IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 4686/2021P

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA	**APPLICANT**
and	
THE MINISTER OF POLICE	**FIRST RESPONDENT**
NATIONAL COMMISSIONER FOR THE SOUTH AFRICAN POLICE SERVICE	**SECOND RESPONDENT**
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**THIRD RESPONDENT**
THE SECRETARY OF THE JUDICIAL COMMISSION OF INQUIRY INTO STATE CAPTURE, FRAUD AND CORRUPTION IN THE PUBLIC SECTOR, INCLUDING ORGANS OF STATE	**FOURTH RESPONDENT**
RAYMOND MNYAMEZELI ZONDO N.O.	**FIFTH RESPONDENT**
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**SIXTH RESPONDENT**
THE HELEN SUZMAN FOUNDATION	**SEVENTH RESPONDENT**

ORDER

The following order shall issue:

The application is dismissed with costs, such costs to include those occasioned by the employment of senior counsel.

JUDGMENT

Mnguni J:

Introduction

[1] This is an urgent application in which the applicant, Mr Jacob Gedleyihlekisa Zuma (Mr Zuma) seeks an order in two-fold:

(a) First (Part A):

'. . .

2. That, pending the outcome of the rescission application, which is before the Constitutional Court, in respect of the matter of *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of Sate v Zuma and Others* (Case No CCT52/21), and the due determination of orders in Part B of this Notice of Motion, an order is hereby granted:

2.1 Staying and/or suspending the execution of the relevant orders in the aforementioned orders pending the outcome of the application for an order of reconsideration and rescission of orders and judgment in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of Sate v Zuma and Others* referred to in paragraphs 2 above; and/or

2.2 Interdicting the first and second respondents from executing the orders in paragraphs 4, 5 and 6 of the aforementioned judgment.

. . .'

(b) Second (Part B):

'5. Declaring that in circumstances such as the present, the crime of civil contempt of court must be conducted in accordance with the provisions of the Criminal Procedure Act, 1977;

6. Declaring the Criminal Procedure Act 51 of 1977 to be unconstitutional insofar

as it fails or omits to make any provision for the conduct of a criminal trial in respect of proceedings in which contempt of court proceedings are conducted for the sole and exclusive purpose of securing the imprisonment of any person.
. . .'

Parties

[2] The main role players in these proceedings are: Mr Zuma, the former President of the Republic of South Africa; the first respondent, the Minister of Police; the second respondent, the National Commissioner for the South African Police Service, the third respondent, the Minister of Justice and Correctional Services, and the sixth respondent, the President of the Republic of South Africa. The first, second, third, and sixth respondents have filed notices to abide the decision of the court.

[3] The fourth respondent is the Secretary of the Judicial Commission of Inquiry into State Capture, Fraud and Corruption in the Public Sector, Including Organs of State ('the Secretary'). The fifth respondent is the current Honourable Acting Chief Justice, Mr Raymond Mnyamezeli Zondo N.O., the Chairperson of the Commission ('the Chairperson'). Collectively the Secretary and the Chairperson will be referred to as the Commission.

[4] The seventh respondent is the Helen Suzman Foundation, who was joined as *amicus curiae* in the *First*[1] and *Second Judgments*[2] of the Constitutional Court. The seventh respondent will be referred to as the Foundation.

[5] The Commission and the Foundation are opposing this application.

Background

[6] The background facts are very important to this application, and will be set out in some detail.

The initial summons issued by the Commission

[7] In the course of its inquiry into allegations of state capture, corruption and fraud, the Commission issued a summons for Mr Zuma to appear before it for examination from 16 to 20 November 2020. The purpose of this summons was for Mr Zuma to give

[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 (Council for the Advancement of the South African Constitution and others as amici curiae)* [2021] ZACC 2; 2021 (5) BCLR 542 (CC) (*First Judgment*).
[2] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and others (the Helen Suzman Foundation amicus*

evidence and to be questioned on various matters that are the subject matter of the Commission's investigation. He was also required to respond to the evidence of certain witnesses, which evidence implicates or may implicate him of certain acts of wrongdoing. The alleged corruption, and acts which might constitute state capture, are alleged to have occurred during Mr Zuma's term of office as the President of the Republic of South Africa.

[8] Mr Zuma attended the proceedings on 16 November 2020. On that day, his legal representatives moved an application for the Chairperson's recusal. The recusal application was fully argued on 16 November 2020, and on 19 November 2020, the Chairperson dismissed the recusal application. At that stage, the head of the Commission's Legal Team, Mr Paul Pretorius, was prepared to commence questioning Mr Zuma. However, Mr Zuma's then legal representative, Mr *Sikhakhane SC*, informed the Chairperson of Mr Zuma's decision to 'excuse himself' from the proceedings. Mr *Sikhakhane* also informed the Chairperson of Mr Zuma's decision to take the recusal ruling on review, and to report the Chairperson to the Judicial Service Commission on the basis that, by deciding Mr Zuma's recusal application, he had adjudicated a matter to which he was a party.

[9] Despite being advised that he was not entitled to leave the proceedings and that his absence would constitute a criminal offence, Mr Zuma left the proceedings during the tea adjournment, without the Chairperson's permission. He further did not appear on 20 November 2020 as required by the summons.

[10] Given Mr Zuma's refusal to comply with the summons issued, the Commission approached the Constitutional Court for an order, inter alia, declaring that Mr Zuma was required to appear before the Commission whenever served with a summons to do so, declaring his failure to remain in attendance at the Commission on 19 November 2020 to be unlawful, directing Mr Zuma to give evidence and answer any question, subject to his right against self-incrimination, and to comply with any directions issued by the Chairperson.[3] Mr Zuma, despite having been served with the application papers, did not oppose the application. Instead, he caused his then attorneys of record to address a letter to the Commission indicating that he would not be participating in those proceedings 'at all'. The application was argued unopposed before the

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curiae) [2021] ZACC 18 (*Second Judgment*).

[3] A copy of the complete notice of motion is attached as Annexure 'AA5' to the fourth and fifth respondents' answering affidavit.

Constitutional Court on 29 December 2020.

Mr Zuma's refusal to appear in January 2021

[11] By 11 January 2021, the Constitutional Court had not yet delivered its judgment. A fresh summons was served on Mr Zuma requiring him to appear before the Commission a week later, on 18 January 2021. The Commission accordingly wrote to Mr Zuma's attorneys, advising them that Mr Zuma was required to comply with the summons and to appear before the Commission from 18 to 22 January 2021, notwithstanding the fact that the Constitutional Court had not yet delivered its judgment. The letter also expressly stated that the summons requiring him to appear on those dates remained valid and binding, as it had not been withdrawn, set aside or suspended.

[12] In response, on 15 January 2021, Mr Zuma's attorneys addressed a letter to the Commission, recording that Mr Zuma would not be appearing between 18 and 22 January 2021. Two reasons were given for this:

(a) that 'President Zuma can only be legally obliged to appear after his review application has been determined'; and

(b) that 'the Commission must await the decision of the Constitutional Court which has a bearing on President Zuma's appearance'.

Mr Zuma did not appear at the Commission between 18 and 22 January 2021 as directed.

The Constitutional Court's First Judgment

[13] The Constitutional Court delivered its *First Judgment* in respect of this matter on 28 January 2021, the relevant paragraphs of the order reading:

'. . .

4. Mr Jacob Gedleyihlekisa Zuma is ordered to obey all summonses and directives lawfully issued by the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State (Commission).

5. Mr Jacob Gedleyihlekisa Zuma is directed to appear and give evidence before the Commission on dates determined by it.

6. It is declared that Mr Jacob Gedleyihlekisa Zuma does not have a right to remain silent in proceedings before the Commission.

7. It is declared that Mr Jacob Gedleyihlekisa Zuma is entitled to all privileges under section 3(4) of the Commissions Act, including the privilege against self-incrimination. . .'[4]

After delivery of that judgment, and on 15 February 2021, Mr Zuma caused his then

attorneys of record, Mabuza Attorneys, to address a letter to the Commission stating that he would not be presenting himself at the Commission.

[14] The Constitutional Court granted its order, notwithstanding the fact that the review application was pending before the high court. The Constitutional Court emphasised the public importance of Mr Zuma's evidence before the Commission. Both the Constitutional Court's judgment and order were served on Mr Zuma by the sheriff on 5 February 2021, at his residences in Forest Town (Gauteng) and Nkandla (KwaZulu-Natal).

Mr Zuma's continued refusal to appear before the Commission

[15] On 1 February 2021, Mr Zuma issued a public statement in his own name, entitled 'Statement on Constitutional Court Decision Compelling Me to Appear before the Commission of Inquiry into Allegations of State Capture.' This letter is in the public domain, and its contents will not be reproduced herein.

[16] On 15 February 2021, and despite being summoned to do so, Mr Zuma failed to attend the Commission. Instead, his lawyers addressed a letter to the Commission

[4] *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 (Council for the Advancement of the South African Constitution and others as amici curiae)* [2021] ZACC 2; 2021 (5) BCLR 542 (CC).

to inform it 'as a matter of courtesy' that he would not be appearing between 15 and 19 February 2021. Again, the letter cited two reasons:

(a) First, that the Constitutional Court did not consider, determine and/or adjudicate the application to review the Chairperson's decision not to recuse himself, and that appearing before the Commission 'would undermine and invalidate the review application'.

(b) Second, it was contended that the summons issued to Mr Zuma to appear on 15 to 19 February 2021 was 'irregular and not in line with the Fourth order of the Constitutional Court'.

[17] Accordingly, on 15 February 2021 and after being informed of Mr Zuma's refusal to comply with the summons and to appear before the Commission, the Chairperson announced that the Commission would institute contempt of court proceedings for a punitive order holding Mr Zuma in contempt of court. On the same

day, Mr Zuma issued a further public statement, entitled 'Final Statement on Constitutional Court Decision Compelling Me to Appear before the Commission of Inquiry into Allegations of State Capture and my Refusal to Appear before the Zondo Commission'. As in the case with the previous statement, this statement is also in the public domain, and its contents will not be reproduced herein.

[18] These statements confirm Mr Zuma's defiant attitude to the order issued by the Constitutional Court on 28 January 2021. They also go on further to scandalise not only the Constitutional Court, but also all other courts that have issued orders against him. They are evidently calculated to undermine public confidence in the integrity of the Constitutional Court and the judiciary more broadly.

The Constitutional Court's Second Judgment

[19] Due to Mr Zuma's failure to appear before the Commission in accordance with the court order, and the new summons issued by the Commission, the Secretary instituted urgent contempt of court proceedings in the Constitutional Court against Mr Zuma. Mr Zuma was directed by the Chief Justice to file an answering affidavit, and written submissions, which he did not do. Mr Zuma was afforded a further opportunity to make submissions to the Constitutional Court with regard to an appropriate sanction. Instead of filing an affidavit as requested, he addressed a letter to the Constitutional Court. On 29 June 2021, the Constitutional Court found Mr Zuma guilty of contempt of court, and sentenced him to 15 months' imprisonment. The relevant paragraphs of the Constitutional Court's order are as follows:

'. . .

3. It is declared that Mr Jacob Gedleyihlekisa Zuma is guilty of the crime of contempt of court for failure to comply with the order made by this Court in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma* [2021] ZACC 2.

4. Mr Jacob Gedleyihlekisa Zuma is sentenced to undergo 15 months' imprisonment.

5. Mr Jacob Gedleyihlekisa Zuma is ordered to submit himself to the South African Police Service, at Nkandla Police Station or Johannesburg Central Police Station, within five calendar days from the date of this order, for the Station Commander or other officer in charge of that police station to ensure that he is immediately delivered to a correctional centre to commence serving the sentence imposed in paragraph 4.

6. In the event that Mr Jacob Gedleyihlekisa Zuma does not submit himself to the South African Police Service as required by paragraph 5, the Minister of Police and the National Commissioner of the South African Police Service must, within three calendar days of the expiry of the period stipulated in paragraph 5, take all steps that are necessary and permissible

in law to ensure that Mr Jacob Gedleyihlekisa Zuma is delivered to a correctional centre in order to commence serving the sentence imposed in paragraph 4. . .'[5]

[20] It is against this background that Mr Zuma has launched this application seeking the relief as foreshadowed in paragraph 1 above.

Locus standi

[21] I have consciously recorded in some detail the history of this matter especially as it engages itself between Mr Zuma and the Commission. I have been driven to do so because Mr Zuma is challenging the locus standi of the Commission and the Foundation for their stance in opposition of this application. The contentions advanced on Mr Zuma's behalf in this regard in relation to the Commission are that:

(a) The Commission is a statutory body created by the executive, namely the President. As the executive branch, for whose benefit the Commission had been established, does not oppose the application, nor the application in the Constitutional Court, Mr Zuma questions what constitutional and legal interest the Commission has in opposing the application.

(b) The thesis advanced in this regard is that the Commission's legal interest in the matter ended when it successfully obtained an order of committal against Mr Zuma, and that its legal interest does not extend beyond what has already been achieved in the Constitutional Court.

[22] As to the Foundation, the contention is that it is a 'busy body'. This contention was advanced despite the fact that the Foundation applied to be and was admitted as *amicus curiae* by the Constitutional Court in the *First* and *Second Judgments* of the Constitutional Court.

[23] Having carefully considered Mr Zuma's contentions on this issue, I have no doubt that they are grounded on an unsound rationale. In its *Second Judgment*, the Constitutional Court, in admitting the Foundation, said the following:[6]

'I am satisfied that HSF's [the Foundation's] application to be admitted as amicus curiae did indeed meet these requirements, because its submissions are relevant and of assistance to this Court, *particularly in relation to the question of sanction*. In this regard, it has provided for

[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 and others (the Helen Suzman Foundation amicus curiae)* [2021] ZACC 18.

[6] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and others (the Helen Suzman Foundation amicus curiae)* [2021] ZACC 18 para 18.

an alternative sanction to that proposed by the applicant. Given that this matter is unopposed, and there is little guidance available to this Court in terms of the appropriate sanction, these submissions are useful to this Court. HSF is therefore admitted as amicus curiae.' (My emphasis.)

Notwithstanding the vigour of the argument of Mr *Mpofu SC on behalf of Mr Zuma* on this point, the *First* and *Second Judgments* of the Constitutional Court say otherwise. It follows, therefore, that Mr Zuma's contention is misplaced, and falls to be rejected.

Jurisdiction

[24] As I see it, the fundamental tenet that lies at the heart of this application is whether this court (as a high court) has jurisdiction to suspend the execution of a specific order of the Constitutional Court. Mr *Mpofu*, contends for an answer in the affirmative, whereas Mr *Ngcukaitobi SC*, for the Commission, and Mr *du Plessis SC,* for the Foundation, contend otherwise. The starting point in resolving this impasse is the Constitution of the Republic of South Africa, 1996. This is so because the Constitution, with its Bill of Rights, heralded in a new era. The new order is no longer determined by parliamentary sovereignty. All laws now have to be interpreted in consonance with the Constitution, and those that are contrary to the provisions of the Constitution and the Bill of Rights are to be declared invalid and of no force and effect.

[25] The Constitution provides for the hierarchy of courts in Chapter 8. Section 167 sets out the Constitutional Court's jurisdiction. This was amended by the Constitution Seventeenth Amendment Act of 2012, with effect from 23 August 2013. The relevant provisions of s 167 now read:

'(3) The Constitutional Court—

(a) is the highest court of the Republic; and

. . .

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

(a) to bring a matter directly to the Constitutional Court. . .'

[26] Further sections having an impact on the jurisdiction of the courts are, as follows:

(a) Section 169(1) which provides that:

'(1) The High Court of South Africa may decide—

(a) any constitutional matter except a matter that—

(i) the Constitutional Court has agreed to hear directly in terms of section 167 (6) (*a*); or

(ii) is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa; and

(b) any other matter not assigned to another court by an Act of Parliament.'

(b) Section 172(2)*(b)* reads as follows:

'A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.'

(c) Further s 172(2)*(d)* provides as follows:

'Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.'

(d) And s 173 states that:

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

[27] Mr *Mpofu* submitted that the circumstances of the current matter are, as described by the Constitutional Court in the *Second Judgment*, extraordinary and exceptional in many aspects, including that the conviction of Mr Zuma for the crime of civil contempt of court, and the sentence for a period of 15 months, followed without resort to the provisions of the Criminal Procedure Act[7] (CPA). He further submitted that had the conviction occurred following a trial in the High court, the High court or Constitutional Court would have had the power to suspend the committal order, pending the outcome of the appeal. Mr Zuma would then have been entitled to bail pending the outcome of his appeal, but as there is no appeal against an order of the Constitutional Court, Mr Zuma's only recourse is to challenge his conviction and sentence by way of a rescission application. He argued that it was for this reason that he sought a suspension of the committal order.

[28] He expressed the view that s 14(2) of the Superior Courts Act,[8] dealing with how a high court is to be constituted for the hearing of a criminal matter, requires such court to 'be constituted in the manner prescribed in the applicable law relating to procedure in criminal matters'. In his submission, a person cannot be convicted of civil contempt by a court not constituted in the manner prescribed by the CPA, especially because the Constitutional Court was not constituted as a criminal court.

[7] 51 of 1977
[8] 10 of 2013.

Consequently, so the submission went, the Constitutional Court did not have the jurisdiction to conduct a criminal trial as the lower courts have, as the Constitutional Court was the 'ultimate appeal court'.

[29] He contended that a high court does have the necessary jurisdiction to suspend the Constitutional Court's committal order in terms of the provisions of s 172(2)*(b)* of the Constitution. The main thrust of his argument was that the object of bringing this application was to suspend the committal order, pending the determination of the proceedings in the Constitutional Court. He submitted that this court has jurisdiction because the committal order is to be executed within the jurisdiction of this court. According to him, this is the only sensible approach in the matter, due regard being had to the extraordinary nature of the Constitutional Court exercising its jurisdiction as a court of first and last instance in matters involving criminal proceedings. Hence, he submitted that this is the reason why the relief sought in Part B of this application is critical for the equal application and protection of criminal procedure to all criminal matters, as required in s 14(2) of the Superior Courts Act, and that the Constitutional Court itself made it plain why there is a higher threshold for approaching it as a court of first and last instance on any matter, including constitutional matters.

[30] He contended that even where the Constitutional Court has exclusive jurisdiction in matters referred to in s 167(4) of the Constitution, the Constitutional Court has repeatedly emphasised the benefits of having the views of other courts in hearing those matters, before it deals with them as a court of final appeal. Furthermore, that the rules for direct access to the Constitutional Court make it clear that such access must be exercised only in the clearest of cases and not in all cases which involve the adjudication of constitutional issues.

[31] Mr *Ngcukaitobi* and Mr *du Plessis* disagreed. They contended that s 173 of the Constitution grants the Constitutional Court, the Supreme Court of Appeal and the high courts of South Africa, 'the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice'. They submitted that this section did not grant a high court any powers to suspend the execution of a judgment or decision of the Constitutional Court, but that that power is limited in a high court to 'suspend its own decisions'.

[32] They pointed out a fundamental difference between a high court issuing an interdict pending the hearing of a matter by the Constitutional Court, and a high court

issuing an interdict suspending an order already made by the Constitutional Court. In their submission, what Mr Zuma was asking this court to do is the latter, and it is incompetent, because a high court is being asked to assume 'an over-ride' power which it does not possess. They contended that unless the Constitutional Court suspends or rescinds the order in *Second Judgment*, then Mr Zuma and this court are bound by the provisions of s 165(5) of the Constitution, which provides that '[a]n order or decision issued by a court binds all persons to whom and organs of state to which it applies'.

[33] Three further contentions were advanced by Mr *Mpofu* under this head. First was that on the matter before me, this court has concurrent jurisdiction with the Constitutional Court because of territorial jurisdiction over Mr Zuma. Reliance in this regard was placed on *Makhanya*[9] and *Gcaba.*[10] The submission in this regard was that the act which is sought to be prohibited by the interdict, namely the arrest and/or incarceration of Mr Zuma, will take place within this court's territorial jurisdiction. I find this argument to be fundamentally flawed. The flaw seems to lie in the failure to appreciate the principal issue in this application, which is: is it permissible for a high court to suspend the execution of an order by the Constitutional Court? As I see it, any attempt by Mr Zuma to call in the aid of the territorial jurisdiction to answer this principal issue is misguided.

[34] The second contention was that because paragraph 6 of the order in the *Second Judgment* directs the Minister of Police and the National Commissioner of the South African Police Service to effect the arrest of Mr Zuma should he fail to submit himself to the police, that this amounted to a delegation, enabling this court to find jurisdiction in this matter. After giving this contention careful thought, I was driven to conclude that this was a diversion without merit.

[35] The third contention was the reliance on rule 45A of the Uniform Rules of Court which provides:

'**45A Suspension of orders by the court**

[10] *Gcaba v Minister for Safety and Security and others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC).

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[9] *Makhanya v University of Zululand* [2009] ZASCA 69; 2010 (1) SA 62 (SCA); [2009] 4 All SA 146 (SCA).
[10] *Gcaba v Minister for Safety and Security and others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC).

The court may, on application, suspend the operation and execution of any order for such period as it may deem fit: Provided that in the case of an appeal, such suspension is in compliance with section 18 of the Act.'

This argument is ill-conceived for the reason that '. . . a court must be competent to make whatever orders it issues. If a court lacks authority to make an order it grants, that order constitutes a nullity'.[11]

[36] The Constitutional Court in *Turnbull-Jackson* has already said the following on the doctrine of judicial precedent:[12]

'[54] . . . the important doctrine of precedent, [is] a core component of the rule of law, without which deciding legal issues would be directionless and hazardous. Deviation from it is to invite legal chaos. The doctrine is a means to an end. This court has previously endorsed the important purpose it serves:

> "[The doctrine of precedent] is widely recognised in developed legal systems. Hahlo and Kahn describe this deference of the law for precedent as a manifestation of the general human tendency to have respect for experience. They explain why the doctrine of *stare decisis* is so important, saying:
>
> "In the legal system the calls of justice are paramount. The maintenance of the certainty of the law and of equality before it, the satisfaction of legitimate expectations, entail a general duty of Judges to follow the legal rulings in previous judicial decisions. The individual litigant would feel himself unjustly treated if a past ruling applicable to his case were not followed where the material facts were the same. This authority given to past judgments is called the doctrine of precedent.
>
> . . .
>
> It enables the citizen, if necessary with the aid of practising lawyers, to plan his private and professional activities with some degree of assurance as to their legal effects; it prevents the dislocation of rights, particularly contractual and proprietary ones, created in the belief of an existing rule of law; it cuts down the prospect of litigation; it keeps the weaker Judge along right and rational paths, drastically limiting the play allowed to partiality, caprice or prejudice, thereby not only securing justice in the instance but also retaining public confidence in the judicial machine through like being dealt with alike. . . . Certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of s*tare decisis*.' [Footnotes omitted.]

[55] I cannot but also borrow from the eloquence of Cameron JA:

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[11] *Competition Commission of South Africa v Standard Bank of South Africa Limited and related matters* [2020] ZACC 2; 2020 (4) BCLR 429 (CC) para 201.

[12] *Turnbull-Jackson v Hibiscus Coast Municipality and others* [2014] ZACC 24; 2014 (6) SA 592 (CC).

> "The doctrine of precedent, which requires courts to follow the decisions of coordinate and higher courts in the judicial hierarchy, is an intrinsic feature of the rule of law, which is in turn foundational to our Constitution. Without precedent there would be no certainty, no predictability and no coherence. The courts would operate in a tangle of unknowable considerations, which all too soon would become vulnerable to whim and fancy. Law would not rule. The operation of precedent, and its proper implementation, are therefore vital constitutional questions."'

[37] It is common cause that in this country there is no higher authority than the Constitutional Court, and that its decisions cannot be undermined by a lower court. Should this court accede to the contentions advanced on behalf of Mr Zuma, then the hierarchy will be disturbed and there will be no finality to legal decisions.[13]

[38] What, in my view, this application seeks to achieve is to entangle this court in judicial adventurism (which has been strongly deprecated in constitutional democracies), and to make whimsical orders which have the effect of granting unlawful and unwarranted relief.

Constitutional challenge to the CPA

[39] It remains to consider Part B of the notice of motion. The linchpin of Mr Zuma's attack under this point is that the provisions of the CPA are unconstitutional in that there is no requirement that the crime of civil contempt, as in the present circumstances, should be dealt with in accordance with the CPA, and the Constitution. Mr *Mpofu* submitted that Mr Zuma cannot challenge the constitutionality of the CPA on a direct and urgent basis to the Constitutional Court, on the grounds that it allows for civil contempt proceedings to be conducted outside of its provisions without a trial.

[40] This is so, as goes the submission, because the Constitutional Court does not have primary jurisdiction in terms of s 167(4) of the Constitution, and that this challenge must first be brought in the high court. It was further argued that the suspension of the execution of the committal order is in the interests of justice, and that the high court can grant such order in terms of s 173 of the Constitution, as the court has the power to develop the law of the crime of civil contempt, taking into account the interests of justice.

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[13] The doctrine of judicial precedence and hierarchy of courts is equally applicable in foreign jurisdictions, see for example *Union of India v Raghubir Singh* AIR 1989 SC 1933 at 8; *Scheuneman v Canada* (Attorney General) 2003 FCA 194 (CanLII) paras 10-11; *Leahy v Canada (Justice)* 2021 FC 302 (CanLII) para 11; *Carter v Canada (Attorney General)* 2015 SCC 5; [2015] 1 SCR 331.

[41] I pause to record that there is a penetrating analysis of case law on this issue which tends to diminish the force of this contention.[14] For instance, in *Fakie*[15] the majority affirmed that the civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of motion court applications, adapted to constitutional requirements. In my view, this conclusion has the effect of removing all the wind from the sails of the boat upon which Mr Zuma's contention is journeying.

Interim relief

[42] In view of this court's findings in Part A and B, it is strictly not necessary to deal with the interim relief. Under the circumstances, a few observations may not be inappropriate. It is settled that a party that seeks interdictory relief on an interim basis must show that it has at the very least a prima facie right, that such right will be unlawfully infringed, that the balance of convenience is in its favour, and that irreparable harm will result if an interim order is not granted in the meantime which would protect that right.

[43] I have carefully considered the case advanced on Mr Zuma's behalf in relation to the requirements for an interim interdict. What, in my view stands squarely against his assertions in this regard, are the following:

(a) Mr Zuma does have an alternative remedy available to him, namely that of approaching the Constitutional Court in terms of rule 12 of the Rules of the Constitutional Court, which provides for urgent applications.

(b) The balance of convenience does not favour the granting of the interim interdict as it would be harmful to the rule of law and our Constitution, as this court will permit Mr Zuma to disregard the courts and their authority. As aptly stated in *Hotz:*[16]

'In granting an interdict the court is enforcing the principle of legality that obliges courts to give effect to legally recognised rights. In the same way the principle of legality precludes a court from granting legal recognition and enforcement to unlawful conduct.

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[14] *Matjhabeng Local Municipality v Eskom Holdings Ltd and others; Mkhonto and others v Compensation Solutions (Pty) Ltd* [2017] ZACC 35; 2018 (1) SA 1 (CC); 2017 (11) BCLR 1408 (CC*); Pheko and others v Ekurhuleni Metropolitan Municipality (No 2)* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC); *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA).

[15] Fakie NO v CCII Systems (Pty) Ltd above para 41.

[16] *Hotz and others v University of Cape Town* [2016] ZASCA 159; 2017 (2) SA 485 (SCA); [2016] 4 All SA 723 (SCA) para 39.

To do so is “the very antithesis of the rule of law”.’

(c) Finally, as of now, Mr Zuma’s concerns about his health are not supported by any evidence. This court is thus not in a position to determine the nature of the harm, and to what extent it might be irreparable.

[44] I pause to record that in terms of s 173 of the Constitution, read together with rule 12 of the Rules of the Constitutional Court, the Constitutional Court has the power to suspend its own orders. The Secretary benevolently extended an invitation to Mr Zuma to approach the Constitutional Court, accompanied by the following undertaking: ‘in the event that the applicant takes that route, the Commission might adopt a different approach’. But that invitation was ignored. In the circumstances, I am not persuaded that Mr Zuma has made out a case for this court to grant the relief sought.

Rescission application

[45] In their papers, the parties dealt extensively with the prospects of success of the rescission application pending at the Constitutional Court. In the course of argument, counsel attempted to address me on this issue. For the reason that I appreciated that I was called upon to adjudicate only on Parts A and B of the order sought in the notice of motion and that the merits of the rescission application are issue for determination by the Constitutional Court, I requested counsel to refrain from doing so. Consequently, I express no view one way or the other on the prospects of success of the application for rescission.

Conclusion

[46] Unsurprisingly, faced with this seemingly insuperable difficulty in relation to the invocation of the incorrect and unprecedented procedure, the rest of Mr Zuma’s case then collapses like a deck of cards.

Costs

[47] What remains to be considered is the question of costs. The general rule is that in the ordinary course, costs follow the result. I am unable to find any circumstances which persuade me to depart from this rule.

Order

[48] In the result, the following order shall issue:

The application is dismissed with costs, such costs to include those occasioned by the employment of senior counsel.

Mnguni J

***APPEARANCES*:**

Heard:	06 July 2021
Delivered:	09 July 2021
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