IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT52/21

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA	Applicant
and	
THE COMMISSION OF INQUIRY INTO STATE CAPTURE, FRAUD AND CORRUPTION IN THE PUBLIC SECTOR, INCLUDING ORGANS OF STATE	First Respondent
RAYMOND MNYAMEZELI ZONDO NO.	Second Respondent
THE MINISTER OF POLICE	Third Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fourth Respondent

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FOUNDING AFFIDAVIT

I, the undersigned,

GEDLEYIHLEKISA JACOB ZUMA

do make oath and state:

1. I am the former President of the Republic of South Africa, residing in the village of Kwa-Nxamalala at Nkandla. I am the first respondent in the judgment handed down by this Honourable Court on Tuesday, 29 June 2021 attached hereto as annexure **"X"** and in which I was found guilty of the crime of contempt for which I have been summarily, and without undergoing any trial, sentenced to fifteen (15) months of direct imprisonment. I bring this application in my aforementioned capacity.

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2. The facts contained in this affidavit are, unless the contrary appears from the context or is so stated, within my own knowledge and are true and correct. The facts of which I do not have personal knowledge are to the best of my knowledge and belief both true and correct. Where I make submissions of a legal nature, I do so on the strength of legal advice which my legal advisers have provided to me.

THE PARTIES

3. I am the applicant in this application and the first respondent under case number CCT 52/21 referred to above and marked "X". The relevance of the fact that I am the former President and Head of State of the Republic of South Africa and served as such between the period of 9 May 2009 to 14 February 2018 will become clear later in this affidavit. Prior to being President of the Republic of South Africa, I also served in different executive capacities in government since 1994.

4. The first respondent is the **COMMISSION OF INQUIRY INTO STATE CAPTURE, CORRUPTION AND FRAUD IN PUBLIC ENTITIES AND OTHER ORGANS OF STATE,** appointed in January 2018 by me as the then President and nominated by the Chief Justice on the dictation and direction of the remedial action of the Public Protector which was endorsed by order of the High Court in the case President of the Republic of South Africa v Public Protector.

5. The second respondent is the Chairperson of the Commission of Inquiry, **DEPUTY CHIEF JUSTICE ZONDO,** who was selected by the Chief Justice for appointment to chair the Commission of Inquiry ("the Chairperson").

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6. The third respondent is the **MINISTER OF POLICE,** a member of the executive appointed as such by the President of the Republic of South Africa. No relief is sought against the Third respondent who has been cited for the role that he has been directed to play in the execution of the incarceration orders of the aforementioned judgment.

7. The fourth respondent is the **MINISTER OF JUSTICE AND CORRECTIONAL SERVICES,** who is member of the executive appointed by the President of the Republic of South Africa responsible for the administration of justice. No relief is sought against the Minister who has been cited for the role that he has been directed to play in the execution of the incarceration orders of the aforementioned judgment.

8. Service upon all the respondents will, by arrangement, be electronically effected upon The State Attorney, Johannesburg, per JohVanSchalkwyk@justice.gov.za.

9. The respondents are cited only insofar as they may have a direct or indirect interest in the outcome of the application and no costs order will be sought except in the event of opposition.

THE PURPOSE OF THIS APPLICATION

10. This is an urgent application as contemplated in Rule 42 of the Uniform Rules of Court, read with Rule 29 of the Rules of this Honourable Court, for relief that paragraphs 3 and 4 of the judgment of the Honourable Court referred to above be reconsidered and rescinded. In this application I further seek orders that paragraphs 3, 4, 5 and 6 of the said order be consequentially set aside.

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11. Alternatively, and in the event that the Court rejects my application to reconsider and rescind or vary paragraph 3 of the order, that it directs that I am given the proper opportunity to present evidence in relation to the question of whether direct imprisonment is an appropriate remedy for the crime of contempt of court under the circumstances of my dispute with the Commission of Inquiry.

12. I approach the Honourable Constitutional Court fully cognisant of the passionate, charged and strong expression of judicial disdain for my apparent defiance of its orders in **Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including the Organs of State v Zuma (Council for the Advancement of the South African Constitution, Ngalwana SC, the Helen Suzman Foundation Amicus Curiae) [2021] ZACC; 2021 JDR 0079 (CC)**. Given my impending incarceration, I have not had sufficient time to put this application together. However, I believe I meet the jurisdiction and/or direct access requirements in terms of the rules of the Court, more particularly because no other court would have the jurisdiction to rescind an order of the Constitutional Court, and this application is connected to an application in which direct access and jurisdiction have already been determined and exercised.

13. The tone in which the Court conveyed its judicial exasperation and displeasure at my non-compliance with its orders in relation to my appearance at the Commission of Inquiry would ordinarily discourage any litigant from seeking the same court to reconsider, vary and rescind its orders. I approach the Honourable Court dreading the prospect that in dealing with this application against the background of its seminal and unprecedented judgment on summary imprisonment without trial for contempt of Court, I do trust that it will be able to dig from the depth of its judicial being, to extract the requisite calmness and restraint, and to adjudicate my

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application solely based on its legal merits. I also trust that my application will not be regarded as another affront to the Court or what it regarded as "*direct assaults as well as calculated and insidious efforts ... to corrode its legitimacy and authority*", as was the case with my genuine pleas that the issue of the recusal of Zondo DCJ, which I have brought before the courts, be first decided before I could be forced to appear before him, when assuming the neutral pose of the Chairperson of a fair judicial enquiry. In the final analysis, taking that stance, whether ill-advised or not, is my only sin. It was certainly never intended to attract or provoke such acerbic judicial ire. To the extent that it has clearly had that unintended consequence, it is very regrettable indeed. I hope my *bona fides* will be accepted at face value in this important regard. Either way, this aspect of the matter will be more fully ventilated at the open hearing of this matter, if so directed.

14. I am advised that, before I walk through the prison doors to serve my sentence as the first direct prisoner of the Constitutional Court under our constitutional democracy, it will not be futile to make one last attempt to invite the Constitutional Court to relook its decision and to merely reassess whether it has acted within the Constitution or, erroneously, beyond the powers vested in the court by the Constitution. The peculiarity and uniqueness of these unprecedented circumstances, the implications thereof on my personal freedom and the health challenges facing the country should all combine to militate in favour of the serious entertainment of this matter.

15. In so doing and although I am in obvious agreement with the relevant sentiments expressed in the lucid minority judgment of Theron J and Jafta J, it is worth emphasising that I go far beyond the minority judgment in my support for the relief sought herein. I would not embark on what would be the futile exercise of simply regurgitating the minority judgment.

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16. Given my own unstable state of health. and. that it is my physical life that the incarceration order threatens, I believe that I am entitled to a court that will examine – with dispassionate interest but a keen sense of judicial duty and independence – whether this judgment represents the law on contempt of court orders in a constitutional democracy that is undergirded by the Constitution whose foundational values are human dignity, equality, ubuntu and the advancement of human rights or whether, as I seek to assert, it is underlied by rescindable errors and omissions. In the present circumstances, it is the right to life itself which may be at stake. It is the therefore no exaggeration to label mine as cruel and degrading punishment.

17. I therefore seek this Honourable Court, based on its supreme duty to entrench a constitutional culture in which inherent dignity, ubuntu, the protection and advancement of rights and freedoms and rule of law, to examine its direct imprisonment order and re-evaluate whether such an order does not violate the constitutional rights it is enjoined to protect, promote and give effect to and thereby make itself susceptible to the rescission regime envisaged in Rule 42 and/or the common law.

18. Let me be upfront with the Court. I do not seek any sympathy from this Honourable Court but its sense of fairness and impartiality in adjudicating this rescission application. I am a 79 year-old man who suffers from a medical condition that requires constant and intense therapy and attention. I disclose this not to avoid imprisonment, which I have gladly faced before in my life for conscientious reasons, but to indicate the gravity of the threat that an unconstitutional order of summary direct imprisonment creates. In the event that the court is persuaded that I should be given a proper opportunity to deal with the issue of direct imprisonment, my state of health would also form part of the many other reasons why I should not be imprisoned, more particularly in the

current context of a deadly pandemic to which people in my circumstances are particularly vulnerable and at the highest risk of death.

19. Imprisonment will not serve any constitutional value but may be a political statement of exemplary punishment which does nothing to affirm the court as the supreme custodian of our constitutional rights. As already indicated by the premature celebrations of newfound upholders of "the rule of law", it may also satisfy the vengeful appetites of my political foes but ours is a society not built on the basic instincts of revenge, as was famously held in *S v Makwanyane*, to which reference will be extensively made on my behalf. I only mention my health conditions merely to demonstrate, as an example, that this Honourable Court has summarily sentenced me to direct imprisonment without even affording me a proper opportunity to advance mitigation after conviction, like all the other millions of human beings who have ever served sentences in South Africa and anywhere else in the world where there is any semblance of law. It is not with a sense of pride that I am on the verge of being the first person to face direct and unavoidable detention, without the benefit of a trial or a proper opportunity to present mitigating circumstances, in post-apartheid South Africa.

BRIEF BACKGROUND

20. The judgments of the Constitutional Court arise from a dispute with the Chairperson of the **Judicial Commission of Inquiry into Allegations into State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma** ("Commission of Inquiry") regarding what he alleged was my refusal to give evidence before the Commission. The true and simple fact is that I never refused to appear before the Commission of Inquiry. That much has been repeatedly articulated by me, even in the statements which the court has so

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much relied on as aggravation in respect of the exact opposite sentiment. namely that I have somehow vowed not to attend the Commission.

21. The objective evidence will show that I indeed appeared twice and gave my evidence after which I was questioned by the Commission Evidence Leader. It was during my appearance that an agreement that was ultimately sanctioned by the Chairperson was reached that I would submit an affidavit covering a number of issues that the Commission Evidence Leaders had identified for my attention. As a consequence of ill-health, I was unable to consult with my lawyers to instruct them on the issues identified by the Commission. I had to travel outside the country for medical reasons. The Chairperson of the Commission crucially accepted my bona fides in relation to my medical leave and directed that he would meet with the leader of my medical team to understand my medical condition. It was during the period of my ill-ness that I got to know that the Commission Evidence Leaders had applied to the Chairperson to have me summonsed in terms of the provisions of the Commissions Act to appear before it on the basis that I had failed to give an affidavit as agreed. I became concerned at the motivation advanced by the Commission Evidence Leaders for the issuance of the summons. I instructed my lawyers to oppose the summons application and to that effect provided an affidavit. In that affidavit, amongst others, I indicated that I was ill and unable to give my attention to the issues involving the drafting of the affidavit. My lawyers appeared at the Commission and indicated, to the apparent satisfaction of the Chairperson, that I was unwell to attend to the issues that the Commission wished to have me answer. I say to the apparent satisfaction of the Chairperson of the Commission because when he read his ruling into the record, he specifically indicated that dates for my appearance would be scheduled when I returned from my medical leave and as discussed with my medical team. I attach a copy of the transcript of that Chairperson' ruling as "**JZ1**".

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22. Of particular importance are the following aspect of the orders of the Chairperson: (i) that the Chairperson, although reluctant, would meet with the leader of my medical team to be fully advised of my medical condition (ii) that on my return from my medical leave, that appropriate arrangements would be made for my appearance depending on the state of my medical situation. In fact it was during my medical leave that Acting Justice Pillay, who incidentally formed part of this Court's panel on the issue of contempt, issued a warrant for my arrest for failing to appear in the criminal court in Pietermaritzburg. It was also Acting Justice Pillay who, in the Hanekom defamation matter, gave judgment in which he directed that I should appear to give evidence before the Commission truthfully. I do believe that she was, for these and other reasons, conflicted to be part of this panel's court dealing with my matters. I revisit this issue further below.

23. The Chairperson, despite his ruling that he would meet with the leader of my medical team and despite being given the details of the leader of my medical team, never contacted him or at least sought my assistance to meet him. In fact, in later communications with my lawyers, he specifically indicated that he would only meet with my medical team in the presence of another (supposed neutral) doctor of his choosing to help him understand the report of my medical team. That approach to me was firstly inconsistent with his ruling but secondly appeared to be a unilateral variation of his ruling on the issue. I believe that the Chairperson's condition for meeting my medical team was an indication of new distrust in me and my medical team. Over and above that, I felt that the Chairperson was undermining my right to privacy in relation to my medical condition which as he would know, was treated as a state secret of a fairly high-level classification. I attach a copy of the letters of the Commission indicating the Chairperson's attitude to meeting my medical team as "**JZ2**".

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24. I received a letter from the Commission that, despite the ruling of the Chairperson that he would schedule my appearances after speaking to the leader of my medical team, he directed that I appear on dates that I was unavailable. I was unavailable purely and solely for medical reasons. When confronted with this, the Commission dung its heels on my explanation, clearly accusing me of refusing to appear before the Commission and setting down the hearing of the summons application of the Commission's Evidence Leaders. I was concerned by this conduct of the Chairperson which I considered highly prejudicial and unfair given my long record of co-operation with the Commission and our courts. On examining the implications of the accusations that I was undermining the work of the Commission and resisting to appear before it, I formed the reasonable view that the Chairperson was biased. There are other prejudicial comments made about by the Chairperson that began to make me doubt his impartiality and independence.

25. I sought legal advice and was informed that my *bona fide* apprehensions were reasonable and justified an application for the Chairperson's recusal. At that point I had indicated two issues that I considered fairly serious and they related to the lawfulness of the Commission. That was not the basis that I did not appear before the Commission. The simple reason is that I was not well. My doctors could attest to that fact but the Chairperson, contrary to his own ruling decided to ignore critical information that would have assisted him to understand my state of mind in relation to participating in the Commission.

26. After anxious consideration, and receiving advice on whether a recusal application should be pursued, I instructed that such an application should be made to the Commission. My lawyers prepared the application and served it on the Commission. The Commission filed its answering affidavits and the matter was set down for hearing before the Chairperson. It was argued and

judgment was handed down a day after the arguments. My counsel made it abundantly clear that I wanted to participate in the Commission but that the Chairperson had made it intolerable for me to do so by making prejudicial statements regarding my attitude towards the Commission. However, he also indicated my willingness, based on my circumstances, to explore other methods through which my evidence could be given.

27. Let me state what my attitude towards the Commission is. I do not believe that it was established in terms of the Constitution and at the right time, that issue will be the albatross around the neck of its legitimacy. For now, I was happy to present my evidence if the circumstances were fair and in accordance with the law. When the recusal application was argued before the Chairperson, prior to hearing my application, he submitted a media statement of his own – not under oath but purporting to be a response to factual allegations made in my affidavit. When the Chairperson did that, I believe that it entitled me to reply, which opportunity the Chairperson gave me. I replied. That on its own, amplified the nature of the conflict in terms of which the Chairperson would be involving in the adjudication of a dispute in which he was a witness on the factual issues.

28. Following his ruling, I was advised that I could approach a court to review his decision, which advice I accepted and gave instructions on. My counsel indicated two things after the judgment of the Chairperson, (i) that I would be seeking to review his ruling on recusal and (ii) that a complaint of judicial misconduct would be filed against him for his conduct. A review application was prepared and served on the Commission. But before I deal with this issue, let me complete the sequence of how things evolved after the ruling of the Chairperson for I have been falsely accused of walking out of the Commission – without the permission of the Chairperson.

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29. After the Chairperson had read his ruling, my counsel conveyed my intention to seek to review the decision of the Chairperson. He indicated that, for that reason, we would be excused from further attendance in the proceedings. The Evidence Leader stood up to seek to argue that I was not entitled to leave unless I had the permission of the Chairperson. The Chairperson immediately ordered an adjournment of proceedings. We understood that we had the permission of the Chairperson to leave after that adjournment. When we reached my holding room, my lawyers were not sure if the Chairperson had in fact granted me permission to leave, so one of my lawyers left to inform the Chairperson that I would not be returning to the proceedings. I am advised that there was a discussion with my lawyers about us coming back to the Commission for the Chairperson to adjourn the proceedings for hearing on the next day which would be a Friday. While this was taking place, I was scheduled to take my medication and had left the Commission premises to do that. My lawyer was asked to convey to the Chairperson that I had left the premises on the understanding that I was entitled to leave.

30. I watched the televised broadcast of the proceedings and heard the Chairperson say that I had left "without his permission", and that he had decided not to schedule any hearings on Friday but would be taking "stern actions" against me in terms of the Commissions Act. At that point my lawyers had advised that if called upon to appear on Friday, I should do so, but that was no longer possible because the Chairperson had abandoned the Friday hearing without asking me to appear.

31. This is one of the charges that he publicly declared that he would report to the SAPS in terms of the Commissions Act. I have waited for the process under the Commissions Act to be initiated so that I have the opportunity to explain my absence in the court by leading evidence. None of that was forthcoming, even though the Chairperson has specifically directed the Secretariat of

the Commission to initiate the process under the Commissions Act. Instead, civil contempt proceedings were deliberately initiated in motion court and the threatened Commissions Act process was consciously abandoned. This election was significant.

32. Instead, I was served with an urgent application to the Constitutional Court, in which the Chairperson sought to enforce his directives under the Commissions Act through the order of the highest court in South Africa. He was no longer pursuing the matter via the prescribed statutory route of the Commissions Act. In essence, the Constitutional Court was approached to impose a final order on me to enforce the Chairperson's directives. Before I deal with the Chairperson's urgent approach to the Constitutional Court, let me deal with what I did to contest the ruling of the Chairperson in relation to the recusal application.

33. I must emphasise that I raise this background simply to put into context this rescission application and not to revisit the merits of the previous applications.

34. I close this section by reminding this Honourable Court of a fact in respect of which it may take judicial notice. There is no other human being in this country who has attended to and respected our courts with such frequency and consistency as I have done in the past 20 years or so. I have never and will never treat our courts with contempt. My only simple call is for fairness to prevail.

REVIEW APPLICATION

35. My review application was prepared and duly served on the Commission. I attach a copy of the Notice of Motion in that review application as "**JZ3**". As can be seen, it was framed as a rule 53 review application requiring the production of the record.

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36. The Commission has simply ignored the legal significance and procedural importance of my review application in dealing with the dispute with the Chairperson of the Commission of Inquiry. The attitude of the Commission is set out in a letter which is attached as "**JZ4**". As will be seen from that letter of the Commission, while acknowledging receipt of the application, it took the view that it would simply not respond to it. The conduct of the Commission in relation to my review application is clearly untenable. For reasons that are not necessary to deal with in this application, my erstwhile attorneys, Mabuza Inc, subsequently decided to withdraw from all my cases with the consequence that I had to find new attorneys. This has been difficult as I do not have adequate resources to fund all the cases that in my view are important to vindicate my rights. Understandably, not many attorneys and advocates were prepared to take my cases on a verbal promise that I would raise funds for the litigation. When I finally got new attorneys, I had to focus on my criminal trial which had begun. I took the view that any other applications which demanded financial resources that I do not have would not receive my priority. For obvious reasons, my criminal trial is a priority. My reasons for not engaging 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 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.

37. I now fully accept that the most legally appropriate route which I could and should have taken would have been to apply for interim relief to interdict my appearance before the Commission. I did not do so partly because of the legal advice I had received but also motivated by the issue of financial hardship, to which I now turn. My failure or lack of wisdom to take that route, however annoying it might be, is certainly not sufficient justification to send me to prison without a trial.

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FINANCIAL HARDSHIP

38. From the time I left the office of the President, I have faced a tremendous amount of financial pressure. The Nkandla judgment of the Constitutional Court to all other court cases demanded extreme financial resources from me. State funding for my criminal trial which the State had agreed to pay was stopped and the relevant agreements set aside in court judgments that the courts described my litigation as one on a "luxurious scale". Other than the cost orders in this judgment, I face punitive cost orders in approximately twelve judgments amounting to more than R20 million.

39. As a consequence of the financial hardships that I was facing, I decided that I would only litigate matters where it was absolutely necessary for me to do so. I did not have the extravagant funds to engage lawyers to commit fully to the urgent applications of the Commission, especially those which I honestly, but clearly mistakenly, believed to be wholly unmeritorious.

40. 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 Commissions' 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.

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41. The Constitutional Court unfortunately accepted the view that my non-participation in the urgent application was a demonstration of some calculated disdain for the court as incorrectly submitted on behalf of the Commission. It was not. I simply did not have the financial resources to fund these particular cases and given the demands of my criminal prosecution, I elected to leave matters to the court and the Commission. I also put my faith in the Court's duty to deal with legal and procedural issues that were engaged on which I was advised could result in the Commission's application being dismissed. I was assured that even if the application was unopposed, the court would most likely discharge its duty to scrutinise and reject the application on the grounds of urgency and direct access.

42. I was taken aback by the remarks made by the Court on my alleged attitude towards it. I was surprised that the Court, in the absence of any affidavits from me on which to adjudicate on my attitude towards it, found that my conduct was unacceptable. I tried to understand the basis of the Court's belief on my conduct and it appears two-fold. First, my non-appearance at the Commission of Inquiry was regarded as unconstitutional conduct for which far-reaching orders implicating my constitutional rights were made. The second issue was my non-appearance to contest the Commission of Inquiry's application was similarly condemned as a show of disdain for the Courts. In fact, the decision not to appear was very innocent at best and merely strategic at worst. It was strategic because given the large number of punitive cost orders against me I had to avoid placing myself in a situation of further adverse cost orders by the Courts or unnecessarily incurring legal costs even on my side.

43. I issued a statement expressing my views on the judgment. I attach a copy of my public statement in which – relying on my rights to hold and express my views, I criticised the judgment

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of the Court. I have re-examined the statement that I issued and do not do not agree that I made scandalous allegations even if found to be wrong. Those were my views and I should not be imprisoned because I held a wrong opinion or view or belief. I am unable to appreciate the Court's finding that based on public utterances that I made about its judgment I disrespected the authority of the Court and undermined the judiciary. I reiterate that – I am prepared to die defending my right to hold and express my views about the work of the judiciary and will not desist from doing so in the future, only within the bounds justified in law. I served ten years on Robben Island because I was not going to surrender my right to hold and express views, opinions and belief on judges and their judgments. I held very strong views about the oppressive apartheid judiciary. I expressed those views publicly and privately. I was ultimately involved in a real struggle for liberation to ensure that the oppressed South African black people were not imprisoned for holding and expressing views. My views about how the judiciary has engaged with my cases leaves me with a reasonable belief that there is unexplained judicial antipathy and that they have not been dealt with in accordance with the finest judicial traditions. Even if I am wrong on that, why is it consistent with the duties of the Court to order summary imprisonment for holding and expressing them? The remarks are purely based on my own personal and lived experience of the judiciary. I will happily go to jail if the law once again prohibits my right to hold and express views, beliefs and opinions about the judges and the judiciary – even if those view, opinions and beliefs were factually wrong but genuinely held. However, the only point I wish to make in this application is that it is erroneous to send me to jail for holding genuine but unpalatable views.

44. Soon after the Court had granted its orders, the Chairperson armed with that court order – and rather than utilising the powers given to him by legislation - unilaterally demanded that I appear before him by scheduling dates for my appearance. The demand for my appearance was no

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longer based on the Commissions Act – but on the orders of the Constitutional Court. I was treated differently and unfairly, in violation of my rights in section 9 of the Constitution. In all history in South Africa and elsewhere, persons who refuse or do not obey summons from a Commission of Inquiry are dealt with in terms of the Commissions Act. I was treated differently on the basis of my political position – which is prohibited under our Constitution. What aggravates the violation is that the Chairperson of the Commission of Inquiry, Deputy Chief Justice Zondo, deliberately set out to undermine the provisions of the Commissions Act in an attempt to regulate my attendance in the Commission of Inquiry in terms of a court order as opposed to the Commissions Act. This is not fair for a number of reasons I deal with further below but suffice to say that once Deputy Chief Justice Zondo had publicly announced that he was invoking the Commissions Act to deal with my alleged commission transgressions, he was not entitled to approach the Constitutional Court to enforce the directives of the Commissions Act. I should not be subjected to a different set of legal rules simply because I was a former President of the Republic. It is common cause that even PW Botha was apparently dealt with under the Commissions Act when he refused to appear before the Truth and Reconciliation Commission to account for apartheid atrocities.

45. This is what bothers me about the judgments and orders of the Constitutional Court – that they may have inadvertently sanctioned an unconstitutional and unlawful attempt to subvert a legal process prescribed in legislation by the Chairperson of the Commission of Inquiry. This approach was also in breach of the well-established principle of subsidiarity which the Honorable Court has on numerous occasions utilised to refuse to deal with complaints of violations that are brought to it in a manner that is inconsistent with the law. The Chairperson was not entitled to inform the public and myself that he was invoking the provisions of the Commissions Act and then do something different to that. His approach to the Constitutional Court is not prescribed in the

Commissions Act and the justification for doing so is flimsy and plainly irrational. I had a legitimate expectation to be treated as every person who had been in my position in relation to a judicial commission of enquiry as I will set out further below. Treating me as the Chairperson of the Commission of Inquiry did violated my constitutional right to be treated equally before the law in terms of section 9 of the Constitution. I was entitled to the equal benefit and protection of the law as set out in the Commissions Act.

46. The Constitutional Court should not sanction or endorse potentially unlawful conduct by a Commission of Inquiry on the basis that I was the former President of the country. It should not permit the violation of constitutional rights by a Commission of Inquiry simply because a Deputy Chief Justice presides over it. It is well known that a Commission of Inquiry is not a court of law but it is not entitled to apply the law in a manner that is inconsistent with the prescribed law on its powers. It is not entitled to operate on the basis of a court order and will only seek the intervention of the court in circumstances prescribed by the law. In essence my participation in the Commission of Inquiry was no longer subject to the Commissions Act but controlled and regulated by a court order, an unprecedented manoeuvre which reclothed the Chairperson of a Commission of Inquiry in judicial robes.

47. The Commission of Inquiry most certainly did not approach the Constitutional Court on an urgent basis to vindicate any constitutional right or duty but to violate mine. The procedure for enforcing commission directives is fully catered for under the Commissions Act and to date I know of no reason why the Constitutional Court decided not to defer to the established institutions for the enforcement of commissions summons. There has been no constitutional challenge by the Chairperson of the Commission of Inquiry of the process established in the Commissions Act, which may have justified bypassing that legislation. The stated intention of the Commission in

approaching this Honourable Court was unashamedly and with the single purpose of extracting imprisonment for me. Theirs was nothing but a thinly disguised private prosecution, only without the inconvenience of a fair trial.

48. The only basis for describing me in such unkind and uncharitable terms is because I dared assert my constitutional right to a hearing before an impartial Chairperson of the Commission. I do not believe it is within the constitutional terms of the Court to seek its vindication by imposing orders that coerce a person to appear before a tribunal whose independence and fairness is serious questionable and on which there is a justiciable dispute before a court.

49. In my view, the Constitutional Court must reconsider its orders that completely strip me of so many of my guaranteed constitutional rights. It is unconstitutional to issue orders that violate the law and undermine constitutional rights. My view, belief and opinion that the orders of the Constitutional Court in both of its judgments are unconstitutional and do not justify the excessive judicial condemnation that has been heaped on me, even if I were held to be wrong in holding these views. Imprisoning me for holding and expressing opinions, views and beliefs is not only oppressive, it is out of kilter with the very ethos of our constitutional system. Sections 15 and 16 of the Constitution guarantees my right to hold opinions, belief and views and to express them freely without fearing unjustified judicial reprisal. Summarily sentencing me to jail for exercising my constitutional rights to hold and express beliefs, views and opinions about judges and the Courts is not only unlawful, but it is oppressive and unjustified in terms of section 36 of the Constitution. I am entitled to hold and express the view that Courts are wrong, have acted unconstitutionally and should revisit this grave injustice and unconstitutional conduct. Only the Constitutional Court may rectify these unconstitutional orders and give our democratic system its true value restoring the rule of law and the public's confidence in its power to reflect on its

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conduct. Our constitutional culture is a break with the past and our Constitutional Court must act with circumspect when it handles the demands of entrenching a constitutional culture in which the rule of law reigns high within an environment of dignity, ubuntu, freedom and the protection of constitutional rights and a society in which retribution should be a shield and not a sword.

50. The Court correctly states that no one is above the law and that includes myself. However, it too must bow to the supremacy of our constitution and not use its very powerful position to denigrate and demean litigants simply because they dared to hold genuine views about a judgment of the court or a judge or did not act as model litigants ought to.

51. We are no longer under a system of law that punished people for their views, belief and opinions but have moved into a society undergirded by the values of human rights, the recognition of inherent dignity and worth and freedom. To rule that I cannot advance legitimate objectives based on my constitutional rights in a Commission of Inquiry is simply unconstitutional and cannot be consonant with the powers given to the Courts by our Constitution.

THE ISSUE OF CONTEMPT OF COURT: PARAGRAPH 3 OF THE ORDER

52. I advised the Court that I would not comply with this directive. It appears that the Court took offense to my election not to file an affidavit even though I was advised that this position was permissible in terms of its notice. What I did instead was to address a letter to the Chief Justice which I was happy could be shared with the justices on the panel. I set out my reasons in that letter for electing not to file an affidavit only on the question of sanction and only in the event that I am convicted of the crime of contempt of court.

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53. In that letter I address basically many issues including why I had elected not to file or participate in the proceedings of the Court. The letter is self-explanatory. In it, I raised several concerns, including the participation of Honourable Pillay AJ in the adjudicating panel when she was clearly conflicted and the issue of being required to give evidence in mitigation before a conviction was made, to mention but a few. I continue to hold the view that to be expected to plead in mitigation in the air and without knowing the actual degree of the conviction is an unfair implementation of the right.

54. 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. First, I am entitled to a fair and impartial tribunal and I did not have that in the Chairperson of the Inquiry. I was entitled to have a judicial pronouncement on whether I am correct that the Chairperson of the Commission had acted in a manner that was inconsistent with the law. Second, I am entitled to challenge the very constitutionality of the Commission and that opportunity was taken away from by judicial fiat in terms of which I would appear only on the strength of the orders of the Court and not on the strength of the Commission's powers. In essence lending its constitutional weight to the Commission of Inquiry in a manner that violated the Commissions Act was itself unlawful.

55. It is against the above background that I bring this rescission application, a procedure to which I am entitled in law and in terms of our Constitution.

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THE APPLICABLE LEGAL FRAMEWORK

56. I now deal with some of the relevant legal provisions. The emphasis is added.

57. Rule 29 of the Rules of the Constitutional Court provides that:

> *"The following rules of the Uniform Rules shall, with such modifications as may be necessary, apply to proceeding in this Court … Rule 42: variation and rescission of orders."*

58. Rule 42 of the Uniform Rules of Court provides that:

> *"(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:*
>
> *(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*
>
> *(b) An order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;*
>
> *(c) An order or judgment granted as the result of a mistake common to the parties.*
>
> *(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.*
>
> *(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."*

59. Section 9(1), which provides that:

> *"Everyone is equal before the law and has the right to equal protection and benefit of the law."*

60. Section 10, which provides that:

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"Everyone has inherent dignity and the right to have their dignity respected and protected."

61. Section 11, which provides that:

"Everyone has the right to life."

62. Section 12(1), which provides that:

"Everyone has the right to freedom and security of the person, which includes the right:

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial."

63. Section 34, which provides that:

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

64. Section 35(3)(o), which provides that:

"Every accused person has a right to a fair trial, which includes the right of appeal to, or review by, a higher court."

65. Section 36(1), which provides that:

"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purposed."

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66. It is these and other relevant legal prescripts which will be invoked in written and oral submissions to be made in connection with this application.

SYNOPSIS OF THE LEGAL BASES FOR THE APPLICATION

67. This application is based on the following simplified propositions:

67.1. Rule 29 of the Constitutional Court rules incorporates Rule 42 of the Uniform Rules of Court. The common-law requirements for rescission also still apply;

67.2. The granting of the impugned order, *inter alia*, for the applicant's detention without trial is in breach of several of his fundamental rights, notably in the Bill of Rights, especially sections 12, 34 and 35 thereof, and amounts to a number of rescindable errors and/or omissions in terms of the provisions of the said Rule 42;

67.3. The relevant orders identified in the notice of motion ought properly and accordingly to be rescinded and set aside.

68. The first proposition is unlikely to be disputed. Neither is the third proposition disputable if the second one is established. I therefore turn to the necessary discussion of the second proposition.

The jurisdictional requirements for a rescission order

69. In this application, reliance will be placed on the following cumulative and/or alternative requirements set out in Rule 42 and/or the common law:

69.1. an application by an affected party;

69.2. to rescind an order or judgment erroneously sought or erroneously granted;

69.3. in the absence of any party affected thereby;

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69.4. or in which there is a patent error;

69.5. or omission; and/or

69.6. upon sufficient or good cause shown.

70. Once again, the requirements of the rule set out in sub-paragraphs 68.1 and 68.3 above are unlikely to be contested. I will therefore concentrate on the issues raised in sub-paragraphs 68.2 and 68.4 to 68.6.

71. Before so doing, I wish to assert that this matter will be argued on the basis that to the extent necessary, the relevant provisions of the common law and/or the provisions of Rule 42 must be constitutionally interpreted so as to give an interpretation of the word "error", which includes notions such as granting an unconstitutional order and/or reviewable material errors of fact and/or law. These are notions which are well-known in our law. The rule must be applied with the necessary constitutional flavour as intended by the words "*with such modifications as may be necessary*", which are found in Rule 29.

72. Furthermore, and as canvassed hereinabove, I proceed from the departure point that the finding of guilt for contempt of court is in itself erroneously made, as dealt with in the preceding sections. However and due to the relative urgency of the issue of my personal freedom and liberty, the rest of this application is primarily focused on the orders pertaining to the sanction and my imminent detention without trial.

Was the relief erroneously sought and/or granted and accompanied by patent errors or omissions?

73. I am advised that based on the factual background given above, it will be argued, firstly, that the conduct of the Commission in seeking an order solely aimed at my detention or imprisonment by

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means of motion proceedings was erroneous within the meaning of that word, as alluded to above.

74. It was legally incumbent upon the Commission when, once it had abandoned the desire for my appearance at the Commission, for whatever reasons, to seek my imprisonment in such a way that my constitutional rights to a fair trial were not deliberately limited or infringed. The Commission acted in the exact opposite manner.

75. The order was also sought on the basis, which turned out to be erroneous, that the expiry date of the Commission was 30 June 2021. This must have influenced the tactical decision to abandon a coercive order.

76. It is the height of irony and apparent contradiction to base the urgency of the matter on the allegedly looming end-date of the Commission, but to seek (and grant) relief which is specifically not intended to secure my attendance at the same Commission.

77. It is also significant that the alleged end-date must have also informed the incorrect view that there was "no hope" that I would ever attend the Commission, even if my concerns of conflict of interest and bias on the part of its Chairperson had been adequately addressed.

78. By the same token, this Honourable Court granted the relevant orders erroneously in a number of respects, with which I now proceed to deal.

79. Firstly, it is abundantly clear, on any reading of the majority judgment that the nature and severity of the sentence was greatly, if not totally, 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 of the Constitutional Court.

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80. That outcome was in turn a direct result of the erroneous assumption or conclusion that these statements were issued by me and/or were intended to insult the court. As correctly remarked in paragraphs [232] and [233] of the minority judgment:

> *"Despite accepting that 'the mischief [it] is called upon to address is ... [Mr Zuma's failure] to comply with the order of this Court', the main judgment seems to justify the punitive approach it has taken by decrying Mr Zuma's statements, which it describes as 'scurrilous and defamatory' and 'scandalous'. ... The main judgment's appraisal of the gravity and seriousness of Mr Zuma's contempt, and its threat to the rule of law, thus flows in part from the derisive nature of his public statements. This may explain the heavy handed sentence it has meted out and why it is so comfortable overlooking serious inroads into Mr Zuma's fundamental rights."*

81. Having erroneously admitted the hearsay evidence based on the incorrect assumptions not sustainable on the objective facts, the majority erroneously decided that the very same statements were "irrelevant", to the extent that they may have been exculpatory and the statements "*are of no relevance to the question whether he is guilty of contempt*". It was respectfully held that the very statements upon which my imprisonment was premised were "*of no moment*". The patent error in adopting these mutually exclusive approaches on the issue of the hearsay statements is self-evident.

82. Secondly, the majority committed a further error in not heeding the statement that *"Judicial authority should not be protected at the expense of fundamental rights*". The devastating impact of this particular aspect of the case cannot be over-exaggerated. It is this aspect which led the minority, with respect correctly, to hold that the majority judgment was unconstitutional. I shall develop this point by making initial reference to a related issue which was not dealt with in the minority judgment. That issue is the patent breach of the fundamental rights contained in section 34 of the Constitution.

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83. Having, with respect correctly, characterised the proceedings as a "hybrid" and an "amalgam" of both civil and criminal proceedings, the court went on only to examine the fundamental rights at play solely from a criminal proceedings point of view, ie in terms of section 35. The court thus omitted to also investigate the civil proceedings side of the hybrid, ie the fair trial rights enshrined in section 34.

84. This amounted not only to an error but also an omission, within the meaning of those words as employed in Rule 42.

85. The violation of my right of appeal ought properly to have been examined also from a section 34 point of view. The majority, with respect erroneously, held that "*the right of appeal does not* arise". Similarly, with the right to advance mitigating circumstances after conviction, which is equally applicable in civil proceedings in the workplace or in voluntary associations. The majority actually held that a serious issue, such as my ill health and exposure to death, does not do "anything" to counterbalance the *"profound and significant impact of the aggravating factors*".

86. Thirdly and similarly, the obvious limitation of my fundamental rights to be protected from detention without trial in direct breach of section 12(1)(b) of the Constitution constitutes a rescindable constitutional error.

87. The most important error and/or omission which flows directly from the errors mentioned above is the fact that, in spite of the undeniable limitation of any one or more or all of the fundamental rights mentioned above, the majority refused to perform the obligatory and compulsory task of a section 36 justification analysis.

88. This must rank as the most serious and egregious error and/or omission of all time, sufficient to grant an order of rescission.

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89. It was also a patent error to assume that my failure to bring an interim order in respect of the review application could only have been motivated by bad faith. It was in fact done in good faith.

90. The above matters constitute not mere errors but gross irregularities which preceded the erroneous granting of the relevant orders.

91. In short, it was incompetent for the court to grant such orders in the face of such errors.

92. Finally in this regard, it was also erroneous for this Honourable Court to overlook totally the significant fact that one of the Judges who sat on the adjudicating panel, namely Honourable Pillay AJ, was conflicted for various reasons, including having adversely adjudicated upon the relevant issue of my inability to attend to a trial and the Commission due to ill health. The court can also take judicial notice that it was subsequently revealed that Pillay AJ was the subject of an improper intervention by her friend, Minister Gordhan, for judicial office. It is also an open secret that Minister Gordhan is my political enemy and was responsible, a few years ago, for the so-called "Zuma Must Go" movement.

93. It may well be that Pillay AJ was still suitable to sit, but it is the failure to even scrutinise her suitability that constitutes a clear error and/or omission in a country which is ruled by the law, including the maxim *nemo iudex in re sua*.

94. The errors and omissions referred to above are of such a fundamental constitutional character that Rule 42, properly adapted, must be read to accommodate them, *mutatis mutandis*.

95. The issues raised above are by no means exhaustive. To the extent necessary, further reliance will be made on the key sting of the minority judgment, namely the unprecedented pronouncement that the Constitutional Court had acted unconstitutionally and therefore irrationally or has exceeded its judicial authority and mandate.

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96. Fortunately, the majority itself at least acknowledged that there was no precedent for an order of detention without trial in these circumstances, in our law and possibly in the law of any democratic country on earth.

97. Although incorrectly hailed as evidence that we are all equal before the law, the majority judgment has actually and erroneously demonstrated the exact opposite, in that the harsh treatment unprecedentedly meted out to me was largely premised on my unique position as a former President. It is therefore impossible that any other South African, rich or poor, will ever be treated the same before the law. It is also a patent error to fashion certain punishments for a specific individual. It is the antithesis of equality before the law and the rule of law. The rule of law is necessarily defined by laws of general application not laws of individual and targeted application. There cannot be one law for what the majority called "*an influential contemnor*", such as me, and another law for "*non-influential contemnors*" if all are indeed equal before the law.

98. This unprecedented and cruel regime has therefore been custom-made and specifically designed for me because it is statistically impossible that in the future, another former Head of State who is almost 80 years old will be forced to appear before a Chairperson of a Commission who is accused of bias and conflict of interests. Only Jacob Zuma will fit that bill. Any other future case will be easily and conveniently distinguished, for good reasons.

99. I am advised that full legal argument will be advanced at the hearing in respect of the elements discussed above in respect of the specified errors and/or omissions.

100. For the sake of completion and transparency and although of no direct or immediate relevance to this application, I wish to disclose that I have given instructions to my legal representatives to launch parallel proceedings in the High Court, aimed at, *inter alia*, challenging the constitutionality of the Criminal Procedure insofar as it fails or omits to cater for affording the normal fair trial rights to persons facing imprisonment in proceedings which are solely aimed at

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such imprisonment. To the extent necessary, this Honourable Court will be appraised of any progress in that regard.

Good cause

101. In the alternative and in the unlikely event that it may be found that the requirements of Rule 42 have not been met, I am advised that it will be argued that in the very peculiar circumstances of this case, and upon the grounds pleaded above, sufficient and/or good cause for justifying the rescission of the relevant orders has been shown. Accordingly, the relief sought may also be granted on the basis of the common law.

102. So many identifiable threats to the rule of law, the dictates of fairness and the rights to a fair trial ought properly to constitute just case.

103. Above all, the unprecedented judicial sanctioning of detention without trial, as decried by the minority judgment, in conditions of freedom, and given our bitter past with that phenomenon, ought properly and singularly to be sufficient and good cause for granting the relief sought in this particular case.

Discretion of the Court

104. I am advised that the better articulation of the legal position is that, once the requirements set out in Rule 42 and/or the common law have been satisfied, the court should grant an application of this nature.

105. However and if I am wrong in that regard, the court nevertheless ought to exercise its discretion in favour of granting the relief, *inter alia*, for the purpose of giving itself the opportunity to hear mitigation in particular in relation to my developing health situation.

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106. At that point, I will be in a better position to adduce the expert evidence of my medical team. That is the least humane gesture this Honourable Court may wish to undertake before possibly sentencing me to death at my age, state of health and in the middle of a deadly pandemic.

107. I insist that the granting of an opportunity for mitigation before even knowing whether and on what basis I could speculatively be found guilty constituted a severe limitation of my rights to a fair trial, whether in terms of section 34 or section 35.

108. Most importantly, it must be borne in mind that what we are dealing with here are not grounds of appeal or review but allegations of conduct which is *ultra vires* and unconstitutional and therefore invalid. This matter is unprecedented also in that important respect.

CONCLUSION

109. In all the circumstances, I am advised that this Honourable Court will grant the relief sought, with costs if opposed, including the costs attendant upon the employment of two counsel.

WHEREFORE I pray that it may please this Honourable Court to grant the relief sought in the notice of motion to which this affidavit is attached.

_____

DEPONENT

I HEREBY CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at DURBAN on this the 2ND day of **JULY** 2021, the regulations contained in

Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

SOUTH AFRICAN POLICE SERVICE
PRESIDENTIAL PROTECTION SERVICE
2021 -07- 02
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