

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 52/21

In the application of

THE HELEN SUZMAN FOUNDATION

Applicant for admission
as *amicus curiae*

In the matter between:

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

Applicant

and

JACOB GEDLEYIHLEKISA ZUMA

First Respondent

MINISTER OF POLICE

Second Respondent

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

Third Respondent

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DATED AT JOHANNESBURG ON THIS 19th DAY OF MARCH 2021



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AND TO: **THE STATE ATTORNEY,
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**NOTICE OF APPLICATION:
APPLICATION TO BE ADMITTED AS *AMICUS CURIAE***

TAKE NOTICE THAT the applicant for admission as *amicus curiae* ("**HSF**") hereby makes application to the Constitutional Court for an order in the following terms:

1. To the extent necessary, dispensing with the relevant rules of form and procedure set out in the Rules of the Constitutional Court and granting leave for this application to be heard on as one of urgency under Rule 12 of the Rules of the Constitutional Court;

2. That the HSF is admitted as an *amicus curiae* in the above matter;
3. That the HSF is granted leave to lodge written submissions on a date to be determined by the Court and to present oral argument at the hearing of this matter;
4. That any party opposing this application is ordered to pay HSF's costs, including the costs of two counsel;
5. Granting further and/or alternative relief.

TAKE NOTICE FURTHER THAT if any of the parties intends to oppose the relief sought in this application they are required to give notice of their intention to do so and file any answering papers by 16:00 on 22 March 2020, subject to any directions that the Honourable Chief Justice may give in relation to these time periods or any further conduct of this application.

TAKE NOTICE FURTHER THAT the affidavit of FRANCIS ANTONIE, together with annexes thereto, will be used in support of this application.

TAKE NOTICE FURTHER THAT the applicant will accept notice and service of all documents in these proceedings at the address set out below.

DATED AT JOHANNESBURG ON THIS 19th DAY OF MARCH 2021



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**AND TO: THE STATE ATTORNEY,
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AND TO: THE STATE ATTORNEY, PRETORIA
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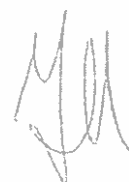
Third Respondent

**FOUNDING AFFIDAVIT:
APPLICATION TO BE ADMITTED AS *AMICUS CURIAE***

I, the undersigned,

FRANCIS ANTONIE

do hereby make oath and state that:



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1. I am an adult male director of the applicant for admission as *amicus curiae*, the Helen Suzman Foundation ("**HSF**"), situated at 6 Sherborne Road, Parktown, Johannesburg, a non-governmental organisation whose objectives are to defend the values that underpin our liberal constitutional democracy, and to promote respect for human rights.
2. I am duly authorised to depose to this affidavit and bring this application on behalf of the HSF.
3. The facts contained in this affidavit are to the best of my knowledge both true and correct and, unless otherwise stated or indicated by the context, are within my personal knowledge. Where I make legal submissions, I do this on the strength of the advice of the HSF's legal representatives.

INTRODUCTION AND PURPOSE OF THIS APPLICATION

4. This is an application in terms of rule 10 of the Rules of the Constitutional Court ("**the Rules**") for the admission of HSF as *amicus curiae* in the application before this Court, under the above case number, instituted by 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 Commission**" or "**the Applicant**") against the Former President of the Republic of South Africa, Mr Jacob Gedleyihlekisa Zuma ("**Mr Zuma**" or "**the Respondent**") ("**the Proceedings**").
5. The Commission has made application to this Court for an order declaring that Mr. Zuma is guilty of contempt of court in that he intentionally and unlawfully



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disobeyed this Court's order in *Commission v Zuma*.¹ The Commission seeks an order sentencing Mr. Zuma to imprisonment for a term of two years.

6. In *Commission v Zuma*, this Court ordered Mr. Zuma to obey all summonses and directives lawfully issued by the Commission, and to appear and give evidence before the Commission on the dates determined by it.²
7. Mr. Zuma has refused to comply with this Court's order. The Commission contends that Mr. Zuma's non-compliance is intentional and *mala fide* – making him liable for conviction for contempt of court.
8. The HSF participated as *amicus curiae* in *Commission v Zuma*, which proceedings resulted in the order in issue in these Proceedings. The HSF seeks leave to intervene in these Proceedings so that it may continue being of assistance to the Court.
9. This affidavit is made in support of the application for leave to be admitted as *amicus curiae* in the Proceedings and is structured as follows:
 - 9.1 background to this application;
 - 9.2 the interest of the HSF in the Proceedings;
 - 9.3 the submissions which the HSF seeks to make in the Proceedings should it be admitted as *amicus curiae*; the relevance of these submissions and how they will assist the Court in determining the issues before it; and how these submissions differ from those of the Applicant.

¹ *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* [2021] ZACC 2 ("*Commission v Zuma*").

² *Ibid* at paras 4 and 5 of the order.



BACKGROUND

10. The HSF became aware of the directions of this Court, dated 1 March 2021 ("the Directions") on 4 March 2021. It is the HSF's understanding that Mr. Zuma did not file an answering affidavit on 8 March 2021 as required by the Directions, nor has he delivered any such affidavit to date. In accordance with the Directions, the Commission lodged its written submissions on 15 March 2021.
11. Once the HSF had the opportunity meaningfully to analyse the full extent of the legal issues raised by the Applicant in its founding papers and written submissions, it became clear that they raised important legal and constitutional issues and that the HSF has a substantial interest in the Proceedings.
12. After considering the founding papers and written submissions, the HSF took all necessary steps as expeditiously as possible to begin the process of being admitted as *amicus curiae*. On the morning of 18 March 2021, the HSF sent a letter to the parties seeking their consent to the admission of the HSF as *amicus curiae* ("the 18 March 2021 letter"). The 18 March 2021 letter is attached marked "FA1".
13. The 18 March 2021 letter requested the parties' consent to its admission as *amicus curiae* and agreement that it should be entitled to participate in the proceedings including by filing written submissions. As set out in the Directions, the matter has been set down for hearing on 25 March 2021. On account of the proximity of the hearing the HSF requested that the parties respond to the 18 March 2021 letter by 8.30am on 19 March 2021.
14. The applicant received no substantive responses from the parties in relation to the granting of consent.

A handwritten signature in black ink, appearing to be 'M. J. J.', with a small box containing the letter 'A' underneath.

15. The HSF thus proceeded to draft and file this application to ensure compliance with Rule 10 of the Rules.
16. Due to the limited time before the hearing, for the benefit of the parties and the Court, the HSF has endeavoured to set forth the thrust of its written submissions (under the section entitled "**the HSF's submissions**" below).

THE HSF'S INTEREST IN THE PROCEEDINGS

17. The HSF is a non-governmental organisation whose objectives are to "*defend the values that underpin our liberal constitutional democracy and to promote respect for human rights*".
18. The HSF has a longstanding history of promoting South Africa's commitments in the realm of upholding democracy and the rule of law, constitutionalism and human rights, all of which are implicated in this matter.
19. The HSF has an interest in the Proceedings, as it was admitted as amicus curiae and made written submissions before this Court in *Commission v Zuma*, which proceedings resulted in the order that is in issue in these contempt Proceedings.
20. The HSF has a further interest in the Proceedings owing to the fact that Mr. Zuma, a central figure in the state capture inquiry, is refusing to respect the lawful powers of the Commission and the act in accordance with the summonses and directives issued against him. In addition, Mr. Zuma is refusing to comply with this Court's order directing him to obey the summonses and directives of the Commission, and to appear and give evidence before the Commission. Mr. Zuma has further embarked on a campaign of scandalising



insults and attacks against the integrity of the judges of this Court, this Court, the Commission and the judiciary as a whole.

21. The order declaring Mr. Zuma guilty of contempt of court sought by the Applicant in the Proceedings is critical to vindicate the dignity of the courts and the rule of law, and to ensure the continued effective administration of justice in South Africa. The enforcement of Mr. Zuma's duty to comply with court orders is essential to vindicate equality before the law, and the values of accountability and the rule of law.
22. In addition, an effective remedy and sanction for Mr. Zuma's contempt is critical to coerce or incentivise Mr. Zuma's cooperation with the Commission, and ensure that the Commission is able to perform its crucial mandate to investigate allegations state capture, corruption and fraud. It is also critical to ensure the efficacy of investigations and commissions more generally: if Mr Zuma (as a principal party before the Commission) is allowed to evade his statutory responsibilities in respect of this Commission, all witnesses subpoenaed to give testimony before commissions could adopt similar dilatory and uncooperative tactics, safe in the knowledge that the court system is unable to ensure effective and punctilious compliance with the law and indeed some have already adopted this unlawful tactic and refused to appear and / or abide by Commission subpoenas. The Commission's search for truth in the inquiry is of utmost constitutional importance, and the Commission must be assisted in its task to uncover all the facts in relation to state capture, corruption and fraud.
23. The HSF thus seeks to intervene as *amicus curiae* in order to advance submissions on the legal and constitutional requirements in relation to the enforcement of court orders. These submissions will assist the Court in its



determination of Mr. Zuma's duty to comply with this Court's order, the factors to be taken into account in determining an appropriate sanction for contempt of court and the appropriate sanction in this case.

THE HSF'S SUBMISSIONS

24. The HSF has reviewed the submissions of the Applicant and is of the view that there are a number of legal issues that have not been traversed, or have not been fully traversed, in the Applicant's submissions that will be of assistance to the Court in determining this matter.
25. Critically the HSF's submissions differ from that of the applicant as it is of the view that an appropriate and effective sanction for Mr. Zuma's contempt of court cannot be purely punitive. The HSF submits that the coercive purpose of sanctions for contempt of court cannot be ignored, since the public interest dictates in favour of an order that seeks to coerce or incentivise Mr. Zuma to comply with this Court's order, and to appear and give evidence before the Commission.
26. The HSF's submissions thus deal with the following aspects:
 - 26.1 The requirements of equality before the law and the values of accountability and the rule of law in relation to the duty to comply with court orders. There are no exceptions or exemptions permitted to former Presidents or any other categories or classes of persons in relation to the duty to comply with court orders.
 - 26.2 The factors that must be taken into account in determining the appropriate sanction for Mr. Zuma's contempt of this Court's order. In particular, the exceptionality of Mr. Zuma's contempt, which has given



rise to a constitutional crisis possibly unprecedented since the dawn of our democracy. The extraordinariness of Mr. Zuma's contempt arises from three features.

- 26.2.1 His former role as President of the Republic, and the heightened obligation of compliance that arises from his continuing constitutional duty and oath to uphold the Constitution;
 - 26.2.2 His contempt not only of this Court's order, but of the important truth-seeking work of the Commission, and the active undermining of the administration of justice. The obligation to comply with the summonses and directives of the Commission, which this Court sought to enforce in its order, is intimately connected to the truth-seeking purpose of the Commission, and ultimately to the constitutional values of accountability and openness. Mr. Zuma's conduct threatens to undermine the Commission's effective performance of its mandate; and
 - 26.2.3 His scandalising attacks against the judges of this Court, this Court and the judiciary. The harm of these attacks must be assessed in light of the historical context surrounding the judiciary and the importance of public trust in the judicial process and the courts.
- 26.3 An appropriate sanction for Mr. Zuma's contempt of this Court's order. A sanction for contempt of court must serve dual and interlinking punitive and coercive purposes. A purely punitive sanction will fail to incentivise Mr. Zuma to cure his contempt and cooperate with the Commission. An effective remedy must be crafted not only to vindicate the dignity of this Court, but also assist the Commission in uncovering the truth.



27. If admitted as *amicus curiae* in the Proceedings, the HSF intends to make the following written submissions.

MR. ZUMA IS EQUAL BEFORE THE LAW

28. In *Commission v Zuma*, the HSF made written submissions before this Court on the requirements of the principle of equality before the law in that case. The HSF contended that no exception or exemption from the duty to comply with the Commission's subpoenas could be permitted to be made for Mr. Zuma. This, it argued, is because equality before the law, and the values of accountability and the rule of law, require that everyone be treated equally when it comes to compliance with subpoenas.
29. This argument found favour with this Court. The Court chastened the Commission for "*treating [Mr. Zuma] differently*" and with "*a measure of deference*" despite "*the constitutional injunction of equal protection and benefit of the law*".³ The Court confirmed that the everyone must be treated equally in respect of the obligation to comply with subpoenas.
30. This Court affirmed that no one is above the law, including Mr. Zuma whose previous position does not grant him immunity from obeying the law.⁴ It said:

"The respondent's conduct in defying the process lawfully issued under the authority of the law is antithetical to our constitutional order. We must remember that this is a Republic of laws where the Constitution is supreme. Disobeying its laws amounts to a direct breach of the rule of law, one of the values underlying the Constitution

³ *Commission v Zuma* above n 1 at para 58.

⁴ *Ibid* at para 87.

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."⁵ (our emphasis).

31. This finds equal force in this case. Mr. Zuma, like everyone else, is subject to the laws of the Republic of South Africa – including the laws of contempt of court. He does not, within the context of this matter, fall within an exempt or excluded category that allows for special treatment.
32. The Constitution provides that an order or decision issued by a court binds "*all persons to whom it applies*".⁶ No exception or exemption can be made for any person, not even the former President, when it comes to compliance with court orders.
33. This is patently what is required by equality before the law. In its written submissions before this Court in *Commission v Zuma*, the HSF traversed the South African jurisprudence on equality before the law.⁷ It does not seek to repeat this jurisprudence here. However, the recent case of *Vance* decided by the Supreme Court of the United States offers salutary guidance in this case.⁸
34. In *Vance*, the Supreme Court reaffirmed an age old principle that a sitting President is not "*absolutely immune from state criminal subpoenas*".⁹

⁵ *Ibid.*

⁶ Section 165(5) of the Constitution.

⁷ See, for instance, *Prinsloo v Van der Linde* 1997 (3) SA 1012; *Weare v Ndebele NO* [2008] ZACC 20; 2009 (1) SA 600 (CC); 2009 (4) BCLR 370 (CC), and *City Council of Pretoria v Walker* [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257.

⁸ *Trump v Vance* 591 U.S. (2020) at 21.

⁹ *Ibid.*

Mr. Trump, former President of the United States of America, argued that he was entitled to "*absolute immunity from state criminal process*" during the time that he occupied the office of the Presidency.¹⁰ However, the Supreme Court disagreed, and held that it could "*not conclude that absolute immunity is necessary or appropriate*".¹¹ Of particular import, the Supreme Court recognised that "*every man has included the President of the United States*" and that in its "*judicial system*", "*the public has a right to every man's evidence*".¹² Similarly, in our own constitutional setting, "*any person*" in section 165(5) of the Constitution includes the President, both whilst in office and after stepping down.

35. Moreover, it would be antithetical to the value of accountability if those who hold or have held high office are not bound by court orders applicable to them. One of the key functions of an independent judiciary is to "*review the exercise of any power by State functionaries, from the lowest to the highest ranking officials*".¹³ Allowing an exemption for a former President from the obligation to comply with court orders – particularly in the context of an investigation into abuses of power – would serve to foster impunity, and seriously undermine the value of accountability.

¹⁰ Ibid at 2.

¹¹ Ibid at 17.

¹² Ibid at 1.

¹³ *Mukaddam v Pioneer Foods (Pty) Ltd* [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) ("*Mukaddam*") at para 29.

36. It would similarly be antithetical to the rule of law to allow any exception or exemption for Mr. Zuma from the duty to comply with court orders. As explained by this Court, per Khampepe J, in *Tasima I*¹⁴—

*"The obligation to obey court orders 'has at its heart the very effectiveness and legitimacy of the judicial system'. Allowing parties to ignore court orders would shake the foundations of the law, and compromise the status and constitutional mandate of the courts. The duty to obey court orders is the stanchion around which a state founded on the supremacy of the Constitution and the rule of law is built."*¹⁵

37. Indeed, the position is quite the contrary. As will be further explained below, Mr. Zuma's former position as President of the Republic, rather than exempting him from compliance with court orders, places a heightened obligation on him to be exemplary in his compliance.¹⁶
38. Mr. Zuma's defiance of the subpoena requiring him to appear before the Commission as well as his defiance of an order of this Court is a flagrant disregard of the rule of law, supremacy of the Constitution and an absolute signal that he is above the law. An exception or exemption for Mr. Zuma from the duty to comply with court orders, in this case, would violate equality before the law and the values of accountability and the rule of law.
39. An order by this Court declaring Mr. Zuma guilty of contempt will send an important message that no one is above the law. More than this, a carefully

¹⁴ *Department of Transport v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) ("*Tasima I*").

¹⁵ *Ibid* at para 183.

¹⁶ See 'Mr. Zuma's heightened obligation arising from his former role as President' below.

crafted sanction effectively incentivising Mr. Zuma to cooperate with the Commission will serve a critically important objective relating to the truth-seeking work of the Commission.

FACTORS TO BE TAKEN INTO ACCOUNT IN DETERMINING AN APPROPRIATE SANCTION

40. The Commission contends that Mr. Zuma is guilty of the offence of contempt of court in that he, wilfully and with mala fides, refused to comply with this Court's order in *Commission v Zuma*. The Commission further contends that Mr. Zuma's attacks against this Court, the judiciary and the Commission are aggravating factors, which ought to be taken into account in determining the appropriate sentence.
41. The HSF agrees that this is no ordinary case of contempt of court. Mr. Zuma's conduct constitutes the height of contempt. The exceptionality of this case lies not only in Mr. Zuma's scandalising insults and attacks, but also in his breach of a heightened obligation to comply with this Court's order. Mr. Zuma's heightened obligation arises from:
- 41.1 First, his position as the former President of the Republic; and
- 41.2 Second, the nature of this Court's order, and its close connection to the constitutional values of accountability and openness, underpinned by the international law obligation in respect of the truth.
42. The HSF contends that Mr. Zuma's breach of his heightened obligation to comply with this Court's order is also a factor that must be taken into account in determining an appropriate sanction.

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



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43. The Constitution provides that an order or decision of a court binds *all persons* to whom it applies.¹⁷ A wilful and mala fide refusal to comply with a court order by *any person*, therefore, threatens judicial authority and the rule of law. However, there is a heightened obligation on holders of high office to be exemplary in their compliance with court orders.
44. This Court has recognised that organs of state – including the President of the Republic as the head of state and the head of the national executive¹⁸ – have a *special duty* to comply with court orders. The Constitutional Court, in *Mamabolo*, held that servants of the state are "*obliged to be exemplary in their obedience to court orders*".¹⁹ It further opined that "[i]t strikes at the very foundations of the rule of law when government servants presume to disregard orders of court."²⁰
45. In *Pheko II*, the Constitutional Court confirmed that organs of the state are constitutionally bound to comply with court orders.²¹ It endorsed the remarks of Justice Brandeis in *Olmstead et al v United States*²² that "[i]f the government becomes a law-breaker, it breeds contempt for the law; it invites every man [or woman] to become a law unto himself [or herself]; it invites anarchy."²³

¹⁷ Section 165(5) of the Constitution.

¹⁸ Definition of organ of state in the Constitution.

¹⁹ *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) ("*Mamabolo*") at para 63.

²⁰ *Ibid* at para 65.

²¹ *Pheko v Ekurhuleni Metropolitan Municipality* (No 2) [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (7 May 2015) ("*Pheko II*") at 67.

²² 277 US 438 (1928) at 485.

²³ *Pheko II* above n 21 at para 66 (emphasis added by the Constitutional Court). These remarks were previously endorsed by the Constitutional Court in *Mamabolo* above n 19.

46. In *Tasima I*, the majority of the Constitutional Court held that organs of state have "a duty, above and beyond that of the average litigant, to comply with the court orders" and that this is demanded by the integrity of the Constitution.²⁴
47. This imposes a duty on government, especially those in high office, to lead by example through exemplary compliance with court orders. There are few office-bearers of greater constitutional importance than that of the President.²⁵ The Constitution places certain obligations on the President.²⁶ In *EFF I*,²⁷ this Court, per Mogoeng CJ, explained the nature of the constitutional obligations imposed upon the President. It said:

"An obligation is expressly imposed on the President to uphold, defend and respect the Constitution as the law that is above all other laws in the Republic. As the Head of State and the Head of the national executive, the President is uniquely positioned, empowered and resourced to do much more than what other public office-bearers can do. It is, no doubt, for this reason that section 83(b) of the Constitution singles him out to uphold, defend and respect the Constitution. Also, to unite the nation, obviously with particular regard to the painful divisions of the past. This requires the President to do all he can to

²⁴ *Tasima I* above n 14 at para 187.

²⁵ In *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) at para 30 this Court, per Mogoeng CJ, explained that:

"The President of South Africa is not just any of the many other constitutional office-bearers in the Republic. She is indeed an embodiment of supreme power. When all others fail, it is to that repository of raw power that we all ought to turn. It is in the President that citizens justifiably pin their hopes by reason of the vast and unrivalled capacities she has as a singular centre of extensive constitutional powers."

²⁶ Section 83 of the Constitution provides that the President "must uphold, defend and respect the Constitution as the supreme law of the Republic" and "promotes the unity of the nation and that which will advance the Republic".

²⁷ *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) ("*EFF I*") at para 26.

*ensure that our constitutional democracy thrives. He must provide support to all institutions or measures designed to strengthen our constitutional democracy. More directly, he is to ensure that the Constitution is known, treated and related to, as the supreme law of the Republic. It thus ill-behoves him to act in any manner inconsistent with what the Constitution requires him to do under all circumstances. The President is expected to endure graciously and admirably and fulfil all obligations imposed on him, however unpleasant."*²⁸

48. In addition, the President of the Republic is required to make an oath or solemn affirmation. The President is required to swear or solemnly affirm that he or she will "*obey, observe, uphold and maintain the Constitution*".²⁹ This necessarily includes section 165 of the Constitution, which provides that court orders are binding on all, protects the courts from interference, and imposes an obligation on organs of state to protect and assist the courts to ensure, among other things, the dignity and effectiveness of the courts.
49. It is clear that the President holds a special and heightened duty to obey court orders. Although Mr. Zuma is no longer the President of the Republic, his conduct flies in the face of the obligation that he held as President and the oath that he took to uphold the Constitution. Mr. Zuma is actively undermining the dignity and effectiveness of the courts, and thereby actively undermining the Constitution itself – both through his refusal to obey this Court's order and his contemptuous statements impugning the integrity of the judges of this Court, this Court and the judiciary.

²⁸ Ibid at para 26.

²⁹ Section 1 of Schedule 2 of the Constitution.

50. Contempt of court by a former President poses a unique threat to the courts, the administration of justice and the rule of law. Having been imbued with constitutional authority whilst in office, a former President retains moral authority and continues to wield influence in society even after leaving office. It is for this reason that a former President must continue to honour the duty and oath to uphold the Constitution even after stepping down. A contrary holding would pose a real threat to our constitutional democracy. This is because conduct by a former President defying the courts is likely to be *particularly harmful*.³⁰
51. While Mr. Zuma no longer holds the position of President of the Republic, he is still a public figure wielding influence within South Africa. It follows that contemptuous conduct on his part poses a real and significant threat of harm to the courts. In any event, his contemptuous conduct relates to his duty to account for the time that he was in office: it is thus inextricably linked to his constitutional obligations as a public official. As a former President Mr Zuma also remains on the public payroll. The HSF therefore contends that Mr. Zuma's flagrant breach of his constitutional duty and oath to uphold the Constitution is a relevant factor, which must be taken into account in determining the appropriate sanction.

³⁰In *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877, the Constitutional Court was confronted with a contemptuous statement made by then Minister of Local Government (Western Cape) at a political gathering. The statement was to the effect that the Court might hand down a judgment guided by political considerations. Referring to this statement, the Constitutional Court said:

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



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

52. In a unanimous judgment in *SS v VVS*,³¹ the Constitutional Court explained that while all court orders must be complied with diligently, there is a *heightened obligation* where court orders touch upon interests closely connected to the constitutional vision for our society. This Court said:

*"All court orders must be complied with diligently, both in form and spirit, to honour the judicial authority of courts. There is a further and heightened obligation where court orders touch interests lying much closer to the heart of the kind of society we seek to establish and may activate greater diligence on the part of all."*³²

53. Similarly, in a unanimous judgment in *Pheko II*, involving the constitutional right to housing, the Constitutional Court said that cases of contempt of court are particularly troubling where constitutional rights and obligations are in issue.³³ Failures to comply with court orders that seek to enforce constitutional rights and obligations "*have real and serious consequences for those whose interest they are there to serve*".³⁴

54. This Court's order in *Commission v Zuma* clearly touches upon interests "*lying close to the heart of the kind of society*" that the Constitution envisions. This

³¹ *SS v VVS* [2018] ZACC 5; 2018 (6) BCLR 671 (CC). In *SS v VVS*, this Court was confronted with a failure by the applicant to fulfil his court ordered basic maintenance obligations. This Court held that there was a heightened obligation because the court order touched upon interests connected to the protection of children's rights and the "collective ability of our nation to 'free the potential of each person' including its children."

³² *Ibid* at para 23.

³³ *Pheko II* above n 21 at para 27.

³⁴ *Ibid*.

Court's order sought to enforce Mr. Zuma's clear legal duty to comply with the summonses issued by the Commission by appearing and giving evidence before the Commission.³⁵ In doing so, the order gives effect to the founding values of accountability and openness enshrined in section 1,³⁶ and the constitutional vision of a "*democratic and open society*" contained in the Preamble.³⁷

55. This Court has said that the values of accountability and openness are of "*singular importance in South Africa coming – as we do – from a past where governance and administration were shrouded in secrecy*".³⁸
56. As emphasised by Sachs J "*the Constitution requires candour on the part of government. What is involved is not simply a matter of showing courtesy to the public and to the courts, desirable though that always is. It is a question of maintaining respect for the constitutional injunction that our democratic government be accountable, responsive and open*".³⁹
57. The Commission is a constitutional mechanism for accountability and openness through truth-seeking. The Commission was established to uncover the truth about state capture, corruption and fraud, and to make recommendations to ensure that these crimes cease and are not repeated.

³⁵ *Commission v Zuma* at paras 4 and 5 of the order.

³⁶ Section 1(d) of the Constitution.

³⁷ Preamble to the Constitution.

³⁸ *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC), majority judgment of Madlanga J, at para 65.

³⁹ *Matatiele Municipality and Others v President of the Republic of South Africa and Others (1)* (CCT73/05) [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC), at para 107.

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58. In *Magidiwana I*,⁶¹ a case broadly concerning victim participation in the Marikana commission of inquiry, this Court explained the truth-seeking purpose of commissions of inquiry. It said:

*"The power to appoint a commission of inquiry is mandated by the Constitution. It is afforded to the President as part of his executive powers. It is open to the President to search for the truth through a commission. The truth so established could inform corrective measures, if any are recommended, influence future policy, executive action or even the initiation of legislation. A commission's search for truth also serves indispensable accountability and transparency purposes. Not only do the victims of the events investigated and those closely affected need to know the truth: the country at large does, too."*⁴⁰ (our emphasis)

59. In its terms of reference, the Commission is tasked with inquiring into, making findings on and reporting on matters of public and national interest concerning allegations of state capture, corruption and fraud.⁴¹ The public has a clear and direct interest in the Commission's important work to uncover of the truth concerning these serious allegations.

⁴⁰ *Magidiwana v President of the Republic of South Africa* 2013 (11) BCLR 1251 (CC) at paras 14-6.

⁴¹ The Commission's terms of reference.



60. This Court, in *Commission v Zuma*, clearly recognised that the matters being investigated by the Commission constitute matters in which the public has an interest.⁴²
61. In deciding to grant the Commission's application for direct access to the Court, it said:

*"[Mr. Zuma] is firmly placed at the centre of those investigations which include an allegation that he had surrendered constitutional powers to unelected private individuals. If those allegations are true, his conduct would constitute a subversion of this country's constitutional order. It must be plainly stated that the allegations investigated by the Commission are extremely serious. If established, they would constitute a huge threat to our nascent and fledgling democracy. It is in the interests of all South Africans, [Mr. Zuma] included, that these allegations are put to rest once and for all. It is only the Commission which may determine if there is any credence in them or to clear the names of those implicated from culpability."*⁴³

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

⁴² *Commission v Zuma* above n 1 at para 19, in which this Court said: "In view of the nature of the allegations which are being investigated by [the Commission], there can be no doubt that they constitute matters of public concern" as envisaged in the Commissions Act.

⁴³ *Ibidat* paras 69-70.



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the Commission's investigation, that some matters connected to the investigation fall within his personal knowledge, and that these matters may not be properly investigated without his participation.⁴⁴

63. Mr Zuma's conduct is not only contemptuous of this Court's order, but also of the Commission's important truth-seeking work. His conduct has seriously frustrated the work of the Commission, and has stymied the public interest in the uncovering of the truth.
64. His contempt, therefore, threatens the vision for our society contained in the Constitution. His contempt undermines accountability and openness, and threatens to keep the allegations concerning state capture, corruption and fraud shrouded in secrecy. His conduct has real and serious consequences for the public, whose interest this Court's order sought to serve, and who will be kept in the dark while the truth remains concealed.⁴⁵
65. This failure is unconstitutional, but for another reason too. It is inconsistent with our country's international law obligations in respect of truth telling. The HSF made submissions in this regard previously to this Court – they are

⁴⁴ Ibidat paras 21-2. This Court said:

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

⁴⁵ See *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) at para 17 where Mahomed DP says:

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



submissions which it shall, if admitted, summarise and update in relation to the question of contempt.

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

66. In addition to defying this Court's order, Mr. Zuma has published contemptuous statements attacking the integrity of the judges of the Constitutional Court, this Court and the judiciary as a whole.
67. This conduct, in itself, constitutes contempt of court in a different form, namely that of scandalising the court – which is "*committed by the publication, either in writing or verbally, of words calculated to bring a court, a judge of a court, or the administration of justice through the courts generally, into contempt.*"⁴⁶
68. Although the Commission does not seek an order declaring Mr. Zuma guilty of contempt of court for scandalising the courts in these proceedings, the Commission is correct to contend that the statements published by Mr. Zuma are an aggravating factor in his contempt.
69. The Commission details the contemptuous statements made by Mr. Zuma about this Court and the judiciary in its written submissions,⁴⁷ and the HSF does not repeat them here. In support of the Commission's contention that these attacks should be treated as an aggravating factor, the HSF draws attention to the particularly serious harm caused by these contemptuous statements.

⁴⁶ *In re: Chinamasa* 2000 (12) BCLR 1294 (ZS) at p 1302; citing *Chokolingo v Attorney General of Trinidad and Tobago* [1981] 1 All ER 244 (PC) at 248f per Lord Diplock.

⁴⁷ Commission's written submissions at paras 69 and 72.



70. The constitutionality of the offence of scandalising the court was unanimously upheld by the Constitutional Court in *Mamabolo*.⁴⁸ In reaching that conclusion, the Constitutional Court explained why scandalizing the court remains an offence under our constitutional democracy. It is because "[t]he judiciary cannot function properly without the support and trust of the public."⁴⁹ It said:

"[I]t is the people who have to believe in the integrity of their judges. Without such trust, the judiciary cannot function properly; and where the judiciary cannot function properly the rule of law must die."⁵⁰

71. The Constitutional Court further explained that the real offence is "*the wrong done to the public by weakening the authority and influence*" of the courts.⁵¹

72. Mr. Zuma's conduct – in refusing to comply with this Court's order and, at the same time, directing scurrilous attacks against the integrity of the judges of this Court, this Court and the judiciary – undermines public trust in the judicial process and in the courts, without which the courts will not be able to attend to the administration of justice.⁵²

⁴⁸ *Mamabolo* above n 19. However, the Constitutional Court was cautiously explained at para 45 that:

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

⁴⁹ *Ibid* at para 18.

⁵⁰ *Ibid* at para 19-20.

⁵¹ *Ibid* at para 24; citing *R v Davies* [1906] 1 KB 32 at 40.

⁵² *Mamabolo* *ibid* at para 32.

73. Mr. Zuma's conduct, viewed holistically, is likely to damage the administration of justice.⁵³ More than this, Mr. Zuma's conduct poses a "*real and direct threat*" to the administration of justice. It can be seen as part of a wider campaign to challenge the legitimacy of the judiciary and constitutionalism in order to achieve impunity for serious crimes.⁵⁴
74. In understanding the potential harm done to the judiciary by Mr. Zuma attacks, the historical context is key. The courts in South Africa have not always enjoyed the trust of the public. This is an historical legacy from which this Court itself has not shied away. In *Sonke*,⁵⁵ the majority per Theron J said:

"Under the racist authoritarian regime of apartheid, the legal system administered injustice, as the courts were required to

⁵³ It is not necessary in these proceedings for the Constitutional Court to determine whether Mr. Zuma's conduct meets the elements of the offence of scandalising the court. If this were in issue, however, the HSF contends that Mr. Zuma's conduct would meet the elements even on the stricter test proposed by Justice Sachs in *Mamabolo*. The test for scandalising the court expounded at para 45 in the majority judgment per Kriegler J in *Mamabolo* is "whether the offending conduct, viewed contextually, really was likely to damage the administration of justice." In his concurring judgment at para 75, Sachs J proposes a stricter test. He says: "[T]o meet the constitutional standards of reasonableness and justifiability, prosecutions should be based not simply on the expression of words likely to bring the administration of justice into disrepute, but on the additional ingredient of provoking real prejudice. In its context such expression must be likely to have an impact of a sufficiently serious and substantial nature as to pose a real and direct threat to the administration of justice. Thus, it could be part of a wider campaign to promote defiance of the law or to challenge the legitimacy of the constitutional state. Or, more specifically, it could be connected to attempts by persons such as warlords or druglords to achieve de facto immunity for themselves. Alternatively, there might be less dramatically confrontational examples where the speech in its context is likely in a direct and significant way to sap the capacity of the courts to function properly. If the speech targets a particular judicial officer, it should be of such an unwarranted and substantial a character as seriously and unjustifiably to impede that judicial officer in being able to carry on with his or her judicial functions with appropriate dignity and respect. Thus, to call a judge a crook in circumstances where the public is likely to give credence to such allegation, is effectively to challenge and undermine the capacity of that judge to continue with the function of impartial adjudication."

⁵⁴ See the concurring judgement of Sachs J at para 75, quoted directly above.

⁵⁵ *Sonke Gender Justice NPC v President of the Republic of South Africa* [2020] ZACC 26; 2021 (3) BCLR 269 (CC) ("*Sonke*") at para 23.

*implement increasingly oppressive laws. Far from being guardians of fundamental rights, the Judiciary came to represent the gateway to unjust imprisonment and punishment without purpose. The majority of the South African population came to regard the machinations of justice with suspicion and mistrust. As the late Mahomed DP observed, '[t]he legitimacy of law itself was deeply wounded as the country haemorrhaged dangerously in the face of this tragic conflict which had begun to traumatise the entire nation'.*⁵⁶

75. The potential harm of Mr. Zuma's virulent attacks against the integrity of the judges of this Court, this Court and the judiciary must be assessed with this historical context and the importance of maintaining the public trust in the courts in mind. These attacks are indeed a serious aggravating factor in his contempt.

AN APPROPRIATE SANCTION FOR MR. ZUMA'S CONTEMPT

76. It is well established that contempt of court in the form of failing or refusing to comply with a court order, willfully and with *mala fides*, may justify the imposition of a sentence of imprisonment.
77. In *Pheko II*, the Constitutional Court explained that "*[t]he object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order*".⁵⁷ A sanction for contempt

⁵⁶ Ibid at para 23.

⁵⁷ *Pheko II* above n 21 at para 28, our emphasis.

is, therefore, intended to serve two purposes. First, compelling compliance with a court order (the coercive purpose). And second, vindicating the dignity of the court (the punitive purpose).⁵⁸

78. The Commission is seeking "*a punitive order in the form of an unsuspended term of imprisonment, which in its nature, would not permit Mr. Zuma to avoid imprisonment by undertaking to comply*".⁵⁹
79. While the order of committal sought by the Commission will effectively serve the punitive purpose of the sanction, the HSF contends that it does not serve the coercive purpose at all. This is because no further opportunity is provided to Mr. Zuma to cure his contempt by appearing and giving evidence before the Commission.
80. The HSF agrees with the Commission that a suspended sentence will serve no purpose in this case. More importantly, it will not fulfil the punitive purpose of the sanction. An order of committal for *at least* some period is necessary to vindicate the dignity of this Court, and to serve the public interest in "*obedience to court orders and the maintenance of the rule of law*".⁶⁰ Indeed, the extraordinary seriousness of Mr. Zuma's contempt compels an order of committal.
81. However, an order that provides for a period of committal *and* requires or at least allows Mr. Zuma to cure his contempt will better serve the dual and interlinked punitive and coercive purposes of a sanction for contempt of court.

⁵⁸ Ibid at para 30.

⁵⁹ Commission's Heads of Argument at para 73

⁶⁰ *Pheko II* above n 21 at para 34

82. The HSF suggests that a more effective coercive sanction for Mr. Zuma's contempt may be an order for his committal for a minimum compulsory period, but coupled with:
- 82.1 an order which would curtail any further period of imprisonment if Mr Zuma voluntarily complies with the requirement to testify before the Commission; or
- 82.2 an order that, following the period of imprisonment, the sheriff of the High Court be directed to bring Mr Zuma to the Commission to testify.
83. Mr. Zuma's obligation to answer questions lawfully put to him at such appearance would be subject to the privilege against self-incrimination, but not to the right to remain silent, as recently confirmed by this Court.⁶¹
84. A sanction that seeks to ensure Mr. Zuma's compliance with this Court's original order will better promote the Commission's important truth-seeking work. It will do so while also signalling the serious nature of Mr. Zuma's contempt and vindicating the dignity of this Court.
85. The purpose of the Commission's subpoenas directing Mr. Zuma to appear and give evidence before it – and this Court's order seeking to enforce those subpoenas – was to arrive at the truth concerning serious allegations of state capture, corruption and fraud. This Court itself described these allegations, if proven true, as "*a subversion of this country's constitutional order*" and "*a huge threat to our nascent and fledgling democracy*".⁶² This truth-seeking purpose

⁶¹ *Commission v Zuma* above n 1 at paras 6 and 7 of the order.

⁶² *Commission v Zuma* above n 1 at paras 69-70.



has not disappeared. It remains heightened now as the Commission's lifespan nears its end.

86. A sanction that seeks to compel Mr. Zuma's compliance with this Court's order directing him to appear and give evidence before the Commission is more likely to enable the Commission to fulfil its truth-seeking purpose. On the other hand, an order that does not seek at all to coerce Mr. Zuma into appearing and giving evidence before the Commission will, in spirit and effect, confirm that Mr. Zuma has successfully flouted the purpose of the Commission and its subpoenas.
87. Moreover, compelling Mr. Zuma to appear and give evidence before the Commission may indeed serve to counter impunity for serious crimes. The Commission's Regulations were amended before the commission commenced to allow evidence given before the Commission to be used in subsequent criminal proceedings, with the sole exception of self-incriminating statements or answers.⁶³ As this Court acknowledged, many serious allegations concerning state capture, corruption and fraud fall within Mr. Zuma's exclusive personal knowledge. Evidence given by Mr. Zuma before the Commission may prove crucial in future proceedings, where persons involved in state capture, corruption and fraud may be held accountable for their misdeeds.

⁶³ Proclamation 8 of 2018, Amendment of the Regulations of the Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, 23 March 2018 at section 2. The legal position concerning the use of evidence given before the Commission in subsequent criminal proceedings is incorrectly recorded at para 24 of this Court's judgment in *Commission v Zuma*.



88. A coercive order is generally sought by a frustrated successful litigant to compel compliance with a court order.⁶⁴ However, in this case, the successful litigant – the Commission – seeks a purely punitive order and appears to have abandoned any hope of compelling Mr. Zuma to comply with this Court's order.
89. However, a sanction that seeks to compel Mr. Zuma to comply with this Court's order, and to appear and give evidence before the Commission, is in the public's interest (not only that of the Commission as the successful litigant in the earlier proceedings). As discussed above, this Court has affirmed the interest that the public has in the Commission's investigations into the allegations of serious crimes against Mr. Zuma.⁶⁵
90. The public interest in a complete and effective investigation by the Commission into serious allegations of state capture, corruption and fraud should weigh heavily in favour of a coercive order to incentivise Mr. Zuma to cooperate with the Commission.
91. The HSF, therefore, contends that the coercive purpose of a sanction for contempt cannot be overlooked in a case, such as this one, where the defied court order lies close to the heart of the constitutional vision for our society and compliance with the court order is of the utmost importance.

This Court's power to make the suggested order

92. The HSF contends that its suggested order lies within this Court's power to make "*any order that is just and equitable*".⁶⁶ In *Hoërskool Ermelo*,⁶⁷ this Court

⁶⁴ *Pheko II* above n 21 at para 30.

⁶⁵ *Commission v Zuma* above n 1 at para 69.

⁶⁶ Section 172(1)(b) of the Constitution.

⁶⁷ *Head of Department : Mpumalanga Department of Education and Another v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC) ; 2010 (3) BCLR 177 (CC) ("*Hoërskool Ermelo*").

confirmed that the wide remedial discretion to make just and equitable orders is available whenever a court is adjudicating a constitutional matter. It said:

*"It is clear that section 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in section 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct."*⁶⁸

93. A flagrant contempt of court of this nature by the former President of the Republic of South Africa is clearly a constitutional matter – imperiling, as it does, constitutional supremacy, the effective administration of justice by the courts and the maintenance of the rule of law.
94. It is well recognised that enforcement of court orders is a crucial component of the right of access to court. This Court has on numerous occasions quoted with approval Jafta J in *Mjeni*:⁶⁹

"The constitutional right of access to courts would remain an illusion unless orders made by the courts are capable of being enforced by those in whose favour such orders were made. The process of adjudication and the resolution of disputes in courts of law is not an

⁶⁸ Ibid at para 97.

⁶⁹ *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk); quoted with approval in *Nyathi v Member of the Executive Council for the Department of Health Gauteng* [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) at para 43; *Moodley v Kenmont School* [2019] ZACC 37; 2020 (1) SA 410 (CC); 2020 (1) BCLR 74 (CC) at para 20; and *Government of the Republic of Zimbabwe v Fick* [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) at para 61.

end in itself but only a means thereto; the end being the enforcement of rights or obligations defined in the court order."⁷⁰

95. Moreover, the right of access to courts, is the linchpin upon which all other rights in the Bill of Rights rely for enforcement. In *Mukaddam*,⁷¹ this Court explicated the importance of the right of access to courts—

*"Access to courts is fundamentally important to our democratic order. It is not only a cornerstone of the democratic architecture but also a vehicle through which the protection of the Constitution itself may be achieved."*⁷²

96. Contempt of court was described by the Supreme Court of Appeal in *Meadow Glen* as a "*blunt instrument*".⁷³ It follows that a remedy or sanction for contempt that more effectively incentivises compliance with court orders will promote the spirit, purport and objects of the Bill of Rights.⁷⁴ As stated by this Court, an order which inadequately addresses the contempt by a party or which does not appropriately incentivise or coerce compliance "*will dilute the potency of the judicial authority and it will send a chilling message to litigants that orders*

⁷⁰ Ibid at 452G-H and 453C-D.

⁷¹ *Mukaddam* above n 13.

⁷² Ibid at para 29.

⁷³ *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* [2014] ZASCA 209; 2015 (2) SA 413 (SCA) ("*Meadow Glen*") at para 35.

⁷⁴ Indeed, our courts have previously called for development of the common law of contempt to provide for more effective remedies. The Full Court in *Burchell v Burchell* [2005] ZAECHC 35 at para 27, per Froneman J (as he was then) sought to develop ancillary civil sanctions for contempt of court. Froneman J sought to develop civil sanctions for where contempt of court was proven on a balance of probabilities and a criminal sanction, therefore, could not be applied. Froneman J's development of the common law in this regard was looked upon with approval by this Court in *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) at para 51.

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of court may well be ignored with no consequence. At the same time, it will signal to those who are the beneficiaries of such orders that their interests may be secondary and that the value and certainty that a court order brings counts for little."⁷⁵ In the HSF's respectful submission, this outcome should and can be avoided in the present matter through the Court utilising the full gambit of its remedial tools.

97. The HSF contends that this is a case of contempt that calls out for an effective coercive remedy and sanction, within the remit of this Court's broad powers to issue just and equitable remedies. Indeed, it is quite clear that an order of imprisonment for any period, on its own, will not incentivise Mr. Zuma to comply with this Court's order or to cooperate with the Commission.

Conclusions

98. Accordingly, the HSF submits that the submissions it wishes to advance are relevant and will be of assistance to the Court, not least because such submissions have not been advanced by the other parties to this application. The HSF approaches this Court on an impartial basis.
99. Accordingly, the HSF seeks leave of this Court to enter as *amicus curiae* in the Proceedings. The HSF requests that the Registrar of this Court issue directives to regulate the participation of the HSF in these proceedings, including that it be permitted to lodge written submissions in this matter, and if the Court believes it would be helpful, that it be permitted to present oral submissions at the hearing of this matter on 25 March 2020.

⁷⁵ *SS v VVS* above n 31 at para 35.



WHEREFORE the HSF seeks the relief in the notice of application to which this affidavit is attached.

[Handwritten Signature]
DEPONENT.

THUS SIGNED AND SWORN to before me at ROSBANK on 19 MARCH 2021, by the deponent, he having acknowledged that he knows and understands the contents of this affidavit, that he has no objections to taking the prescribed oath and considers same to be binding on his conscience.



[Handwritten Signature]
Commissioner of oaths

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Your reference

Our reference

Date

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

18 March 2021

Dear Sirs

Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including State Organs // Jacob Gedleyihlekisa Zuma (CCT Case No: 52/21)

1. We represent the Helen Suzman Foundation ("the HSF") in relation to the above application before the Constitutional Court, to be heard on 25 March 2021 ("the application").
2. The HSF was admitted as *amicus curiae* and submitted written submissions in the proceedings before this Court under case number CCT Case No: 295/20, which proceedings were the predecessor to the application.

Senior Partner: JC Els Managing Partners: SJ Hutton Partners: BW Abraham AB Africa NG Alp RL Appelbaum GC Baymao K. Beilings AE Bennett T Blackbeard AP B'air DHL Bodysen AR Bowley J Braunl MS Burger M Buy RL Carrim T Cassim SJ Chang C Colett KL Collier KM Colman KE Coster K Courzyn DB Dion PA Drosland R Graywager JH Davies PM Daya L De Bruyn PU De la M Denanga DW de Villiers BEC Dickinson MA Dientont DA Dingley G Driver W Druce HJ du Preez CP Du Toit SK Edmundson LF Egypt Kh Esler AE Esterhuizen MJR Evans K Fazel AA Fellekis G Fitzmaurice JQ Forman C Gabriel KL Gwilt CH Geldenhuys MM Gibson CI Gijwa PD Grealy S Haroun JM Harvey JG Henning KR Hlils Z Hlophe S Hockey CM Hofeld PM Holloway AV Ismail MS Jarvis CA Jennings JC Jones CM Jenker S Jooste LA Kann ACR Katze M Kennedy A Keyser MD Kola JC Kraamwinkel M Kyle J Lamb E Louw M Mahangu V Manner L Maras MC McIntosh SJ Merenize CS Meyer AJ Mills D Mlo NP Mngomezulu M Nkomo LE Mastert VM Movshovich RA Nelson G Niven ZN Ntshona N Nxumalo AV Nyatumba A October L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel GR Perford SE Phajene M Philippides BA Phillips MA Phillips D Ramjattan CI Rapson X Rew SA Ritchie NJA Robb G Sader M Sader H Samsodien JW Scholtz KE Shepherd AJ Simpson N Singh N Singh Nogueira P Singh S Sihlale J Smit BS Smith NP Spalding PS Steia MW Straeuli LJ Swaine Z Swallopel A Tnaker T Theissen TK Thekiso C Theodossou R Thavani G Truter WZ Vanda SE van der Merwe JP van der Pool CS Vanmarl JF Verdon B Versfeld MG Versfeld TA Versfeld DN Visagie ERE Warrington J Watson AWR Westwood RH Wilson M Yudanin Chief Operating Officer: SA Boyd

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3. The HSF is a non-governmental organisation whose objectives are to "defend the values that underpin our liberal constitutional democracy and to promote respect for human rights". The HSF is an organisation primarily concerned with the principles of democracy and constitutionalism, as well as the rule of law, all of which are implicated in this matter.
4. The HSF is of the view that there are important legal and constitutional submissions germane to the proper adjudication of the application which do not appear to have been sufficiently dealt with in the applicant's papers and submissions before this Court.
5. The HSF thus hereby requests the consent of the parties to participate in the proceedings, including the delivery of written submissions, in accordance with Rule 10 of the Rules of the Constitutional Court.
6. The HSF believes that its submissions will be of material benefit to the Constitutional Court in that the HSF intends to raise important issues of law in respect of the following issues:
 - 6.1 In accordance with the Constitution all persons are considered and held equal before the law. The Constitutional Court and various courts in comparative jurisdictions have confirmed that no person, including former presidents, are exempt from the application and sanction of the law. The HSF intends to make submissions in relation to the application of the principle of equality before the law in the circumstances of this case.
 - 6.2 The circumstances of this case are, however, indeed exceptional which call for an extraordinary remedy to vindicate this Court's dignity and the Constitution. Firstly, a former president, who has taken an oath to act in accordance with the Constitution and in compliance with all laws of South Africa has elected to disobey a binding court order, which in turn is pivotal to the work of several other state institutions. This approach by the former President is not only contemptuous of an order of the highest court in the land but is also contrary and an affront to the truth-seeking purpose of the Commission. The HSF intends to make submissions regarding the exceptionality of the case, in the context of the Commission's mandate, the severity of the offence of former President Zuma and the exceptional nature of his duties in relation to upholding the Constitution and South Africa's international law obligations, and towards all citizens of South Africa.
 - 6.3 The HSF also intends to make submissions regarding the purpose of contempt of court applications and orders and the approach to be adopted by the Constitutional Court in the specific circumstances of this case to give effect to such purpose. To the extent necessary, in this case, the Court should exercise its broad powers to fashion creative remedies to cater for this specific situation, to prevent recurrence and bring certainty to the legal position. In considering this aspect, the HSF will submit that the Court should consider, *inter alia*: the purpose of the Commission's subpoena; the truth seeking nature of the Commission; that the purpose of the Commission will be thwarted if the subpoena is not respected and enforced or any exception is made for former President Zuma. The outcome of that process, in the HSF's submission should be that former President Zuma should be imprisoned. However, a purely punitive sanction will not incentivise Mr. Zuma to comply with the Constitutional Court's order or to cooperate with the Commission. An effective remedy must be crafted to also assist the Commission in uncovering the truth. For instance, the Court may order that Mr. Zuma be subject to committal until such time as he cures his contempt or may order him to be brought before the Commission by the sheriff to testify, as is his constitutional duty to do. The HSF submits that the Court's powers are sufficiently




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broad to cater for such relief, and that only relief which ensures his testimony truly vindicates the Constitution's purpose and this Court's dignity, which is the ultimate objective of all contempt-related remedies.

7. Owing to the limited time remaining before the hearing of the application, please let us have your response by no later than 8.30am on Friday, 19 March 2021.

Yours faithfully

pp **WEBBER WENTZEL****V Movshovich**

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