IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT52/21

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA	Applicant
and	
COMMISSION OF INQUIRY INTO STATE CAPTURE, FRAUD & CORRUPTION IN THE PUBLIC SECTOR, INCLUDING ORGANS OF STATE	First Respondent
RAYMOND MNYAMEZELI ZONDO N O	Second Respondent
THE MINISTER OF POLICE	Third Respondent
THE MINISTER OF JUSTICE & CORRECTIONAL SERVICES	Fourth Respondent
HELEN SUZMAN FOUNDATION	Fifth Respondent

FIRST AND SECOND RESPONDENTS' SUBMISSIONS

TABLE OF CONTENTS

INTRODUCTION

1. Mr Jacob Gedleyihlekisa Zuma ("Mr Zuma") was ordered by this Court to obey the summons of the Commission of Inquiry into State Capture, Fraud and Corruption in the Public Sector Including Organs of State ("the Commission"). He defied that order. He has now been convicted of contempt of court and sentenced to 15 months direct imprisonment, without suspension. He says that he will not appear before the Commission – he persists in the contempt. That means the public will be deprived of his evidence and explanations about his role in the serious allegations of state capture, fraud and corruption which took place under his watch as President of the country. But he does not want imprisonment either.[1] He has brought these rescission proceedings to set aside the conviction and the sentence. Although he seeks a rescission of the contempt of court finding, he makes out no case at all for rescinding this finding. The case for rescinding the sentence is poorly pleaded. Some facts in the founding affidavit are internally inconsistent, contradict the objective evidence or have been left out of both the replying papers and Heads of Argument.

2. The application bears no prospects of success. It borders on abuse of the rescission procedure. For these reasons, we ask the Court to dismiss it, with costs. First, it does not meet the threshold requirement for rescission either under Rule 42(1)(a) of the Uniform Rules of Court or the common law. Second, the applicant's new case pleaded in the replying affidavit, namely, that Rule 29 of this Court's

[1] This he says, notwithstanding the Court's invitation to him on 9 April 2021, to provide an affidavit on what he thought might be an appropriate sanction, should he be found in contempt.

Rules should be “developed” is not made out in the founding papers, and in any event is without merit. Third, the important rule of finality in proceedings, should not be lightly relaxed. There is no basis to relax the rule here.

3. We develop each of these arguments below. But we start with an analysis of the facts. Since the facts are exhaustively chronicled in this Court’s judgments under Case Numbers CCT295/20 (28 January 2021) – *Zuma 1* – and CCT52/21 (29 June 2021) – *Zuma 2* – only the facts germane to this rescission application are recounted.

RELEVANT FACTS

Notice of proceedings

4. Mr Zuma is the former president of the Republic of South Africa. Allegations of abuse of office, maladministration and potential criminal conduct on his part surfaced and were investigated by the then Public Protector, Adv Thuli Madonsela in 2016. She did not make definitive findings and recommended the establishment of a judicial commission of enquiry. Since Mr Zuma was an implicated party – accusations against him included using public office for personal benefit, his family and advancing the interests of his friends, the Gupta family – Adv Madonsela prescribed in her remedial action that the Chief Justice should select the judge to chair the enquiry.

5. The Second Respondent, Deputy Chief Justice RMM Zondo, came to be appointed. He was selected by Chief Justice Mogoeng Mogoeng. Mr Zuma

appointed him, in turn. The terms of reference contained specific references to Mr Zuma as the matter of the investigation by the Commission. This Court set out this history in *Zuma 1* and concluded:

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

6. Because of his refusal to co-operate with the Commission – refusing to submit affidavits after being requested in terms of the Commission's Regulations; failing to submit statements in terms of the Commission's Rules – the Commission issued a summons against Mr Zuma in terms of the Commission Act 8 of 1947. He defied the summons. This defiance was the subject matter of *Zuma 1*. The application papers in that matter were delivered on Mr Zuma personally and to his then attorney of record, Mr Eric Mabuza, on 3 December 2020.[2]

[2] Record AA PIM1 at page 429.

7. Directions were issued on 11 December 2020, setting the matter down for argument on 29 December 2020, which were also served on Mr Zuma and his attorney.[3] Mr Zuma's stance was communicated through Mr Mabuza, in terms of a letter dated 14 December 2020, in which he stated that Mr Zuma "will not be participating in these proceedings at all."[4]

8. Judgment in *Zuma 1* was delivered on 28 January 2021, and was also brought to the attention of Mr Zuma and his attorneys. It directed Mr Zuma to comply with the Summons of the Commission, including any Directions issued by the Chairperson of the Commission.

9. Despite having earlier requested that the Commission should await the outcome of *Zuma 1*, Mr Mabuza, on behalf of Zuma sent a letter on behalf of Mr Zuma in which he stated that he would not appear at the Commission.[5]

10. Contempt proceedings were instituted before this Court on 22 February 2021. The Notice of Motion and the founding papers were served on Mr Zuma and his attorneys.[6]

11. Mr Zuma did not file answering papers.

12. The application was argued on 25 March 2021, after which judgment was reserved.

[3] Record AA PIM3, at page 438.
[4] Record AA PIM2, at page 437.
[5] Record AA PIM6, at page 449.
[6] Record AA PIM7, at page 452.

13. On 14 April 2021, this Court issued further directions specifically directed at Mr Zuma. He was invited to submit an affidavit of maximum 15 pages to set out any mitigation circumstances which this Court may take into account.

14. He refused. Under the guidance of his attorney, Mr Mabuza, Mr Zuma submitted a 21-page denunciation of the Constitutional Court, the judiciary and the Commission.[7]

15. Judgment in *Zuma 2* was delivered on 29 June 2021.

Not responding to the applications

16. It is common cause that Mr Zuma did not file papers in response to both *Zuma 1* and *Zuma 2*.

17. His failure was deliberate. The explanation is contained at paragraph 36 of the founding affidavit in this application, where he states:

> *"My reasons for not engaging with the applications of the Commission to the Constitutional Court was based in large part on the lack of finances to engage lawyers to focus – on the urgency basis and in terms demanded by the Commission and accepted by the Constitutional Court. I must also say that I put my trust in the clearly mistaken view that I could not be forced to appear*

[7] Record AA PIM8, at page 459.

before Judge whose recusal was the subject matter of an ongoing court process. I was clearly wrong in this belief, which I held in good faith." [8]

18. At paragraph 40 Mr Zuma gives a further reason for not responding to the applications:

> "*The second reason was that I was advised that I had the option not to participate in the proceedings and to trust the Court to engage with the Commission's application on its own merits. This was because I was advised that the test for urgency was high, and, in all probability, the Court would reject the application for lack of urgency given the inexplicable delays on the part of the Commission. Over and above the urgency issue, I was told that the established test for direct access to the Constitutional Court was also too high to be met on the facts of that particular application. Given my decision to reduce the financial resources deployed for such unplanned cases, I elected not to participate in the urgent proceedings, trusting entirely in the usually rigorous process of the Court and its ability to separate the wheat from the chaff.*"[9]

19. There are four fundamental problems with these explanations.

20. First, if these explanations are taken at face value, they all relate to *Zuma 1*. They do not relate to *Zuma 2*. By the time *Zuma 2* was heard, it was clear that this Court was engaged with the application on an urgent basis. It was also known that direct

[8] Record, p17, para 36.
[9] Record, p 18, FA para 40.

access had been granted for *Zuma 1*. Mr Zuma's suggestion that he believed that the Court "*would most likely discharge its duty to scrutinize and reject the application on the grounds of urgency and direct access*"[10] is unfortunately a thinly guised attack on the Court.

21. Second, the problem, however, is that these explanations are contradicted by other statements made by Mr Zuma. In his statement of 1 February 2021 Mr Zuma raged against the Court, accusing it of "politicizing" the law. He also asserted that he had decided to be "defiant" in the face of injustice.[11] Mr Zuma's statement also made it clear that he would not cooperate with the Commission because of a "personal animosity" between him at the Chairperson of the Commission.

22. Third, these explanations demonstrate beyond any doubt that Mr Zuma acted intentionally, when he did not oppose the applications. He was not caught by surprise but acted knowingly and conscious of the consequences of his actions. He had reconciled himself with the likelihood of imprisonment for defiance.

23. Fourth, the explanations about lack of funds to appoint lawyers do not make sense. Mr Zuma was represented by Senior Counsel throughout the process, until the judgment of *Zuma 2*. At this point Mr Zuma is still represented by Senior Counsel. Another difficulty is that Mr Zuma actually gives no details as to when exactly he ran out of funds, what steps he took to ensure that he secures the funds and how he is able now to continue employing two Senior Counsel.

[10] Record, p19, FA para 41.
[11] Record, AA Annexure PIM13, p524.

Non-compliance with the decisions

24. It is common cause that Mr Zuma did not comply with the judgment in *Zuma 1*. He also admits this. And it is clear from his admission that his was a deliberate, calculated defiance.

25. His "explanation" for the defiance appears at paragraph 54, where he states:

> "*My response was difficult and robust and even though I said things that regrettably and seemingly appear insulting, I am entitled to express strong views against an oppressive system. So I did not comply with the orders of the Constitutional Court because I believed that they were unlawful. To issue an order that I should appear before a biased Commission of Inquiry and to obey its instructions was fundamentally flawed because of two reasons that I set out in my review application*."[12]

26. Plainly then, Mr Zuma intentionally disobeyed the Court order in *Zuma 1*. He did not do so out of any misapprehension of the law or his rights. He did so because he thinks that the Court is wrong. Mr Zuma does not expressly say that his decision to disobey this Court was in tandem with legal advice received. But it is significant that he was represented by Senior Counsel then, as he is in these proceedings. Whether he acted in line with legal advice or not, Mr Zuma took the law unto his hands. This is the stance he persists with before this Court, i.e. complying only

[12] Record, p 25, para 54.

with orders he believes to be lawful and disobeying others, as he deems fit. It is astonishing that this has been pleaded on oath.

Summary on the pertinent facts

27. From the above, it is clear that Mr Zuma:

27.1 had notice of proceedings;

27.2 knew the remedy sought by the Commission, including incarceration;

27.3 reconciled himself with an arrest;

27.4 rejected the directions of the Chief Justice; and

27.5 was represented by Senior Counsel at all times.

28. We shall now deal with each of the grounds for rescission argued by Mr Zuma. It is necessary to make the point up-front. This case takes place against a defined legal dispute. The parties must be held to the pleadings. The case of *Holomisa v Holomisa & another*[13] confirmed the rule that *"holding parties to pleadings is not pedantry."*[14] Rather the rule is *"an integral part of the principle of legal certainty, which is an element of the rule of law, one of the values on which our Constitution is founded."* The reason for the rule, at least in constitutional litigation, is that *"every*

[13] *Holomisa v Holomisa & another* 2019 (2) BCLR 247 (CC)
[14] *Holomisa* at para 30.

other party likely to be affected by the relief sought must know precisely the case it is expected to meet."[15]

29. Mr Zuma is entitled only to argue the points which are foreshadowed in the founding affidavit. He is not entitled to change his case in the reply. The case of *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*[16] has held:

> "*An applicant must accordingly raise the issues upon which it would seek to rely in the founding affidavit. It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof*."

30. Thus, it is not only necessary to plead one's case in the founding affidavit, the evidence in support thereof must also be pleaded. Vague, unsubstantiated, generic allegations do not constitute proper pleadings which can be properly answered. As the answering affidavit points out, the applicant's case is shoddily pleaded, comprises distortions of the evidence and makes sweeping statements that contradict with claims previously made by the applicant.

31. This Court has endorsed the same rule of pleading:

> *"It is, in any event, imperative that a litigant should make out its case in its founding affidavit, and certainly not belatedly in argument. The exception,*

[15] See also *South African Transport & Allied Workers Union and others v Garvas* 2013 (1) SA 83 (CC) at para 114.
[16] *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 323H to 324C.

of course, is that a point that has not been raised in the affidavits may only be argued or determined by a court if it is legal in nature, foreshadowed in the pleaded case and does not cause prejudice to the other party."[17]

32. We turn to the analysis of the grounds for rescission, as pleaded in the founding papers.

ANALYSIS OF GROUNDS FOR RESCISSION

Rule 42(1)(a)

33. The pleaded basis for the application is Rule 42(1)(a) of the Uniform Rules of Court.[18]

34. Rule 42(1)(a) provides that a judgment "*may*" be rescinded on the basis that the judgment was erroneously sought or "*erroneously granted in the absence of any party affected thereby*".

35. In *Daniel v President of the Republic of South Africa and Another*[19] this Court held:

"*The applicant is required to show that, but for the error he relies on, this Court could not have granted the impugned order. In other words, the error must be something this Court was not aware of at the time the order was*

[17] *My Vote Counts NPC v Speaker of the NA* 2016 (1) SA 132 (CC) at para 177.
[18] Record, p26, para 58.
[19] *Daniel v President of the Republic of South Africa and Another* 2013 (11) BCLR 1241 (CC).

made and which would have precluded the granting of the order in question, had the Court been aware of it."[20]

36. The same conclusion appears from a judgment of the Supreme Court of Appeal:

> *"[10] Generally a judgment is erroneously granted if there existed at the time of its issue a fact of which the court was unaware, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment*."[21]

37. Two elements must be met. First, there must be a factual error in the judgment, of which the Court was unaware at the time of the judgment or order. Second, that error must be such that had it been known at the time, it would have precluded the court from granting the judgment.

38. The mere existence of a defence – whether good or bad – is not an error in the judgement. A court which grants an order in the absence of a defendant does not do so on the basis that they have no defence. It does so because the plaintiff is entitled to judgment on the basis that notice was given to the defendant and the matter was not defended:

> *"[27] Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by*

[20] *Daniel* at para 6.
[21] *Van Heerden v Bronkhorst* (Case no 846/19) [2020] ZASCA 147 (13 November 2020).

the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment."[22] [Underlining added].

39. It is necessary to consider each of the grounds pleaded by Mr Zuma to determine whether or not they can show a fact of which the Court was erroneously unaware which would have precluded the granting of the judgment. Further, whether Mr Zuma is blameless for not bringing forth any fact which he claims should have been considered.

Failure to oppose

40. A primary factor which cuts through the entire pleaded case of Mr Zuma is that he intentionally did not oppose. He was aware of the entire case against him, and its consequences. He knew that imprisonment was the sentence requested by the Commission. A party who deliberately chooses not to oppose cannot complain of a judgment granted erroneously in their absence.

41. Mr Zuma was never absent, he was always present. His lawyers were also there. They communicated his decision not to oppose, his reasons for doing so, and his willingness to submit himself to a prison term. He acquiesced to the judgment,

[22] *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA).

including the term of imprisonment. In *Standard Bank v Estate Van Rhyn*[23] the doctrine was explained as follows:

> "*It comes to this, that if an unsuccessful litigant by unequivocal conduct, inconsistent with an intention to appeal, shows that he acquiesces in the judgment, then he cannot continue to prosecute his appeal. The principle was stated in Daner's case, as follows*:
>
> > "*If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven'. This is the doctrine. <u>If a man has clearly and unconditionally acquiesced in and decided to abide by the judgment he cannot thereafter challenge it</u>.*"" [Underlining added].

42. This is such a case. Mr Zuma unequivocally recorded his intention to accept any sentence. The statement of 25 March 2021 issued by him is categorical: *"<u>I am entitled not to file opposing</u> papers and it is unfair to suggest that I must be punished for this election."*[24] His conduct was inconsistent with an intention to challenge the judgment. The statement of 14 April 2021 says that he *"thought long and hard"* about making representations on the sentence. Yet, he still came to the

[23] *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 268.
[24] Record, PIM13, p524 at p544.

conclusion: "*I had decided not to participate in the proceedings of the Court. I did not ask for this right to hearing*".

43. To be sure, Mr Zuma was perfectly happy with his imprisonment:

> "*I am ready to become a prisoner of the Constitutional Court and since I cannot appeal or review what I see as a gross irregularity, my imprisonment would become the soil on which future struggles for a judiciary that sees itself as a servant of the Constitution and the people rather than an instrument for advancing dominant political narratives*."[25]

44. Unmistakably, Mr Zuma acquiesced in the judgment and his sentence. He was not an "absent" party, unaware of the litigation. He decided not to brief counsel to appear – not for lack of funds – because he was objecting on "conscientious" grounds to the proceedings before the Constitutional Court.

<u>Commissions' decision to ask for imprisonment</u>

45. Mr Zuma asserts that it was an error for the Commission to seek an order of his direct incarceration, rather than an order first seeking compliance.[26]

46. This is demonstrably false. In the founding papers to *Zuma 2*, the Commission stated:

> "*The Commission seeks an order of direct imprisonment. Should this Court be inclined to grant a suspension of the order of imprisonment*

[25] AA, para 82, p408, PIMP8, p459.
[26] FA, para 73-78.

on condition that Mr Zuma gives evidence before the Commission as directed and submits the affidavits required in terms of Regulation 10.6 of the Commission Regulations, the Commission would need to make appropriate logistical arrangements. For such relief to be possible and effective, a special arrangement would need to be made to hear Mr Zuma's evidence before 31 March 2021." [27]

47. Thus, from the outset, it was explained that there is an option for Mr Zuma to seek compliance. But Mr Zuma, much in the same manner as before this Court, rejected this out of hand.

48. It is also self-serving to criticize the Commission. Mr Zuma's present application makes it clear that he will not testify before Justice Zondo under any circumstances. Having adopted this attitude, Mr Zuma cannot – falsely – complain that the Commission never mentioned in its papers the possibility of compliance. It is clear, now, with hindsight that such an approach would have been pointless. Mr Zuma has told this Court that he did not comply with the judgment of this Court because he deems it to be wrong.

49. The judgment of this Court was not erroneous on this score. The notice of motion, the founding affidavit and the heads of argument submitted by the Commission made it clear that the Commission would be seeking an order of incarceration. This is a fact that was disclosed up front. Mr Zuma knew of it. When he exercised his election not to file opposing papers, he did so fully cognizant of the consequences

[27] Para 20; FA in *Zuma 2*.

of an adverse order. He had a chance to resist this, which he could have by tendering to attend the Commission hearings and to give evidence. He rejected it, intentionally.

Complaint about hearsay evidence

50. Mr Zuma claims that this Court relied on hearsay evidence. He asserts that the court "*greatly, if not totally, was influenced by the material contained in the hearsay evidence of the statements which were issued by the Jacob Zuma Foundation in the aftermath of the first judgment*".[28]

51. This again is a dishonest accusation against this Court. The findings of the Court on the issue of hearsay evidence appear at paragraph 19 to 23 of *Zuma 2*. The statements referred to in the judgment of this Court are not statements of the JG Foundation as Mr Zuma falsely alleges. They are his own statements. The judgment in *Zuma 2* records this clearly:

> *"[19] Before I deal with any of the issues for adjudication, I pause to address a preliminary concern that arose during the hearing in relation to the admissibility of certain evidence. The applicant's submissions rely, to a great extent, on the public statements made and issued by Mr Zuma. Despite being extra-curial documents, these public statements are integral to the uniqueness and gravity of this case. It is thus necessary to immediately dispose of any doubt as to whether I am entitled to admit these documents and consider them as evidence. This doubt arises because Mr Zuma has declined to officially come on record to confirm or deny the veracity of these statements and, consequently, they must be regarded as*

[28] Record, p 30, para 79.

hearsay evidence as defined by the Law of Evidence Amendment Act (LEAA).

[23] In this truly unique matter, the veracity of the hearsay evidence depends on the respondent. The statements were attached to the founding affidavit, and it is inconceivable that Mr Zuma could be unaware of their relevance to the sanction sought by the applicant. If the publication of these statements had no relation to him, he could have provided an explanation – either publicly or in these proceedings. He did not. He even had an additional opportunity to dispute his connection to these statements after the hearing of the matter. However, to date, Mr Zuma has made no attempt to distance himself from these statements. Although the admission of these statements will undoubtedly prejudice Mr Zuma's case, the intention behind section 3(1)(c) of the LEAA is to create flexibility so that hearsay evidence may be admitted when the interests of justice, and indeed common sense, demand it. I am satisfied that these circumstances exist in this matter, and that there is nothing preventing this Court from admitting these statements as evidence. No more needs to be said on this." [Underlining ours].

52. Contrary to the claims made by Mr Zuma, the Court relied on the statements made by him.

53. In relation to the statements issued by the JG Zuma Foundation, these were also perfectly admissible. Mr Zuma never disputed that: first, the Foundation speaks on his behalf; he is its patron. He knew about the statements. It was alleged specifically in the papers of the Commission that the statements were made with

his knowledge, on his behalf and with his endorsement. He had ample opportunity to refute these allegations or object to their admission.

54. Whether or not the majority judgment was wrong in the admission of the statements is beside the point. An admission of a hearsay statement, after a thorough debate, is not an error as envisaged by Rule 42(1)(a). In this case, the statements were correctly admitted.

Access to court; appeal; detention without trial

55. Mr Zuma asserts that his rights under section 34 of the Constitution were impinged. This is a complaint about the merits of the case, not a ground for rescission.[29]

56. Section 34 of the Constitution provides that:

> "*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum*."

57. The dispute whether or not Mr Zuma was guilty of contempt of court was decided in a court. The hearing was both fair and public. Mr Zuma received all the papers which contained the allegations against him. He decided not to oppose. He cannot complain about section 34 of the Constitution having decided against opposing the application.

[29] Record, p 31; paras 82-83 of FA.

58. Mr Zuma's rights of appeal[30] simply do not enter the equation. They are relevant only to the issue of direct access. Direct access was an issue in *Zuma 1* and *Zuma 2*. It was known by the Court that once direct access is granted, there is no right of appeal. The absence of a right of appeal does not mean there is an error in the judgment.

59. In the current application, Mr Zuma explains in his own words why he did not oppose the applications. Among the reasons he advances are that he believed that the justices of this Court would, on their own, reject the applications.[31] That may have been his belief. But it does not translate into an error on the judgment within the meaning of Rule 42(1)(a).

<u>No basis to the complaint about section 12 of the Constitution</u>

60. Mr Zuma complains that his rights to detention without trial as contained in section 12 of the Constitution were violated.[32] The proposition is untenable in law. But it is also irrelevant for purposes of rescission. A rescission is not an opportunity to re-enter the merits and disclose a possible defence. An applicant must point to an error in the judgment. It is not an error to reject an argument. Here, the Court rejected the argument that an order of imprisonment would amount to detention without trial.

[30] Record, p32, para 85.
[31] Record, p18, para 40.
[32] Record, p32, para 86.

61. Mr Zuma's argument is at any rate born of a category mistake. He conflates section 12 and section 35(3) of the Constitution. These are separate and distinct provisions. The Court made this plain in *Zuma 2*:

> *"[67] What is undoubtedly apparent from this is that, although a contemnor in contempt proceedings does not elegantly fit into the category of an accused person for the purposes of the protections afforded by section 35, he or she remains entitled to his or her rights in terms of section 12. And, to the extent that I acknowledge the importance of section 12, this judgment does not differ from that of my Sister, Theron J. Importantly, section 12 includes the right not to be deprived of freedom arbitrarily or without just cause. This Court has, on numerous occasions, confirmed that this right entails both substantive and procedural protections. On the procedural front, the right requires that no one be deprived of physical freedom unless a fair procedure has been followed. In De Lange, O'Regan J went as far as interpreting the procedural protection afforded by the right not to be deprived of freedom arbitrarily as demanding "a high standard of procedural fairness". This principle was echoed in Fakie, where the Court held that—*
>
> > *"[t]here can be no reason why these protections should not apply also where a civil applicant seeks an alleged contemnor's committal to prison as punishment for non-compliance. This is not because the respondent in such an application must inevitably be regarded as an 'accused person' for the purposes of section 35 of the Bill of Rights. On the contrary . . . it does not seem correct to me to insist that such a respondent falls or fits within section 35. Section 12 of the Bill of Rights grants those who are not accused of any offence the right to freedom and security of the person, which includes the right not only 'not to be detained without trial', but 'not to be deprived of freedom arbitrarily or without just cause'. This provision affords both substantive and procedural protection, and an application for committal for contempt must avoid infringing it*."
>
> *[68] Therefore, although a contemnor is not an accused person as envisaged by section 35, the fair procedure required by section 12 may,*

depending on the circumstances, necessitate a process that is akin to that afforded by section 35. I have already noted that section 35(3) affords an accused person a residual fair trial right to say something in mitigation of sentence. Taking away the liberty of an individual is a drastic step. Affording her or him an opportunity to say something in mitigation of sentence, as is the case under the residual fair trial right, is the least that a court can do before taking that drastic step. Especially since the principle that a person ought to be afforded an opportunity to be heard in matters where their rights or interests are affected permeates our law regarding fair procedure. Indeed, it is even considered unfair to take administrative action against an individual without affording her or him an opportunity to make representations. It must then follow that it is untenable to impose a criminal sentence on a person without affording her or him an opportunity to say something on an appropriate sanction. After all, a criminal sanction has the potential of so serious a consequence as depriving an individual of their constitutional right to freedom."

62. The approach of the Court is not only correct, it is also perfectly compatible with existing authority. In *De Lange v Smuts*, it was stated:

> *"[67] In Nel v Le Roux this Court held that the "trial" envisaged by the right not to be detained without trial did not "in all circumstances require a procedure which duplicates all the requirements and safeguards embodied in section 25(3) of the [interim] Constitution" but in most cases required "the interposition of an impartial entity, independent of the executive and the legislature to act as arbiter between the individual and the state*."[33]

63. The same applies here. The reference to *"trial"* in section 12 means, at a minimum, that there must be a fair procedure before a court before conviction and

[33] *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC).

sentencing. It does not translate to a duplication of the rights in section 35(3) of the Constitution. This is why in *De Lange*, the section under consideration was found to be unconstitutional only *"to the extent that a person who is not a magistrate is authorized by the subsection to issue a warrant committing to prison"*.[34]

64. The motion procedure for contempt of court is compatible with the Constitution. It is the commonly used procedure. A strong reason is that the weapon of contempt of court should be available to a private litigant who is successful in obtaining a judgment, but cannot obtain enforcement.[35]

65. Therefore, the detention without trial complaint is unfounded. The procedure followed by this Court is consistent with section 12 of the Constitution. Mr Zuma has not been detained without trial. He had a trial, according to a procedure suitable for contempt of court proceedings. He was aware of the judgment – *Zuma 1* and it was delivered to him. He knew what was expected of him. He told the Court he would defy. Mr Zuma also knew of the application to hold him in contempt. He knew it was on motion. He had a full opportunity to make representations before conviction and before the imposition of sentence. Mr Zuma rejected the opportunity.

66. There is now a further complaint about the period between the invitation to make representations (on 9 April) and the delivery of judgment (on 29 June). This is a contrived complaint. Mr Zuma does not say anything changed in regard to his

[34] *De Lange* at para 83.
[35] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para 21 to 33.

personal circumstances between these two dates. The fact of the matter is that he did not ask for an opportunity to make mitigation factors at any stage before judgment was delivered.

The Complaint Relating to Acting Justice Pillay

67. Mr Zuma complains that Acting Justice Pillay was also a member of the panel that heard the matter.[36] This is a gratuitous complaint. Justice Pillay's name was known beforehand, and that she was on the bench. Mr Zuma did not apply for recusal.

68. The accusation against Acting Justice Pillay is also disputed by the Commission. Acting Justice Pillay was never the subject of an *"improper intervention*" for appointment to the Constitutional Court. It is pointed out that these allegations stem from the recent April 2021 interviews of judges by the Judicial Services Commission for appointment to the Constitutional Court. One of the questions posed by Chief Justice Mogoeng, to Justice Pillay was that Minister Pravin Gordhan had, some six years ago, asked him how Justice Pillay had performed in an interview.

69. According to the Chief Justice, he told Minister Gordhan that Justice Pillay was not recommended. That was the end of the discussion. The statements of Chief

[36] Record, p33, para 92.

Justice Mogoeng do not reveal any *"improper intervention*". The accusation is therefore without merit.

70. There are two further complaints mentioned by Mr Zuma about Acting Justice Pillay. The first is that she issued a warrant of his committal during a period where Mr Zuma was hospitalized. It has been explained in the answering affidavit that this is standard procedure in criminal courts where the accused is absent. The second complaint is that she made a finding against Mr Zuma in the matter of *Hanekom v Zuma*.[37] But that fact is not sufficient to give rise to any apprehension of bias. The correctness of the judgment is confirmed by the fact that applications for leave to appeal before the Supreme Court of Appeal and the Constitutional Court were dismissed.

71. The complaint about Acting Justice Pillay is thus wholly baseless.

<u>The complaint that Mr Zuma is singled out [38]</u>

72. Mr Zuma alleges that the sentence of incarceration was fashioned for him specifically. There is no basis to the claim. It is not a ground for rescission. Mr Zuma was the respondent in Court. The sentence proposed by the Commission had to consider all relevant factors, including his status as former President. Mr Zuma cannot seriously suggest that his status as a former president was not a relevant factor in assessing the sanction. Plainly, it was. But the important fact is that this was not an error. These were facts known to the Court. They were given

[37] *Hanekom v Zuma* [2019] ZAKZDHC 16.
[38] Record, p34, paras 97-98.

sufficient weighting, an appropriate balance was struck, and the sentence was imposed.

73. The procedure followed in this case is part of our law. It is false to say that it was designed for Mr Zuma. Some 15 years ago already, in *Fakie* Heher JA had drawn attention to the differences between a "coercive" and a "punitive" order:

> *"[76] The differences are marked and important. They emphasise that a coercive order of imprisonment is one to which a respondent willingly (if reluctantly) and defiantly submits in order to frustrate the rights of another party. If he is 'deprived' of his liberty it is because he has, with knowledge of the order and the consequences of disobedience, elected to flout the order. Such an attitude has nothing to do with an onus of proof: the respondent would or would not submit or comply irrespective of the onus. Nor can one properly describe as 'punishment' that confinement to which a defendant of his own choice submits to serve his own ends. So understood, the circumstances of a coercive detention (and the procedure which is fair and appropriate to its imposition) stand at a vast remove from the case of enforced deprivation of liberty against which s 12 is primarily concerned to guard*." [Underlining added].

74. Ten years later, in *Pheko*[39], this Court, unanimously affirmed this distinction:

> *"[31] 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*

[39] *Pheko and Others v Ekurhuleni Metropolitan Municipality* (No 2) 2015 (5) SA 600 (CC)

with a coercive order. By contrast, punitive orders aim to punish the contemnor by imposing a sentence which is unavoidable."

75. As Heher JA noted a in a punitive sanction context, a respondent willingly and defiantly submits in order to frustrate the rights of another party. "*If he is 'deprived' of his liberty it is because he has, with knowledge of the order and the consequences of disobedience, elected to flout the order*."

76. And these judgments were not written with Mr Zuma in mind. They are part of South African law. They were *applied* to Mr Zuma. That was not because Mr Zuma was being singled out. He had made himself guilty of an aggravated form of contempt. When he defied a court order Mr Zuma willingly submitted himself to punishment to frustrate the rights of the successful party to compliance. The consequence is that he is not complying with the *Zuma 1* order. But the law requires that he gets punished for it. He cannot refuse to comply and escape punishment. The fact that the punishment is not what he would have preferred is neither here nor there. The constitutional order would break down otherwise.

77. It is clear that Mr Zuma does not meet the requirements for rescission under Rule 42(1)(a). He does not meet the common law requirements either.

Common law grounds not met

78. Mr Zuma has pleaded the common law as an alternative ground for rescission. His arguments simply do not get out of the starting blocks. In term of the common law of rescission, Mr Zuma must show *"good cause"*. Good cause means he must first provide a reasonable and acceptable explanation.

79. The *locus classicus* is *Chetty v Law Society, Transvaal.*[40] Here it was held that good cause comprises two elements: a reasonable and acceptable explanation for the default and reasonable prospects of success on the merits.

80. The Court further held:

> "*It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits*."[41]

81. Mr Zuma gives no reasonable or acceptable explanation for his failure to oppose. Since he cannot show a reasonable and acceptable explanation, his application must fail. It is not reasonable to assert that a respondent intentionally refused to file papers trusting that the Court will find against the applicant.[42] Nor is it reasonable to stay away from proceedings because one has decided to focus on one's criminal trials.[43]

---

[40] *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A).
[41] *Chetty* at 765C.
[42] Record, p18 para 40.
[43] Record, p17, para 36.

82. His prospects of success are also weak. We have traversed each of his concerns on the merits. They have all been considered and rejected by this Court. He cannot simply ask for the replacement of the majority judgment with the minority judgment.

83. The case based on the common law must accordingly fail.

INTERESTS OF JUSTICE

84. In terms of section 167(3)(1) the Constitutional Court *"is the highest Court of the Republic"*. It is also the final Court of appeal. It controls its own jurisdiction. It has the power, employed in exceptional circumstances, to hear matters directly, in terms of section 167(6)(a) of the Constitution.

85. When the jurisdiction of this Court is engaged, whether as a court of appeal or directly, its judgments and determinations are final. They cannot be appealed. And for good reasons too. Chaskalson P (as he then was) explained the rationale:

> *"[29] The principle of finality in litigation which underlies the common law rules for the variation of judgments and orders is clearly relevant to constitutional matters. There must be an end to litigation and it would be intolerable and could lead to great uncertainty if courts could be approached to reconsider final orders made in judgments declaring the provisions of a particular statute to be invalid*."[44]

[44] *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC).

86. The risk of uncertainty looms large in a case like this. Mr Zuma complains of "facts" that he says should have been taken into account. But he was there all along. He decided not to place those facts before this Court. Now he expects to re-open the entire case. This is intolerable. It is not in the interests of justice for a party to willfully refuse to participate in litigation and then expect to reopen the case whenever they feel like it.

87. If the public does not have the confidence in the finality of litigation, the rule of law will be undermined. One exception, which would justify the reopening is exemplified by *S v Molaudzi*,[45] is where an accused person did not have the benefit of legal representation, resulting in their inability to raise matters of substance. The court explained:

> *"[40] The applicant is serving a sentence of life imprisonment, of which he has already served ten years. His co-accused, convicted on similar evidence, had their convictions and sentences overturned. A grave injustice will result from denying him the same relief simply <u>because in his first application he did not have the benefit of legal representation</u>, which resulted in the failure to raise a meritorious constitutional issue. The interests of justice require that this Court entertain the second application on its merits, despite the previous unmeritorious application, and relax the principle of res judicata*." [Underlining added].

88. These considerations are absent in this case. Mr Zuma had the benefit of senior advocates. He decided not to engage with this Court, at all. There is nothing

[45] *Molaudzi v S* 2015 (8) BCLR 904 (CC).

compelling in his application which would require the relaxation of the principle of finality in litigation.

89. Mr Zuma's alleged health concerns are noted. There is no reason put forward why they were not raised when this Court specifically invited mitigating circumstances. Moreover, these concerns are completely unsubstantiated. Laconic statements do not constitute admissible evidence which would require this Court to relax the rule of finality in litigation. A litigant must plead a case "*by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof*".[46] Vague, unsubstantiated statements do not amount to pleading a case. This Court is thus precluded from having regard to such statements which are not supported by any evidence.

90. Mr Zuma did not comply with the order in *Zuma 1*. In his own words, he will never do so. He also did not comply with the order in *Zuma 2*, which instructed him to hand himself over to the police, until he was arrested by the police.

91. In these proceedings, he continues the unjustified attacks which are designed to impugn the integrity and standing of this Court. There are many examples from his affidavit which exhibit his disdainful attitude to this Court. He says that this Court should be "calm and restrained"[47] an decide the case "solely based on its legal merits".[48] This is designed to suggest that the Court has not been calm and restrained and decided his case without regard "solely" to its legal merit. He

[46] *Swissborough* at 323I.
[47] FA, para 13, p7.
[48] FA, para 13, p.8.

alleges, falsely that he has been "summarily"[49] sentenced. Yet he knows that this was not a summary procedure that was followed here, but a motion procedure. He has made gratuitous remarks against a member of this Court, Acting Justice Pillay[50], which he did not bother to retract or explain in the replying affidavit. He has asserted that this court is "usually rigorous"[51] and able to "separate the wheat from the chaff"[52]. This is a statement made to suggest that this Court was less than rigorous and failed to separate "the wheat from the chaff". He has implied that this Court failed to "discharge its duty to scrutinise"[53] the Commission's application for direct access. He has repeated the public statements he made in response to the judgment of this Court where he attacked the Court. He has repeated the allegation of an "unexplained judicial antipathy"[54] against him. He has dishonestly alleged that the reason for the order of imprisonment is because he expressed views critical of the Court, rather than the contemptuous conduct. He persists with the view that he is entitled to make "factually wrong"[55] statements, as long as he "genuinely"[56] holds them. He has drawn ludicrous comparisons with PW Botha, who he suggests to have been treated better than him. He has accused this Court of sanctioning unlawful conduct by the Commission. Finally, Mr Zuma has made it abundantly clear that the judgments in Zuma 1 and Zuma 2 are *"unconstitutional"* and *"unlawful"*.

[49] FA, para 1, p4.
[50] FA, para 22, p12.
[51] FA, para 40, p18.
[52] FA, para 40, p18.
[53] FA, para 41, p19.
[54]FA, para 43, p19.
[55] FA, para 43, p19.
[56] FA, para 43, p19.

92. These allegations appear directly from the affidavit filed by Mr Zuma. They make it plain that Mr Zuma is beyond judicial redemption. They are the clearest evidence of the futility of this application. This is not a genuine application in vindication of the rescission procedure. It is a thinly disguised appeal against this Court's judgment. But, as has become the hallmark of Mr Zuma's litigation strategy, he has continued the trend of vilifying the Court and its decisions. The interests of justice cannot be served by re-opening a case, only to enable Mr Zuma to heap further insults to the Court.

93. Our law provides a clear remedy for a party in the position of Mr Zuma who approaches the court to legitimate his contempt of court. So long as the contempt continues, it is a bar to the proper administration of justice:

> "… *I am of opinion that the fact that a party to a cause has disobeyed an order of the Court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impeded the course of justice in the cause, by making it more difficult for the Court to ascertain the truth or to enforce the orders which it may make, then the Court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."*[57] [Underlining added].

94. This has been endorsed by the Constitutional Court, which held:

> *"[35] Those interests will not be best served and will be undermined if the applicant is allowed to proceed and deal with the merits of the appeal in the absence of him remedying his conduct by complying with the August Order. It will dilute the potency of the judicial authority and it will send a chilling message to litigants that orders of court may well be ignored with no*

[57] *Byliefeldt v Redpath* 1982 (1) SA 702 (A).

> *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. For all these reasons, and in particular that the subject matter of this litigation involves the best interests of the child, the interests of justice strongly militate against the applicant's pursuing his application."*[58]

95. Mr Zuma has no intention to comply the order in *Zuma 1*. He also did not comply with the order in *Zuma 2*. He has presented a feeble challenge to the finding of contempt of court. A party who is in contempt, but explicitly states that he shall not comply should not be heard by a court.

CONCLUSION

96. We ask that this application must be dismissed with costs.

97. There is no reason why the Commission should be out of pocket for opposing the application. This application is wholly without merit. The founding papers repeat are riddled with invective and insult to the Court. Despite two judgments of this Court, Mr Zuma continues to employ scandalizing language against this Court.[59] When the Commission filed its answering papers, Mr Zuma was in contempt in refusing to submit himself to the police according to the court order.

[58] *S S v V V S* 2018 (6) BCLR 671 (CC)
[59] The Supreme Court of Appeal has held that the use of scandalous language against the court is a ground for punitive costs: *Zuma v Democratic Alliance and Another* [2021] ZASCA 39; [2021] 3 All SA 149 (SCA) at paras 47-52.

TEMBEKA NGCUKAITOBI SC

NYOKO MUVANGUA

Counsel for First and Second respondents

Chambers, Sandton

9 July 2021

LIST OF AUTHORITIES

1. *Byliefeldt v Redpath* 1982 (1) SA 702 (A)
2. *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A)
3. *Daniel v President of the Republic of South Africa and Another* 2013 (11) BCLR 1241 (CC).
4. *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC)
5. *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA)
6. *Hanekom v Zuma* [2019] ZAKZDHC 16
7. *Holomisa v Holomisa & another* 2019 (2) BCLR 247 (CC)
8. *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA)
9. *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC)
10. *Molaudzi v S* 2015 (8) BCLR 904 (CC)
11. *My Vote Counts NPC v Speaker of the NA* 2016 (1) SA 132 (CC)
12. *Pheko and Others v Ekurhuleni Metropolitan Municipality* (No 2) 2015 (5) SA 600 (CC)
13. *S S v V V S* 2018 (6) BCLR 671 (CC)
14. *South African Transport & Allied Workers Union and others v Garvas* 2013 (1) SA 83 (CC)
15. *Standard Bank v Estate Van Rhyn* 1925 AD 266
16. *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T)
17. *Van Heerden v Bronkhorst* (Case no 846/19) [2020] ZASCA 147 (13 November 2020)