IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA, BRAAMFONTEIN

CC CASE NUMBER: 52/2021

In the application of:

DEMOCRACY IN ACTION Applicant

Re*: Application for admission as *Amicus Curiae

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA Applicant

and

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

RAYMOND MNYAMEZELI ZONDO N.O Second Respondent

MINISTER OF POLICE Third Respondent

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE Fourth Respondent

HELEN SUZMAN FOUNDATION Fifth Respondent

DIA'S WRITTEN SUBMISSIONS

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A. ***Caveat***

> **"The power to punish for contempt, large as it is, must always be exercised cautiously, wisely and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity of the court, but may sometimes affect it adversely. Wise Judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct. We venture to think that what is true of the Judicature is equally true of the Legislature."[1]**

1. We need hardly extract from the majority judgment excerpts that may conceivably be considered as manifesting *"anger"* and *"irritation"* which seem to permeate the majority judgment. Examples include:

1.1 ". . . the strength of the Judiciary is being tested. I pen this judgment in response to the precarious position in which this Court finds itself on account of a series of direct assaults, as well as calculated and insidious efforts launched by former President Jacob Gedleyihlekisa Zuma, to corrode its legitimacy and authority. . ."[2];

1.2 "Never before has this Court's authority and legitimacy been subjected to the kinds of attacks that Mr Zuma has elected to launch against it and its members. Never before has the judicial process been so threatened. Accordingly, it is appropriate for this Court to exercise its jurisdiction and assert its special authority as the apex Court and ultimate guardian of the Constitution, to the exclusion of the aegis of any other court. . ."[3]

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1 *Special Reference No. 1 of 1964* [AIR 1965 SC 745; 1965 SCR (1) 413] at para 142
2 At para 1
3 para 29

1.3 "Not only is Mr Zuma's behaviour so outlandish as to warrant a disposal of ordinary procedure, but it is becoming increasingly evident that the damage being caused by his ongoing assaults on the integrity of the judicial process cannot be cured by an order down the line. It must be stopped now. Indeed, if we do not intervene immediately to send a clear message to the public that this conduct stands to be rebuked in the strongest of terms, there is a real and imminent risk that a mockery will be made of this Court and the judicial process in the eyes of the public. The vigour with which Mr Zuma is peddling his disdain of this Court and the judicial process carries the further risk that he will inspire or incite others to similarly defy this Court, the judicial process and the rule of law."[4]

1.4 "I do not think this Court should be so naïve as to hope for his compliance with that order. Indeed, it defies logic to believe that a suspended sentence, which affords Mr Zuma the option to attend, would have any effect other than to prolong his defiance and to signal dangerously that impunity is to be enjoyed by those who defy court orders."[5]

1.5 "Let me be perfectly clear: it is not permissible for a disgruntled litigant to besmirch the reputation of the Judiciary or its members without fear of consequence. This is not the status quo in our constitutional democracy, and it is patently undesirable that an influential figure, like Mr Zuma, should be allowed to exhibit such behaviour. This is not the first time that Mr Zuma's malevolent attitude towards the Judiciary has attracted punitive costs, but I sincerely hope that it will be the last. Mr Zuma's conduct has undoubtedly set

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4 para 30
5 para 48

> an example to the public, so let this costs order follow suit. Let it be known that she or he who abandons all ethical standards in pursuit of a cause must prepare to meet this Court's reproach, and the award of punitive costs that naturally follows"[6]

2. This is not a closed list of observations in the majority judgment that can reasonably be construed as exhibiting anger and irritation at the applicant, and the examples should not be taken individually but collectively in order to appreciate their import.

3. It is our respectful submission that the majority neglected the wise counsel of the Indian Supreme Court. We submit that it is not too late for the majority to reconsider its approach, bearing in mind the counsel of the Indian Supreme Court.

4. In addition, article 11(1)(c) of the Code of Judicial Conduct provides that a Judge must *"refrain from any action which may be construed as designed to stifle legitimate criticism of that or any other judge"*.

5. Because a judgment of this Court is a public document, the majority's engagement in it with what it terms *"Mr Zuma's malevolent attitude towards the Judiciary"* – and not only finding him guilty of contempt but also mulcting him in a punitive costs order for that *"malevolent attitude towards the Judiciary"* – may be regarded by some as *"action which may be construed as designed to stifle legitimate criticism of [the Judiciary]"*. Of course, whether or not such criticism may be legitimate is for the Judicial Service Commission to decide, not the Court or Justices being criticised.

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6 para 136

6. We submit, respectfully, that these are some of the relevant factors that this Court ought to take into consideration in its assessment of the applicant's rescission or variation application.

B. Introduction

7. DIA seeks leave to intervene in these proceedings and make written and oral submissions on the constitutional issue of fair trial rights before a person is subjected to an unsuspended custodial sentence (as a punitive rather than a coercive measure) by the South African Apex Court sitting as a Court of first and last instance, and the far-reaching implications of the Apex Court meting out unsuspended custodial sentences for contempt of court as a form of punishment and not for purposes of coercing a contemnor to purge his or her contempt.

8. It is DIA's respectful submission that the majority judgment of this Court will have far-reaching and adverse effects on the fair trial rights of persons found in contempt of court following the exchange of pleadings in motion proceedings.

9. We submit that it is the responsibility of this court, as a guardian of the constitution, to ensure that the constitutional rights, enshrined in sections 12 and 35(3) of the Constitution, are afforded to all persons "charged" with contempt of court in motion proceedings or hybrid proceedings and are not unjustifiably infringed. This is particularly acute when such proceedings are conducted in the Apex Court from whose judgments or orders no known and established appeal avenue is available.

10. The applicant in this case was found guilty of contempt of court and sentenced to 15 months imprisonment without the option of a fine, in clear violation of section 12(1)(b) of the Constitution, which prohibits detention/incarceration without trial.

11. The object of the right to a fair trial is to minimise the risk of wrong convictions, inappropriate convictions, and consequent failure of justice, pervades all stages of a trial until the last word has been said on appeal.[7]

12. In **Twala**[8] Yacoob J stated:

> "The ambit of the right enshrined in section 35(3)(o) must be determined by having regard to the context in which it appears and the purpose for which it is intended. The right of appeal to, or review by, a higher court is not a self-standing right; it is an incidence or component of the right to a fair trial contained in section 35(3) and it appears in that context. . . . [T]he purpose of section 35(3), read as a whole is to minimise the risk of wrong convictions and the consequent failure of justice, and section 35(3)(o) is intended to contribute towards achieving this object by ensuring that any decision of a court of first instance convicting and sentencing any person of a criminal offence would be subject to reconsideration by a higher court. The provision requires an appropriate reassessment of the findings of law and fact of courts of first instance and is clearly not intended to prescribe in a technical sense, the nature of the reassessment that will always be appropriate. The reason for this is that the nature of the reassessment that is appropriate will depend on the prevailing circumstances. Section 35(3) does not provide for specifics. It creates a broad framework within which the lawmaker is afforded flexibility in order to provide for the kind of reassessment mechanism which is both appropriate and fair."

13. It is indisputable that the applicant was not afforded the opportunity for a re-consideration of the finding of guilt and the sentence imposed upon him because the court that convicted and sentenced him is the court of last instance. Had this Court remitted the matter to the NDPP, the applicant would have been entitled to the full

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[7] S v Steyn 2001(1) SA1146 para 13

[8] S v Twala 2000(1) SA 879 CC para 9

rights afforded to him by section 35(3)(o) of the Constitution to have the finding and the sanction against him reconsidered by a higher court, which may have included the Constitutional Court exercising its rightful role as an Apex Court.

14. It is indisputable that the applicant was denied his section 35(3) fair trial rights. The Commission's averment that he was afforded an opportunity to file affidavits in this Court with respect misses the point. Its direct access application to this court constituted motion proceedings. The Commission proceedings are not trial proceedings. So, the fact that a litigant was afforded an opportunity to respond in motion proceedings but spurned that opportunity, cannot denude that litigant of her or his fair trial rights.

15. We urge this Court to consider this case as it would any other case unaffected by the applicant's status and what some in society perceive him to represent. If everyone is equal before the law, as the majority is at pains to remind us, then the applicant's status as former President should not earn him special treatment, one way or another, in the adjudication of his case and in the assessment of what rights he has at his disposal. The applicant is entitled to such rights.

C. The appropriate standard for rescission or variation of orders in this Court

16. Rule 29 is the avenue by which the applicant has elected to approach this court in these proceedings. That rule references rule 42 of the High Court rules. But it does not adopt rule 42 without qualification. It says

> "The following rules of the Uniform Rules shall, with such modifications as may be necessary, apply to the proceedings in the Court…"

17. The underlined qualification takes account of the status of this Court as the Apex Court which cannot be restricted in its duty as the Apex Court by the regimen of rule 42. Even if the applicant were absent "by choice" and not out of ignorance from the motion proceedings launched by the Commission for his imprisonment for contempt, that cannot be a basis for the Apex Court to refuse to grant the rescission or variation of its orders in the interests of justice as envisaged in section 167(6)(a) of the Constitution. The *"interests of justice"* measure could, in our submission, be one such modification to the application of rule 42 in these proceedings of this court. As the Apex Court, this Court has a higher duty than the tick-box exercise upon which a lower court – whose judgment and orders may be set aside on appeal or review in a higher court – has the luxury to embark. We submit, therefore, that the approach that the Commission seems to adopt in relation to the application of rule 42 to the proceedings of this Court – when a man's liberty is at stake – is mistaken and inappropriate. Ultimately, the overarching standard for this Court, as the Apex Court, in the determination of this rescission or variation application ought to be *"the interests of justice"*.

D. **The standing of HSF:**

18. The status of Helen Suzman Foundation (HSF) in these proceedings needs resolution. HSF was admitted as *amicus curiae* in the main application. How it transmogrified into a party in these proceedings with a right to oppose this rescission or variation application is a mystery that this Court should resolve.

19. We submit that HSF has no standing as a party in these proceedings. Its role was that of *amicus curiae* in the main proceedings. HSF can have no right to oppose the rescission or variation application. This is so even if the applicant had erroneously named HSF as *"fifth respondent"* in his notice of motion. This is so because this Court is not bound by an error committed by a litigant.

20. This Court's jurisprudence, as does that of the Supreme Court of Appeal, makes plain what the role of an *amicus curiae* is. It is there to assist the court, not oppose applications. It is imperative that this Court determines this question.

E. Section 12(1)(b)

21. Section 12(1)(b) of the Constitution is clear and unambiguous. It prescribes a *"trial"*, not a mere *"hearing"* or filing of affidavits in motion proceedings. The section specifically prohibits detention *"without trial"*. There can be no doubt that the applicant is detained without trial.

22. The section 12(1)(b) right (the right not to be detained without trial) that every South African enjoys, is not for the Court to take away from a litigant without even embarking on a section 36(1) justification analysis. The majority's conclusion or finding that the applicant's constitutional rights *"have in no way been limited or disregarded by this Court"* seems at odds with the facts. It is a fact that the applicant has not been subjected to trial proceedings before the majority sentenced him to 15 months unsuspended imprisonment. The Commission's application to this Court for the contempt finding

against the applicant, and for his summary imprisonment, did not constitute trial proceedings.

23. We submit that the majority had an obligation to embark on the section 36(1) justification analysis for taking away from the applicant his fair trial rights. A Court has an obligation to embark on the section 36(1) justification analysis for limiting any person's fundamental right, however contumelious her or his conduct. Urgency – real or imagined – cannot serve as a basis for limiting a fundamental right and dispensing with the section 36(1) justification analysis. The majority's failure to embark on that justification analysis, based as it is on the mistaken premise that none of the applicant's constitutional rights were violated by the Court, would seem to be inconsistent with the Constitution.

24. That being so, and as the founding value of the Constitution in section 2 makes plain, we submit that the majority's custodial sentencing of the applicant without trial must consequently be invalid and must be set aside or rescinded by this Court itself.

F. **Section 35(3)**

25. The view of the majority decision as regards the extent of the section's application is, with respect, unwarrantedly narrow. Section 35(3) fair trial rights **do not** find application only in relation to persons accused in criminal proceedings. Even the authority cited by the majority in paragraph 77 does not say section 35(3) fair trial rights do not apply to a *"hybrid process"* such as contempt proceedings.

26. In **Fakie**[9] the Supreme Court of Appeal said *"not all of the rights under [section 35(3)] will be appropriate to or could easily be grafted onto the hybrid process"*.[10] There appears to be no authority, nor did the majority point to any such authority, which says none of the fair trial rights in section 35(3) finds application in a *"hybrid process"* such as contempt proceedings for failure to obey a court order.

27. In fact, there is authority (not considered by both the majority and the minority) for the proposition that for purposes of civil contempt proceedings, the recalcitrant party is, in fact, an accused within the contemplation of section 35(3) of the Constitution, and so is entitled to such fair trial rights as are compatible with those proceedings.

28. In **Burchell**[11], a Full Bench decision of the Eastern Cape High Court, Justice Froneman held as follows:

> "committal for civil contempt court orders remains a particular form of the crime of contempt of court under the new constitutional order, and that a respondent brought before court for committal in civil contempt proceedings is an 'accused person' under s35(3) of the Constitution."

29. We are not aware of a subsequent decision of a higher court, including this Court, that has expressly overruled that decision.

30. We submit that the circumstances of this case, far from justifying a short shrift approach to the fair trial rights (as enshrined in section 12 and 35(3) of the Constitution) of someone in the applicant's position, demand that he should have been afforded a fair

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9 *Fakie N.O. v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA)
10 Id para 26
11 *Burchell v Burchell* (ECJ 010/2006 [2005] ZAECHC 35 (3 November 2005) at para 13

trial – as envisaged in section 12(1)(b) of the Constitution, not as imagined by the Commission in its papers – before being detained.

31. The construction of the section by the majority is, with respect, too narrow and opens the door wide open for abuse in non-criminal proceedings which may culminate in the incarceration of a person without the benefit of these rights. This Court has held that fundamental rights must be construed broadly and not narrowly.

32. If the majority judgment is left uncorrected, it will have far-reaching and adverse implications on the rule of law and human rights jurisprudence in South Africa.

33. The lower courts may take their cue from the majority judgment, as the doctrine of precedent dictates, to imprison people without trial for violating court orders and treating courts or judicial officials with disdain.

G. <u>The proper approach</u>

34. In this regard, we commend to this Court the counsel of the Indian Supreme Court cited above, and the injunction of article 11(1)(c) of the Code of Judicial Conduct.

35. The judgment of the Supreme Court of Appeal in *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another (538/2020) [2021] ZASCA 95 (1 July 2021)*[12], which came just two days after the decision in this case, demonstrates, with

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[12] *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another (538/2020) [2021] ZASCA 95 (1 July 2021)*

respect, the approach that the majority should have followed. In *De Beer*, the Supreme Court of Appeal referred a matter of contempt to the National Prosecuting Authority. In the event that the National Director of Public Prosecutions should find that Mr De Beer's conduct was in contempt of the Supreme Court of Appeal, then it is likely that Mr De Beer will be formally charged and prosecuted in a trial and, if found guilty, only then be sentenced by a lower court. He will be afforded all his fair trial rights. No exceptional circumstances warrant a party in the applicant's position in this case being denied the same treatment. The Supreme Court of Appeal said:

> "[118] Courts are not above criticism. Legal commentators, the media, academics, and members of the public criticize judgments and court rulings on an almost daily basis. In that sense, courts can rightly claim that they are constantly held up to public account. No judge, indeed, no person, whatever his or her station is above scrutiny. Our concern in this case, however, is to draw a judicial line in the sand. We have set out in some detail the criticisms levelled against us. Our primary concern however, is the baseless criticism levelled, in the last communication of Mr de Beer and the LFN, against the President of this Court, the deplorable denigration of the Court, and the generalised contempt displayed towards all our colleagues, unconnected though they are to this case. We are concerned too about the scurrilous insults, set out in the communications referred to above, directed at those who serve in the Registrar's office.
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> [119] The last written communication from Mr de Beer and the LFN is crude, gratuitously insulting, clearly contemptuous and intended to denigrate this court. The Constitutional Court has most recently warned that unjustifiable defamatory and scurrilous utterances against judicial officers will not be tolerated.[13] In the present circumstances there seems to us to be no alternative but to refer this judgment to the National Director of Public Prosecutions (the NDPP) for her attention. In doing so we are mindful that Mr de Beer is a layperson. However, even for a layperson the statements are beyond the pale and there is no excuse for his conduct or that of the LFN.[14] The Registrar is thus directed to take the necessary steps to ensure that this judgment is brought to the attention of the NDPP."

(footnotes in original text)

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13 *Mkhatshwa and Others v Mkhatshwa and Others* [2021] ZACC 15 paras 23-27.

14 See the latest Constitutional Court Judgment 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 Zuma and Others* [2021] ZACC 18 at para 136.

36. The sentiments and outrage expressed by the Supreme Court of Appeal in *De Beer* are not materially different from those expressed by the majority in this case in relation to the applicant's conduct towards this Court.

37. The majority sentenced the applicant to an effective term of imprisonment, without trial, and mulcted him in punitive costs, for, among other things, scandalous statements about this Court, inflammatory statements intended to undermine this Court's authority, besmirching the reputation of the Judiciary or its members, malevolent and contumelious attitude towards the Judiciary.

38. The conduct of the applicant is, indeed, worthy of deprecation. *Non constat* that this justifies summary imprisonment without fair trial.

39. The Commission is itself not blameless for where this Court now finds itself. In the words of 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 Zuma** (CCT 295/20) [2021] ZACC 2; 2021 (5) BCLR 542 (CC) (28 January 2021):

> "[57] . . . We are told that the Commission has sought the respondent's attendance at its hearings since 2018. We are also told that to date the Commission has issued no less than 2526 summonses, but we are not informed why a summons was not issued against the respondent until October 2020.
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> [58] Despite the constitutional injunction of equal protection and benefit of the law,[15] of which the Commission was aware, for reasons that have not been explained the Commission treated the respondent differently and with what I could call a measure of deference. He was only subjected to compulsion by summons when it was too late in the day. On the occasion of the respondent's withdrawal without permission from the Commission in November 2020, the Chairperson stated:

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

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

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

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

[61] But of more importance is the fact that in December 2019, the Commission was convinced that a summons should be issued against the respondent. However, instead of asking that the summons be issued immediately by the Commission's secretary, the Commission's lawyers chose to give the respondent notice, informing him that they planned to make a substantive application to the Chairperson for authorisation of the summons. Shortly thereafter, they launched the application which was served upon the respondent. All of this appears not to be required by any law. And the Commission was aware that it had limited time within which to conduct hearings. As to why it did not follow the law in relation to issuing summons, we are not told.

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

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

three months lost by the Commission must be April to June 2020. It is not clear from the Commission's papers why the application was set down for 9 September 2020. The period July to August 2020 is not accounted for by the Commission.

[64] When the respondent pointed out that 9 September 2020 did not suit his legal team, the hearing of the application was rescheduled for 9 October 2020. It was only on that day that a summons against the respondent was authorised and issued. It required the respondent to appear in November 2020. During his appearance then, the respondent moved an application for the Chairperson's recusal. When this failed, he unilaterally withdrew from the hearing and left the Commission's venue.

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

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

40. The Commission's "maladroit" conduct of its proceedings is a relevant factor in the determination of the applicant's rescission or variation application. Had the Commission conducted its proceedings in a proper manner, the urgency of the majority's sentencing of the applicant would possibly not have arisen. For example, it was within the Commission to call the applicant as a witness right at the beginning of its process, or summoned him. It was also within the Commission's powers to use the powers conferred on it by the Commission Act much earlier than it did. Now, as a result of the Commission's failure to invoke the powers conferred on it by law, a man is languishing in gaol for contempt of court. This hardly seems fair, just or equitable.

41. It is also clearly in the interests of justice that this Court rescinds its majority judgment and refer the applicant's contempt to the National Director of Public Prosecutions. That the Commission's life is nearing its end cannot reasonably be a basis for ordering

summary imprisonment of a recalcitrant party instead of meting out a coercive order aimed at affording the recalcitrant party an opportunity to purge his or her contempt. We say so because the applicant is not responsible for the Commission's choice to call his evidence as late as he did.

42. The Commission was established principally to investigate corruption and fraud that was allegedly committed by, or with the connivance of, the applicant. This seems clear from the judgment of the Full Bench which directed its establishment. The Second Respondent's scheduling of witnesses, so that the applicant who seems to be at the very centre of the Commission's investigation is called right at the end of the Commission's life, is the choice of the Second Respondent.

43. By punishing the applicant with an unsuspended imprisonment for contempt, based on the choice of the Second Respondent in the manner in which he scheduled his witnesses, seems extraordinarily unreasonable. On the majority's reasoning, it is clear that the lateness of the hour is a significant factor in its decision to sentence the applicant to an effective gaol term. Had time not been a factor, it seems reasonable to expect that the applicant could not have been given an unsuspended gaol term.

44. The other factor is the majority's (with respect) speculative finding, based on public statements the majority attributes to the applicant, that he would still not appear at the Commission if given a coercive sentence suspended for a period. But, with respect, (as Justice Willis once put it): *"Although judges learn to be adept at reading tealeaves,*

they are seldom good at gazing meaningfully into crystal balls"[16] to predict the future. The majority had no means of knowing that the applicant would not appear at the Commission and give evidence.

45. It is the nature of the sanction in prospect that determines the nature of the rights to which the person being sanctioned is entitled, not the label attached to the nature of the proceedings through which the sanction is to be meted out.

H. Conclusion

46. In the circumstances we submit that the just and equitable remedy is for this court to rescind its order of a guilty finding and the prison term imposed, and to refer this matter to the NDPP to decide this matter.

47. That is the proper way that would afford the applicant the full exercise of his fair trial rights enshrined in section 35(3) that this Honourable Court has denied him.

48. Given the strict time limits within which we were required to file these submissions (less than 24 hours), we ask that we be permitted to supplement them by way of oral submissions.

VUYANI NGALWANA SC
NOMGCOBO JIBA

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16 *Heroldt v Wills* (12/10142) [2013] ZAGPJHC 1; 2013 (2) SA 530 (GSJ); 2013 (5) BCLR 554 (GSJ); [2013] 2 All SA 218 (GSJ) (30 January 2013), par 40

Pro Bono Counsel for Democracy In Action

Chambers, Sandton
12 July 2021