

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 295/20

In the matter between:

**SECRETARY OF THE JUDICIAL COMMISSION OF
INQUIRY INTO ALLEGATIONS OF STATE
CAPTURE, CORRUPTION AND FRAUD IN THE
PUBLIC SECTOR INCLUDING ORGANS OF STATE**

Applicant

and

JACOB GEDLEYIHLEKISA ZUMA

Respondent

and

**COUNCIL FOR THE ADVANCEMENT
OF THE SOUTH AFRICAN CONSTITUTION**

First Amicus Curiae

VUYANI NGALWANA SC

Second Amicus Curiae

HELEN SUZMAN FOUNDATION

Third Amicus Curiae

THE HELEN SUZMAN FOUNDATION'S WRITTEN SUBMISSIONS

INTRODUCTION

1. The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State ("**the Commission**") was established to uncover the truth about state capture, corruption and fraud, and to make recommendations on these matters so as to ensure that these crimes cease and are not repeated.
2. Mr Jacob Gedleyihlekisa Zuma ("**Mr Zuma**" or "**the Respondent**"), the Former President of the Republic of South Africa, is at the centre of the allegations of state capture, corruption and fraud, which the Commission is tasked with uncovering. Mr. Zuma's conduct, in refusing or failing to attend the Commission and give evidence in accordance with the summonses and directives issued by the Commission, has seriously impeded the functioning of the Commission and threatens to undermine its ability to fulfil its crucial truth-seeking and recommendation-making mandate.
3. The Secretary of the Commission ("**the Applicant**") accordingly seeks various orders from this Court, on an urgent basis, in order to ensure Mr. Zuma's compliance with the Commission's summonses and directives by appearing before the Commission and satisfactorily answering any questions put to him so that the Commission can fulfil the crucial mandate entrusted to it.
4. The third amicus curiae, the Helen Suzman Foundation ("**the HSF**"), seeks to participate in these proceedings to make submissions on Mr. Zuma's legal duty to comply with the summonses and directives issued by the Commission, arising from the applicable statutory and regulatory scheme as informed by principles of constitutional and international law.

5. The HSF's written submissions address the following topics:
 - 5.1 The relevant legislation and regulations are clear and unambiguous in relation to the coercive powers conferred upon the Commission to issue and enforce summonses and directives. The exercise of the Commission's coercive powers gives rise to clear legal duties to comply with the summonses and directives of the Commission. The duty to comply has been repeatedly endorsed in the relevant case authority and applies to all witnesses equally;
 - 5.2 No exception or exemption from the duty to comply can be permitted to be made for Mr Zuma, particularly taking into account the purposes of the Commission and the allegations against Mr Zuma to which he must be made to answer. Moreover, the constitutional enshrinement of equality before the law and the values of accountability and the rule of law require that all witnesses be treated equally when it comes to compliance with subpoenas and no exception can be permitted to Former Presidents or any other categories or classes of witnesses;
 - 5.3 There are a number of constitutional rights and values that will be undermined if Mr Zuma is not ordered to comply with the summonses and directives, and to appear before the Commission to answer all questions put to him;
 - 5.4 In particular, the public has a collective right to truth in relation to state capture, corruption and fraud, which may be inferred from a number of rights in the Bill of Rights understood in light of South Africa's customary international law obligations;

- 5.5 Systemic and grand scale corruption is a serious human rights violation impeding the state's fulfilment of its constitutional obligations, which engages the public's right to truth. The public's right to truth will be undermined without an order enforcing the Commission's summonses and directives;
- 5.6 The public's right to the truth about state capture, corruption and fraud supports and requires the relief sought in the Proceedings as a component of reparations for serious human rights violations guaranteed under the Constitution and international law.

MR ZUMA'S LEGAL DUTY TO COMPLY WITH THE COMMISSION'S SUMMONSES AND DIRECTIVES

6. The HSF views the central issue in these proceedings as relating to the powers of the Commission regarding the issuing and enforcing of summonses and directives and the duties on all witnesses to obey such summonses and directives. Specifically, the question is whether the Secretary of the Commission is right to seek to compel Mr Zuma to appear before the Commission and to answer questions posed to him.
7. It is well to recall, the power that the Secretary of the Commission seeks to enforce in this application by securing the appearance of Mr Zuma before the Commission for the purposes of giving evidence, is not a power that is unique to the Commission:

7.1 For example, section 35(1) of the Superior Courts Act¹ gives a party to proceedings before any *High Court* in South Africa that requires the attendance of witnesses in those proceedings, the power to procure such attendance in the manner provided for in the Uniform Rules of Court. Uniform Rule 38(1) is the applicable rule of court and it gives a party, *as of right*, the power to cause a subpoena to be issued for the purposes of securing a witness to appear. More importantly, a person that is subpoenaed to attend any proceedings is required to comply with the subpoena and if that person does not, the court concerned may issue a warrant directing that he or she be arrested² and detained³ with the view of securing his or her presence as a witness. In terms of section 35(4) of the Superior Courts Act, a person that fails, without reasonable excuse, to obey a subpoena is guilty of an offence and is liable, upon conviction, to a fine or to imprisonment for a period not exceeding three months.⁴

7.2 In the company law context, in *Roering*⁵ the SCA opined in relation to the obligation to appear before a commissioner appointed in terms of section 418 read with section 417 of the old Companies Act,⁶ that once

¹ 10 of 2013.

² Section 35(2) of the Superior Courts Act.

³ Section 35(3) of the Superior Courts Act.

⁴ These provisions remain applicable law and have recently been considered by the Western Cape High Court in *Antonsson v Jackson* 2020 (3) SA 113 (WCC) at paras 38 – 53.

⁵ *Roering v Mahlangu* 2016 (5) SA 455 (SCA).

⁶ Which sections remain in force pursuant to Item 9 of the Fifth Schedule of the new Companies Act 71 of 2008.

summoned to appear a witness is obliged to answer any question put to them.⁷

7.3 As a further example, section 205(1) of the Criminal Procedure Act⁸ permits a judge, regional court magistrate or magistrate to require the attendance before him or her, by the issuance of a subpoena in terms of section 205(1) and on request from the relevant prosecuting authority, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed.⁹

8. Sound policy reasons exist for enabling specified statutory bodies and institutions to use the subpoena to extract evidence from relevant witnesses.

It has long been recognised that a person who is subpoenaed to give evidence before any legally constituted tribunal empowered to subpoena witnesses is, generally speaking, obliged to obey it.¹⁰

9. The lawfulness of the subpoenas issued by the Secretary of the Commission is not in dispute, the legal framework in accordance with which the subpoenas have been issued is clear as set out below and enforcing the subpoenas does not breach any other law or rights of Mr Zuma.

10. The HSF contends that relevant legislation and regulations are clear and unambiguous in relation to the coercive powers of the Commission and that the exercise of these powers, in turn, gives rise to clear legal duties to obey

⁷ *Roering* above n 5 at para 22.

⁸ 51 of 1977.

⁹ *Nel v Le Roux NO* 1996 (3) SA 562 (CC) at para 7, this Court found that subpoenas issued in terms of section 205(1) are not inconsistent with the Constitution.

¹⁰ *Podlas v Cohen & Bryden NNO* 1994 (4) SA 662 (T) at headnote.

the summonses and directives of the Commission. In addition, the relevant legislation and regulations must be understood as permitting no exemptions or exceptions from the coercive powers of the Commission. The HSF places reliance for this interpretation on the constitutional enshrinement of equality before the law and the values of accountability and the rule of law.

The Commission's purpose and its powers to subpoena witnesses

11. The Commission is mandated to inquire into, make findings on, report on and make recommendations in relation to state capture, corruption and fraud.¹¹ In order to fulfil this critical mandate, the Commission is clothed with coercive powers to summons witnesses and issue directives in terms of the applicable statutory and regulatory scheme.
12. The Commissions Act¹² ("**the Commissions Act**") provides for the setting up of commissions of inquiry for the purposes of investigating matters of public concern. Such commissions may be declared subject to the Commissions Act or any other law.¹³ Regulations may also be promulgated conferring additional powers on commissions and providing for the manner of holding or the procedure to be followed at the investigation.¹⁴ In addition, such regulations may provide for penalties for any failure to comply therewith.¹⁵
13. The relevant Government Gazette No 41436 of 9 February 2018 declares that in terms of the powers vested in the President by the Commissions Act,

¹¹ See the Commission's terms of reference. The Commission's terms of reference appear in Annexure IM1 of the Applicant's Founding Affidavit, at 78-82.

¹² 8 of 1947.

¹³ Section 1(a) of the Commissions Act.

¹⁴ Section 1(b) of the Commissions Act.

¹⁵ Section 1(2) of the Commissions Act.

the President declares that the provisions of the Commissions Act and the regulation annexed thereto to be applicable to the Commission.

14. Section 3(1) of the Commissions Act provides that *"[f]or the purpose of ascertaining any matter relating to the subject of its investigations, a commission ... shall have the powers of a Provincial Division of the Supreme Court of South Africa has within its province to summon witnesses, to cause an oath or affirmation to be administered to them, to examine them, and to call for the production of books, documents and objects."*
15. Section 6(1) of the Commissions Act provides that any person summoned to attend and give evidence before a commission:
 - 15.1 who, without sufficient cause (the onus of proof whereof shall rest upon him) fails to attend; or
 - 15.2 refuses to be affirmed as a witness; or
 - 15.3 fails to answer fully and satisfactorily any question lawfully put to him,

is guilty of an offence.
16. The Regulations of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including State Organs promulgated on 9 February 2018 (as amended) ("**the Regulations**") are the regulations applicable to the Commission.
17. Regulation 10(6) of the Regulations provides that, *"[f]or the purposes of conducting an investigation the Chairperson may direct any person to submit an affidavit or affirmed declaration or to appear before the Commission to give evidence or to produce any document in his or her possession or under*

his or her control which has a bearing on the matter being investigated, and may examine such person". (emphasis added)

18. Regulation 8(1) provides that, "*[n]o person appearing before the Commission may refuse to answer any question on any grounds other than those contemplated in section 3(4) of the Commissions Act.*"
19. Regulation 12(2)(b) provides that "*[a]ny person who (b) wilfully hinders, resists or obstructs the Chairperson or any officer in the exercise of any power contemplated in regulation 10, is guilty of an offence and liable on conviction ... to a fine, or to imprisonment for a period not exceeding 12 months.*"
20. The HSF, therefore, contends that the statutory and regulatory scheme applicable to the Commission in relation to the Commission's coercive powers to subpoena persons to give evidence before it is beyond debate. These clear coercive powers are critical to the proper functioning of the Commission.
21. The HSF further contends that the exercise of the Commission's coercive powers gives rise to concomitant legal duties to obey any subpoenas issued by the Commission. The duties to obey subpoenas, to which we turn next, are particularly relevant in this context, taking into account the seriousness of the subject matter of the Commission and the importance of the integrity of the Commission's work.

The duty to obey subpoenas, affirmed through this Court's jurisprudence

22. The legal duty to comply with the summonses and directives issued by the Commission arises immediately from the Commissions Act, which confers subpoena powers on the Commission and imposes a criminal sanction for non-compliance. But the reason for that duty has been explicated and underlined by this Court through important decisions, each of which situate the duty within our constitutional framework. The decisions are *Bernstein*,¹⁶ *SARFU III*,¹⁷ *Minister of Police v Premier of the Western Cape*,¹⁸ and *Glenister II*.¹⁹ Before he can side-step the Commission, Mr Zuma will have to side-step each of these decisions.
23. In *Bernstein*, this Court recognised that it is the legal duty of persons who are subpoenaed to “*co-operate with the courts, and to attend court for the purpose of giving evidence or producing documents when required to do so*”.²⁰ In that case, which concerned the constitutionality of sections 417 and 418 of the old Companies Act²¹ (which sections remain in force pursuant to Item 9 of the Fifth Schedule of the new Companies Act)²² that permitted the summoning and examination of any person as to the affairs of a company being wound up, this Court recognised that the legal duty to obey subpoenas

¹⁶ *Bernstein v Bester* NO 1996 (2) SA 751.

¹⁷ *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (“*SARFU III*”).

¹⁸ *Minister of Police v Premier of the Western Cape* 2014 (1) SA 1 (CC).

¹⁹ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) (“*Glenister II*”).

²⁰ *Bernstein* above n 16 at para 52.

²¹ 61 of 1973.

²² 71 of 2008.

extends to subpoenas issued by non-judicial mechanisms.²³ It described the duty as “*a civic obligation recognised in all open and democratic societies and not an invasion of freedom.*”²⁴

24. *Bernstein* was quoted with approval by this Court in *SARFU III*, in which it was held that a person who is subpoenaed to attend a commission of inquiry is under a legal duty to obey the subpoena.²⁵ This Court said: “*A person who is served with a subpoena is required to give evidence and to produce documents in relation to the terms of reference of the commission to the satisfaction of the commission.*”²⁶

25. Thus, any person summoned by the Commission to give evidence, regardless of their political or other standing, is under a legal duty to attend the Commission unless they can show “sufficient cause” for failing to attend.²⁷ The onus of establishing sufficient cause is on the person who is the subject of the summons.²⁸

26. Moreover, in *Bernstein*, this Court stated that “[w]itnesses who ignore subpoenas or who refuse to answer questions put to them may be subjected to the sanction of imprisonment”.²⁹ It held that such sanctions are “*reasonable and necessary*” in order to enforce compliance with the law.³⁰

Given the important objects of the Commission and commissions of inquiry in

²³ *Bernstein* above n 16 at para 52.

²⁴ *Ibid.*

²⁵ *SARFU III* above n 17 at para 185.

²⁶ *Ibid.*

²⁷ Section 6(1) of the Commissions Act.

²⁸ *Bernstein* above n 16 at para 52. In *Bernstein*, this Court acknowledged that the power of subpoena may be abused, but held that absent proof of abuse it is the duty of the person summoned to cooperate.

²⁹ *Ibid* at para 53.

³⁰ *Ibid* at para 55.

general, such coercive powers are not surprising: the Commission's powers must include the necessary ability to compel the summonsed person to attend and to remain in attendance at the inquiry.

27. Accordingly, the HSF contends that the Commissions Act and the Regulations must be interpreted and applied in a manner that allows the Commission to perform its mandate effectively. This requires an interpretation that imbues the Commission with coercive powers and an application that effectively enforces those powers.
28. The applicant has appropriately referenced this Court's decision in *Minister of Police v Premier of the Western Cape* as confirming the Commission's coercive powers to ensure accountability. But the HSF wishes to draw attention to a different aspect thereof: where this Court recognised that establishing a commission of inquiry may be a step taken in terms of section 7(2) of the Constitution to respect, protect, fulfil and promote the rights in the Bill of Rights.³¹ This Court has expressly held that section 7(2) of the Constitution imposes an obligation on the state to combat corruption.³² This is because corruption has deleterious effects "on the full enjoyment of fundamental rights and freedoms" and "disenables the state from respecting, protecting, promoting and fulfilling them as required by section 7(2) of the Constitution".³³ It follows that the establishment of a commission of inquiry

³¹ *Minister of Police v Premier of the Western Cape* above n 18 at paras 51-2.

³² *Glenister II* above n 19 at para 175, where this Court said:

"The Constitution is the primal source for the duty of the state to fight corruption. It does not in express terms command that a corruption-fighting unit should be established. . . . There is however no doubt that its scheme taken as a whole imposes a pressing duty on the state to set up a concrete and effective mechanism to prevent and root out corruption and cognate corrupt practices. As we have seen, corruption has deleterious effects on the foundations of our constitutional democracy and on the full enjoyment of fundamental rights and freedoms. It disables the state from respecting, protecting, promoting and fulfilling them as required by section 7(2) of the Constitution."

³³ *Ibid.*

into state capture, corruption and fraud, which is ultimately aimed at combatting corruption, must be seen as a state measure in terms of section 7(2).

29. Measures taken under section 7(2) must be “*reasonable and effective*”.³⁴ A commission tasked with investigating state capture, corruption and fraud would be unable to fulfil its mandate without enforceable coercive powers. The effectiveness of the Commission would clearly be undermined if those allegedly involved in these serious crimes were “*shielded from the coercive power of subpoena*”, as those at the centre of these crimes (and with the most information concerning them) would be unlikely to provide evidence to the Commission voluntarily.³⁵
30. In addition, this Court has stressed the importance of anti-corruption bodies having adequate independence to perform their mandates without undue political interference or influence.³⁶ An interpretation of the Commissions Act that failed to underscore the Commission’s coercive powers to enable it to perform its mandate or an application of the Act that failed effectively to enforce those powers, would make a mockery of the adequate independence of the Commission. If the Commission is rendered toothless to effectively enforce its coercive powers, it cannot be said to have operational independence in the sense of “*control over and freedom from interference in those matters connected with the performance*” of its functions.³⁷

³⁴ Ibid at para 189; and *Sonke Gender Justice NPC v President of the Republic of South Africa* [2020] ZACC 26 (“**Sonke**”) at paras 42-3.

³⁵ *Minister of Police v Premier of the Western Cape* above n 18 at para 50.

³⁶ *Glenister II* above n 19 at para 197.

³⁷ See *Sonke* above n 34 at para 77.

31. The HSF submits that it follows from the reasons given above that the Commissions Act and the Regulations must be interpreted and applied by this Court in a manner that allows the Commission to perform its mandate effectively. A different interpretation or application would be inconsistent with the Constitution and this Court's own jurisprudence in relation to the duty upon all persons served with subpoenas to comply therewith.

No exceptions or exemptions permitted in terms of equality before the law, accountability and the rule of law

32. There are no exceptions or exemptions from the provisions of the Commissions Act and the Regulations made for any category of persons or for any particular reasons. The HSF contends that the provisions of the Commissions Act and the Regulations must be read as applying without exception to any individual that may have relevant evidence in relation to those issues, which undoubtedly includes Mr Zuma. This has heightened importance in the context of the purpose of the Commission, being to investigate issues of state capture, corruption and fraud involving, inter alia, former and current state officials and entities and the politically connected. But it serves a further importance: such an interpretation is demanded by the requirements of equality before the law, accountability and the rule of law.

33. Equality before the law is enshrined in section 9(1) of the Constitution, which provides that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law.” This Court, in *Prinsloo*,³⁸ explained the

³⁸ *Prinsloo v Van der Linde* 1997 (3) SA 1012.

meaning of equality before the law in the interim Constitution,³⁹ in the following terms:

“Nonetheless, it would appear that the right to ‘equality before the law’ is concerned more particularly with entitling ‘everybody, at the very least, to equal treatment by our courts of law’. It makes clear that no-one is above or beneath the law and that all persons are subject to law impartially applied and administered.”⁴⁰ (emphasis added).

34. This is the less-developed meaning of section 9(1)⁴¹ – in that section 9(1) has primarily been understood as a protection against irrational or arbitrary differentiation by the state.⁴² However, it is the first meaning of section 9(1) that is directly implicated by this case⁴³ – being that the law applies equally to everyone.
35. It is this richer and equalising power of the law that is inextricably linked to the value of accountability. Measures that place certain persons above the law clearly subvert accountability – *“the sharp and mighty sword that stands*

³⁹ Section 8(1) of the Interim Constitution provided: “Every person shall have the right to equality before the law and to equal protection of the law.”

⁴⁰ *Prinsloo* above n 38 at para 22. This is obiter dictum (what is said by the way), but it has been quoted with approval in subsequent judgments of this Court, including *Weare v Ndebele NO* [2008] ZACC 20; 2009 (1) SA 600 (CC); 2009 (4) BCLR 370 (CC) and *City Council of Pretoria v Walker* [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (“*Walker*”).

⁴¹ See Albertyn and Goldblatt “Equality” in Woolman and Bishop (eds) *Constitutional Law of South Africa* 2 ed (Juta & Co Ltd, Cape Town 2014) (“*Albertyn and Goldblatt*”) at 15.

⁴² *Ibid.* See also *Prinsloo* at para 25; and *Harksen v Lane NO* [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 at para 42. Equality before the law, understood in this sense, is intimately connected to the rule of law and the principle of legality. This is because irrational or arbitrary state conduct would be inconsistent with the rule of law.

⁴³ Nonetheless, this Court, in *Walker* above n 40 at para 27, stated that the rationality standard is equally applicable to the first meaning of section 9(1). Albertyn and Goldblatt, above n 41 at 23, argue that the applicable standard is fairness.

ready to chop the ugly head of impunity off its stiffened neck."⁴⁴ In addition, equality before the law is inextricably linked to the rule of law. Allowing certain persons to flout the law – or thumb their noses at accountability measures like the Commission – seriously undercuts the rule of law.⁴⁵

36. An exemption or exception from the coercive powers of the Commission for a former President of Republic of South Africa would be contrary to the clear statutory provisions and violate equality before the law and the values of accountability and the rule of law.⁴⁶ It would place persons who have held high public office above the law and be an arbitrary use of power and not in accordance with clear statutory provisions. This is heightened in the context of commissions of inquiry into serious crimes because an exemption or exception for former Presidents may be seen as fostering impunity, quite aside from suggesting that the law's power runs flat when faced with persons of status.
37. We need look no further than our own history for the appropriate lessons about the importance of the constitutional enshrinement of equality before the

⁴⁴ *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC) ("**Nkandla judgment**") at para 1.

⁴⁵ The principle of the rule of law, which is a founding constitutional value in terms of section 1(d) of the Constitution, requires *inter alia* that state functionaries act in accordance with statutory duties, and do so rationally, in a way that is not arbitrary and without undue influence. See *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 at paras 85 - 86; and *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) BCLR 158 (CC) at para 41.

⁴⁶ This Court in *SARFU III*, above n 17 at paras 242-5, held that a sitting President of the Republic of South Africa may even be required in a civil matter to give evidence before a court concerning the exercise of his or her powers. This is to ensure that courts are not impeded in the administration of justice. The Court emphasized that consideration must be given to "the special dignity and status of the President together with his busy schedule and the importance of his work". The same considerations do not apply to former Presidents of the Republic.

law and the values of accountability and the rule of law in the context of commissions of inquiry.

38. South Africa's transition from its dark past under apartheid to a constitutional democracy founded on dignity, equality, and human rights and freedoms was facilitated by the uncovering of the truth concerning human rights abuses through the mechanism of a commission of inquiry.⁴⁷ The Truth and Reconciliation Commission ("**TRC**") was established in terms of the Promotion of National Unity and Reconciliation Act ("**the Reconciliation Act**").⁴⁸ The preamble of the Reconciliation Act provides that the TRC was established because it is "*necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known*". The objectives of the TRC include "*establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed*" during the period of legalised apartheid.⁴⁹
39. In order to effectively uncover the truth, the TRC had coercive powers to compel the testimony of any person, without which its work would have been incomplete. South Africa was a proud trailblazer in this regard, as far as other truth commissions were concerned. Its final report records that:

⁴⁷ See the judgment of Ngcobo J (as he then was) in *The Citizen 1978 (Pty) Ltd v McBride* 2011 (4) SA 191 (CC) at para 171, in which he said:

"Also indispensable to creating and maintaining our constitutional democracy, however, is the reconciliation and reconstruction process this nation embarked upon with the establishment of the Truth and Reconciliation Commission (TRC). Reconciliation and reconstruction are the twin pillars on which our transition from a deeply divided past to a future founded on the recognition of universal human rights, democracy, and peaceful co-existence firmly rest."

⁴⁸ 34 of 1995.

⁴⁹ The TRC focused on crimes committed during the period from March 1, 1960 to December 5, 1993.

“Another significant difference can be found in the Commission’s powers of subpoena, search and seizure, which are much stronger than those of other truth commissions. This has led to more thorough internal investigation and direct questioning of witnesses, including those who were implicated in violations and did not apply for amnesty. None of the Latin American commissions, for example, was granted the power to compel witnesses or perpetrators to come forward with evidence, and these commissions have had great difficulty in obtaining official written records from the government and the armed forces”.⁵⁰

40. The Reconciliation Act provides that the TRC *“may for the purposes of or in connection with the conduct of an investigation or the holding of a hearing, as the case may be, by notice in writing call upon any person to appear before the Commission and to give evidence or to answer questions relevant to the subject matter of the investigation or the hearing”*.⁵¹ The Reconciliation Act further makes it a criminal offence to, without sufficient cause, fail to attend a meeting of the TRC in accordance with a subpoena or fail to remain in attendance until the conclusion of the meeting unless excused by the person presiding at the meeting or refuse to fully and satisfactorily answer any question lawfully put to them.⁵²

⁵⁰ See Truth and Reconciliation Commission “Truth and Reconciliation Commission of South Africa Report” volume 1 (1998) at 54 (“**TRC Report**”) available at <https://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf>.

⁵¹ Section 29(1)(c) of the Reconciliation Act.

⁵² Section 39(e) of the Reconciliation Act provides:

“(i) *having been subpoenaed in terms of this Act, without sufficient cause fails to attend at the time and place specified in the subpoena, or fails to remain in attendance until the conclusion of the meeting in*

41. Importantly, there were no exemptions or exceptions for former leaders from the coercive powers of the TRC. Why? Because of the principle of equality before the law and the values of accountability and the rule of law. As explained by Lansing and King Perry, an exception for former leaders would have undermined the TRC's search for truth as well as its effectiveness and credibility.⁵³
42. The equal applicability of the coercive powers of the TRC to all was aptly demonstrated by the charging, prosecution, conviction and sentencing of P.W. Botha, former President of the Republic of South Africa, for contempt for failing to comply with repeated subpoenas to appear before the TRC (albeit that the conviction was later overturned on appeal on a procedural technicality).⁵⁴ The decision to lay charges against and the decision to prosecute Mr. Botha for failing to comply with the TRC's subpoenas⁵⁵ was seen as a critically important message that no one is above the law or beyond its reach. At the time, then-spokesperson of the African National Congress' sub-committee on the TRC and Minister of Justice, Dullah Omar said: "*By refusing to obey the subpoena, Mr Botha has defied the law and*

question or until excused from further attendance by the person presiding at that meeting, or fails to produce any article in his or her possession or custody or under his or her control;

(ii) *having been subpoenaed in terms of this Act, without sufficient cause refuses to be sworn or to make affirmation as a witness or fails or refuses to answer fully and satisfactorily to the best of his or her knowledge and belief any question lawfully put to him or her".*

⁵³ Lansing and Perry 'Should Former Government Leaders be Subject to Prosecution After Their Term in Office? The Case of South African President P. W. Botha' (1999) *California Western International Law Journal*, Vol. 30, No. 1 at 113.

⁵⁴ See New York Times "P. W. Botha, Defender of Apartheid, Is Dead at 90" (1 November 2006) available at <https://www.nytimes.com/2006/11/01/world/africa/01botha.html>.

⁵⁵ The TRC laid charges against Mr. P.W. Botha in December 1997. South African Press Association "TRC Lays Charges Against PW Botha" (5 December 1997) available at <https://www.justice.gov.za/trc/media/1997/9712/s971205b.htm>.

*signalled he is above the law. We want to make it very clear that no person in our country, no matter what office such person occupies, is above the law".*⁵⁶

43. That decision, and others of the TRC,⁵⁷ served as powerful symbols of the transformation that South Africa was undergoing – from impunity and unchecked abuses of state power to a constitutional democracy in which even former Presidents are subject to the law and will be held accountable for abuses of power.⁵⁸
44. In the fight against corruption through the work that is carried out by the Commission, South Africa is again able to insist on equality before the law, including by compelling evidence from those who are reluctant to account for past abuses. The Commission necessarily has similar coercive powers to those of the TRC to enable it to uncover the truth about state capture, corruption and fraud. Mr. Zuma's repeated failure to comply with summonses and directives of the Commission is echoed in the past conduct of Mr. PW Botha. Mr. Zuma too has defied the law and sought to signal that he is above the law.

⁵⁶ South African Press Association "PW Botha's Actions Not Good for Reconciliation: ANC" (19 December 1997) available at <https://www.justice.gov.za/trc/media/1997/9712/s971219f.htm>.

⁵⁷ Notably, during the Chemical and Biological Hearing of the TRC Dr Wouter Basson, the project leader, who had been subpoenaed to give evidence, launched an application in the Cape High Court contending that his rights in terms of section 35 of the Interim Constitution, 1993 would be infringed if he were compelled to testify. The High Court ruled that he should testify. See TRC Report above n 50 chapter 7 at 174.

⁵⁸ *Nkandla judgment* above n 44 at para 1. As explained by this Court in the *Nkandla judgment*—
"One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy."

45. Equality before the law then becomes not only symbolically important, but instrumentally vital to the Commission's work and its integrity. It requires that all, no matter how previously high, be required to account to the Commission. Whether at the time of our constitutional transformation, when the political stakes were dangerously high, or now, when the country is attempting to understand and undo the devastating effects of years of state capture, the principle of equality before the law retains equal force. This Court has already made it clear that its enforcement of clear legal duties will not be impacted by potentially adverse political consequences.⁵⁹ And protection of the law means that all persons in South Africa are entitled to expect that the appropriate tribunal prescribed by law for the purpose of resolving disputes of one kind or another (but particularly disputes that go to the integrity of our constitutional order, such as the Commission) will not have their mandates and protections rendered ineffective by persons who believe themselves outside the law.
46. An order by this Court compelling Mr Zuma to comply with his statutory obligations under the Commissions Act will send the same crystal clear and constitutionally sourced message that no one is above the law. In this case, the principle of ensuring that Mr Zuma is subject to the law like all of us, is not merely a constitutional end in itself: it serves a critically important function relating to the truth. We turn to that purpose next.

⁵⁹ See *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre* [2014] ZACC 30; 2015 (1) SA 315 (CC); 2015 (1) SACR 255 (CC); 2014 (12) BCLR 1428 (CC) at para 74, in which this Court enforced the South African Police Service's obligation to investigate crimes of torture committed in Zimbabwe regardless of the potential political fall-out.

THE COLLECTIVE RIGHT TO TRUTH UNDER OUR CONSTITUTIONAL AND INTERNATIONAL LAW

47. The HSF submits that the statutory obligation on Mr Zuma to attend the Commission and answer questions lawfully put to him is bolstered by the fact that these obligations are derived from provisions of the Commissions Act and the Regulations that give effect to constitutional rights and values.
48. Commissions of inquiry serve a fundamental truth-seeking purpose in addition to (and interlinked with) the accountability-promoting purpose served by commissions of inquiry, detailed by the applicant.⁶⁰ Importantly, the coercive powers of commissions of inquiry, which facilitate the uncovering of the truth, give effect to the public's collective right to truth.

The truth-seeking purpose of commissions and the applicable constitutional rights and values

49. Commissions of inquiry are a constitutional mechanism for truth-seeking. In *Magidiwana I*,⁶¹ a case broadly concerning victim participation in the Marikana commission of inquiry, this Court explained the truth-seeking purpose of commissions of inquiry. It said:

"The power to appoint a commission of inquiry is mandated by the Constitution. It is afforded to the President as part of his executive powers. It is open to the President to search for the truth through a commission. The truth so established could inform corrective measures, if any are recommended, influence future policy, executive

⁶⁰ Applicant's written submissions at paras 48-52.

⁶¹ *Magidiwana v President of the Republic of South Africa* 2013 (11) BCLR 1251 (CC) ("*Magidiwana I*") at paras 14-6.

action or even the initiation of legislation. A commission's search for truth also serves indispensable accountability and transparency purposes. Not only do the victims of the events investigated and those closely affected need to know the truth: **the country at large does, too.**⁶² (our emphasis).

50. Importantly, this Court highlighted that commissions of inquiry serve the public purpose of providing the public with the truth.⁶³
51. While commissions of inquiry are constitutional mechanisms, their powers are sourced in the Commissions Act and regulations promulgated thereunder. The coercive powers of commissions of inquiry provided for in terms of the Commissions Act and Regulations, and the corresponding legal duties placed on persons by the exercise of these powers, are essential for the effective search for truth. Comparative law is replete with examples of commissions of inquiry serving as mechanisms for truth-seeking, with experience showing that commissions of inquiry that lack coercive powers are seriously impeded in the task of uncovering as full an account of the truth as possible.⁶⁴

⁶² Ibid at paras 14-6.

⁶³ This Court recognised that the purpose of commissions of inquiry go beyond providing the President with “*information and advice*”. Commissions of inquiry serve a public purpose. Compare *SARFU III* above n 17 at para 147. See also *Minister of Police v Premier of the Western Cape* 2014 (1) SA 1 (CC) above n 18 in which the Constitutional Court emphasised the “*deeper public purpose*” served by commissions of inquiry.

⁶⁴ See the comparative discussion in Lansing and King Perry above n 53 at 108-10. Lansing and King Perry highlight the cases of Argentina and Chile, whose truth commissions lacked coercive powers to subpoena witnesses or compel testimony. Both commissions were unable to obtain the testimony of former leaders and were accordingly unable to provide a complete picture of the human rights abuses that had occurred in these countries. This also had the deleterious effect of fostering impunity.

52. The HSF submits that the coercive powers of commissions of inquiry provided for in the Commissions Act and the regulations promulgated thereunder, and the corresponding legal duties created, give effect to constitutional rights and values by facilitating the uncovering of the truth. In the HSF's view these constitutional rights and values include:

52.1 The values of accountability and openness enshrined in section 1(d) of the Constitution.

52.2 The right to dignity enshrined in section 10 of the Constitution.⁶⁵ Denial of the truth in matters of public concern undermines the right to human dignity as it violates the moral agency of individuals in our society.

52.3 The right to freedom of thought, opinion and belief enshrined in section 15 of the Constitution.⁶⁶ Access to the truth in matters of public concern is essential for the full enjoyment of this right.

52.4 The interlinked rights to freedom of expression, political choice and assembly enshrined in sections 16, 17 and 19 of the Constitution.⁶⁷ Access to the truth in matters of public concern is essential for the full enjoyment of these rights.

⁶⁵ Section 10 of the Constitution provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected.”

⁶⁶ Section 15(1) of the Constitution provides that “[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion.”

⁶⁷ Section 19(1) of the Constitution provides:

“Every citizen is free to make political choices, which includes the right—

(a) to form a political party;

(b) to participate in the activities of, or recruit members for, a political party; and

(c) to campaign for a political party or cause.”

- 52.5 The right of access to information enshrined in section 32 of the Constitution,⁶⁸ which covers access to any information held by the state and any information held by any person provided it is needed for the exercise or protection of rights. Denial of the truth in matters of public concern undermines the right of access to information.
- 52.6 The right to an effective remedy for any infringement or threat to any right in the Bill of Rights enshrined in section 38 of the Constitution.⁶⁹ Access to the truth in cases of rights violations is essential for the enjoyment of the right to an effective remedy. Without access to the truth, it may be impossible to pursue any remedy for a rights violation.
53. Mr Zuma's obligations are sharpened by the fact that they stem from legislative and regulatory provisions that give effect to these constitutional rights and values. Mr Zuma's conduct in failing to comply with his legal obligations, and thereby frustrating the truth-seeking purpose of the Commission, seriously undermines these rights and values. The HSF contends that these rights and values will only be appropriately vindicated by this Court granting the mandatory relief sought by the Applicant.

⁶⁸ Section 32(1) of the Constitution provides everyone has the right of access to "any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights". This right is given effect to by the Promotion of Access to Information Act 2 of 2000.

⁶⁹ In *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 at para 69, this Court said:

"Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced."

56. Moreover, the HSF submits that a right to truth emanates from essential elements of the constitutional rights listed above. Read together, these rights enshrine a right to truth in matters concerning serious rights violations. This is clear on a reading of the Constitution itself.⁷⁰ It is also bolstered by a consideration of South Africa's international law commitments. Together they conduce to an important principle: that failing to deal properly with historical injustice is an injustice in itself.

The right to truth in customary international law

57. Section 39(1)(b) of the Constitution provides that courts *must* consider international law when interpreting the rights in the Bill of Rights. In *Glenister II*, this Court explained that the Constitution “*draws the obligations assumed by the State on the international plane deeply into its heart, by requiring the State to fulfil them in the domestic sphere*”.⁷¹ This includes customary international law, which has “*a higher rank in the international hierarchy than treaty law*”.⁷²

58. There is an emerging principle of customary international law that recognises a right to truth for serious human rights violations.⁷³ Our Constitution's

⁷⁰ See *New Nation Movement NPC v President of the Republic of South Africa* [2020] ZACC 11, in which case this Court held that section 19(3)(b) read with section 18 and other cognate rights found a right to run for and, if elected, hold office as an independent candidate in national and provincial elections.

⁷¹ *Sonke* above n 34 at para 45; citing *Glenister II* above n 19 in at para 189.

⁷² *Sonke* *ibid* at para 63; citing *Prosecutor v Anto Furundžija*, IT-95-17/1-T, § 153, ICTY 1998. Section 232 of the Constitution provides that “*customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament*.”

⁷³ The right to truth falls under the umbrella right to know. See Groome “Principle 2: The Inalienable Right to Truth” in Handleman and Unger (eds) *United Nations Principles to Combat Impunity: A Commentary* (Oxford University Press, Oxford 2018) (“**Groome**”) at 59. See further Groome, “The Right to Truth in the Fight Against Impunity” (2011) 29 *Berkeley Journal of International Law* 175 available at <http://scholarship.law.berkeley.edu/bjil/vol29/iss1/5>.

commitment to truth-seeking is both confirmed by and given deeper meaning by our international law commitments to the right to truth.

59. In any event, section 233 of the Constitution enjoins the courts to interpret any legislation in a manner that is consistent with international law. In *Sonke*, this Court said: “*International law also offers useful interpretative guidance outside the sphere of Bill of Rights interpretation. . . . Section 233 of the Constitution requires us, when interpreting any legislation, to prefer an interpretation that accords with international law.*”⁷⁴ Therefore, the Commissions Act itself must be interpreted in accordance with the customary right to truth.
60. As an emerging principle of customary international law, while the contours of the right to truth are still developing, a core of the right has crystallised.⁷⁵ This is that states have an obligation to provide victims, those closely related to victims and the public with information about serious human rights violations.⁷⁶ The customary norm, thus, also recognises the right to truth as a collective right held by the public.⁷⁷ And, importantly, commissions of inquiry are considered a key mechanism for fulfilment of the obligation to provide the public with the truth.

⁷⁴ *Sonke* above n 34 at para 70.

⁷⁵ Groome above n 73 at 59.

⁷⁶ See Naqvi “The right to the truth in international law: fact or fiction?” (2006) *International Review of the Red Cross* Volume 88 Number 862 (“**Naqvi**”) at 260; and Groome *ibid* at 65.

⁷⁷ Naqvi *ibid*; and Groome *ibid*.

61. An explicit recognition of the right to truth is found in the United Nations Principles on Impunity⁷⁸ (formulated in 1996) and the Updated Principles (updated in 2005).⁷⁹ The UN Principles on Impunity identified an inalienable right to the truth.⁸⁰ This was affirmed in the Updated Principles in Principle 2, which says:

“Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.”

62. This is clearly a collective right to truth held by the public, as distinguished from the right of victims to know the truth recognised in Principle 4. Moreover, Principle 5 of the Updated Principles provides that States must take effective measures to give effect to the right to truth. What do such measures look like? The same Principle specifies the use of commissions of

⁷⁸ Economic & Social Council (ECOSOC), Commission on Human Rights, The Administration of Justice and the Human Rights of Detainees, Annex 1 “Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,” U.N. Doc. E/CN.4/Sub.2/1996/18 (June 29, 1996) (“**UN Principles on Impunity**”) available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G97/141/42/PDF/G9714142.pdf?OpenElement>.

⁷⁹ ECOSOC, Commission on Human Rights, Promotion and Protection of Human Rights: Impunity, Add. 1 “Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,” Principle 2, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) (“**Updated Principles**”) available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>.

⁸⁰ Principle 1 provides: “Every people has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through systematic, gross violations of human rights, to the perpetration of heinous crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of violations in the future.”

inquiry to ascertain the truth in cases of massive or systemic human rights violations as an effective measure to give effect to the right to truth.

63. In a 2006 report on the right to truth, the Office of the UN High Commissioner for Human Rights,⁸¹ concluded that:

“[T]he right to the truth about gross human rights violations and serious violations of human rights law is an inalienable and autonomous right, linked to the duty and obligation of the State to protect and guarantee human rights, to conduct effective investigations and to guarantee effective remedy and reparations.” (our emphasis)

64. There are also a number of UN resolutions that propound the right to truth and call for its protection. In 2005, the General Assembly of the United Nations passed a resolution on the Basic Principles on the Right to Reparation for Victims.⁸² The Resolution recognised a collective right to truth for human rights violations as a component part of the right to a remedy.⁸³
65. In 2009, the Human Rights Council adopted a resolution on the right to truth, in which the Council recognised *“the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights”* and encouraged States to *“consider establishing specific judicial mechanisms and, where appropriate, truth and reconciliation*

⁸¹ Promotion and Protection of Human Rights: Study on the right to the truth. UN Doc E/CN.4/2006/91 (8 February 2006) (“**UN study on the right to truth**”) available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/106/56/PDF/G0610656.pdf?OpenElement>.

⁸² Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147 (16 December 2005) (“**Basic Principles on the Right to Reparation for Victims**”) available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

⁸³ Ibid at paras 18, 22(b) and (e).

*commissions to complement the justice system, in order to investigate and address gross violations of human rights”.*⁸⁴ In 2013, the General Assembly adopted a resolution containing identical terms.⁸⁵

66. In 2010, both the General Assembly and the Human Rights Council passed resolutions proclaiming an International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims.⁸⁶ And in 2011, the Human Rights Council passed a resolution establishing a Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence.⁸⁷
67. These international law and soft law sources provide important evidence of the development of a customary norm. The crystallisation of a customary norm recognising a right to truth is further supported by the decisions of regional bodies and courts and by State practice at the national level.
68. At the regional level, the European Court of Human Rights has inferred a right to the truth as part of the prohibition against torture, the right to an effective remedy, and the right to an effective investigation.⁸⁸ The African

⁸⁴ Human Rights Council, Right to Truth, UN Doc A/HRC/12/L.27 (25 September 2009) at paras 1 and 4.

⁸⁵ General Assembly, Right to Truth, A/RES/68/165 (18 December 2013).

⁸⁶ General Assembly, Proclamation of 24 March as the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims, A/RES/65/196 (21 December 2010); and Human Rights Council, Proclamation of 24 March as the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims, A/HRC/RES/14/7 (17 June 2010).

⁸⁷ Human Rights Council, Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, UN Doc A/HRC/RES/18/7 (13 October 2011).

⁸⁸ See Judgment of 25 May 1998, *Kurt v. Turkey*, Application No. 24276/94 at para 175, in which the ECtHR held that the authorities' failure to assist the applicant in establishing the truth about the whereabouts of her son violated the prohibition against torture enshrined in article 3 and the right to an effective remedy enshrined in article 13; Judgment of 14 November 2000, *Tas v. Turkey*, Application No. 24396/94 at paras 88-92, in which the ECtHR held that the authorities failure to conduct an investigation into the

Commission on Human and Peoples' Rights has similarly inferred a right to truth as part of the right to an effective remedy.⁸⁹

69. The Inter-American Commission on Human Rights recognised a collective right to truth arising from the obligation to respect and ensure the enjoyment of the rights and freedoms recognised in the American Convention on Human Rights⁹⁰ and from the right to simple and prompt recourse for the protection of the rights enshrined in the Convention.⁹¹ The Inter-America Commission has stated that “[e]very society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future”.⁹² The Inter-American Court on Human Rights has also recognised a collective right to truth, stating that “[s]ociety has the right to know the truth regarding such crimes, so as to be capable of preventing them in the future.”⁹³

disappearance of the applicant's son in custody had violated the right to an effective remedy and the right to an effective investigation in terms of article 5 (right to liberty and security); and Judgment of 10 May 2001, Cyprus v. Turkey, Application No. 25781/94).

⁸⁹ African Commission on Human and Peoples' Rights “Principles and guidelines on the right to a fair trial and legal assistance in Africa” African Union Doc. DOC/OS(XXX)247, Principle C(b)(iii), available at https://www.achpr.org/public/Document/file/English/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf. Principle C(b)(iii) provides that the right to an effective remedy includes “access to the factual information concerning the violations”.

⁹⁰ Organization of American States, American Convention on Human Rights, 22 November 1969.

⁹¹ These rights are found in articles 1(1) and 25 of the American Convention on Human Rights. See Inter-American Commission, Report No. 1/99, of 27 January 1999, Case of Lucio Parada et al. v. El Salvador, at paras 148-158 available at <http://cidh.org/annualrep/98eng/Merits/ElSalvador%2010480.htm>.

⁹² Inter-American Commission on Human Rights, annual Report 1985-1986, OEA/SER.L/V/II.68, Doc. 8 rev. 1, at 205 available at <http://www.cidh.oas.org/annualrep/85.86eng/toc.htm>.

⁹³ *Bámaca-Velásquez v. Guatemala* judgment of February 22, 2002 (Reparations and Costs) at para 77 available at https://www.corteidh.or.cr/docs/casos/articulos/Seriec_91_ing.pdf.

70. At the national level, an important indicator of the crystallisation of a customary norm is the establishment of truth commissions in numerous countries where systemic or mass human rights violations have been committed to uncover the truth. As Professor Groome, a leading authority on the right to truth confirms, the proliferation of truth commissions demonstrates the “*near universal value*” placed on truth-seeking in respect of serious human rights violations.⁹⁴ South Africa, of course, has been at the forefront of these developments, with the TRC providing a model for truth commissions throughout the world. The Commission’s work into state capture is a natural continuation of that important trend. It exemplifies South Africa’s response to years of state abuse and corruption, in search of a truth that the public is entitled to.

Corruption and the right to truth

71. Corruption seriously undermines our constitutional democracy and constitutionally enshrined rights, engaging the right to truth.

72. It is now trite – through the judgments of this Court⁹⁵ and the laws of our Legislature⁹⁶ – that corruption has a pervasive and destructive effect on the ability of the State to fulfil, and of individuals to realise, a number of

⁹⁴ Groome above n 73 at 64.

⁹⁵ See *Glenister II* above n 19 above at para 166, where this Court said:

“There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk”.

⁹⁶ See the Prevention and Combating of Corrupt Activities Act 12 of 2004 (“**PCCA**”), passed to address corruption and other serious crimes. The preamble to the PCCA explains:

“[C]orruption and related corrupt activities undermine the rights [enshrined in the Bill of Rights], endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardise sustainable development, the rule of law and the credibility of governments, and provide a breeding ground for organised crime.”

fundamental rights contained in the Bill of Rights. It does so by decreasing the funds available for public spending. In particular, corruption undermines the State's ability to take progressive measures to fulfil the socio-economic rights enshrined in the Constitution – impeding access to housing, health care, food, water and social security among other things essential for human dignity. In this way, corruption threatens the fulfilment of “*many of the rights promises made by our Constitution*”.⁹⁷ Corruption particularly affects the most vulnerable in our society who are most reliant on public goods and services.

73. The Indian Supreme Court – a court that has, like this Court, significantly influenced the contours of socio-economic rights – also recognised that corruption “*undermines human rights, indirectly violating them*”.⁹⁸ It held that “*systematic corruption is a human rights’ violation in itself, as it leads to systematic economic crimes*”.⁹⁹ There is also an influential and growing body of literature that recognises corruption as a human rights violation.¹⁰⁰ Indeed, one of this Court’s former Justices – Justice Goldstone – in calling for the establishment of an International Anti-Corruption Court, has cited a number of cases in which corruption was directly linked with severe breaches of human rights and devastating consequences for human health.¹⁰¹

⁹⁷ *Beadica 231 CC v Trustees for the time being of the Oregon Trust 2020 (5) SA 247 (CC)* (“*Beadica*”), where this Court said: “*The fulfilment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country.*”

⁹⁸ *State of Maharashtra through CBI, Anti-Corruption Branch, Mumbai v. Balakrishna Dattatrya Kumbhar* [2012] 9 S.C.R. 601 602 at para 14.

⁹⁹ *Ibid.*

¹⁰⁰ See, among others, Boersma *Corruption: A Violation of Human Rights and a Crime under International Law* (Intersentia, 2012); Peters “Corruption as a Violation of International Human Rights” (2019) *The European Journal of International Law* Vol. 29, No. 4; and International Council on Human Rights Policy “Corruption and Human Rights: Making the Connection” (June 2009).

¹⁰¹ See Organised Crime and Corruption Reporting Project “Two Judges Call for an International Anti-Graft Court” (9 April 2020) available at <https://www.occrp.org/en/daily/12056-two-judges-call-for-an-international-anti-graft-court>. In that article, Justice Goldstone is reported as citing a report of the United Nations High Commissioner for Human Rights in 2013, according to which “corruption kills by siphoning

74. Systemic and grand scale corruption undermines constitutional rights in a serious manner. In that context, the public has a right to the truth concerning the state capture, corruption and fraud that have threatened our constitutional democracy and undermined the constitutional vision of a society founded on *“human dignity, the achievement of equality and the advancement of human rights and freedoms”*.¹⁰² The Commission is an important mechanism for uncovering this truth. Mr. Zuma’s conduct, by subverting the coercive powers of the Commission and frustrating the truth-seeking purpose of the Commission, undermines the public’s right to the truth regarding state capture and corruption.

75. In the HSF’s submission, any reading of the Commissions Act, or remedy related thereto, which fails to give best effect to the right to truth, would be most unfortunate for two related reasons:

75.1 First, South Africa has been at the forefront of the developments concerning truth-seeking for years, and any retrogression in relation thereto, particularly in response to the need to understand the depth and scale of corruption that has blighted our development, would be at odds with our constitutional efforts to make a break with a past that obscured and distorted the truth.

75.2 Secondly, any retrogression would also be at variance with international law commitments that herald the importance of truth-finding as a customary international law norm in service of vindicating

money from humanitarian and development projects... and that money stolen through corruption every year is enough to feed the world’s hungry 80 times over...”

¹⁰² Section 1(a) of the Constitution.

human rights violations arising from corruption.¹⁰³ As the international law history shows, South Africa has been at the vanguard of developments around the right to truth through its TRC processes.

76. At this time when truth itself is under threat worldwide, it is imperative that the right to truth - under our Constitution and internationally - be given its full respect. In our own backyard, there can be few projects less worthy of the fullest respect for truth-telling than the Commission's efforts in searching for the answers and solutions to state capture that has blighted our past and imperilled our future.

The right to truth as a means of ensuring effective remedies under the Constitution and meaningful reparations under international law

77. Moreover, the uncovering of the truth is not only important for its own sake – it has critical instrumental value. The Commission is tasked with inquiring into, making findings on and reporting on matters of public and national interest concerning allegations of state capture, corruption and fraud. But, importantly, it is also tasked with making recommendations on these matters.¹⁰⁴ The HSF submits that as full and complete an uncovering of the truth concerning the possible causes of and the nature and extent of state capture, corruption and fraud as possible is essential for the Commission to make appropriate and effective recommendations.

¹⁰³ See also *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC) paras 4 - 5: international law was central in shaping our democracy and enjoys a well-deserved prominence in the architecture of our constitutional order.

¹⁰⁴ See the Commission's terms of reference at para 1. The Commission's terms of reference appear in Annexure IM1 of the Applicant's Founding Affidavit, at 78-82.

78. The recommendations of the Commission will serve a "never again" impulse – ensuring that the same situation does not again threaten our constitutional democracy. As such, the Commission's recommendations give effect to the public in South Africa's right to an effective remedy for the serious rights violations that arose from state capture, corruption and fraud.
79. The Constitution provides a right to an effective remedy for violations of or threats to rights in the Bill of Rights.¹⁰⁵ This is informed by the customary international law norm that recognises a right for individuals to receive reparations for serious violations of human rights, including guarantees of non-repetition.¹⁰⁶ Guarantees of non-repetition impose an obligation on states, which is owed to society as a whole, to take preventative measures to ensure that human rights violations are not repeated.¹⁰⁷ Importantly, the obligation to take preventative measures includes reviewing and reforming laws contributing to or allowing gross human rights violations,¹⁰⁸ institutional reform,¹⁰⁹ strengthening the independence of oversight entities,¹¹⁰ and educational measures¹¹¹ to prevent repetition.

¹⁰⁵ Sections 38 and 172 of the Constitution. See *Fose* above n 69 at para 69.

¹⁰⁶ The other key elements of the right to reparations are restitution, compensation, rehabilitation and satisfaction. See Evans *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press, Cambridge 2012), in which the author forcefully argues for the emergence of a customary right to reparations for serious human rights violations. See also International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, A/56/10, ch. IV.E.1, Article 30, available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf; and the Basic Principles on the Right to Reparation for Victims above n 82 at para 18.

¹⁰⁷ International Law Commission, Draft Articles on Responsibility of States, *ibid*, at article 30(12).

¹⁰⁸ The Basic Principles on the Right to Reparation for Victims above n 82 at para 23(h).

¹⁰⁹ *Ibid* at para 23(b).

¹¹⁰ *Ibid* at para 23(c).

¹¹¹ *Ibid* at para 23(e).

80. This broader understanding of reparations was recognised by this Court in interpreting the “*need for reparations*” in connection with the gross human violations perpetrated under apartheid, which appears in the epilogue of the Constitution. This Court stated that:

*“The election made by the makers of the Constitution was to permit Parliament to favour ‘the reconstruction of society’ involving in the process a wider concept of ‘reparation’, which would allow the state to take into account the competing claims on its resources but, at the same time, to have regard to the ‘untold suffering’ of individuals and families whose fundamental human rights had been invaded during the conflict of the past.”*¹¹²

81. The Reconciliation Act tasked the TRC with recommending reparation measures in respect of victims of gross human rights violations¹¹³ and with making recommendations of measures to prevent the future violations of human rights.¹¹⁴ In its final report, the Reparation and Rehabilitation Committee of the TRC stressed that it followed the “*internationally accepted approach to reparation*”, which it saw as including reassurance of non-repetition – defined as “*the right to a guarantee, by means of appropriate legislative and/or institutional intervention and reform, that the violation will not be repeated*”.¹¹⁵

¹¹² *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 672 at para 45.

¹¹³ Section 3(c) of the Reconciliation Act.

¹¹⁴ Section 3(d) of the Reconciliation Act.

¹¹⁵ Truth and Reconciliation Commission “Report of the Reparation & Rehabilitation Committee” volume 6 (1998) at 93-4 available at https://www.justice.gov.za/trc/report/finalreport/vol6_s2.pdf.

82. The recommendations of the Commission covering institutional and law reform will, accordingly, be a constitutive part of the remedy or reparations owed to the public in South Africa by the state for the rights violations that arose from state capture, corruption and fraud. In order to make these recommendations, the Commission needs as complete a picture as possible of the causes, nature and extent of state capture, corruption and fraud. For it to have this, it must hear from the persons allegedly responsible for the commission of these crimes. Mr. Zuma is at the heart of the allegations concerning state capture, corruption and fraud.¹¹⁶ The HSF, therefore, submits that it is critical that Mr. Zuma account to the Commission in order for the Commission to obtain the complete picture and to make recommendations that will ensure not only accountability for those implicated, but will facilitate the undoing of state capture and put in place measures and correctives that will guard against it being repeated.

CONCLUSION

54. The HSF submits that an order of this Court granting the relief sought by the applicant will effectively enforce the Commission's summonses and directives – ensuring the effective functioning of the Commission and safeguarding the integrity of the Commission's work.

55. Equally importantly, it will vindicate the public's collective right to the truth concerning the state capture, corruption and fraud that has resulted in serious human rights violations and will ensure that the public is provided

¹¹⁶ See the "Allegations of Abuses of Power and Breach of Constitutional Duty by Mr Zuma" in the Applicant's written submissions at paras 29-32.

with an effective remedy and proper reparations for these violations under our Constitution and international law.

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Chambers, Sandton and Durban, 28
December 2020

TABLE OF AUTHORITIES

SOUTH AFRICAN LAW

Legislation and Regulations

Commissions Act 8 of 1947.

Constitution of the Republic of South Africa 108 of 1996.

Criminal Procedure Act 51 of 1977.

Interim Constitution of the Republic of South Africa 200 of 1993.

Prevention and Combating of Corrupt Activities Act 12 of 2004.

Promotion of National Unity and Reconciliation Act 34 of 1995.

Superior Courts Act 10 of 2013

Regulations of the Judicial Commission of Inquiry into allegations of state capture, corruption and fraud in the Public Sector including Organs of State, Government Notice No. 105, Government Gazette No. 41436 (9 February 2018).

Cases

Antonsson v Jackson 2020 (3) SA 113 (WCC).

Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa 1996 (4) SA 672 (CC).

Beadica 231 CC v Trustees for the time being of the Oregon Trust 2020 (5) SA 247 (CC).

Bernstein v Bester NO 1996 (2) SA 751 (CC).

City Council of Pretoria v Walker [1998] ZACC 1; 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC).

Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly 2016 (3) SA 580 (CC).

Fose v Minister of Safety and Security [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 (CC).

Glenister v President of the Republic of South Africa 2011 (3) SA 347 (CC).

Law Society of South Africa and Others v President of the Republic of South Africa and Others 2019 (3) SA 30 (CC).

Magidiwana v President of the Republic of South Africa 2013 (11) BCLR 1251 (CC).

Minister of Police v Premier of the Western Cape 2014 (1) SA 1 (CC).

National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre [2014] ZACC 30; 2015 (1) SA 315 (CC); 2015 (1) SACR 255 (CC); 2014 (12) BCLR 1428 (CC).

Nel v Le Roux NO 1996 (3) SA 562 (CC).

New Nation Movement NPC v President of the Republic of South Africa [2020] ZACC 11.

Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC).

Podlas v Cohen & Bryden NNO 1994 (4) SA 662 (T).

President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC).

Prinsloo v Van der Linde 1997 (3) SA 1012 (CC).

Roering v Mahlangu 2016 (5) SA 455 (SCA).

Sidumo v Rustenburg Platinum Mines Ltd 2008 (2) BCLR 158 (CC).

Sonke Gender Justice NPC v President of the Republic of South Africa [2020] ZACC 26.

The Citizen 1978 (Pty) Ltd v McBride 2011 (4) SA 191 (CC).

Weare v Ndebele NO [2008] ZACC 20; 2009 (1) SA 600 (CC); 2009 (4) BCLR 370 (CC).

INTERNATIONAL, REGIONAL AND COMPARATIVE LAW

Conventions

Organization of American States, American Convention on Human Rights, 22 November 1969.

UN sources

Economic & Social Council (ECOSOC), Commission on Human Rights, The Administration of Justice and the Human Rights of Detainees, Annex 1 "Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity", U.N. Doc. E/CN.4/Sub.2/1996/18 (29 June 1996).

ECOSOC, Commission on Human Rights, Promotion and Protection of Human Rights: Impunity, Add. 1 “Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity”, U.N. Doc. E/CN.4/2005/102/Add.1 (8 February 2005).

Promotion and Protection of Human Rights: Study on the right to the truth. UN Doc E/CN.4/2006/91 (8 February 2006).

General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147 (16 December 2005).

Human Rights Council, Right to Truth, UN Doc A/HRC/12/L.27 (25 September 2009).

General Assembly, Right to Truth, A/RES/68/165 (18 December 2013).

General Assembly, Proclamation of 24 March as the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims, A/RES/65/196 (21 December 2010).

Human Rights Council, Proclamation of 24 March as the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims, A/HRC/RES/14/7 (17 June 2010).

Human Rights Council, Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, UN Doc A/HRC/RES/18/7 (13 October 2011).

International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, A/56/10, ch. IV.E.1 (November 2001).

European Court of Human Rights

Judgment of 25 May 1998, Kurt v. Turkey, Application No. 24276/94.

Judgment of 14 November 2000, Tas v. Turkey, Application No. 24396/94.

Judgment of 10 May 2001, Cyprus v. Turkey, Application No. 25781/94.

African Commission on Human and Peoples Rights

“Principles and guidelines on the right to a fair trial and legal assistance in Africa” African Union Doc. DOC/OS(XXX)247.

Inter-American Court of Human Rights

Judgment of 22 February 2002, *Bámaca-Velásquez v. Guatemala* (Reparations and Costs).

Inter-American Commission on Human Rights

Report No. 1/99, of 27 January 1999, Case of Lucio Parada et al. v. El Salvador.

Annual Report 1985-1986, OEA/SER.LV/II.68, Doc. 8 rev. 1.

Indian Supreme Court

State of Maharashtra through CBI, Anti-Corruption Branch, Mumbai v. Balakrishna Dattatrya Kumbhar [2012] 9 S.C.R. 601 602.

OTHER

Reports

Truth and Reconciliation Commission “Truth and Reconciliation Commission of South Africa Report” volume 1 (1998).

Truth and Reconciliation Commission “Report of the Reparation & Rehabilitation Committee” volume 6 (1998).

International Council on Human Rights Policy “Corruption and Human Rights: Making the Connection” (June 2009).

Academic sources

Albertyn and Goldblatt “Equality” in Woolman and Bishop (eds) *Constitutional Law of South Africa* 2 ed (Juta & Co Ltd, Cape Town 2014).

Boersma *Corruption: A Violation of Human Rights and a Crime under International Law* (Intersentia, 2012).

Evans *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press, Cambridge 2012).

Groome “Principle 2: The Inalienable Right to Truth” in Handleman and Unger (eds) *United Nations Principles to Combat Impunity: A Commentary* (Oxford University Press, Oxford 2018).

Groome, “The Right to Truth in the Fight Against Impunity” (2011) 29 *Berkeley Journal of International Law* Vol. 29, No. 175.

Lansing and Perry “Should Former Government Leaders be Subject to Prosecution After Their Term in Office? The Case of South African President P. W. Botha” (1999) *California Western International Law Journal*, Vol. 30, No. 1.

Naqvi "The right to the truth in international law: fact or fiction?" (2006) *International Review of the Red Cross* Vol. 88, No. 862.

Peters "Corruption as a Violation of International Human Rights" (2019) *The European Journal of International Law* Vol. 29, No. 4.

News articles

New York Times "P. W. Botha, Defender of Apartheid, Is Dead at 90" (1 November 2006) available at <https://www.nytimes.com/2006/11/01/world/africa/01botha.html>.

Organised Crime and Corruption Reporting Project "Two Judges Call for an International Anti-Graft Court" (9 April 2020) available at <https://www.occrp.org/en/daily/12056-two-judges-call-for-an-international-anti-graft-court>.

South African Press Association "TRC Lays Charges Against PW Botha" (5 December 1997) available at <https://www.justice.gov.za/trc/media/1997/9712/s971205b.htm>.