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
HELEN SUZMAN FOUNDATION	Fifth Respondent

APPLICANT'S HEADS OF ARGUMENT

SALIENT BACKGROUND TO RELIEF SOUGHT

1. This Court has *mero motu* transformed the present application, which was brought in terms of section 11 of the Rules to one dealt with in terms of Rule 12. This may or may not be due to the unusual circumstances of this matter. The Court issued directions on a Saturday and within 24 hours of the lodging of the application.

2. This application for the Honourable Court to rescind its own orders is extraordinary but absolutely necessary. In an unprecedented decision, the Applicant, a 79 year old pensioner with Covid-19 comorbidities, was convicted and sentenced to a period of 15 months' direct imprisonment, without

the option of a fine or complying with the breached court order, for the crime of civil contempt of court. The Court may take judicial notice of the fact that, as a direct result of the order, the Applicant is at present in jail.

3. Two days after this rather harsh sentence of the Applicant by the Constitutional Court, the Supreme Court of Appeal handed down judgment in which it found a contemnor, a Mr De Beer, to be in contempt of court for the following extremely insulting remarks directed at the entire SCA and contained in a letter addressed to the Registrar of that Court.

4. It is necessary to quote the insult to the court for which he was found to be in contempt of court, as set out in paragraph 117 of that judgment:[1]

> "1. The email dated 17th instant received from the Chief Registrar, Ms. Van der Merwe, which carried your answer to our letter dated 10th instant, refers.
> 2. After careful consideration of your official response, writer has decided to herewith inform you that the **entire Supreme Court of Appeal may stick its fictitious "apology" to us in its arse".**
> 3. As the leader of the institution, you have allowed the COVID-19 flimflam to take over the Court's judicial functionality and for it to desecrate the institution to the point of pure codswallop which it is today – nothing but a mere extension of Government's narrative; a Court which had lost its independence and which has become incapable of protecting the Constitution of the Republic of South Africa and of protecting the very rights which the Constitution and Bill of Rights afford the people.
> 4. Let writer remind you, Madam President of the Court, that neither you nor anyone of your judicial colleagues are divine and the Court still belongs to the people of South Africa, and not the Government, which acts merely as their steward.
> 5. …
> 6. Let God's water run God's acre.

5. The SCA correctly found these remarks to constitute the crime of civil contempt. In paragraph 119 of the SCA judgment it held the following:

[1] *Minister of COGTA v De Beer* ZASCA 95 (1 July 2021)

> "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. **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. **The Registrar is directed to take the necessary steps to ensure that this judgment is brought to the attention of the NDPP** (own emphasis added).

6. The SCA did not follow the earlier high-profile precedent of the Constitutional Court following the conviction of the Applicant of the crime of contempt. The alternative procedure followed in the Constitutional Court was to issue a direction asking the Applicant – before conviction of the crime of civil contempt – what his submissions would be in mitigation of sentence in the event that he was convicted of the crime of contempt in the future. This is the procedure that is heavily criticised in the minority judgment as being unconstitutional - for the procedure in itself was clearly inappropriate and unusual compared to normal sentencing procedure. Before conviction and appreciating the gravity of the conviction, it is not only unfair to require mitigating circumstances, it does not assist the convicted person to know the extent and gravity of the conviction in respect of which mitigation is required. It is, literally, mitigation in the air. The procedure patently that does not meet the requirements of section 35(3) of the Constitution and is incomparable to that of a criminal trial. It cannot be seriously disputed that the procedure, by definition, limited the Applicant's fundamental rights guaranteed in section 35 of the South African Constitution. Whether that limitation is justified in the circumstances is a completely different question.

7. By way of contrast, the SCA procedure of referring the judgment to the National Director of Public Prosecutions for her attention will secure for the contemnor in that case all the benefits of a fair trial as set out in section 35(3) of the Constitution read together with the provisions of the Criminal

Procedure Act, 1977. It is this procedure that the minority judges found was necessary for the lawfulness of the sentence of direct imprisonment.

8. Significant differences in the approach of our two highest appellate courts in their handing of similar crimes requires some attention, but amplifies the Applicant's complaint that he was convicted of a crime and sentenced to imprisonment without a trial.

9. The Constitutional Court found that the Chief Justice's directions constituted a sufficient constitutional safeguard comparable to the procedure prescribed and guaranteed in section 35(3) of the Constitution for a lawful conviction and sentence of the Applicant. These safeguards operate in respect of persons who had enjoyed the benefit of a trial and several appeals, unlike the Applicant, who is the first person in the history of South Africa, before and after democracy, to serve a prison sentence without enjoying all the rights associated with a fair trial and the right of appeal, not to mention the right to test whether those limitations are justifiable in a democratic society which treasures human dignity, equality and (personal) freedom.

10. The majority judgment of the Constitutional Court does not appear or pretend to set a new judicial path or precedent for dealing with the crime of contempt of court – for it repeatedly reminds us that this procedure is only reserved for the present exceptional and extraordinary circumstances, in which the contempt was too egregious to warrant the formalities of a criminal trial and the normal remedies applied to contemnors or other citizens whose rights have been limited. Not only did the Constitutional Court express its indignation by sending the Applicant to prison without a criminal trial having been conducted, it also mulcted him with a punitive cost order for good measure. Harsh is an understatement. This is, again, what the minority judgment in part criticises about the majority judgment – that a law has been fashioned specific to the Applicant – which it appears will have no precedent setting value from henceforth because it was tailor-made for the Applicant alone. Among his most cardinal sins, the Applicant dared to refuse to appear before the country's Deputy Chief

Justice in his capacity as the first respondent herein, whom he reasonably apprehended to be biased.

11. Against this rather sad, incredible and admittedly "unprecedented" background, which has been hailed in some quarters as "*a victory for the rule of law*" and conclusive proof that "*all are equal before the law*", it is the simple departure point of this application that what was done by the majority of this Honourable Court was not simply "wrong" in the language of appeals but that it constituted the serial manifestation of many rescindable errors and/or missions. If we are correct in that simple proposition, the application must succeed. If we are not, it must fail.

12. We start the journey by pointing out facts and circumstances that were not disclosed to the Constitutional Court but which were clearly relevant to assessing whether the Applicant was in fact in contempt of the Commission summons. The duty to bring these facts existed, to the full knowledge of the Commission, which brought two unprecedented urgent and direct access applications – the first for the enforcement of the Commission summons and the other for the enforcement of the court orders.

RELEVANT FACTS NOT PRESENTED TO THE COURT BY THE COMMISSION

13. The following facts were not presented to the Court. They should have been presented by the Commission which was seeking to avoid relying on the provisions of the Commissions Act to seek direct access to the Constitutional Court to enforce summons granted in terms of the Commissions Act. The following facts which were not presented in the Constitutional Court make out prima facie case for the rescission of the order of the Constitutional Court.

    13.1. The Chairperson's ruling of 14 January 2020 in which the Chairperson ruled that he would meet with the Applicant's medical team to receive a medical report from them

about the Applicant for the purpose of determining how to schedule his appearances. The Chairperson said the following;

> **CHAIRPERSON:** The commission's legal team will deliver a replying affidavit on or before close of business on Friday the 24 January. **That is one. With regard to what is going to happen in regard to this application and the further appearance before the commission of the former President what has been agreed in the discussion involving myself and counsel on both sides is that this application is to be adjourned to a date to be arranged and I hasten to say arranged does not mean agreed.** That is one.
>
> **2. I have accepted with some reluctance but I have accepted the offer made by the former President that the leader of his medical team should see me and in confidence convey to me information that may assist in understanding the medical reasons relating to his failure to appear at some stage in the past before the commission as well as information relating to the future concerning up to when he might not for medical reasons be able to appear before the commission to give evidence and when there would be no medical reasons for him not to appear. It has been accepted that with regard to this 27 to the 20 – to the 31 January the former President need not appear before the commission because of the medical reasons that he has given. The consultation or meeting that the leader of his medical team will have with me will – it is hoped assist in looking at dates when his medical condition would not prevent him from appearing before the commission. So this application will then stand adjourned to a date that will be arranged at the right time. Now before we finalise I just want to check with Mr Pretorius and Mr Masuku whether I have covered everything that needs to be said publicly that we discussed. Mr Pretorius.**

14. The Chairperson was unequivocal that the applicant's appearances at the Commission would be subject to his ruling above which made it clear that such scheduling would consider and be informed by the Applicant's medical team's medical report. The Chairperson did not comply with his own ruling. More importantly, the Chairperson did not disclose the scope of his order in so far as it was capable of being interpreted as the Applicant did –that his attendance at the Commission was to be determined once the Chairperson had met with the Applicant's medical team. The Chairperson does not dispute this assertion in his affidavit – that he had a duty to disclose all his rulings to the Constitutional Court relating to the Applicant. Neither has there ever been an

explanation as to why, if the duty indeed existed, it has never been discharged to this Honourable Court, even in the present proceedings.

15. If it is so that the Chairperson of the Commission failed to inform the Constitutional Court about a crucial factor such as the Applicant's medical situation, it is possible that the Constitutional Court may revisit its committal orders by reference to that material fact, which was not taken into consideration. Even this Court, in sentencing the Applicant to 15 months after making the most fleeting reference to his age and health in a single sentence by Khampepe ADCJ that the court was "mindful" of his age and unspecified and unknown health issues.

16. As a direct result of the little or no importance put on this mitigating factor, the Applicant is currently sitting in a jail cell even before this application to set his sentence aside can be heard, successfully or otherwise. He is the only person in history and possibly in the future who will ever be visited with that kind of cruel and degrading punishment, a very strange way to demonstrate that "*all are equal before the law*" or, more specifically, that "*Everyone is equal before the law <u>and has the right to equal protection and benefit of the law</u>*".

17. The Applicant further alleges that the Commission did not present to the Constitutional Court the following facts;

    17.1. The Commission's attitude towards the Applicant's review application especially whether it intended to file any papers after filing the notice to oppose the application. This is because, there is evidence that while the Chairperson of the Commission has filed a notice to oppose, he has neither filed the rule 53 record and an answering affidavit. The two letters from the State Attorney disclose the Chairperson's attitude towards the obligation to deal with the issue of whether or not he suffers from a conflict to preside over the Applicant's appearances.

17.2. Having refused or failed to respond to the review application, the Chairperson's approach was to simply refuse to have his impartiality determined by the High Court but without expediting the resolution of the impartiality challenge instead prioritised and embarked on an alternative path which was strangely and solely aimed at inflicting punishment rather than securing the Applicant's attendance before his Commission. They are the following:

17.2.1. First, the Chairperson publicly announced that he would invoke his powers under the Commissions Act to report the Applicant's alleged conduct as a criminal offense to the SAPS. That would be consistent with the procedure prescribed in the Commissions Act which is the controlling statute for Commissions of Inquiry.

17.2.2. Second, instead of complying with his rulings in relation to the Applicant's non-appearance at the Commission (in terms of the Commissions Act), the Chairperson invoked an extraordinary summary procedure for the enforcement of Commissions summons, with no reference to the Commissions Act, which is the subsidiary legislation which governs his Commission, but for a direct access to the Constitutional Court compelling the Applicant to appear even before resolving the issue of whether he was conflicted or not. Needless to say, no other witness has ever been met with such an approach. After all, all are equal before the law!

17.2.3. Third, the Chairperson's decision or reasons for abandoning his own ruling to deal with the Applicant's non-appearance at the Commission in accordance with the procedure of the Commissions Act was not disclosed to the Constitutional Court. This in itself is *prima* facie unlawful and

irrational. It violates the subsidiarity principle. Having decided to invoke the provisions of the Commissions Act to address the Applicant's failure to comply with the Commission summons, it is clear that the Chairperson had a duty to disclose to the Constitutional Court that he was no longer pursing his duties under the Commissions Act but had chosen somehow to enforce his powers under the Commissions Act by the facility of the bold move and gamble of an urgent, direct access application to the highest court in the land to obtain "unprecedented" relief. Fortunately for him, it worked.

18. The Chairperson does not dispute these contentions above in the papers before this Court. Neither did he do so in the recent and related High Court application, in which he opposed the suspension for a few days of the Applicant's imprisonment pending the hearing of this rescission application to set the arrest or committal orders aside. With the greatest respect, it is difficult to view these actions of a public official, heading two crucial organs of state, as carrying the requisite doses of passive aloofness and casual or professional interest. Seemingly, a lot more is at play. For now, however, the review and recusal applications are still pending in our court system. Nothing more therefore needs to be said on this score.

19. Had the Chairperson of the Commission particularly disclosed to him that the Applicant had indicated that he had a health condition which was relevant to his non-appearances and that the Chairperson had accepted to receive a medical report from the Applicant's medical team and even to meet the team, the Court may well have seen the picture of non-compliance in a different light. It cannot be considered to be beyond the realm of possibility that this Court may well have even viewed both the conviction and/or the sentence in a different light.

20. Had this Honourable Court also been aware of the exact nature and extent of the Applicant's medical condition(s), it may have come to a different decision.

21. To that extent, the arrest and committal order was "*erroneously sought*" within the meaning of that phrase in Rule 42(1)(a).

22. The relief sought ought properly to be granted on this ground alone.

23. We however go further now to show that the arrest and committal orders were also "*erroneously granted*".

The erroneous granting of the orders

24. Before demonstrating the errors raised under this heading, it will be appropriate to deal with some terminological or definitional issues. In this regard, we seek, for convenience, to introduce the concept of "rescindable errors". We do so for three separate reasons:

    24.1. so as to distinguish a rescindable error from an appealable error and refute the defence that this application conflates these two different legal concepts; and

    24.2. to expose the distinction between "ordinary" Rule 42 applications in other courts and how that Rule may be applied in proceedings before the Constitutional Court context. In other words, to give effect to the phrase "*with such modifications as may be necessary*", which is contained in Rule 29 of the Rules of this Court; and

    24.3. to apply the same logic, *mutatis mutandis*, to the corresponding concept of a "*rescindable omission*".

25. It is trite that decisions (ie judgments and orders) of the Constitutional Court are not appealable but they are rescindable. It is the meaning of this distinction which we seek in the present analysis.

26. An appealable error or ground of appeal may cover decisions which are loosely regarded as having been "*wrongly made*". Such considerations do not govern the law on rescissions in respect of

decisions which are erroneously sought or granted. This much was clarified in the SCA decision in *Seale v Van Rooyen*,[2] in which Cloete JA said:

> "*The granting of this latter order amounted to a mis-exercise of the court a quo's discretion because it unjustifiably disregarded the tender made by the province, but that renders the order appealable, the order was not 'erroneously sought' or 'erroneously granted' within the meaning of the rule. The submission by counsel representing the TYC that the rule should be interpreted, 'because of its plain and grammatical meaning', as covering orders wrongly granted, is inconsistent with the interpretation given to the rule in numerous cases, has not a shred of authority to support it and requires no further consideration.*"

27. Further illumination on the distinction was made in the relevant SCA decision in *Lodhi 2 Properties v Bondev*,[3] in which, as one of the key principles which govern rescission under Rule 42(1)(a), the following was included, that:

> "*the mistake may either be one which appears on the record of proceedings or <u>one which subsequently becomes apparent from the information made available in an application for rescission</u>*" (emphasis added).

28. In the context of the present case, this is a crucial distinction in that, if it can be shown that such information as may be included in the rescission application exposes a mistake or error which may have materially influenced the outcome or decision, then it may be set aside on that basis alone. In appeals such information would be irrelevant, save in exceptional circumstances in which new evidence may be introduced on appeal. To this extent, a rescission court has a much wider reach

[2] *Seale v Van Rooyen* 2008 (4) SA 43 (SCA) at 52A-C
[3] *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Limited* 2007 (6) 87 SCA

of sources of information and evidence than an appeal court, which is typically restricted to the record.

29. Another crucial distinction emanates from the well-known distinction between reviews and appeals. A rescission application is more akin to a review than an appeal. In the case of *National Pride Trading*,[4] putting reliance on *Lodhi* (*supra*), Alkema J said:

> " *It has often been held that where the rules prescribe a particular procedure, and that procedure is not followed, then such procedural error renders the judgment sought and granted 'erroneous' within the meaning of Rule 42(1)(a). What is effectively being rescinded is the procedure in terms of which the judgment was granted, and therefore, by necessary implication, also the judgment*."

30. In simple terms, a reviewable irregularity will form a good basis of rescission but not (necessarily) a good ground of appeal. The same must hold true for a reviewable omission, which must also be rescindable.

31. Therefore, assuming for a minute that in the present case, it can be easily demonstrated, as we shall endeavor to do, that the procedure followed, insofar as it fundamentally differs from the procedure in criminal trials conducted in terms of section 35 of the Constitution (read with the Criminal Procedure Act) in some little or big way, limited any one or more of the Applicant's rights enshrined in the Bill of Rights, then constitutionally speaking, the failure of the Constitutional Court to invoke the provisions of section 36 of the Constitution must constitute a glaring and serious rescindable error. In such circumstances as postulated here, the application of section 36 is not optional but compulsory. The omission to invoke it is therefore more than a mere procedural

[4] *National Pride Trading 452 (Pty) Limited v Media 24 Limited* 2010 (6) 587 ECP at 593R-594I

irregularity but a constitutional irregularity, which must rank higher. No judgment should rightfully survive such an error when subjected to a Rule 42 test, read with Rule 29.

32. What will be left in this analysis will be the much simpler task of demonstrating that any single one of the plethora of rights which were limited or infringed in this matter was indeed limited. In this regard, this Honourable Court will be literally spoilt for choice, any pick will do. For the sake of economy, we will pick only a few illustrations.

The right of appeal

33. There can be very little doubt that the procedure adopted by this Court in allowing for contempt of court proceedings, which are solely aimed at imprisonment, to be conducted in motion proceedings, <u>which have been brought by way of direct access to the apex court</u>, clearly limited the "accused" person's right of appeal, let alone his right to a fair trial.

34. It ought to be self-evident that the direct access jurisdiction of this Honourable Court was never intended by the drafters of the Constitution to include first-instance criminal proceedings directed at imprisonment or the deprivation of liberty of a person or indeed his or her detention without trial.

35. The right of appeal, among others, was clearly limited by the mere adoption of this procedure, putting aside whether such limitation was justified, which we will never know exactly because section 36 was not invoked.

36. In the face of the above grim picture, the majority concluded, very chillingly indeed, that "*the right of appeal <u>does not arise</u>*". So it was not even a question of any justification being present. The right did not even arise.

37. If this does not constitute a rescindable error in terms of Rule 42, read with Rule 29, then nothing ever will be, in our humble and respectful submission.

The right to adduce evidence in mitigation before conviction

38. Even in domestic disciplinary proceedings, let alone criminal proceedings, which are solely directed at long-term imprisonment exceeding a year, it is trite that the opportunity to present mitigating circumstances is always granted only after a finding of guilt.

39. This approach is not only consistent with the law or the Constitution but also simple logic and common sense. If a person was, for example, facing 10 charges, it would be illogical to force them to present mitigating circumstances in respect of all 10 at a stage when there was still a reasonable possibility (the presumption of innocence) that he may only be found guilty of one or a few or more of the charges.

40. Secondly, to exercise the right some two or three months before conviction would also deprive the person of any benefit which might have only arisen in the past month, which may have a cataclysmic effect on the question of whether he or she would be a candidate for a custodial or non-custodial sentence. This can be illustrated with countless examples, especially in the age of Covid-19.

41. In any case, it is undeniable that the stage issue does limit the full exercise of the right.

42. In this regard, it is not even open for the respondents to invoke the dreaded "no difference" argument. It makes a big difference when mitigation is presented. To argue otherwise would be to miss the point, as recently declared by Madlanga J,[5] speaking for the unanimous and full court, when he said, in matter dealing with the very issue of the stage at which fair trial rights ought to be enjoyed in criminal proceedings and in which it was argued that the incorrect stage would have made no difference to the result:

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[5] *Van der Walt v S* 2020 (11) BCLR 1337 (CC) at paragraph [28]

"*Of course, this misses the point. It fails to address a crucial issue, and that is this. The admission and rejection of evidence at the right time may influence the decision whether to close one's case without tendering any evidence. Nor can one ever guess with any degree of accuracy what impact evidence – if tendered – might have had on the outcome. The 'no difference' argument is thus misconceived. It calls to mind the famous words of Megarry J in John v Rees:*

'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."

43. This limitation of fundamental rights is accordingly established in the present matter. As it happens, the Applicant is sitting in jail without having said even one word in mitigation or having had the mere opportunity to do so in the period between his conviction and sentencing. All other inmates in our correctional facilities, without exception, had such an opportunity and right irrespective of whether or not they elected to exercise it or forego it for one reason or another.

44. The procedure followed therefore clearly constituted a rescindable error with potentially and actually devastating consequences.

45. The same arguments can be advanced in respect of section 12, as well as section 10.

46. The arguments advanced above will, if it is still necessary, also be developed during legal argument in respect of all the other rescindable errors and omissions pleaded in paragraphs 73 to 99 of the founding affidavit.[6]

47. To save time, we must now turn to the repeated defence raised by the respondents in refrain mode that the Applicant was the author of his own misfortune since he spurned many opportunities to participate in the proceedings, which resulted in the arrest and committal orders. According to his logic, it therefore does not matter whether the Applicant's rights are irregularly infringed or not because he asked for it.

48. This argument too misses the point, only by the proverbial mile. It also offends the value of ubuntu. We do not stoop to the level of those who offend us. The rights in the Constitution are mostly unqualified. They must be extended even to the worst among us. These rights cannot be forfeited. Neither can they, generally speaking, be waived.

49. These principles were established in the seminal judgment of *S v Makwanyane*,[7] when Chaskalson P, authoritatively stated that:

> "*Constitutional rights rest in every person, including criminals convicted of vile crimes. Such criminals do not forfeit their rights under the Constitution and are entitled, <u>as all in our country</u> now are, to assert these rights, <u>including</u> the right to life*" (emphasis added).

50. Not only can the rights at play in this matter not be forfeited, they can also not be waived by conduct or the application of similar common-law doctrines like election, estoppel or acquiescence. Currie and De Waal[8] summarise this point as follows:

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[6] Record, paginated pages 29 to 34
[7] 1995 (3) SA 391 (CC) at paragraph [137]
[8] Currie and De Waal: The Bill of Rights Handbook, 6th Edition (Juta) page 40

> "*In contrast to the freedom rights, the nature of the rights to human dignity (s 10), to life (s 11) and the right not to be discriminated against (s 9(3) and (4)' or the right to a fair trial, does not permit them to be waived. Unlike the freedom rights, these rights cannot be exercised negatively. The right to freedom of expression, for example, can be exercised by keeping quiet, but the right to dignity cannot be exercised by being abused*" (emphasis added).

51. The arguments repetitively advanced by the respondents in this leg of the case closely resemble the arguments famously used to justify the death sentence or any other form of undignified, cruel and degrading punishment directed at "bad people" or the worst among us, including child molesters and serial rapists. Unfortunately for the respondents, such people too are deserving of the protections guaranteed in the Constitution for "everyone", every person or even every arrested, detained and accused person, such as the Applicant.

52. Such arguments can only come from a place of a conservative or right-wing approach to constitutionalism.

53. Finally, we wish to submit that in giving effect to the words "*with such modifications as may be necessary*", this Honourable Court should refrain from applying the rules mechanically as if Rule 42 was being applied outside of the constitutional context.

54. Accordingly, concepts such as waive in the context of finding meaning to expressions like "*in the absence of any party affected*" must be approached with maximum caution. Such expression must necessarily be interpreted generously and in favour of individual freedom and liberty. In reality, such egregious and rescindable errors cannot, without justification, be negated or ignored, even if the victim thereof was present during the proceedings. It would still be in the interests of justice to rescind judgments and orders so riddled with otherwise rescindable errors which defeat the very notion of how such decisions ought to be reached.

55. In the present case, the absence of the Applicant was itself a direct result of, *inter alia*, exercising his constitutional rights as a conscientious objector and also the right not to be tried by a biased decision-maker. That one may criticise the way he exercised those rights and whether or not, in doing so, he violated other rights, rendering him to be a "bad person" cannot disentitle him to his fundamental rights to a fair process in front of this Court, as enshrined in section 34 of the Constitution.

56. Neither does it entitle any person or institution, including, with respect, this Honourable Court to exceed the permissible scope of intrusion into basic fundamental rights of the person, for example, not to be detained without trial, to exercise his rights of appeal and to have a fair trial, in criminal, civil or "hybrid" court proceedings.

CONCLUSION

57. These and other considerations must be what induced the Supreme Court of Appeal even faced with the most extreme provocation imaginable, to still refer Mr De Beer to the NDPP, where he will probably be charged in the Magistrate's Court, with the rights of appeal and mitigation exercised at every stage, ie in the High Court, in the Supreme Court of Appeal and, one day, in the Constitutional Court.

58. It was also the same sense of justice which brought Mr PW Botha, a former apartheid ruler who refused to appear before the Truth and Reconciliation Commission for "conscientious objection", after calling the TRC a "mickey mouse" commission, to be still afforded his fair trial rights and be visited with the well-known trial of justice daily employed in criminal sentencing, which was not even referred to *in casu*.

59. For these and other reasons, we respectfully submit that it is most certainly in the interests of justice that the relief sought ought accordingly to be granted. The orders should be rescinded,

reconsidered and/or substantially varied in order to give effect to the rights of the Applicant and thereby swing open the doors of his prison cell for no other reason than to vindicate the Constitution of the democratic Republic of South Africa.

DC MPOFU SC
T MASUKU SC
M QOFA
NB BUTHELEZI
B MKHIZE
N XULU
Chambers, Johannesburg,
Cape Town and Durban
8 July 2021