

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 52/ 21

In the matter between:

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

Applicant

and

JACOB GEDLEYIHLEKISA ZUMA

First Respondent

MINISTER OF POLICE

Second Respondent

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

Third Respondent

APPLICANT'S WRITTEN SUBMISSIONS

INTRODUCTION

1. The rule of law is foundational to South Africa's constitutional democracy.¹ The Constitution affirms the supremacy of the Constitution² and the judicial authority of the courts.³ To maintain these three attributes of our constitutional order,

¹ Section 1(c) of the Constitution.

² Section 2 of the Constitution.

³ Section 165 of the Constitution.

judicial decisions must be implemented. Judicial authority should not be impugned, and courts should protect their institutional authority and judgments.

2. This Court has explained why it is important to protect the authority of the courts and ensure the effectiveness of court orders in *Pheko II*. It held:

“The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.”⁴

3. The respondent and former president, Mr Jacob Gedleyihlekisa Zuma, (‘Mr Zuma’), has intentionally disobeyed this Court’s order of 28 January 2021, and publicly attacked this Court in seeking to justify his disobedience. He has no legally valid reason for the disobedience, nor are his tirades against this Court and the judiciary fair or justified.

⁴ *Pheko v Ekurhuleni City* 2015 (5) SA 600 (CC) (‘*Pheko II*’) para 1.

4. 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 dates determined by it”.⁵
5. Mr Zuma defied this order when he failed to comply with the Commission’s summonses and directives. He failed to appear and give evidence at the Commission on 15 to 19 February 2021, despite being summoned by the Commission to do so. Mr Zuma also failed to file any affidavits with the Commission, despite being directed to do so.
6. Mr Zuma also launched unjustified public attacks on this Court, the Commission and the judiciary. Shortly after this Court gave judgment, on 1 February 2021, Mr Zuma issued a public statement, expressing his intention to defy the Court’s order.
7. Mr Zuma acted according to his stated intention and failed to appear before the Commission on 15 February 2021. On the same day, Mr Zuma issued a second public statement. This statement, like the statement of 1 February 2021, was replete with insults and vituperative attacks against this Court, the Commission and the judiciary.
8. By his conduct, Mr Zuma has wilfully disobeyed this Court’s order, in scathing terms. Mr Zuma has not merely frustrated the Commission’s right to an effective court order. Mr Zuma’s conduct directly challenges the authority of

⁵ *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (CCT 295/20) [2021] ZACC 2 (‘*Secretary of the Judicial Commission of Inquiry v Zuma*’), attached as annexure IM6 to the Founding Affidavit. See paras 4 and 5 of the order at p 53.

this Court and the administration of justice as a whole. Mr Zuma's conduct poses a grave threat to the rule of law and the very legitimacy and effectiveness of the judicial system that underpins South Africa's constitutional order.

9. The applicant accordingly approaches this Court for orders declaring Mr Zuma to be in contempt of this Court's order and for his committal to prison for two years.

10. Mr Zuma has not filed any notice to oppose or answering affidavit in these proceedings. Nor has he stated whether or not he abides the decision of the Court. Bearing in mind what he has stated publicly about this Court, it would have been expected that he would defend or explain his utterances on oath, before this Court. The legal effect of his failure to file an opposing affidavit, however, is that all the facts alleged by the Commission must be taken to be established.

STRUCTURE OF THESE SUBMISSIONS

11. We structure these submissions as follows:
 - 11.1. First, we address jurisdiction and urgency;

 - 11.2. Second, we summarise the facts and the conduct that has prompted this application;

 - 11.3. Third, we address the crime of contempt of court – its purpose and how the elements of the offence are met in this case;

11.4. Fourth, we address the appropriate sentence; and

11.5. Fifth, we deal with costs.

JURISDICTION

12. A court that grants an order retains jurisdiction to ensure compliance with its order and to vindicate its authority.⁶ This Court has heard applications for contempt of court where its own orders have been disobeyed. It has also initiated hearings at its own instance for contempt of court in respect of its orders.⁷

13. A contempt application engages a superior court's inherent jurisdiction under section 173 of the Constitution, to protect its own process and ensure that its orders are obeyed.⁸ The court's jurisdiction is also engaged because contempt of its order undermines the successful party's entitlement to effective relief. In cases of ongoing contempt, the court may also be concerned to regulate how the matter is to proceed.⁹

⁶ *Pheko II* para 28: "The 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." See also *Els v Weideman and Others* 2011 (2) SA 126 (SCA) para 37.

⁷ *Pheko II* para 13.

⁸ *Bannatyne v Bannatyne* 2003 (2) SA 359 (SCA) para 8.

⁹ *Pheko II* para 2.

14. There is no authority of this Court on whether the High Court has jurisdiction to hear applications for contempt to enforce this Court's orders.¹⁰ We submit that this is not an issue that need be decided: it is the authority of this Court that has been directly placed under threat by Mr Zuma in his words and deeds. The interests of justice require that this Court exercise its own, undoubted jurisdiction to hear the matter.
15. The threat that Mr Zuma's conduct poses to the rule of law and the administration of justice requires urgent intervention by this Court. The gravity of the threat cannot be understated. The very foundation of South Africa's constitutional order depends on public trust and respect for the courts, and for so long as Mr Zuma's contempt is not finally and decisively addressed, the threat to that foundation persists.
16. The authority of the courts is not protected for its own sake. It is fundamental to a constitutional system based on the rule of law, which provides for the peaceful resolution of disputes and the equal protection and enforcement of substantive and procedural rights through the right of access to courts.
17. This Court has recognised the importance of protecting the authority of the courts for the maintenance of the rule of law. In *Mamabolo*¹¹ it held:

¹⁰ The Supreme Court of Appeal has, however, held in *Els v Weideman and Others* 2011 (2) SA 126 (SCA) paras 34-38, that there is concurrent jurisdiction among the divisions of the High Court to enforce each other's orders. The judgment, however, appears to be limited to instances of court orders that have been issued by the High Court, unlike the present instance.

¹¹ *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) ('*Mamabolo*').

*“Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights — even against the state ...”*¹²

...

*“In the final analysis it 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.”*¹³

18. In *Chief Lesapo*,¹⁴ this Court also described the importance of the rule of law and the right of access to courts in our constitutional order. Mokgoro J held:

*“No one is entitled to take the law into her or his own hands. Self-help, ..., is inimical to a society in which the rule of law prevails, as envisioned by s 1(c) of our Constitution. ...Taking the law into one's own hands is ... inconsistent with the fundamental principles of our law.”*¹⁵

19. Mokgoro J further held that the right of access to courts –

¹² *Mamabolo* para 16.

¹³ *Mamabolo* para 19.

¹⁴ *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) (*‘Chief Lesapo’*).

¹⁵ *Chief Lesapo* para 11.

“is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance”.¹⁶

20. The rule of law and the right of access to courts would be rendered meaningless if court orders could be ignored with impunity. If litigants could decide which orders they wished to obey and which they wished to ignore, a state of chaos and anarchy would ensue.
21. The Constitution recognises this in section 165, which establishes judicial authority. Section 165(3) provides that ‘no person or organ of state may interfere with the functioning of the courts’, and section 165(5) provides that any order issued by a court ‘binds all persons to whom and organs of state to which it applies’.
22. As the ultimate guardian of the Constitution, it is in the interests of justice and the public interest for this Court to assert its authority and bring finality to this matter without delay.¹⁷ The interests of justice would not be served if this matter were to be protracted through an appeals process. Notably, Mr Zuma is not asking for this matter to be heard by a different court.

¹⁶ *Chief Lesapo* para 22.

¹⁷ As this Court recognised in *Pheko II*, in contempt proceedings, the court is not only concerned with giving effect to the rights of the successful litigant, but “also and more importantly”, is “acting as guardians of the Constitution, asserting their authority in the public interest” (para 2).

23. It is also appropriate and, we submit, necessary for this Court to assert its authority to defend the judiciary and administration of justice against Mr Zuma's improper attacks. In defying this Court's order and publicly attacking this Court, Mr Zuma has sought to exploit his political status as the former President. An attack of such a nature requires a response from this Court.
24. Mr Zuma has also directed a very serious affront and pointed attack at this particular Court's authority and integrity. It is well recognised that contempt of court proceedings are not concerned with protecting the dignity or reputation of individual judges or courts, but rather with protecting the authority of the courts and the administration of justice as a whole.¹⁸ However, Mr Zuma's public defiance of this Court appears calculated to undermine public trust in the judiciary and the administration of justice as a whole.
25. The seriousness of this public injury requires this Court to assert its special authority as the highest court in constitutional matters and the ultimate guardian of the Constitution and its values, by holding Mr Zuma in contempt of court and issuing an appropriate sentence.¹⁹

¹⁸ *Mamabolo* para 24: "...it is important to keep in mind that it is not the self-esteem, feelings or dignity of any judicial officer, or even the reputation, status or standing of a particular court that is sought to be protected, but the moral authority of the judicial process as such." See also *Argus Printing and Publishing Co Ltd and Others v Esselen's Estate* [1993] ZASCA 205; 1994 (2) SA 1 (A) at 29E-F; and *In re: Chinamasa* 2001 (2) SA 902 (ZS) at 920D.

¹⁹ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) (*SARFU II*) at para 72.

URGENCY

26. The seriousness of the threat that Mr Zuma's conduct poses to the administration of justice and the rule of law requires this Court to intervene and assert its authority without delay.
27. As a former President and leader of the Republic, Mr Zuma sets an example by his words and conduct. He has the position and influence to do so, as others look up to him as a leader. When Mr Zuma undermines the integrity and authority of this Court, and the judicial system as a whole, there is a grave risk that he will inspire others to do so.
28. This risk is compounded by the very public and forceful nature of Mr Zuma's defiance of this Court and attack on the judiciary.
29. For so long as Mr Zuma is allowed to disobey this Court's order with impunity, others may believe that they too can follow Mr Zuma's lead, and defy court orders with impunity.
30. Thus, not only Mr Zuma's contemptuous conduct, but also any delay in asserting the Court's authority in response to it, poses a threat to the rule of law. The interests of justice require a swift response.
31. Mr Zuma's contempt of this Court's order is also ongoing. He continues to defy this Court's order by refusing to obey the summons issued by the Commission. The Commission's lifespan has since been extended by three months, beyond

31 March 2021. Should any order issued by this Court be suspended, it is necessary that this be done before the end of term of the Commission.

32. No prejudice is caused to Mr Zuma by hearing this application on an urgent basis, as Mr Zuma has not opposed the application.
33. It is, for these reasons, in the interests of justice for this Court to grant direct access and hear the application on an urgent basis.

THE FACTS

34. The Chairperson of the Commission, Deputy Chief Justice Zondo, directed Mr Zuma, in terms of regulation 10(6) of the Commission's regulations, on 27 August 2020 and again on 8 September 2020, to respond on affidavit to certain accusations made against him in evidence before the Commission.²⁰
35. The Secretary of the Commission summoned Mr Zuma on 20 October 2020 to appear before the Commission from 16 to 20 November 2020.²¹
36. At the hearing on 16 November 2020, Mr Zuma applied for the recusal of the Chairperson. The latter refused the application on 19 November 2020 whereupon Mr Zuma walked out of the hearing and made it known that he would no longer attend.²²

²⁰ These directives are annexures IM13 and IM14 to the founding affidavit, at pp 200 to 209.

²¹ This background is addressed in *Secretary of the Judicial Commission of Inquiry v Zuma* at para 49, p 72.

²² *Secretary of the Judicial Commission of Inquiry v Zuma* at paras 50 to 51, p 72. See also founding affidavit para 31, p 14.

37. The Secretary of the Commission again summoned Mr Zuma to appear and give evidence from 18 to 22 January and from 15 to 19 February 2021.²³
38. The Secretary also launched an application to this Court to compel Mr Zuma to comply with the fresh summons.
39. That application was heard by this Court on 29 December 2020. Mr Zuma did not oppose the application.²⁴
40. Mr Zuma failed to appear as summoned on 18 January 2021, despite being advised by the Commission that the summons was valid and binding on him.²⁵
41. This Court handed down judgment on 28 January 2021. Paragraphs 4 and 5 of the its order read as follows:

“4. Mr Jacob Gedleyihlekisa Zuma is ordered to obey all summonses and directions 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.”²⁶

²³ Founding affidavit para 32, pp 14-15. The two fresh summonses are annexure IM1 and IM2, at pp 35 to 42. The returns of service are in annexure IM3, at pp 43 to 46.

²⁴ Founding affidavit para 34, p 15.

²⁵ Founding affidavit paras 35-37, pp 15-16.

²⁶ This Court’s judgment is annexure IM6. The order appears at p 53.

42. Mr Zuma responded publicly to this Court's judgment and order, by issuing a public statement on 1 February 2021.²⁷ In that statement he made plain his intention to defy this Court's order and to persist in his refusal to cooperate with the Commission.
43. This Court's judgment and order was formally served on Mr Zuma, at both his residences in Forest Town and Nkandla, on 5 February 2021.²⁸
44. In keeping with his stated intention, Mr Zuma intentionally disobeyed this Court's order by –
- 44.1. failing to appear and give evidence at the Commission on 15 to 19 February 2021, as directed by the Commission;
 - 44.2. failing to file any affidavit in accordance with the Chairperson's directives under regulation 10(6);²⁹ and
 - 44.3. launching attacks on both this Court and the Commission in the public statements he issued, in his own name, on 1 and 15 February 2021.³⁰

²⁷ Founding affidavit para 43, pp 18-19, and annexure IM7 at p 95.

²⁸ Founding affidavit para 44, p 20. The returns of service are in annexures IM8 and IM9, pp 101 to 102.

²⁹ Founding affidavit paras 58 to 63, pp 24-26.

³⁰ Mr Zuma's first public statement of 1 February 2021 is annexure IM7 to the founding affidavit at pp 95 to 100. For convenience, we refer to this statement as "Zuma 1".

Mr Zuma's second public statement of 15 February 2021 is annexure IM12 at pp 188 to 199. We refer to this statement as "Zuma 2".

CONTEMPT OF COURT

45. Contempt of court is a criminal offence. It is the unlawful and intentional violation of the dignity, repute or authority of a judicial body or a judicial officer.³¹ The offence takes many forms but its essence lies in the violation of the dignity, repute or authority of a court or judicial officer.³²
46. One of the forms of contempt is the crime of “*scandalising the court*”. It is the publication of any statement which brings the administration of justice into disrepute. The nature of the offence of scandalising the court was expressed by Kotzé J in *In re Phelan* as follows:

*“ . . . any publications or words which tend, or are calculated, to bring the administration of justice into contempt, amount to a contempt of Court. Now, nothing can have a greater tendency to bring the administration of justice into contempt than to say, or suggest, in a public newspaper, that the Judge of the High Court of this territory, instead of being guided by principle and his conscience, has been guilty of personal favouritism, and allowed himself to be influenced by personal and corrupt motives, in judicially deciding a matter in open Court.”*³³

47. The offence of scandalising the court is normally prosecuted in the normal criminal process. There was once a summary process by which contempt of this

³¹ *Mamabolo* para 13; Snyman Criminal Law 6ed, p 315.

³² *Fakie v CCII Systems* 2006 (4) SA 326 (SCA) (‘*Fakie*’) para 6.

³³ *In re Phelan* (1877) Kotzé 5 at 7, cited in *Mamabolo* para 22.

kind could be prosecuted and punished by the court or judicial officer who was the target of the contempt. This Court disapproved, however, of this summary process in *Mamabolo*.³⁴

48. Another form of contempt is the wilful disobedience of a court order. This Court described the offence of defying a court order in *Pheko II*³⁵ as follows:

*“Contempt of court is understood as the commission of any act or statement that displays disrespect for the authority of the court or its officers acting in an official capacity. This includes acts of contumacy in both senses: wilful disobedience and resistance to lawful court orders. This case deals with the latter, a failure or refusal to comply with an order of court. Wilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence. The 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.”*³⁶

49. As is apparent from this description, this form of contempt may also be civilly prosecuted by the beneficiary of the court order which has been defied. This Court described this feature in *Pheko* as follows:

³⁴ *Mamabolo* paras 51 to 59.

³⁵ *Pheko II* para 28.

³⁶ *Pheko II* para 28.

“The term civil contempt is a form of contempt outside of the court, and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour.”³⁷

50. In *Matjhabeng*,³⁸ this Court elaborated on this form of contempt as follows:

“It is important to note that it is a crime unlawfully and intentionally to disobey a court order. The crime of contempt of court is said to be a “blunt instrument”. Because of this, “(w)ilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence.” Simply put, all contempt of court, even civil contempt, may be punishable as a crime. The clarification is important because it dispels any notion that the distinction between civil and criminal contempt of court is that the latter is a crime and that the former is not.”³⁹

51. The main purpose of a civil application for contempt of court, by the failure to obey a court order, is usually to coerce compliance with the order. But it may

³⁷ *Pheko II* para 30.

³⁸ *Matjhabeng Local Municipality v Eskom Holdings; Mkhonto and Others v Compensation Solutions (Pty) Limited* 2018 (1) SA 1 (CC) (*‘Matjhabeng’*).

³⁹ *Matjhabeng* para 50.

also be used for punitive purposes, particularly when it is necessary to do so to vindicate judicial authority.

52. Justice Cameron held in *Fakie* that a civil application for contempt of court is never purely coercive and always has a public dimension to vindicate judicial authority.⁴⁰ He concluded as follows:

“A court, in considering committal for contempt, can never disavow the public dimension of its order. This means that the use of committals for contempt cannot be sundered according to whether they are punitive or coercive. In each, objective (enforcement) and means (imprisonment) are identical. And the standard of proof must likewise be identical.

This approach conforms with the true nature of this form of the crime of contempt of court. As pointed out earlier..., this does not consist in mere disobedience to a court order, but in the contumacious disrespect for judicial authority, that is so manifested.”⁴¹

53. This Court made the same point in *Pheko II*:

“Coercive contempt orders call for compliance with the original order that has been breached, as well as the terms of the subsequent contempt order. A contemnor may avoid the imposition of a sentence by complying with a coercive order. By contrast, punitive orders aim to

⁴⁰ *Fakie* paras 34 to 40.

⁴¹ *Fakie* paras 39 and 40.

*punish the contemnor by imposing a sentence which is unavoidable. At its origin the crime being denounced is the crime of disrespecting the court, and ultimately the rule of law.*⁴²

54. This Court again recognised in *Matjhabeng* that a civil order for committal may sometimes be imposed to punish rather than coerce:

*“In some instances, the disregard of a court order may justify committal, as a sanction for past non-compliance. This is necessary because breaching a court order wilfully and with mala fides, undermines the authority of the courts and thereby adversely affects the broader public interest.”*⁴³

55. This approach, which allows orders for committal for contempt of court to punish even if they do not coerce, accords with the broader purpose of the remedy. Its broader public purpose is to vindicate the Constitution and the rule of law.

56. Section 165 of the Constitution, which vests judicial authority in the courts, provides that orders of court bind everybody subject to them and enjoins the state, by legislative and other means, to assist and protect the courts to ensure their dignity and effectiveness.⁴⁴ Enforcing contempt of court orders is one such means.

⁴² *Pheko II* para 31.

⁴³ *Matjhabeng* para 54.

⁴⁴ *Pheko II* para 26.

57. The underlying purpose of punishing contempt of court is moreover to protect the rule of law itself. This Court made the point in *Coetzee*⁴⁵ (and repeated in *Mamabolo*)⁴⁶ that,

“The institution of contempt of court has an ancient and honourable, if at times abused, history... the need to keep the committal proceedings alive would be strong because the rule of law requires that the dignity and authority of the courts as well as their capacity to carry out their functions, should always be maintained.”

MR ZUMA IS GUILTY OF CONTEMPT OF COURT

58. An applicant for a punitive sanction for contempt of court must establish that the alleged contemnor (i) had knowledge of the court’s order; and (ii) failed to comply with the order. Once these facts are established, wilfulness and mala fides are presumed unless the respondent leads evidence to establish a reasonable doubt.

59. Thus, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: should the respondent fail to advance evidence that establishes

⁴⁵ *Coetzee v Government of the RSA* 1995 (4) SA 631 (CC) para 61.

⁴⁶ *Mamabolo* para 14.

a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.⁴⁷

60. In this instance, there can be no doubt that Mr Zuma had knowledge of this Court's order.

60.1. Mr Zuma was served with this Court's judgment and order on 5 February 2021.

60.2. Mr Zuma's knowledge of the Court's order is also plain from the statement Mr Zuma issued on 1 February 2021 and the correspondence the Commission received from his attorneys on 15 February 2021.⁴⁸

61. There can also be no doubt that, despite knowledge of this Court's order, Mr Zuma deliberately refused to obey it.

62. Mr Zuma's wilfulness and *mala fides* in refusing to comply with the Court's order is evidenced by both of his public statements. These statements demonstrate a clear intention to defy this Court's order, regardless of the consequences. They evidence Mr Zuma's belief that this Court's order is politically motivated and not guided by constitutional principle, and for this reason stands to be disobeyed.

⁴⁷ *Fakie* at paras 41-42, endorsed by this Court in *Pheko II* at para 36. See also *Matjhabeng* at para 67 on the applicable standard of proof.

⁴⁸ This letter is annexure IM10, p 103.

63. Mr Zuma has presented no evidence whatsoever to avoid the conclusion that his non-compliance was wilful and *mala fide*.
64. It bears emphasis that Mr Zuma's views about the merits of this Court's order cannot absolve him from guilt for contempt. Unless an order of court is set aside or varied by a competent court, it is valid and binding. Even if Mr Zuma had genuine grounds for contesting this Court's order – which evidently he does not – his remedy lay in applying to this Court for variation or rescission of the order. Any misgivings about the order of 28 January 2021 could also have been raised in these proceedings, in which Mr Zuma has again elected not to respond. Instead of following due process, Mr Zuma decided to malign the Court.
65. Mr Zuma is accordingly guilty of the crime of contempt of court. The question is what should be the appropriate sentence. We deal with aggravating factors next.

MR ZUMA'S INSULTS ARE AN AGGRAVATING FACTOR

66. Mr Zuma has purported to defend his disobedience of this Court's order in his public statements of 1 and 15 February 2021. In these statements Mr Zuma has aggravated his offence of contempt, by insulting this Court, the Commission and the judiciary at large in a manner that appears calculated to bring the judicial process into disrepute.
67. We do not ask this Court to decide whether Mr Zuma committed the offence of scandalising the court. We submit that Mr Zuma's statements are an

aggravating factor in his offence of contempt of court. The statements have been issued, their meaning is plain, and they have not been explained by Mr Zuma before this Court. By issuing these statements, Mr Zuma sought both to publicise and justify his defiance of this Court's order and the Commission.

68. In what follows, we highlight some of Mr Zuma's specially egregious insults. In doing so, we refer to Mr Zuma's public statements as "Zuma 1" and "Zuma 2". We have numbered the paragraphs of the statements for ease of reference.

Mr Zuma's insults of this Court

69. Mr Zuma's insults of this Court and its members are numerous. They include the following:

69.1. The Constitutional Court "*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*". The Constitutional Court represents "*a clearly politicised segment of the judiciary that now heralds an imminent constitutional crisis in this country.*" (Zuma 1 para 1)

69.2. The Commission recently ran to 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.*" (Zuma 1 para 4)

- 69.3. The Constitutional Court's judgment "*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 resembles the conduct of the apartheid government, which legislated for the indefinite detention of Robert Sobukwe, who was also "*specifically targeted for his ideological stance on liberation.*" (Zuma 1 para 5)
- 69.4. I have no 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.*" (Zuma 1 para 11)
- 69.5. The Constitutional Court judgment "*effectively stripped me of my constitutional right as a citizen and created... jurisprudence that only applies to Jacob Gedleyihlekisa Zuma.*" (Zuma 2 para 1)
- 69.6. I defy the Constitutional Court "*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.*" (Zuma 2 para 2)
- 69.7. I defy the Constitutional Court and now await its sentence because "*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.”

(Zuma 2 para 7)

69.8. *“Many in our society have watched this form of judicial abuse....”* (Zuma 2 para 8)

69.9. The Constitutional Court made a costs 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.”* (Zuma 2 para 14)

69.10. *“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.”* (Zuma 2 para 17)

69.11. *“I protest against those in the judiciary that have become an extension of political forces that seek to destroy and control our country.”* (Zuma 2 para 18).

69.12. The recent judgment of the Constitutional Court *“is a travesty of justice”*. It is *“based on mere conjecture and speculation about my future conduct”* and *“a betrayal of the Constitution that many refuse to confront as they scapegoat me for every malady in society.”* (Zuma 2 para 21)

69.13. *“I protest against our black, red and green robes, dressing up some individuals that have long betrayed the Constitution and their oath of office.”* (Zuma 2 para 30)

69.14. My statement *“is a protest against some in the judiciary that have sold their souls and departed from their oath of office.”* My respect for the law *“obliges me to reject the abuse of law and judicial office for political purposes.”* (Zuma 2 para 31)

Mr Zuma’s insults of the Commission

70. The contempt of court for which the applicant seeks to have Mr Zuma punished, is in the first place his unjustified defiance of this Court. But the gravity of Mr Zuma’s offence is also exacerbated by his defiance of the Commission. That is so because this Court ordered him to submit to and obey the Commission. Mr Zuma’s intentional defiance of the Commission accordingly exacerbated his contemptuous defiance of this Court’s order.

71. The following are some of his serious insults of the Commission.

71.1. The Commission *“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.”* (Zuma 1 para 4)

- 71.2. *“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.”* (Zuma 1 para 5)
- 71.3. Deputy Chief Justice Zondo has been *“frugal and expedient with the truth.”* *“I had relied on his own personal integrity, which now seems very compromised.”* *“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.”* (Zuma 1 para 7)
- 71.4. At the Commission *“allegations made against the judiciary have been overlooked and suppressed by the chairperson himself.”* It is blatantly 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... can expect no further cooperation from me in any of their processes going forward.”* (Zuma 1 para 8)
- 71.5. Deputy Chief Justice Zondo and Advocate Pretorius SC did, what has become their hallmark, *“in making submissions to each other and playing politics to influence public opinion.”* (Zuma 2 para 3)
- 71.6. *“That Deputy Chief Justice Zondo could mislead to the nation is something that should concern us all.”* (Zuma 2 para 4)

- 71.7. The Chair *“has always sought to prejudice me.”* (Zuma 2 para 5)
- 71.8. *“Deputy Chief Justice Zondo and due process and the law are estranged.”* (Zuma 2 para 6)
- 71.9. *“Judge Zondo has today again displayed questionable judicial integrity, independence and open-mindedness required in an investigation of this magnitude.”* (Zuma 2 para 9)
- 71.10. *“The commission sought to deliver me at all costs and in this endeavour is prepared to break every rule of justice and fairness.”* (Zuma 2 para 16)

Mr Zuma’s insults of the judiciary

72. It is clear from the context of a number of Mr Zuma’s insults that they were specifically directed at this Court and the Commission. But it is also clear that some of them were insults more broadly of the judiciary as a whole. We highlight a few further examples.

- 72.1. The public discourse has been *“seeking to shield what I regard as a few in the judiciary that have forsaken their oath of office....”* (Zuma 2 para 19)
- 72.2. I *“express my own protest about those in the judiciary that have turned their back on their fundamental task in society... because I believe that judges should never become agents of ruling classes in society.”* (Zuma 2 para 20)

- 72.3. I take this stance “*because we continue to allow some in the judiciary to create jurisprudence and legal inconsistencies that apply only to me.*”
(Zuma 2 para 21)
- 72.4. “*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.*” (Zuma 2 para 29)
- 72.5. 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.*” (Zuma 2 para 34)
- 72.6. “*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....*”
(Zuma 2 para 36).

THE SENTENCE IN THIS CASE

73. The applicant has asked for 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. But the applicant also left the possibility open to Mr Zuma to submit himself to the authority of the Constitution and this Court by undertaking to comply, which has not happened.
74. The distinction between coercive and punitive orders is usefully set out in the minority judgment in *Fakie* as follows:

“[74] The following are, I would suggest, the identifying characteristics of a coercive order:

1. The sentence may be avoided by the respondent after its imposition by appropriate compliance with the terms of the original (breached) order ad factum praestandum together with any other terms of the committal order which call for compliance. Such avoidance may require purging a default, an apology or an undertaking to desist from future offensive conduct.

2. Such an order is made for the benefit of the applicant in order to bring about compliance with the breached order previously made in his favour.

3. Such an order bears no relationship to the respondent’s degree of fault in breaching the original order or to the contumacy of the respondent thereafter or to the amount involved in the dispute between the parties.

4. Such an order is made primarily to ensure the effectiveness of the original order and only incidentally vindicates the authority of the court.

[75] By contrast a punitive order has the following distinguishing features:

1. The sentence may not be avoided by any action of the respondent after its imposition.

2. The sentence is related both to the seriousness of the default and the contumacy of the respondent.

3. The order is influenced by the need to assert the authority and dignity of the court and as an example for others.

4. The applicant gains nothing from the carrying out of the sentence.”⁴⁹

75. This matter falls in the second category. It is a unique and extreme case of contempt of court, for which there is no meaningful precedent. The following interrelated features render it unique:

75.1. Mr Zuma, a former president of the Republic, has deliberately defied orders of the Republic’s highest court.

75.2. Mr Zuma went out of his way to make his defiance public and, in doing so, sought to undermine the integrity and authority of this Court over and over again and in the most scathing terms.

75.3. This Court ordered Mr Zuma to comply with the Commission’s orders and directives. He instead deliberately defied the Commission, not only in breach of this Court’s order, but also in breach of the orders and directives of the Commission.

75.4. Mr Zuma did so in extreme terms and thereby sought to undermine the work of the Commission instead of obeying it as this Court had ordered him to do.

75.5. He used the occasion to attack the integrity and authority of the judiciary generally.

⁴⁹ Footnotes omitted.

- 75.6. Mr Zuma's failure to respond to this application at all further aggravates his culpability, as it demonstrates a persistent attitude of contempt and disregard for this Court and its processes.
76. We submit that all of these features must be taken into account in the determination of Mr Zuma's sentence because they are inextricably intertwined with his defiance of this Court. Mr Zuma did not merely fail to obey its orders. He gave vent to his defiance by making scurrilous statements about this Court, the Commission and the judiciary generally, and has persisted in his demonstration of disdain for the judicial process in these proceedings. He is also continuing his defiance by not submitting himself before the Commission, despite this Court's order.
77. While there is a plethora of legislative provisions that make it an offence for a witness not to heed a summons,⁵⁰ none of these statutory provisions is an appropriate guide to sentence in this case.
78. This is not a case of a witness who merely failed to obey a summons. Mr Zuma failed to obey the Commission's summons, but the most serious elements of

⁵⁰ See, for instance, in the civil context:

- section 6(1) of the Commissions Act 8 of 1947 (six months);
- regulation 12(2) of the Commission's Regulations, as amended (twelve months); and
- sections 35(4) and (5) of the Superior Courts Act 10 of 2013 (three months).

And in the criminal context:

- section 189(1) of the Criminal Procedure Act 51 of 1977 (two to five years); and
- section 41(2) of the National Prosecuting Authority Act 32 of 1998 (fifteen years).

his offence were that he defied this Court and, in doing so, sought to undermine it, the Commission and the judiciary generally in extreme terms.

79. This Court must, by its order, vindicate its authority and that of the Commission and the judiciary generally. It should, we submit, recognise that Mr Zuma's defiance was an attack on the judicial system as a whole and was, despite Mr Zuma's protestations to the contrary, patently designed to imperil the rule of law.

80. A mere fine or suspended sentence would not achieve this purpose. The purpose of suspension would, in any event, have been to allow Mr Zuma to purge his contempt, by complying. But this is pointless. Mr Zuma has made it clear that he is determined not to heed this Court's order. Despite the Secretary indicating in the founding affidavit that the Commission may yet be able to hear the evidence of Mr Zuma, should the Court be inclined to grant a suspension of an order of committal to allow him to do so,⁵¹ Mr Zuma has not come forth to give any undertaking that he would do so. Mr Zuma has remained resolute in his defiance of the Commission and this Court, with the result that no purpose would be served by a suspended sentence.

COSTS

81. The applicant seeks punitive costs on the attorney and own client scale, including the costs of two counsel. This costs order is justified by Mr Zuma's

⁵¹ Founding affidavit para 20, p 11.

reprehensible conduct that has required the Commission to again approach this Court at public expense.

82. Mr Zuma has deliberately and in bad faith defied an order of this Court. He has also launched unjustified public attacks on this Court, the Commission, and the institution of the judiciary. Mr Zuma's public utterances against this Court have been untruthful and malicious. When called upon to justify or explain the statements on oath, Mr Zuma has failed to do so as he has not filed any answering affidavit in this matter. Such malicious conduct is deserving of censure in a punitive costs order.

Tembeka Ngcukaitobi SC

Janice Bleazard

Counsel for the Applicant

14 March 2021

APPLICANT'S AUTHORITIES

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S v Mamabolo 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC)

Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma (CCT 295/20) [2021] ZACC 2