert a valid defense based on the right to be presumed innocent, to remain silent and not to testify in proceedings. Why is it consistent with the central constitutional mission of the Court to deprive me of the rights afforded to other witnesses in similar proceedings?

24. I reflected on the condemnatory tone adopted by the Constitutional Court in relation to my non-participation including its decision to impose a punitive cost order and could only conclude that the Court had decided to come to the assistance of the Zondo Commission – not based on constitutionally justifiable grounds but to support the rampant political narrative of the Zondo Commission that if I am forced to testify – it would assist in assessing the state of democratic governance under my Presidency.

25. Finally, without any reflection on its constitutional status as a court of first and final instance in constitutional matters, the Constitutional Court made rulings that deprived me of my right to have my justifiable dispute with Justice Zondo over his suitability to receive and determine evidence given by or against me in the Zondo Commission. I carefully examined the implications of a judgment that was essentially forcing me to appear before a biased and prejudiced presiding officer and realized that the Court had entrenched a growing judicial trend in which my cases are not determined in accordance with the Constitution and the constitutional values of our Constitution. Broadly speaking, I believe, having

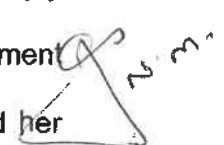
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examined how the courts have dealt with cases involving my constitutional rights, I came to the conclusion that there is inexplicable judicial antipathy towards me. I can give numerous examples of how courts have joined the political narrative in which I am routinely a subject of political ridicule and commentary.

25.1. The condemnatory political comments by Acting Justice Pillay in her judgment about me are but one example.

26. My decision not to participate in the contempt of court proceedings was based on my belief that my participation would not change the atmosphere of judicial hostility and humiliation reflected in its judgment against me. It is my view or my feeling that the judges of the Constitutional Court do not intend to ensure that they address disputes involving me in a manner that accords with the independence, impartiality, dignity, accessibility, and effectiveness of the Court.

27. One of the astonishing facts is indeed the presence of Acting Justice D Pillay as a member of the panel of the Constitutional Court considering my dispute, a judicial officer whose judicial antipathy towards me is well recorded in a court judgment and an order for my arrest while I was in hospital, sitting comfortably as a panelist pretending to exercise impartial judicial authority in a case that would determine whether I should be arrested and imprisoned for not complying with a court order. I found the participation of Acting Justice Pillay particularly disturbing and a clear indication of her unmitigated lack of discretion and a deeply irresponsible exercise of judicial power. Her gratuitous comments in a judgment against me in a dispute involving my comments on Derek Hanekom and her

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subsequent refusal to accept a medical note from a qualified doctor justifying my absence from a court in which my criminal trial was not scheduled to begin are a matter of public record.

28. Your directive, Chief Justice provides that I must answer the questions in a 15-page affidavit within 3 days. Regrettably, if I accede to your request, I purge my conscientious objection for having not participated in the proceedings of the Constitutional Court. So, please accept this letter as the only manner in terms of which I am able to convey my conscientious objection to the manner in which your Constitutional Court Justices have abused their power to take away rights accorded to me by the Constitution. I invite you to share this letter with them as it is relevant to the directions that you have issued. I make this request having been advised that this letter is not a pleading.
29. After agonising over how to respond to your direction, Chief Justice, I came to the conclusion that the directions are an attempt to get me to make submissions that would assist those judging me on the question of sanction.
30. Chief Justice, while giving me a right to a hearing is something I could commend, there are intractable problems with the nature and scope of the right that you have afforded me. The right to hearing in respect of sanction reduced to 15 pages which must be provided to the Court within 3 days does not appear to be made as a good faith attempt to give me a right to hearing but to sanitise the procedural infirmities of the procedures of the Constitutional Court. More importantly, the conditions for my right to a hearing do not appear to fully engage

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with my rights to express a view on the merits - given that the issue of sanction would ordinarily also include the question of why I should not be sanctioned for my non-compliance with the Court order. I have therefore decided to address that antecedent question before I address the theoretical question of what the sanction should be given in the event of my conviction.

31. As stated above, my decision not to participate in the hearing of the Constitutional Court was a conscientious objection.

32. Rather than being regarded as acts of defiance, my actions are aimed at bringing to the attention of the Court the injustice of their actions and judgment. I cannot appeal a judgment of the Constitutional Court even where it perpetrates a grave constitutional injustice. I therefore cannot in good conscience enable the Constitutional Court to violate my constitutional rights contrary to its supreme constitutional mandate by filing an affidavit on sanction simply to cure the procedural infirmities adopted by it.

33. When the Constitutional Court accepted the submissions of the Zondo Commission on the question of extreme urgency and direct access, I was convinced that it had done so because of the political nature of the work of the Zondo Commission – which is established to destroy the work that I did when I served my country as President. I am also concerned that in this context, the Constitutional Court as well as the Zondo Commission misapprehended the powers and legal status of the Commission.

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34. I have no doubt that the Zondo Commission has become a complex project controlled by my political foes. Even though I established the Commission, I was aware that it had been proposed as part of the campaigns to force me out of government.
35. The Zondo Commission has an insurmountable problem which the Court failed to even reflect on: whether it was competent for the judges of the Constitutional Court to adjudicate a matter involving their own colleague and a Deputy Chief Justice for that matter? The Constitutional Court failed to reflect its reasons for adjudicating a dispute involving their colleague.
36. The contempt proceedings were not brought to vindicate the integrity of the Zondo Commission rulings or directives – for as I listened to the arguments made before the Court by the Commission – it expressly does not seek to enforce my further participation in the Commission. In fact, it was stated vociferously on behalf of the Commission that all it wants is my incarceration and not my appearance before it.
37. What the Zondo Commission did was to avoid utilising the statutorily prescribed procedures for enforcing its directives, it created conditions for holding me in contempt of court rather than in contempt of the Zondo Commission. Had the Zondo Commission utilised the procedure prescribed in the Commissions Act to enforce its rulings, I would have been entitled to raise many defences. Approaching the Constitutional Court as a court of first and final instance violated my constitutional rights.

 N. M.

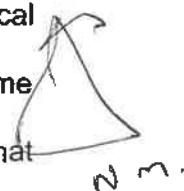
38. As I understand it, the Zondo Commission publicly declared its decision to file a charge of contempt with the NPA in compliance with the Commissions Act. That statutorily prescribed approach was abandoned for the inexplicable convenience of the Zondo Commission and with no regard to the effects that such a position would have on my constitutional rights. This clearly demonstrated that the Court had abandoned its constitutional mission for the sake of promoting the entrenchment of political narratives of alleged acts of state capture, fraud and corruption by me.
39. I therefore believed that the Constitutional Court would not succumb to the temptation of promoting political narratives. The Court simply ignored that the Chairperson of the Zondo Commission had publicly announced that he would have me prosecuted on a criminal charge of contempt. To date I have not received summons to appear in a criminal court to answer any question in terms of the Commissions Act alleging that I should be found guilty of defying the Zondo Commission.
40. The fact that the Constitutional Court failed to detect the abuse of the procedure adopted by the Zondo Commission demonstrates that they too have adopted the political view that there is something that I did for which it is justified to strip me of my constitutional rights.
41. I was further advised that the Constitutional Court, as the supreme custodian of guaranteed constitutional rights would not countenance a situation in which an executive arm of government would request it to strip me of my constitutional

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right to be presumed innocent, to remain silence and not to testify during proceedings guaranteed in section 35(3)(h) of the Constitution. I had seen the Commission Chairperson accepting the right of at least two individuals appearing before him to rely on these rights as a legitimate response to the questions by the Commission. I was treated in a discriminatory manner by the Constitutional Court in violation of my right to s 9 when it agreed that I was not entitled to assert my constitutional right in section 35(3)(h) where other similarly placed witnesses had been allowed to exercise the right.

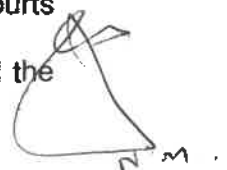
42. I was convinced that the Constitutional Court, acting as the ultimate custodian of our constitutional rights, would not deprive me of my right to appear before a tribunal or Commission of Inquiry that is fair and impartial. This to me was akin to forcing me to appear before someone who had tortured me to give a statement about my alleged criminal conduct involving my political activism. It is for that reason that the Commission has been trying very hard to pretend that my review application does not exist. I have reviewed the decision of Deputy Chief Justice Zondo refusing to recuse himself.
43. In that review I also demonstrate that not only has he told falsehoods on oath, but became a judge in his own matter.
44. I believed that Constitutional Court would respect the authority and obligation of the High Court to determine the merits of my review application and therefore, do nothing that would undermine the fair and impartial adjudication of that matter.

45. The intervention of the Constitutional Court based on political conveniences in the work of the Zondo Commission to me was not only bizarre and premature but demonstrated further that I could not place my trust in the independence, impartiality, dignity, accessibility, and effectiveness of the Court. It was clear to me that the decision to approach the Constitutional Court was an abuse of our judiciary.
46. As a starting point, I do not believe that the Zondo Commission was established in a manner that is consistent with the Constitution. Deputy Justice Zondo's own appointment was unconstitutional as it was done by the Chief Justice – who too was complying with an illegal directive of the Public Protector and an unlawful order of the Gauteng High Court.
47. Chief Justice, you know that you do not have the power, either in terms of the Constitution or by any known convention in political or constitutional governance to participate in the appointment of a Commission of Inquiry established in terms of section 84(2)(f) of the Constitution.
48. You essentially appointed the Deputy Chief Justice Zondo to be Chairperson of the Commission and you did so in the face of a glaring breach of the separation of powers doctrine. The appointment of the Commission failed to uphold the Constitution by accepting the re-allocation of constitutional powers exclusively assigned to the President in terms of the Constitution for the political convenience of the time. In fact, you will recall that you first gave me the name of Justice Desai and thereafter the name of Deputy Chief Justice Zondo. What



is of concern to me other than that you did not have the constitutional power to exercise this function, it is who you consulted with for your change in directing me to appoint Deputy Chief Justice rather than your initial choice of Justice Desai. To date, I do not know what actually changed in this regard.

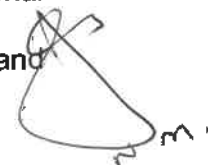
49. DCJ Zondo is simply disqualified to preside over my evidence by virtue of his prejudice towards me for reasons set out in my review application. Approaching this Court was a clear stratagem to sidestep the review. That the Commission even published that I had to demonstrate my seriousness about the review for it to file the necessary record and answer is simply disingenuous, to say the least.
50. The Zondo Commission, as the Court, knows or should know that there is no case of criminal contempt against me.
51. What the Constitutional Court judgment did was to take away my right to have my review application heard and determined. I could not continue to subject myself to a hearing before the very Commissioner who was biased. This was brought to the attention of the Court in a submission in which my review application was described by the Commission's Counsel as "hopeless".
52. It is not a criminal offence to have a dispute with an administrative agency over its eligibility to adjudicate my dispute. I have a legitimate dispute with the Chairperson, Mr Zondo and I am taking steps to have that ventilated in the courts through a judicial review, which has been ignored by the Commission and the Constitutional Court in its determination of this matter in its previous order.

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56. I also have a duty to protect my constitutional rights even at the risk of being imprisoned. I have just turned 79 years as I write this letter. I have not known the peace and the freedom that I committed the most active years of my life to. However, I watch the Constitutional Court which is charged with ensuring the safety of my constitutional rights, violate them with judicial impunity. What the Zondo Commission has done is inexcusable and I will live to see my vindication when – after squandering billions of much needed public revenue, an independent court reviews and set aside the findings of the Commission on the basis that it was not established in accordance with our Constitution.

57. A lawfully established Commission would be an asset in making recommendations to the executive that could be accepted, considered, and possibly implemented. How an unlawfully established Commission of Inquiry is capable of assisting the executive to govern correctly eludes me.

58. Just so you do not believe that I have avoided answering your direction, here is my answer. There is no precedence for what the Constitutional Court has allowed to take place in its sacred forum. As stated above, I am ready to become a prisoner of the Constitutional Court and since I cannot appeal or review what I see as a gross irregularity, my imprisonment would become the soil on which future struggles for a judiciary that sees itself as a servant of the Constitution and the people rather than an instrument for advancing dominant political narratives. My impending imprisonment by the Constitutional Court will be a constitutional experiment because it does not appear that it was created as a court of first and final instance to hold the powers of imprisonment and incarceration.



59. The Constitutional Court accepted its platform to be used to dehumanise and humiliate me by the Zondo Commission. I listened to the submissions made by Counsel and what stood out for me was his determination to convey to the Courts the unwavering belief that the Zondo Commission – an executive arm – was entitled to an urgent hearing to enforce its rulings by the order of the Constitutional Court. The Constitutional Court endorsed the abusive submissions that I am a risk to the integrity of our democratic system because I assert its laws in the correct forums to vindicate my rights. Chief Justice I have publicly expressed the view that the Courts have become political players in the affairs of our country as opposed to neutral arbiters with supreme constitutional duty to act independently, impartially, with dignity, accessibility, and effectiveness.

60. I am disappointed to witness the degradation of our collective commitment to remain vigilant against any form of dictatorship, including judicial dictatorship. I am however determined to stand on my conscience and beliefs in the sacredness of my constitutional rights. For the cause of constitutional rights, I will walk in jail as the first prisoner of the Constitutional Court.

61. Although this letter is an unprecedented step, I hope that I have answered your questions. However, I cannot assist the Courts to violate my constitutional rights by telling them what kind of punishment they must impose which accords with the foundational principles of human dignity, the achievement of equality and the advancement of human rights and freedom.

62. The Constitutional Court must know that it will imprison me for exercising my

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constitutional rights and for that I leave it to you and your court. Clearly, the Constitutional 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. In fact, I have accepted that my stance has consequences and I am of the view that the Constitutional Court already knows what ruling it will make.

63. I stress however, that judges of the Constitutional Court must know too that they are constitutional beings and are subject to the Constitution. The power that they have will not always ride on the wave of the political support of ANC political veterans and interests groups whose agenda in our nation is not particularly clear – but appears to mount campaigns to discredit what we and many freedom fighters were determined to achieve even at the cost of life itself. When I am imprisoned, as it is clearly the Court's intention, it is my body that you imprison and my political foes, who are now friends of the Court will flood the streets with celebration – for in my imprisonment – they would have achieved – using the legitimacy of institutions that we fought for.

64. Chief Justice, I would urge you and your colleagues to remain faithful servants and custodians of our Constitution. Be vigilant on what you do with the power vested on you which represents an inviolable national covenant. That my political foes have turned themselves into friends of the Court with such a powerful voice is unfortunate, but is the fate I have resigned myself to. I am ready

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for the finding the Constitutional Court is already contemplating, but will not clothe it with the legitimacy of my participation at this late stage and for a purpose that is so obvious.

65. I shall await the decision of your esteemed Court and am preparing myself for its obvious although unjustified severity.

ISSUED BY:

JACOB GEDLEYIHLEKISA ZUMA

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