

**IN THE HIGH COURT OF SOUTH AFRICA
KWA ZULU NATAL DIVISION, PIETERMARITZBURG**

Case No:

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA

Applicant

and

THE MINISTER OF POLICE

1st Respondent

**NATIONAL COMMISSIONER FOR THE SOUTH
AFRICAN POLICE SERVICE**

2nd Respondent

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

3rd Respondent

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

4th Respondent

RAYMOND MNYAMEZELI ZONDO *NO*

5th Respondent

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

6th Respondent

HELEN SUZMAN FOUNDATION

7th Respondent

NOTICE OF MOTION

PLEASE TAKE NOTICE that the applicant intends to apply to the above Honourable Court on 6 July 2021 at 10h00, or so soon thereafter as counsel may be heard, for an order:

PART A

1. That, to the extent necessary, the applicant's non-compliance with the Rules of the above Honourable Court is condoned, in particular, the Rules relating to the service and time-periods, and the matter is treated as one of urgency in terms of Rule 6(12) of the High Court Rules;
2. That, pending the outcome of the rescission application, which is before the Constitutional Court, in respect of the matter of *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* (Case No CCT52/21), and the due determination of orders in Part B of this Notice of Motion, an order is hereby granted:
 - 2.1. Staying and/or suspending the execution of the relevant orders in the aforementioned orders pending the outcome of the application for an order of reconsideration and rescission of orders and judgment in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* referred to in paragraph 2 above; and/or
 - 2.2. Interdicting the first and second respondents from executing the orders in paragraphs 4, 5 and 6 of the aforementioned judgment.

3. Costs only in the event of opposition.
4. Further, alternative and/or just and equitable relief.

PART B

5. Declaring that in circumstances such as the present, the crime of civil contempt of court must be conducted in accordance with the provisions of the Criminal Procedure Act, 1977;
6. Declaring the Criminal Procedure Act 55 of 1977 to be unconstitutional insofar as it fails or omits to make any provision for the conduct of a criminal trial in respect of proceedings in which contempt of court proceedings are conducted for the sole and exclusive purpose of securing the imprisonment of any person;
7. Costs only in the event of opposition; and
8. Further, alternative and/or just and equitable relief.

PLEASE TAKE NOTICE FURTHER that the affidavit of **JACOB GEDLEYIHLEKISA ZUMA**, annexed hereto, will be used in support of the application(s).

PLEASE TAKE NOTICE FURTHER that the applicant has appointed the address of his attorneys, as set out hereunder, as the address at which he will accept notice and service of all documents and processes in these proceedings.

PLEASE TAKE NOTICE FURTHER that if any of the respondents intends opposing this application, they are required:

- (a) to notify the applicant's attorneys in writing by filing a notice of intention to oppose on or before 12h00 on Saturday 3 July 2021 and to appoint in such notification an address at which notice and service of all documents in these proceedings shall be accepted; and
- (b) on or before 16h00 on Sunday 4 July 2021, to file their answering affidavit, if any; and
- (c) to receive the applicant's replying affidavit on or before 16h00 on Monday 5 July 2021.

If no such notice is given, the unopposed application will be made on Monday 6 July 2021 at 10h00 or so soon thereafter as Counsel may be heard.

KINDLY SET THE MATTER DOWN ACCORDINGLY.

DATED at JOHANNESBURG on this the **2nd** day of **July** 2021



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TO:
THE REGISTRAR OF THE ABOVE
HONOURABLE COURT
PIETERMARITZBURG

AND TO:
THE STATE ATTORNEY, DURBAN
Respondents' Attorneys

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AND TO:WEBBER WENTZEL INCORPORATED

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THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

6th Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

JACOB GEDLEYIHLEKISA ZUMA

do hereby make oath and say the following:

1. I am an adult male and the former president of the Republic of South Africa residing at Kwa Nxamalala in Nkandla.
2. The facts set out below are, to the best of my knowledge, both true and correct. Save where the contrary is expressed or appears from the context.
3. Where I make the submissions of a legal nature, I do so on the advice of my legal representatives which advice I accept.

A: PARTIES

4. I am the applicant in this application and bring this application in my personal capacity.
5. The 1st respondent is the Minister of Police and/or his subordinates, c/o The State Attorney. The Minister of Police is cited herein in his official capacity as the Minister responsible for the police.
6. The 2nd respondent is the National Commissioner of the South African Police Service and/or his subordinates. The National Commissioner is cited herein in his official capacity as such.
7. The 3rd respondent is the Minister of Justice and Correctional Services and/or his subordinates. The Minister is cited herein in his official capacity as such.
8. The 4th respondent is the Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State. He is cited herein in his official capacity as such.

9. The 5th respondent is Raymond Mnyamezeli Zondo, cited in his capacity as the Chairperson of Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State.
10. The 6th respondent is the President of the Republic of South Africa, who is cited in his official capacity as such and as Head of State.
11. Service upon all the respondents will, by arrangement, be electronically effected upon The State Attorney, Johannesburg, per NPeete@justice.gov.co.za and JohVanSchalkwyk@justice.gov.za, respectively.
12. The respondents are cited insofar as they have an interest in the relief sought herein. Accordingly, no costs orders are sought against any of the respondents save in the event of any one or more of them lodging a notice of opposition.

B: JURISDICTION AND LOCUS STANDI

13. The above Honourable Court has jurisdiction to hear the matter on the basis that I am domiciled within the court's area of jurisdiction. The jurisdiction of the first and main respondent herein is national.
14. The above Honourable Court has inherent powers to enforce or stay the execution of any order of court, even the order of a higher court. In any event, Part B of the present application will be heard in this Honourable Court.

15. The court order which is the subject matter of these proceedings is partly executable in the Nkandla Police Station and/or a correctional facility, both of which are located within the area of jurisdiction of this Honourable Court.
16. I am the person whose personal liberty is at stake as a result of my imminent detention without trial and in breach of my various constitutional rights specified hereunder, including but not limited to the right to life, the right to dignity and/or the right to freedom of the person. I bring this application in my own interest in terms of section 38(a) and/or in the public interest in terms of section 38(d) of the Constitution.

C: NATURE AND PURPOSE OF APPLICATION

17. The relief sought in this urgent application is to suspend and/or interdict the execution and operation of otherwise imminent imprisonment, as recently ordered by the Constitutional Court pending the outcome of an application lodged in the Constitutional Court for the rescission of the said judgment and order, pending the outcomes of a related rescission application which has been lodged in the Constitutional Court and Part B of this application.
18. The rescission application has been brought in terms of Rule 42 of the Uniform Rules of Court, insofar as that rule is applicable to the Constitutional Court in terms of Rule 29 of the Rules of the Constitutional Court.
19. In addition to the above and in Part B, I seek an order declaring that all persons accused and convicted of the crime of contempt of court, whether in civil or criminal proceedings, are entitled to the rights enshrined in sections 9(1), 12 and 35(3) of the Constitution and that it is unconstitutional to sentence an

accused in civil contempt of court proceedings without a trial as set out in the Criminal Procedure Act, 1977, more specifically where the sole intention of the proceedings is imprisonment and/or other criminal consequences.

20. I specifically reserve my rights to supplement and amplify these papers in respect of the relief sought in Part B.
21. In turn, this application is brought in terms of Rule 172(1)(a) and (b) of the Constitution, alternatively the common law of interdicts, with a view to staying, suspending and/or interdicting the execution of the order of the Constitutional Court for the arrest, surrender and/or detention of the applicant within the timeframes stipulated in the urgent court order, which forms part of the relevant full judgment of the Constitutional Court, a copy of which is annexed hereto marked "**JGZ1**".
22. I also duly annex hereto marked "**JGZ2**" a copy of the rescission application.
23. To the extent necessary, reference will also be made to an earlier application urgently brought by the State Capture Commission before the Constitutional Court in December 2020 seeking relief to compel me to attend the Commission. That application is referred to in the impugned Constitutional Court judgment as CCT295/20 and the full order sought is reproduced at footnote 5 of Annexure "JGZ2". To avoid unnecessary prolixity, I do not attach a copy of CCT295/20 but a copy thereof will be handed up at the hearing.
24. Due to the extreme urgency of this matter, as applicant and *dominus litis*, I have instructed my legal representatives to urgently approach the Honourable Judge President for his case management of the matter, with the view that it

be urgently allocated to a Judge or Judges, as the case may be, by no later than Tuesday, 6 July 2021. The period within which the first and/or second respondents would otherwise be duty-bound to act in order to execute the impugned order expires on Wednesday, 7 July 2021. It is however not reasonably anticipated that they will take any action while the outcome of this application, of which they will then be aware, is pending.

D: SALIENT AND BRIEF FACTUAL BACKGROUND

25. The facts upon which this application is based are largely common cause and in the public domain. The relevant facts, I now briefly set out, are also more fully set out in the court judgments directly relevant to this urgent application.
26. As the former President of the Republic, I was summonsed to appear before the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (the Commission) around November 2020.
27. I duly appeared before the Commission on that date as per the summons in November 2020 for the second time. At this appearance, I made an application for the fifth respondent to recuse himself from presiding over issues before the Commission relating to me, on a number of grounds that I shall not delve into to avoid prolixity. The recusal application was heard by the fifth respondent and was later dismissed. My legal representatives, on my instructions, indicated that I would be seeking to review and set aside the recusal ruling on the basis that the fifth respondent had acted as an adjudicator in his own cause. This was so because the fifth respondent had presented evidence to himself in the form of a statement of facts that I had specifically disputed. I

together with my legal representatives left the commission after the fifth respondent had adjourned the proceedings on the understanding that we were entitled to do so given the position that we had taken in relation to the fifth respondent's ruling.

28. To my surprise, following my departure, I came to learn that the fifth respondent had taken the view that I had violated the terms of the summons by leaving the Commission without being excused by him. It was then that the fifth respondent announced his ruling directing the secretariat of the commission to report me to the South African Police Service for investigation and possibly prosecution for the crime under the Commissions Act. I have yet to receive that complaint and to be subjected to the prescribed process envisaged under the Commissions Act.
29. Nonetheless, my legal representatives proceeded to file a review application against the decision of the second respondent at the High Court in Pretoria. That application is still pending and the first and second respondents have dismally failed to deliver their answering affidavits. Instead, they have taken the unprecedented and unknown step of requiring me to indicate my "seriousness" in lodging the review application. A copy of the relevant Notice of Motion is attached to the rescission application.
30. Instead of bringing proceedings against me, as announced by the first respondent and as required by the Commissions Act, in December 2020, the Commission instead filed an urgent application with the Constitutional Court for order seeking to enforce its rulings against me in relation to my appearance before the Commission.

31. I elected not to file any opposing papers because, firstly to avoid a cost order that the commission was seeking against me in the event of opposing the application, secondly due to general financial hardship on my part and thirdly because I was advised that there was reasonable prospect of the Constitutional Court refusing to entertain the urgent and direct application on the basis that the fifth respondent had remedies available to the commission in terms of the Commissions Act to enforce his rulings against me. I was further advised that in light of the fact that the fifth respondent's ruling that the commission would be pursuing proceedings against me in terms of the Commissions Act, the principle of subsidiarity prevented the hearing of this matter in violation of that prescribed process without impugning the constitutionality of the Commissions Act. All the relevant advice was given and accepted in good faith.
32. The unopposed application of the fifth respondent was heard in late December 2020 by the Constitutional Court which handed down its judgment on 28 January 2021. The order of the Constitutional Court directed me to:
- 32.1. obey all summonses and directives lawfully issued by the commission;
 - 32.2. directed to appear and give evidence before the commission on the dates determined by it;
 - 32.3. declaring that I did not have a right to remain silent in the proceedings before the commission
 - 32.4. declaring that I was entitled to all the privileges under section 3(4) of the Commissions Act, including the privilege against self-incrimination.

33. Armed with this judgment and its orders, the Commission issued summons for me to appear before the commission 15 February 2021. I took advice on the implications of these summons and was advised that although the commission was exercising a power under the Commissions Act, I was now under the compulsion of the orders of the Constitutional Court to appear before. I asked about the implication of this position on my review application. I was told that in essence, I was being ordered to appear before a presiding officer against whom I had mounted a challenge against him in relation to his right to preside in matters involving me and my family. I felt that my right to have my recusal application resolved before appearing before the fifth respondent guaranteed in section 34 of the Constitution was being violated. I formed the view that the orders of the Constitutional Court were essentially requiring me to appear before a biased tribunal in violation of my right to an impartial and fair tribunal and in violation of my right to have the review application resolved. This placed me in a difficult position and I decided that I would not comply with the summonses of the commission to appear in February 2021. My attorney conveyed to the commission that I was awaiting the outcome of the review proceedings in the High Court before I am lawfully obliged to appear before the commission whose independence and impartiality I had challenged in court. I did not file an interdict against the Commission in relation to this issue as I was advised that section 34 of the Constitution was sufficient to protect my right to refuse to appear before a commission pending the outcome of that legal process.

34. After a few weeks of my not appearing in the commission, I was served with an urgent, direct access application again to the Constitutional Court for orders

that I had failed to comply with its orders by not 'obeying the summons' of the commission as directed by the Constitutional Court. The problem is that I formed the view that the summonses were not lawfully issued against me. This is because a biased tribunal is not entitled or even competent to issue a legal process in terms of the Commissions Act. This is why the commission's approach to the Constitutional Court on a direct and urgent basis was not to enforce summonses issued under the Commissions Act, but summonses issued under the orders of the Constitutional Court. In essence, contrary to my right in section 34 to have my dispute resolved by the application of the law in review proceedings by a court of law, I was being compelled to forfeit my right and to appear before the commissions under those conditions of legal uncertainty in relation to the fairness and impartiality of the process.

35. The contempt application of the commission was heard on 25 March 2021 and the judgment handed down on 29 June 2021. I attach a copy of the judgment as "**JZ3**".

36. Without a civil or criminal trial on the merits of the complaint of non-compliance of the orders of the Honourable Court, I was summarily sentenced to a 15 months' direct imprisonment. In terms of the committal order, I must submit myself to the South African Police Service ("SAPS") failing which I should be escorted to prison through coercive measures to a correctional centre within three days. I prepared this application under these conditions.

37. I cannot forfeit my right to challenge this incarceration order and I do so in the application that I have presented to the Constitutional Court. Ordinarily, had my summary conviction and sentence been done through the Criminal

Procedure Act and with due regards to my rights under section 9, 12 and 35(3) of the Constitution, I would have enjoyed the same rights of all convicted persons – of appeal to the higher courts. I am unable to appeal to any court because the Constitutional Court is the final court for which there is no appeal for a convicted person in my position. That is why I seek to approach that same court to rescind the order and also to hopefully reconsider whether it is lawful to treat me differently to any criminal accused. In any event, the Constitutional Court has no criminal jurisdiction which the CPA confers only on the lower courts. The grounds for the rescission application are more fully set out in that application.

38. I therefore seek a stay of this incarceration order pending the determination of the rescission application, as well as the relief set out in Part B of the Notice of Motion. Part B of the Notice of Motion mainly pertains to a constitutional challenge to the common law distinction of civil and criminal contempt proceedings. I seek an order declaring that it is not compatible with the Constitution for a person convicted of the crime of civil contempt to be sentenced to any term of imprisonment without conducting a civil or criminal trial in terms of the Criminal Procedure Act.

E: GROUNDS OF APPLICATION

39. I have since the handing down the Constitutional Court judgment of 29 June 2021, been advised that there is a basis upon which I may approach the Constitutional Court for the rescission, reconsideration or variation of the order and/or judgment of the Constitutional Court.

40. I have as a result instructed my legal representatives to launch an alternative application for reconsideration or variation of the judgment, to the extent that it may be necessary. This may also be done under the general rubric of just and equitable remedies in terms of section 172(1)(b).
41. I am advised that the application I have brought to the Constitutional Court is permissible in terms of Rule 29 of the Constitutional Court Rules read with Rule 42 of the High Court Rules. To the extent necessary and permissible, I also bring that application under the common law.
42. I am further advised that while this is an extraordinary application in itself, my prospects of success are reasonable, particularly in light of the admitted exceptionality of the circumstances under which I must serve a term of imprisonment for contempt in circumstances where I was not subjected to a trial. Detention without trial was outlawed with the advent of the current Constitution, which makes a break with our ugly past. Section 12(1)(b) of the Constitution specifically prohibits detention without trial.
43. I have attached a copy of the application to the Constitutional Court above. As a summary of that case, I seek an order that the Court should reconsider and rescind its orders of incarceration that were summarily imposed without a trial conducted. I believe that it is in the interest of justice that I am given the opportunity to have my application in the Constitutional Court determined before I am serve my term of imprisonment, if any.
44. In addition to the rescission application in the Constitutional Court, I seek an order that this Honourable Court determines the constitutionality of the rule in terms of which a person facing civil contempt may be convicted and sentenced

in a manner that does not comply with the provisions of the CPA and section 35(3) of the Constitution. In essence a person in civil contempt proceedings may be tried and sentenced to serve a term of imprisonment without a trial being conducted in accordance with the provisions of the CPA and the Constitution – as any other criminal accused. Moreso in conditions such as the present, where an applicant approaches a court in contempt proceedings with the sole and exclusive aim of securing the imprisonment of any natural person such as me.

45. My pending incarceration is imminent in a matter of days or hours. There are no compelling reasons why I should not be afforded the protection of an interdict or a stay of incarceration pending the determination of my court applications.

F: SUSPENSION ORDER IN TERMS OF SECTION 172(1) OF THE CONSTITUTION

46. In the main, I seek to assert the conclusion that the impugned decision was made in violation of the supremacy of the Constitution and is accordingly invalid.

47. The orders of the Constitutional Court implicate my constitutional rights to inherent dignity in section 10 and to freedom of movement, as well as my bodily integrity, I believe that an order staying my incarceration which has been ordered by the Constitutional Court be stayed. This will allow for significant constitutional issues involving the orders of the Constitutional Court and determination of the constitutionality of the law of civil contempt to the extent that it is not dealt with under the Criminal Procedure Act and section

35(3) of the Constitution but allows for the criminal conviction and imprisonment of the accused without a trial. Furthermore, it is unconstitutional to sentence any convicted person without following the CPA which, with rigorous detail, sets out a fair procedure involving a trial in which an accused person is given the space to mount a defence to the charges and present evidence in mitigation.

48. The issues I seek to have determined by the Court are fundamental to the basic liberty of persons and is a fundamental right in the Bill of Rights that I believe stands to be arbitrarily violated if I am incarcerated under these uncertain legal conditions.

49. Due to my advanced age and very precarious health conditions and in light of the current and latest outbreak of the Covid-19 deadly pandemic, my imprisonment will pose a threat to my life itself. The death sentence, whether directly or indirectly administered, was declared unconstitutional in South Africa. These factors were self-evidently not taken into account in ordering my imprisonment.

50. As more fully explained elsewhere in this affidavit and/or in the rescission application, this matter also affects my other fundamental human rights, as enshrined in the Bill of Rights, notably the following provisions of the Constitution:

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

“Everyone is equal before the law and has the right to equal protection and benefit of the law.”

50.2. Section 10, which provides that:

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

50.3. Section 11, which provides that:

“Everyone has the right to life.”

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

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

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

(b) not to be detained without trial.”

50.5. Section 34, which provides that:

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

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

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

51. These constitutional rights are all engaged in the application before the Constitutional Court and in Part B of this present one. I believe that an order staying the execution of the orders of the Constitutional Court pending the outcome of these two applications is in the interest of justice, does not

undermine the authority of the Constitutional Court and the Commission is not prejudiced. What the commission really wants from the Constitutional Court has already been granted in the form of the orders that I seek suspended. If I fail in my applications, I will serve my time in prison. I have said publicly and now say so under oath. I believe that it is just and equitable to grant an order suspending the execution of orders 3 and 4 of the aforementioned judgment of the Constitutional Court pending the determination of Part B of this application and the application before the Constitutional Court.

52. In my rescission application, I raise fundamental procedural issues relevant to the protection of the bill of rights. The judgment of the Constitutional Court raised but did not resolve the following fundamental issues of constitutional importance: (a) whether this Court could, in clear violation of the principle of subsidiarity, bypass the provisions of the Commissions Act and the penalties provided therein even in situations where the Commission has elected to file criminal charges that are pending investigation by the NPA; (b) whether in bypassing the provisions of the Commissions Act, this Court violated my constitutional right to equality; (c) whether in improvidently exercising jurisdiction over a matter pending before the NPA and the High Court, this Court violated my right of access to Court and right to fair trial under sections 34 and 35 respectively; (d) whether in the extant case where the justices claim to have been “attacked” by the applicant, constitutional due process forbids the justices from wearing too many hats - it is a violation of due process for the same judges to claim to be victims of attack by me and then preside over a contempt proceeding related to the alleged attacks and then issue a judgment including harsh criminal sentence for the alleged attacks. Having

been a part of an accusatory process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused;¹ (e) whether in light of the doctrine of *stare decisis* this Court's judgment has effectively rendered the pending High Court judicial review proceedings and the NPA's investigation of alleged contempt moot and academic and whether the High Court is now directed to find against the applicant and (f) whether this Court's use of the coercive and punitive sanctions despite its disavowal of the former is constitutional.

53. These issues are the basis on which, amongst others, I seek to approach this and the Constitutional Court. My right to institute both the rescission application and to seek the declaration of unconstitutionality sought in Part B are indisputable.

F: REQUIREMENTS FOR AN INTERIM INTERDICT

***Prima facie* right**

54. I clearly have a right to approach the High Court for an order suspending the execution of an order that implicates my constitutional rights set out above. I

¹ See *Dube & Others v The State* (523/07) [2009] ZSCA 28; 2009 (2) SACR 99 (SCA) where the SCA stated the following:

'The rule is clear: generally speaking a judicial officer must not sit in a case where he or she is aware of the existence of a factor which might reasonably give rise to an apprehension of bias. The rationale for the rule is that one cannot be judge in one's own cause. Any doubt must be resolved in favour of recusal. It is imperative that judicial officers be sensitive at all time. They must of their own accord consider if there is anything that could influence them in executing their duties or that could be perceived as bias on their part. It is not possible to define or list factors that may give rise of apprehension of bias – the question of what is proper will depend on the circumstances of each case.'

have been convicted and sentence by the Constitutional Court for a crime that does not require to be dealt with in accordance with the CPA and section 35(3) of the Constitution. In fact, I would be a person in the same position as one who is convicted and detained without a trial if this suspension order was carried out.

55. The judgment in the minority order at the very least flags this issue of whether it is competent for a conviction and sentence to be imposed without a trial. While I accept that the binding court judgment is the majority judgment, the dissenting judgment goes as far as declaring that the majority judgment violates my constitutional rights in section 12 and 35(3) of the Constitution. I believe that the finding of the minority judgment on this issue ground *prima facie* a right to have the issue of whether it is constitutional to discriminate between persons who face criminal charges on the basis that one is criminal and the other is civil. I believe and submit that it is unconstitutional to unfairly discriminate between civil and criminal contempt proceedings in that a person convicted for civil contempt and sentenced to a term of imprisonment does not enjoy the same substantive and procedural rights guaranteed in terms of the CPA and section 35(3) of the Constitution. Given that civil contempt of court is a crime, it is unconstitutional to determine it outside the CPA which governs how criminal proceedings should be conducted and by whom.

56. The current state of law of contempt creates the very problem that the Constitutional Court judgment amplifies – which is that the court or judges of the Constitutional Court may make arbitrary, ad hoc or situational rules of trial without conducting a trial. The problem may lie not with specific judges but the

gaping lacuna in our law to cater for this unprecedented situation where contempt proceedings are instituted with the specific aim of achieving criminal law outcomes.

57. I am advised that in order to enable me to prosecute my constitutional challenges in both this and the Constitutional Court, the incarceration orders of the Constitutional Court in paragraphs 3 and 4 should be suspended. I am therefore entitled to an interdict suspending the operation of these orders. It will be argued that this essentially is a *habeas corpus* interdict and it should accordingly be approached according to the special rules applicable thereto.
58. Notwithstanding this deep-seated and genuinely held apprehension regarding my approach to the Constitutional Court, I nonetheless do so because no matter how robust my engagement on the issues involving the judiciary are, and no matter how hurt the justices are, they will nonetheless give effect to my right on the basis of their oath of office. They are in any event duty-bound to do so by their oath of office. I quote the admonition expressed by Chief Justice Gajendragadkar of India, speaking for six (including himself) of the seven learned Judges, in **Special Reference No. 1 of 1964** under Article 143, where he said:

"Before we part with this topic, we would like to refer to one aspect of the question relating to the exercise of power to punish for contempt. So far as the Courts are concerned, Judges always keep in mind the warning addressed to them by Lord Atkin in Andre Paul v. Attorney-General of Trinidad, AIR 1936 PC 141. Said Lord Atkin, 'Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful even

though out-spoken comments of ordinary men.' We ought never to forget that the power to punish for contempt large as it is, must always be exercised cautiously, wisely and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity or status of the Court, but may sometimes affect it adversely. 'Wise Judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct.'

59. I believe that I have demonstrated that I have a right to approach this court and the Constitutional Court to protect my constitutional rights and to seek orders that have a direct impact on how the crime of contempt of court should be dealt with. Furthermore, the Constitutional Court itself finds that the circumstances of the involving my summary conviction and sentence for contempt is extraordinary and exceptional in its nature. That can only mean that there is appreciable basis on which it would welcome another opportunity to reflect on the issues that I am raising with them in that application to the Constitutional Court. I have a right to have this court begin the journey to scrutinising the real implications of a civil procedure that allows a criminal conviction and sentencing without a civil or criminal trial.

Reasonable apprehension of harm

60. I submit that my apprehension of harm is reasonable in the circumstances in that:

60.1. I am an elderly person who is over 79 years of age and therefore in the highest category of persons likely to be affected by the prevailing and worsening Covid 19 pandemic. I have a medical condition that requires constant monitoring and care that incarceration will no doubt exacerbate. I am not suggesting that I should not be imprisoned if I am unsuccessful in my court applications. All that I am pointing out are medical realities that persons of my age will face. This issue relates directly to the crucial question raised in the rescission application, namely whether or not the omission to grant me the ordinary opportunity to advance mitigating circumstances after conviction, like all other persons facing imprisonment, was not another severe limitation of my fair trial rights. The current mitigating circumstances, including the latest outbreak of Covid-19, were not in existence two or three months ago when I was prematurely asked to present mitigation without being convicted.

60.2. Given the impact of this Court's judgment on my judicial review application pending in the High Court and the unprecedented interference with the High Court's proceedings in violation of section 166 of the Constitution by this Court, the issues raised here are weighty constitutional matters deserving of a full hearing before this Honourable Court. I have nowhere to appeal, hence my application to have the same Constitutional Court that convicted and sentence without a civil or criminal trial reconsider, vary or rescind its orders. Yet the Constitutional Court erroneously declared that "*the right of appeal does not arise*" in my case.

- 60.3. My apprehension for irreparable damage is not just that I will be imprisoned but that I will be imprisoned through a process that does not comply with the requirement of the criminal law and procedure. I accept that if I am convicted and sentenced, I should serve my time in prison. What I am raising in this application and the one to the Constitutional Court is whether it is consistent with our Constitution to convict and sentence me for crime without conducting a trial – in which I there are numerous safeguard and procedural rights that I would be entitled to invoke.
- 60.4. In the case of the Constitutional Court, I was convicted and sentence without a trial. If this sentence is carried out, then I will be detained without a trial. This is clearly a matter that cries out to be treated with requisite a modicum of judicial calmness and restraint because I am sure that my views, opinions and attitude to how I believe I have been treated by the courts have, rightly or wrongly, angered many at a personal level. However, the judicial level is thankfully different.
61. My state offered security as former head of state also supports the vulnerability that I would be exposed and the dangers associated with my former position if this unlawful incarceration. It is for these reasons that the South African state has afforded me the highest level of security details around the clock. Because the procedure for dealing with a crime of civil contempt does not require a trial under the CPA, the incarceration orders of the Constitutional Court do not take the issue of my security into account should I be jailed. There is no evidence on which to appreciate how the civil contempt

process affords the contemnor the right to present evidence, how that evidence is evaluated and determined and how the sentence is reached. The 15-month sentence was determined in default judgment proceedings and in the absence of the accused person.

62. Furthermore, if I am subjected to imprisonment, even for one day, and it turns out later that the rescission application is granted, then I will not be able to recover from the damage done to my health, dignity, reputation and personal freedom. Not even a damages claim can possibly repair the incalculable harm which would have been caused in all the circumstances of this matter.

No alternative remedy

63. Outside of bringing this application on an urgent basis, I have no other legal remedy available to me in the circumstances. An order granted by the highest court in the land can only be stayed or suspended in the present proceedings.
64. I cannot bring a bail application either and thus my only relief in the circumstances is to seek a stay of execution of the order pending the finalisation of the reconsideration application. I accept that I cannot appeal the judgment of the Constitutional Court as I have set that out above. The rights which I am exercising are those available to me in terms of the Constitution of the Republic, which is the supreme law binding on all institutions, including the courts. I am indeed taking ongoing legal advice on any other legal steps which may be available to a person in my position, both within and outside of the borders of this Republic.

65. As already mentioned, a damages claim will not conceivably provide an adequate alternative remedy to what is essentially a *habeas corpus* interdict.
66. Save for the above steps, I have no alternative adequate legal remedy at my disposal.

Balance of convenience

67. In light of the fact that the application I seek bring at the Constitutional Court pertains to my constitutional rights, I submit that the protection of these rights is paramount and any exercise intended to protect these rights ought to be given the fair opportunity to be reasonably considered.
68. The delay in the execution of the order, if granted legitimately by a court of law, cannot conceivably prejudice any of the respondents or indeed any other person. On the contrary, it may well be of assistance to some of the respondents by giving them time to improve their state of readiness, which I reasonably anticipate to be parlous, more particularly in the urgent unforeseen circumstances of a Level 4 Covid Alert.
69. I do not pose any danger to the public or the safety of any person such that my immediate incarceration is a necessity. I am certainly not a flight risk.
70. If I am imprisoned and my sentence is subsequently set aside for any reason, I will not be able to recover the damage done. On the other hand, if my detention is suspended or interdicted and I do not succeed in the main application(s), I will still serve my term of imprisonment at that stage.

71. I submit that the balance of convenience in this case overwhelmingly weighs in favour of granting the relief sought in my favour.
72. To the extent that it may be argued that the so-called *OUTA* test applies, which I am advised it will be argued to be inapplicable, I nevertheless point out that there is no question of separation of powers harm. The relief sought flows directly from a *prima facie* declaration of unconstitutionality. In any event, the *OUTA* test does not apply to the suspension relief which is primarily asserted.

Prospects of success

73. As can be gleaned from a cross-reference to the main rescission application brought before the Constitutional Court, that application has very good prospects of success, more particularly in that:
- 73.1. The rescission application is anchored on the notion that the Constitutional Court exceeded its powers and acted *ultra vires*;
- 73.2. All other orders are therefore sought in the form of just and equitable remedy;
- 73.3. The limitations of right are plain and undeniable;
- 73.4. The failure to perform a section 36 inquiry is fatal to the survival of the impugned orders;
- 73.5. The errors and omissions pointed out in the rescission application are of sufficient quantity to justify the relief sought therein.

74. In all the circumstances, the prospects of success are similarly good in respect of the Part B relief dealing with the declaration of unconstitutionality, which in any event lies in the exclusive domain of this Honourable Court and the Constitutional Court.

G: URGENCY

75. I submit that the urgency of this case is inherent in the facts given that I have been given five calendar days within which to comply with the order of the Constitutional Court. The first and/or second respondents have been given three calendar days within which to use coercive force to execute the order. These two periods expires on Sunday, 4 July, and Wednesday, 7 July 2021, respectively.

76. The application implicates my fundamental rights, which are under direct and imminent threat, including the right to life.

77. Self-evidently, the urgency is not self-created. Neither can it be argued that the relief sought herein can be obtained in due course.

78. The previous proceedings related hereto have all been dealt with on the basis of urgency.

79. In any event, it is not reasonably anticipated that any respondent will argue that this application is not urgent.

80. In the circumstances, I cannot bring this application in the normal course.

81. I have not delayed bringing this application and have sought to bring this matter before the above honorable court in the shortest reasonable time.

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

DEPONENT

I HEREBY CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at _____ on this the _____ day of **JULY** 2021, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS