IN THE HIGH COURT OF SOUTH AFRICA

(KWAZULU NATAL DIVISION, PIETERMARITZBURG)

CASE NO: 4686/21P

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA	Applicant
and	
THE MINISTER OF POLICE	First Respondent
NATIONAL COMMISSIONER FOR THE SOUTH AFRICAN POLICE SERVICE	Second Respondent
MINISTER OF JUSTICE AND CORECTIONAL SERVICES	Third Respondent
THE SECRETARY OF THE JUDICIAL COMMISSION OF INQUIRY INTO STATE CAPTURE, FRAUD AND CORRUPTION IN THE PUBLIC SECTOR, INCLUDING ORGANS OF STATE	Fourth Respondent
RAYMOND MNYAMEZELI ZONDO *NO*	Fifth Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Sixth Respondent
THE HELEN SUZMAN FOUNDATION	Seventh Respondent

HELEN SUZMAN FOUNDATION'S HEADS OF ARGUMENT

Table of Contents

INTRODUCTION AND OVERVIEW

1. "*Never before has the legitimacy of this Court, nor the authority vested in the rule of law, been subjected to the kind of sacrilegious attacks that Mr Zuma, no less in stature than a former President of this Republic, has elected to launch. Never before has the judicial process, nor the administration of justice, been so threatened. It is my earnest hope that they never again will*."[1]

2. So spoke the Acting Deputy Chief Justice, mere days ago, in the Constitutional Court's judgment finding Mr Zuma guilty of contempt and ordering his imprisonment.

3. Yet, by launching this application, Mr Zuma has made a mockery of the Acting Deputy Chief Justice's earnest hope. Stripped of its verbiage, Mr Zuma's application is a naked and abusive attempt to undermine the legitimacy of the Constitutional Court and avoid compliance with its binding and final order.

4. Mr Zuma's case is fatally flawed. It lacks all merit, and by its very nature it is an abuse of process. This Court has no jurisdiction to interdict an order of the Constitutional Court. Mr Zuma approaches this Court for relief, yet he has failed and continues to fail to purge his contempt of court. And, Mr Zuma's rescission application in the Constitutional Court has no prospects of success – but even if for a moment there was a hope, this Court will exercise its discretion against granting interim relief.

5. Mr Zuma's continuing contumacy is extraordinary and constitutionally abhorrent. He is the former President of the country. He swore an oath to "*obey, observe, uphold and maintain the Constitution*".[2] Indeed, as the

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[1] See *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* (CCT 52/21) [2021] ZACC 18 (29 June 2021) (***Secretary of the Judicial Commission of Inquiry***) para 138.

[2] Constitution Schedule 2, part 1.

Constitutional Court has held, the President is "*a constitutional being by design, a national pathfinder, the quintessential commander-in-chief of State affairs and the personification of this nation's constitutional project*".[3]

6. Thus, the head of the Republic must be beyond reproach. He must personify our constitutional democracy and its values. Of all our nation's citizens, it is he who bears the greatest responsibilities, and it is he who is the most accountable to the law.

7. These observations apply equally to Mr Zuma, as the former head of state. This is particularly so since at the heart of this matter, and Mr Zuma's contempt, is his refusal to appear before the State Capture Inquiry in relation to his time as President.

8. As the Constitutional Court emphasised, when finding Mr Zuma guilty of contempt, and ordering his imprisonment, "*Mr Zuma is no ordinary litigant. He is the former President of the Republic, who remains a public figure and continues to wield significant political influence, while acting as an example to his supporters. … He has a great deal of power to incite others to similarly defy court orders because his actions and any consequences, or lack thereof, are being closely observed by the public. If his conduct is met with impunity, he will do significant damage to the rule of law*."[4]

9. Instead of upholding his oath and responsibilities, Mr Zuma defied and vilified the law and the judicial branch, which is tasked with interpreting and giving life to the law. Yet, Mr Zuma now seeks to avoid any accountability. He aims to do so by subverting the order of the highest Court in the land, the Constitutional Court, such that he may be afforded a reprieve which only the Constitutional Court would have competence to grant. He wants this reprieve pending the

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[3] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) para [20].

[4] See *Secretary of the Judicial Commission of Inquiry* para 97, emphasis added.

outcome not only of a hopeless application for rescission before the Constitutional Court, but also pending a Part B constitutional challenge to legislation which he raises in this Court. The latter challenge could, of course, take years to resolve, which appears to be Mr Zuma's strategy. More importantly, that challenge obviously has no prospects of success because the majority of the Constitutional Court in its judgment of 29 June 2021 already rejected these very points.

10. Despite a definitive and binding ruling by the Constitutional Court that it is constitutionally permissible and necessary to commit Mr Zuma to prison for his contempt of its order, Mr Zuma argues that this Court should suspend that order so he can reargue the very issues decided by the Constitutional Court.

11. This Court must not allow this to occur.

12. Mr Zuma was afforded every opportunity to participate before the Constitutional Court in relation to the proceedings which resulted in the Constitutional Court judgment and order dated 29 June 2021 ("**the CC judgment**" and "**the CC Order**" respectively).[5] Mr Zuma was even afforded the somewhat extraordinary opportunity to make submissions to the Constitutional Court after the hearing of the contempt case, which opportunity he elected to decline. Instead, he wrote a letter which, was not only "*totally irrelevant*" but once again made "*inflammatory statements intended to undermine this Court's authority*."[6]

13. Thus, Mr Zuma not only elected not to participate in the Constitutional Court's proceedings, but proceeded publicly to scandalise the Court and impugn the

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5 See e.g. *Secretary of the Judicial Commission of Inquiry* paras 72 and 73.

6 *Secretary of the Judicial Commission of Inquiry* paras 72.

judiciary, repeatedly.[7] Indeed, the Court held, it "*afforded Mr Zuma multiple opportunities to place relevant material before it. He has dismissed those opportunities with disdain*."[8]

14. In a detailed judgment which considered all aspects of the case, including the very legal issues Mr Zuma now belatedly raises, the Constitutional Court found Mr Zuma guilty of contempt of court and sentenced him to 15 months' imprisonment.[9]

15. Mr Zuma now – optimistically – contends that:

15.1 because his views differ with those of the majority of judges in the Constitutional Court, the CC Order is the product of a patent error and can be rescinded;

15.2 his sentence of imprisonment should be stayed – potentially for years – whilst he runs a constitutional challenge against the very legislation already considered and processes affirmed by the Constitutional Court; and

15.3 this High Court has the competency to suspend a final order of the Constitutional Court, despite the clear hierarchy of judicial authority.

16. Quite simply, Mr Zuma seeks to be a law unto himself: a law higher than the Constitution and an authority higher than the Constitutional Court. And he now seeks to enlist this Court's help in his efforts at subverting the Constitutional Court.

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7 *Secretary of the Judicial Commission of Inquiry* para 72.

8 *Secretary of the Judicial Commission of Inquiry* para 79.

9 *Secretary of the Judicial Commission of Inquiry* para 142.

17. His application is self-serving and legally unsustainable, both technically and substantively, as we discuss below. This Court must dismiss it.

18. We structure the remaining portion of these heads as follows:

18.1 First, we explain why this Court has no jurisdiction to interdict the CC order.

18.2 Second, we emphasise that Mr Zuma should have no standing to approach this Court because he has failed to purge his contempt – and this fact alone inclines against the Court exercising any discretion in his favour.

18.3 Third, we deal with why Mr Zuma's recission application has no prospects of success

18.4 Fourth, we point out that the mere fact that the Constitutional Court has set down the rescission application for urgent hearing is irrelevant to the question of whether the interdict should be granted.

18.5 Fifth, we deal briefly with Mr Zuma's Part B constitutional challenge, to demonstrate why it is meritless.

18.6 Sixth, we explain why the interdict is not in the public interest, and will subvert the administration of justice.

18.7 Finally, we provide a conclusion, which deals with the issue of costs.

LACK OF JURISDICTION

19. This Court does not have jurisdiction to grant the interdict sought by Mr Zuma. This Court has no jurisdiction to interfere with, much less suspend, an order of

the Constitutional Court granted in the exercise of the Constitutional Court's original jurisdiction as the court of first and last instance. Mr Zuma's application is thus stillborn.

20. It is trite that a court order stands and must be strictly obeyed unless, and until, set aside by a higher court, and even the same court which granted the original order does not have the competence to nullify its effect or interfere with that order except in very limited circumstances in the context of variation or rescission.[10] It is to the Constitutional Court alone that Mr Zuma can look for a suspension or variation of the CC Order.

21. The Constitutional Court when exercising its appellate jurisdiction, may set aside, substitute or amend the order of a High Court or the Supreme Court of Appeal. In those instances, the Constitutional Court's order becomes the order of court of first instance.[11]

22. But the order in this case is of a fundamentally different nature. In this instance, the Constitutional Court granted direct access, it was not entertaining an appeal. The CC Order thus does not replace any order of an underlying court. It is the order of the Constitutional Court alone. The Constitutional Court has exercised original jurisdiction, and the High Court has no powers of intervention or suspension in relation to the CC Order, since the order is not deemed to be one of the High Court's orders, which it can interfere with. Only the Constitutional Court, in limited and exceptional circumstances, has the power to do that. The Constitutional Court in its judgment firmly stressed that

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10 *Daniel v President of the Republic of SA* 2013 (11) BCLR 1241 (CC) para 5. See also *Zondi v MEC for Traditional and Local Govt Affairs and Others* 2006 (3) BCLR 423 (CC) paras 28 and 29.

11 *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and* Another [2012] ZACC 9; 2012 (9) BCLR 951 (CC) para 7.

the Constitution itself has taken away the right of appeal where direct access is warranted, that direct access was warranted in this case, and that the CC Order was aimed at protecting the integrity of the judicial process through the dignity of the Constitutional Court itself.[12]

23. In *Occupiers of Saratoga Avenue*, the Constitutional Court explained the position, as follows:

> "[7] It is usual that in a successful appeal, the appellate court may make the order that the court of first instance should have made. That order then becomes the order of the court of first instance. Execution and enforcement of the order should then take place **in that court**.
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> [8] This Court has jurisdiction to hear matters other than as a court of appeal. Blue Moonlight was, however, not that kind of case. It was an appeal against the judgment of the Supreme Court of Appeal. Paragraph (e) of the order made it clear that it was the usual 'set aside and replace' kind of order made in an appeal. It effectively became an order of the High Court."[13]

24. Thus, the Constitutional Court has made the position clear:

24.1 Execution and enforcement of the order takes place in the court of first instance.

24.2 It is only when the Constitutional Court acts as an appellate court that its orders then effectively become orders of the High Court.

24.3 And it is only in that instance that the High Court, whose order it is, may involve itself in the execution and enforcement of the order.

24.4 But, importantly, there are instances where the Constitutional Court exercises jurisdiction to hear matters, not as an appeal court, but as a court of first instance. In those instance, it is the Constitutional Court that is the court of first instance, and therefore, it is the Constitutional Court

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12 *Secretary of the Judicial Commission of Inquiry* para 80.

13 *Occupiers of Saratoga Avenue* paras 7 and 8, emphasis added.

that must deal with execution and enforcement of its order made as a court of first instance.

25. The position is certain. There is no room for debate. This Court has no jurisdiction to interfere with the CC Order, granted as it was, in the exercise of the Constitutional Court's original jurisdiction as a court of first instance.

26. And it has no competence, effectively through a backdoor disguised appeal, to interfere therewith. Therefore, this Court – a High Court – is not vested with any jurisdiction to suspend the operation of a CC order. Yet this is exactly what Mr Zuma impermissibly asks this Court to do – effectively to overrule the Constitutional Court's unequivocal order that Mr Zuma is "*ordered to submit himself to the South African Police Service, at Nkandla Police Station or Johannesburg Central Police Station, within five calendar days from the date of this order, for the Station Commander or other officer in charge of that police station to ensure that he is immediately delivered to a correctional centre to commence serving the sentence [of 15 months' imprisonment]*."[14]

27. It is not open to Mr Zuma to suggest that a lower court can thwart our highest Court's will. Mr Zuma no doubt realises this to be true, since his rescission application (which has no merit) has been brought in the Constitutional Court.

28. Moreover, it is a fundamentally different proposition in having a High Court issue an interdict pending the hearing of a matter by the Constitutional Court compared to a High Court issuing an interdict suspending a Constitutional Court order already made. Mr Zuma's case requests the latter, which is jurisdictionally incompetent. Mr Zuma requests an interim regime which is

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14 CC Order para 5, *Secretary of the Judicial Commission of Inquiry* para 142.

destructive of the ruling by our nation's apex Court, and asks a High Court to assume an over-ride power which it simply does not possess.

29. Thus, unless the Constitutional Court suspends or rescinds the CC Order, Mr Zuma and this Court are bound by the command in section 165(5) of the Constitution: orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts.

MR ZUMA HAS FAILED TO PURGE HIS CONTEMPT AND SHOULD NOT BE PERMITTED TO APPROACH THIS COURT

30. Not only does this Court not have jurisdiction to stay the CC Order, but Mr Zuma's application should not even be entertained because he has failed to obey the Constitutional Court's orders, and thus has failed to purge his contempt of court.

31. As the Constitutional Court has held:

> "**It can only be described as unconscionable when a party seeks to invoke the authority and protection of this Court to assert and protect a right it has, but in the same breath is contemptuous of that very same authority in the manner in which it fails and refuses to honour and comply with the obligations issued in terms of a court order**. The High Court, in *Di Bona*, supports the view that a court may refuse to hear a party until they have purged themselves of the contempt by coming to the following conclusion:
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> 'The consequences of the rule are that **anyone who disobeys an order of [c]ourt is in contempt of [c]ourt and may be punished by arrest of his person and by committal to prison and, secondly, that no application to the [c]ourt by a person in contempt will be entertained until he or she has purged the contempt**.' "[15]

32. The judicial authority vested in courts obliges them to ensure that there is compliance with court orders to safeguard and enhance their integrity,

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[15] *SS v VV-S* [2018] ZACC 5; 2018 (6) BCLR 671 (CC) (***SS***) para 31, emphasis added.

efficiency, and effective functioning. The Constitutional Court has made clear, "*[a]ll court orders must be complied with diligently, both in form and spirit, to honour the judicial authority of courts. There is a further and heightened obligation where court orders touch interests lying much closer to the heart of the kind of society we seek to establish and may activate greater diligence on the part of all*."[16]

33. In the present matter the Constitutional Court orders indeed touch interests that lie at the very heart of our constitutional democracy. We quoted previously from the Constitutional Court's decision where it stressed that "*Never before has the judicial process, nor the administration of justice, been so threatened*".

34. Despite this, Mr Zuma has deliberately continued with his ongoing defiance of the Constitutional Court's orders.

35. He was in terms of paragraph 5 of the 29 June Order already meant to hand himself over to the Police. The Constitutional Court ordered him to report to the South African Police Service within 5 calendar days from 29 June 2021, being by Sunday, 4 July 2021. His constitutional delinquency is now openly in continued defiance of the Constitutional Court.

36. His ongoing contempt for the Constitutional Court's orders is not only on legal display through the case he has launched in this Court, but is aligned with public statements made by his foundation, the Jacob Zuma Foundation (from which Mr Zuma has not distanced himself), after the Constitutional Court issued its order on 29 June 2021.[17] In that statement, the Jacob Zuma Foundation "*denounces Judge Kampempe (sic) judgment as judicially*

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16 *SS* para 23.

17 AA para 36, and a copy of the statement, dated 30 June 2021, is annexed marked "**AA1**" to the AA.

emotional & angry and not consistent with our Constitution". This is itself contemptuous and scandalous of the Court.

37. Mr Zuma remains stridently defiant to this day. He has no intention to abide by the CC Order nor does he intend to appear before the Commission and participate in those proceedings. In fact, his position – publicly stated and confirmed on affidavit – is that there should be no investigation into corruption at all. In this regard, we refer to *The Citizen* newspaper on 4 July 2021 and highlight the following remarks made during an address outside his Nkandla home the day before: (which remarks Mr Zuma has confirmed he made, and defended his right to make):[18]

37.1 "*It will be difficult for me to hand myself over for imprisonment when I have done nothing wrong*";

37.2 "*This to me is a clear indication that that lawmakers, and even maybe those that are in power do not have an idea of what it means to be in power and to be in charge of taking care of the laws*"

37.3 "*I would like to remind you that even during the times when this commission was formed, I made remarks that one day there will be consequences because they were asking me to do something never before done*";

37.4 in the context, allegedly, of a statement that South Africa was the only country in the world to ever request its officials to investigate their own government and matters of governance: "*Not even a single one, and if you do that – it means you have no idea of the meaning of ruling because each and every country has its own secrets that are never spoken publicly*"; and

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[18] RA para 84, read with AA para 83.

37.5 "*your support has been immensely important and hopefully, it will make those that are in power to realise that they are ruling over human beings and they cannot just take decisions lightly*"[19]

38. The above clearly demonstrates that, to this day, Mr Zuma believes himself to be above the law (even if Mr Zuma baldly denied this)[20] and the Constitution, and continues wilfully to defy orders of the highest court and will do so whilst deliberately desecrating the Constitution and the judicial system in its entirely.

39. Even if this Court had jurisdiction to grant the interdict he seeks (which it does not), he would have to show compliance with the CC Order (and 28 January 2021 order). Mr Zuma continues to refuse to testify before the State Capture Commission and refuses to hand himself over to the Police. By his conduct he has shown a further deliberate and ongoing willingness not to comply, and nowhere in his affidavit does he suggest that he will comply.

40. Mr Zuma is thus not entitled to self-help by choosing to ignore the Constitutional Court's orders while attempting to bring this case before this Court. The rule of law does not permit it.

41. His continuous flouting of the Constitutional Court's authority, and continuing contempt of its orders, impedes the cause of justice and imperils the rule of law.

42. Mr Zuma has disentitled himself, through his conduct, from assistance from this Court, while he simultaneously flouts his court-ordered obligations.

RESCISSION APPLICATION IS FATALLY DEFECTIVE

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19 AA para 83, quoting from https://citizen.co.za/news/south-africa/politics/2553213/zuma-takes-a-jab-at-judiciary-says-he-will-not-hand-himself-over-to-police/.

20 RA para 84.

43. A central pillar of Mr Zuma's application seeking the suspension of the CC Order is his rescission application before the Constitutional Court. But, his rescission application is fatally defective. It is procedurally unsound and unsustainable on the merits. Mr Zuma has perempted his right to apply for rescission and, in any event, his application bears no prospects of success. Therefore, his application for rescission establishes no *prima facie* right and thus cannot ground the interdictory relief Mr Zuma seeks.

Peremption of Mr Zuma's right to approach the Constitutional Court

44. The principles in relation to peremption were, as accepted by the Constitutional Court,[21] well-articulated by Innes CJ in *Dabner v South African Railways and Harbours*.[22] As Innes CJ held:

> "The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the *onus* of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven".[23]

45. In *SARS v CCMA*, the Constitutional Court held that where "*[p]eremption [has] taken place, the only relevant consideration remaining is whether there are overriding constitutional considerations that justify appealability or the non enforcement of peremption. <u>The broader policy considerations that would establish peremption are that those litigants who have unreservedly jettisoned their right of appeal must for the sake of finality be held to their choice in the interests of the parties and of justice</u>. But, where the enforcement of that*

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21 *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others 2017 (1) SA 549 (CC)* (***SARS v CCMA***) para 26.

22 1920 AD 583 (***Dabner***).

23 *Dabner* at p 594.

choice would not advance the interests of justice, then that overriding constitutional standard for appealability would have to be accorded its force by purposefully departing from the abundantly clear decision not to appeal".[24]

46. The Supreme Court of Appeal recently confirmed that even the failure to oppose the relief sought in the Court *a quo* or an election to abide the decision of that Court leads to peremption and to the perempted party losing standing to appeal.[25]

47. The rule of peremption whilst having its origins in appeals, equally applies to applications for rescission. As was held by Rogers J in *Nkata*, "*[t]he principles of peremption apply not only to appeals but also to the remedy of rescission …. The general principle is that 'no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate'. In order to show that a person has acquiesced in a judgment, the court must be satisfied upon the evidence 'that he has done an act which is necessarily inconsistent with his continued intention to have the case reopened or to appeal' (Hlatshwayo v Mare and Deas 1912 AD 242 at 259*)".[26]

48. In this matter, Mr Zuma evidently perempted his right to seek rescission.

49. Mr Zuma has – unequivocally – indicated that he refused to recognise the Constitutional Court's jurisdiction and would not participate before it. He did not oppose and did not file answering papers. The final salvo in this regard

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24 *SARS v CCMA* para 26.

25 *Cilliers NO and Others v Ellis and Another* (200/2016) [2017] ZASCA 13 (17 March 2017) paras 22-23.

26 *Nkata v Firstrand Bank Limited and* [2014] ZAWCHC 1; 2014 (2) SA 412 (WCC) para 30. The case ultimately served in the Constitutional Court, on a different aspect of the matter under the National Credit Act. But the finding on peremption as applicable to rescission applications was not upset.

was the 21-page letter Mr Zuma addressed to the Constitutional Court in response to the 9 April 2021 directive inviting him to make submissions regarding sanction for contempt and, if committal was deemed appropriate, "*the nature and the magnitude of the sentence that should be imposed, supported by reasons*."[27]

50. Mr Zuma elected not to file the requested affidavit, and instead filed a 21-page letter.[28] This letter was widely circulated throughout the country. In this letter, Mr Zuma indicated that his position was that the Constitutional Court proceedings lacked legitimacy; the directions were a sham; the Constitutional Court was embarking upon "*political gimmicks*" and engaging in "*political or public management*" of a decision already made; that the proceedings constituted "*an extraordinary abuse of judicial authority to advance politically charged narratives*" etc.[29]

51. Importantly, Mr Zuma recorded, unequivocally, the following:

> "[10] It is a matter of record that I filed no notice to oppose. Nor did I file an answering affidavit or written submissions. I also did not request or brief counsel to appear on my behalf to address the Court on the issues raised by Chairperson Zondo on matters arising from the Commission of Inquiry. I was content to leave the determination of the issues in the mighty hands of the Court. If the Court is of the view, as it does, that it can impose a sanction of incarceration without hearing the "accused" I still leave the matter squarely in its capable hands."
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> …
>
> "[62] The Constitutional Court must know that it will imprison me for exercising my constitutional rights and for that I leave it to you and your court. Clearly, the Constitutional Court deems it appropriate and lawful to impose a criminal sanction of incarceration of a person without hearing oral evidence from such an accused person. Contrary to popular sentiment, peddled by sponsored legal analysts and editors, I do not seek to undermine our Constitution or to create any constitutional crises. I have accepted that my stance has consequences…"[30]

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27 AA annex "**AA2**"".

28 AA para 43, read with annex "**AA3**"

29 Ibid.

30 AA annex "**AA3**"

52. Two important consequences arise:

52.1 First: Mr Zuma has indicated, unequivocally, that he leaves it to the Constitutional Court to decide the issue, without his representations. Having made and communicated that election, he cannot back-track, criticise the Court for not affording him an opportunity to make submissions and now – belatedly – attempt to make the very submissions asked of him on 9 April 2021. Quite simply, he – publicly and with great fanfare – washed his hands of the matter and stated that he left the matter for the Constitutional Court to deal with. He also accepted that this stance may have consequences.

52.2 This was a public election by Mr Zuma that the Constitutional Court would indeed deal with the matter, and would do so in the face of his objections and without his further submissions. It is thus not open to him to re-open the matter. He has thus waived his rights and / or is perempted from now seeking to re-open the matter, through rescission, and to make submissions. His refusal to participate, coupled with his acceptance of the consequences of his stance, means that he lacks standing to bring the rescission application.

52.3 Second: Mr Zuma repeatedly complains that he was not afforded an opportunity to make submissions and he has been convicted without a trial. The Constitutional Court in its judgment has made it plain that he was afforded the very opportunity he complains he was denied – namely a right to make representations pertaining to sanction (and the merits). He was afforded this opportunity twice: once in the ordinary course, as a litigant, and then again through the directive. But he elected not to

participate. Having refused to appear or participate, he cannot now raise his own non-participation as a ground of rescission for the order of contempt made against him.

53. Therefore, Mr Zuma lacks standing to bring the rescission application, as his previous position, publicly communicated, amounts to a peremption of any right to seek to rescind the CC Order.

54. In any event, as discussed below, Mr Zuma's application does not meet any of the jurisdictional requirements for rescission to be granted.

Failure to meet the jurisdictional requirements for rescission

55. As a general rule, once a court has finally determined a matter and granted judgment, it becomes *functus officio*.[31] Uniform Rule 42 creates very limited exceptions to that rule.

56. However, Mr Zuma's rescission application does not meet any of the jurisdictional prerequisites which warrant rescission. Therefore, his application has no prospects of success.

57. As per Uniform Rule 42(1):

"The court may, in addition to any other powers it may have mero motu or upon the application of any party affected, rescind or vary—

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties."

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[31] *Daniel* para 5.

58. Mr Zuma was admittedly, contemptuously and by his own election, absent from the proceedings – this was not due to a service or citation failure, but due to Mr Zuma's deliberate decision not to participate. A decision not to participate (dispute repeated opportunities to do so) does not suffice to qualify as "*absent*" as envisaged in Rule 42(1)(a) above. This Court is bound by the Constitutional Court's final findings regarding Mr Zuma's election not to appear before it ("*Mr Zuma had every right and opportunity to defend his rights, but he chose, time and time again, to publicly reject and vilify the Judiciary entirely*")[32], and the consequences of that election, being that he stood to be committed to prison for contempt.

59. The Supreme Court of Appeal has confirmed this view in *Freedom Stationery (Pty) Limited and Others v Hassam and Others*,[33] when it stated, at para 32, that where an affected party "*took the considered decision not to participate*", "*they reconciled themselves with the reasonable prospect that the court could*" make an adverse order against them. And, therefore, such an order cannot be rescinded because it *was* "*not erroneously made in their absence*." The same applies in the present matter. Mr Zuma took a considered decision not to participate and file answering papers before the Constitutional Court. He clearly reconciled himself to the reasonable prospect that the Court (as sought by the Commission) would exercise its discretion to order his imprisonment for contempt. The Court indeed made that order. He cannot now claim that the order was erroneously granted in his absence.

60. Moreover, the order was not erroneously granted: the Constitutional Court was, through Mr Zuma's letter, aware of his contentions as to the procedural hurdles which prevented him from being committed absent a trial. Plainly, the Court was aware of and grappled with these issues, but determined, as our

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32 *Secretary of the Commission of Inquiry* para 73.

33 [2018] ZASCA 170; 2019 (4) SA 459 (SCA) (30 November 2018).

highest Court, that its order was procedurally sound and constitutionally compliant. The Constitutional Court expressly dealt with the procedural issues Mr Zuma now raises, and the absence of a trial. It is not for Mr Zuma now to try re-open those findings through a rescission application. The Constitutional Court has already determined the very procedural challenge he prefaces in making the CC Order. This Court is bound by those findings, and cannot find differently that Mr Zuma has prospects of success on this score either.

61. Mr Zuma contends that the Constitutional Court may have erred as it failed to consider certain factors, such as his age, health, the effect of Covid-19 or what imprisonment could mean for an ex-President. These are not grounds for rescission. They are not new facts arising after judgment. If Mr Zuma felt strongly about these factors, he should have made representations when he was given that opportunity by the Constitutional Court.

62. As the Supreme Court of Appeal has held "*in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment*."[34]

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[34] *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* [2007] ZASCA 85; 2007 (6) SA 87 (SCA) para 27.

63. The Constitutional Court has held that when an applicant relies on Rule 42 to argue that an order was erroneously granted, "*[t]he applicant is required to show that, but for the error he relies on, this Court* ***could not have granted the impugned order****. In other words,* ***the error*** *must be something* ***this Court was not aware*** *of at the time the order was made* ***and which would have precluded the granting of the order in question****, had the Court been aware of it*."[35]

64. Therefore, the Court requires three elements to be established (in addition to there being absence) (a) an error, (b) the error must be something the Court was not aware of at the time of the order, and importantly (c) the error would have "*precluded*" the granting of the order (not merely been a factor taken into account).

65. Mr Zuma has failed to demonstrate any of these elements in the present matter.

66. Moreover, none of the other grounds for rescission under Rule 42 apply.

67. There is no ambiguity in the CC Order, and no patent error or omission. A patent error or omission does not mean that a subject of the order believes that the Court erred on the merits and should have reached a different substantive decision. Instead, in the context of rescissions, patent error refers to an error by the Court whereby the judgment obviously does not reflect its intention.[36] There is no case to this end nor one that is pleaded. The Constitutional Court said precisely what it meant, in the clearest terms.

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35 *Daniel* para 6, read with para 5, emphasis added.

36 *First National Bank of Southern Africa Ltd v Van Rensburg NO* 1994 (1) SA 677 (T) at 680J–681B.

68. Finally, there is no mistake common to the parties. None has been pleaded.

69. Mr Zuma's application for rescission is premised on Rule 42 and not the common law.[37] For the reasons set out above, he has not met the jurisdictional requirement for rescission under Rule 42. Moreover, even if the Constitutional Court were to consider his rescission application under the common law, the wilful default that Mr Zuma has demonstrated in that Court renders the prospects of succeeding under the common law non-existent. To this end it is settled law that whilst the absence of 'wilful default' which is characterised by indifference as to what the consequences would be rather than of wilfulness to accept them, does not appear to be an express requirement under the common law, "*[i]t is, however, clear law that an enquiry whether sufficient cause has been shown is inextricably linked to or dependent upon whether the applicant acted in wilful disregard of Court rules, processes and time limits. While wilful default may not be an absolute or independent ground for refusal of a rescission application, a display of wilful neglect or deliberate default in preventing judgment being entered would sorely co-exist with sufficient cause*."[38] In the face of Mr Zuma's deliberate decision to delegitimise the Constitutional Court by not participating in the applications before it, Mr Zuma was in wilful default. He therefore cannot make out any case for the rescission of orders he has demonstrated utter indifference to.

70. Moreover, to the extent that Mr Zuma takes issue with the process used by the Constitutional Court and argues that he could not be committed without a trial, that is not a new argument in favour of rescission which can serve before this Court or even the Constitutional Court. The majority judgment deals with this

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[37] FA para 41.

[38] *Harris v Absa Bank Ltd T/A Volkskas* 2006 (4) SA 527 (T) para 6**.**

very point, in some detail. The Constitutional Court has held against Mr Zuma in this regard. The Constitutional Court thus considered and ruled upon this issue. The issue is *res judicata* – that ruling too is binding on this Court.

71. This is, however, what Mr Zuma openly contends for. He states that:

> "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 hopefully to reconsider whether it is lawful to treat me differently to any criminal accused."[39]
>
> "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."[40]

72. The rescission application is thus nothing less than a disguised appeal and is impermissible.

73. Mr Zuma has also not been treated differently in the sense in which he contends. He was afforded full rights of *audi*, including in relation to sanction. He abjured those opportunities on every occasion.

74. Ultimately, Mr Zuma fails to trigger any of the jurisdictional prerequisites for rescission. His factual arguments were already known to the court and / or do not suffice to trigger Rule 42, and his legal arguments have already been considered and disposed of by the highest Court, through findings which are not open for reconsideration by this Court.

75. The rescission application thus has no prospects of success and cannot ground any rights. This is fatal to the interim relief he seeks.

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39 FA para 37

40 FA para 60.2.

THE HEARING OF THE RESCISSION APPLICATION

76. The fact that the Constitutional Court has set down Mr Zuma's rescission application for hearing on 12 July 2021,[41] is entirely irrelevant to these urgent interdict proceedings. A rescission application does not itself pend the execution of the order to which it relates.[42] Hence Mr Zuma's rush to this Court for his interdict application (albeit that, as discussed above, the only Court that would have the power to grant such a suspension of the CC Order is the Constitutional Court itself).

77. Thus, the fact that the rescission application may soon be heard does not:

77.1 mean that it will soon be decided – many months may pass, if necessary, whilst the Constitutional Court deliberates (although it is submitted that the rescission application falls summarily to be dismissed);

77.2 mean that the administration of justice will be served by pending the CC Order until the rescission application is decided (assuming that this Court had that power, which it does not); and

77.3 have any bearing on the merits (or lack thereof) of this case.

78. No matter when the Constitutional Court decides the rescission application, Mr Zuma falls to be committed, as per the CC Order, in the interim.

THE "PART B" CONSTITUTIONAL CHALLENGE HAS NO MERIT

79. Mr Zuma's Part B constitutional challenge to the Criminal Procedure Act is also ill-fated. The Constitutional Court considered whether the law permitted for committal for contempt of court in the circumstances complained of by Mr

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41 AA annex "**AA4**".

42 *Hlumisa Technologies (Pty) Ltd and Another v Nedbank Ltd and Others* [2019] ZAECGHC 124; 2020 (4) SA 553 (ECG) paras 17 and 18.

Zuma and determined that indeed it did. It performed a complete legal analysis in this regard to reach the conclusion that its order was a lawful one. This issue was not simply bypassed or ignored, as Mr Zuma's papers suggest. Instead, the regime was expressly endorsed as being constitutionally compliant,[43] and the suggestion that Mr Zuma should have been tried according to criminal standards and protections was expressly rejected as "*flagrantly antithetical to section 165 of the Constitution, which vests the judicial authority of the Republic in the courts themselves, and section 173, which empowers the courts to regulate their own processes*."[44] That is the law, even if Mr Zuma may disagree with it.

80. An attempt to revive this argument formally in the High Court is thus destined to fail, both procedurally and substantively.

81. In any event, even if this is not so, Mr Zuma identifies no reason why he falls to be afforded a stay of imprisonment whilst his challenge runs. A challenge to the constitutionality of legislation may take years to be determined, considering appeal and confirmation hearings. Mr Zuma thus optimistically seeks to stave off imprisonment whilst he litigates for years, on an issue already finally determined by the Constitutional Court.

82. Mr Zuma does not require interim relief to run this litigation, and has made out no case why the interim relief is necessary or plausibly justified in order to pursue Part B in this Court.

83. Critically, the approach adopted by Mr Zuma would be completely destructive of the criminal justice system – the precedent created would be that, if a

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43 *Secretary of the Judicial Commission of Inquiry* paras 63 – 84, simply by way of example.

44 *Secretary of the Judicial Commission of Inquiry* para 112.

prisoner challenges the legislation under which he / she was imprisoned, he / she is to go free until the determination of that challenge. One can immediately appreciate why that cannot possibly be the default position and why it should not be entertained.

84. The Part B challenge is thus stillborn too. The Constitutional Court has carefully and finally had its say on the constitutionality of these proceedings under the very law that Mr Zuma now contends is open to constitutional challenge.

THE INTERDICT IS NOT IN THE PUBLIC INTEREST AND WILL SUBVERT THE ADMINISTRATION OF JUSTICE

85. Mr Zuma contends that he litigates in the public interest, and that it is in the interests of justice that he be afforded the interim relief sought.

86. The Constitutional Court is the arbiter of where the public interests lies in this case, and it has already determined that it requires Mr Zuma to be imprisoned. This Court is bound by those findings.

87. In any event, Mr Zuma's reflections on where the public interest lies is in truth destructive of the public interest, and transparently driven only by his self interest.

88. Mr Zuma has – openly – challenged and condemned the judiciary. He has refused to comply with a subpoena issued by the State Capture Commission, which in itself is contemptuous. More-so, however, he has openly and deliberately defied the ruling of the Constitutional Court made on 28 January 2021 in the January CC Order.

89. Having openly defied this Order, Mr Zuma was served with papers by the State Capture Commission and was aware that the State Capture Commission

sought, *inter alia*, a declaration of contempt accompanied by an unsuspended sentence of imprisonment. Mr Zuma publicly indicated that he would not be participating in that process, filed no papers and had no representatives make argument at the hearing.

90. In a somewhat extraordinary indulgence, Mr Zuma was then invited by the Constitutional Court, on 9 April 2021, to make submissions regarding appropriate sanction for contempt, and submissions regarding potential committal.[45]

91. Again, Mr Zuma refused to do so, releasing a public statement to this end.

92. The Constitutional Court then found Mr Zuma to be in contempt and ordered committal, for all the reasons set out in the CC judgment.

93. Further, this was no ordinary case of contempt:

93.1 it was by an ex-President in relation to matters concerning conduct while he was President;

93.2 in the face of a Constitutional Court order; and

93.3 in the context of the State Capture Commission and its truth-seeking role, which was dealing with one of, if not the greatest, threat to our Republic, namely corruption. Mr Zuma has figured heavily in the evidence before it.

94. Against this backdrop, Mr Zuma contends that it is in the public interest that the Constitutional Court's order be wholly negated; that he face no consequences for his deliberate, calculated and continuing refusal to comply

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[45] Constitutional Court directive, AA annex "**AA2**"".

with the State Capture Commission subpoena and the January CC Order; that he – unlike others – be afforded special treatment at the State Capture Commission and be entitled not to attend or participate; that his scandalous attacks on the judiciary be permitted to stand without consequence; and that he not have to comply with the highest Court's order while seeking extravagantly to undo it.

95. None of these outcomes is in the public interest or the interests of justice. Each and cumulatively, they are in fact destructive of the interests of justice, and would do great harm to the administration of justice. They suggest that court orders may freely be ignored, and – if an order is granted with which one disagrees, even by the Constitutional Court – this too can be ignored without consequence.

96. Further, the practical effect of Mr Zuma's position would be disastrous for certainty and finality under the rule of law – namely that where a party elects not to participate in a hearing but loses, that order must then be suspended so as to afford the party a right to challenge the order that eventuated. This is not in keeping with the constitutional imperatives that judicial authority be respected and court orders be obeyed and implemented, and would be inimical to the proper administration of justice.

97. Finally, as aforesaid, the proposition that Mr Zuma must escape imprisonment whilst he is permitted to run a constitutional challenge against the Criminal Procedure Act is risible and would set a pernicious precedent.

98. Mr Zuma thus fails to appreciate where the public interest lies. That interest lies in the CC Order being upheld and given effect to, for all the reasons set out in the CC judgment.

99. As pointed out above, this Court has no jurisdiction to grant the interim interdict sought (only the Constitutional Court to grant such an order). In any event, this Court ought not entertain this application because of Mr Zuma's continued and obdurate refusal to purge his contempt. Moreover, his rescission application and his Part B challenge are meritless and have no prospects of success. But, even if none of this is the case, this Court in the public interest and to ensure the proper administration of justice, should refuse to exercise its discretion to grant the interim relief sought. As the Court in the *Public Protector v Speaker of the National Assembly*[46] (which dealt with an urgent interdict application to stop the parliamentary process for removal of the Public Protector, pending a Part B challenge to the new Parliamentary Rules governing that procedure) held:

> "[127] The applicant has in my view failed to meet any of the requirements for interim relief. Even if she had done so, I would have exercised my discretion in refusing such relief given the severity of the charges that had been preferred against her and which have been based on trenchant findings by none higher than the Constitutional Court with regard to her conduct, her honesty and her methodology of investigation."

100. In this matter, this Court is bound by the damning findings made by the Constitutional Court in respect of Mr Zuma's scandalous attempts to undermine and destroy the rule of law and judicial authority that are at the heart of our democracy.[47] These findings grounded the very Constitutional Court order that Mr Zuma would now have this Court suspend. This is not only impermissible, but, even if it were not, this Court should exercise its discretion against granting such an order.

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46 [2020] ZAWCHC 117; 2020 (12) BCLR 1491 (WCC); [2020] 4 All SA 776 (WCC).

47 See inter alia *Secretary of the Judicial Commission of Inquiry paras 138.* Findings by a High Court are definitive unless and until set aside on appeal: *Helen Suzman Foundation and Another v Minister of Police and Others* 2017 (1) SACR 683 (GP) para 36. Even more so in the case of findings made by the Constitutional Court.

CONCLUSIONS AND COSTS

101. The Constitutional Court has, in a carefully reasoned and detailed judgment, considered whether Mr Zuma is in contempt of Court and whether it was constitutionally appropriate to order his committal to imprisonment in the circumstances. Sensitive to his constitutional rights, and after affording Mr Zuma every conceivable opportunity to participate and make representations, the Constitutional Court handed down the CC Order and ruled on the constitutionality of committing Mr Zuma to prison.

102. Mr Zuma elected not to participate or make any submissions to the Constitutional Court, other than writing a letter to the Court that was not only "*totally irrelevant*" but once again made "*inflammatory statements intended to undermine this Court's authority*."[48] Yet now he urgently, in a remarkable last-gasp effort, asks this Court, a High Court, to interfere with the CC Order and afford him respite so he can, *inter alia*, make submissions to the Constitutional Court.

103. However, this Court has no competence to subvert or suspend the CC Order.

104. Moreover, Mr Zuma is a delinquent who remains in wilful defiance of two Constitutional Court orders. Until he purges his contempt, he should not be permitted to approach this Court for relief.

105. Even if this Court does assume jurisdiction (which is denied), Mr Zuma fails to satisfy the test for interim relief. He does not need and is not entitled to any interim protection to run his rescission or Part B litigation.

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[48] *Secretary of the Judicial Commission of Inquiry* para 72.

106. Court orders must be obeyed on pain of contempt. Mr Zuma must now face the consequences of his deliberate legal stratagems, and be incarcerated forthwith in accordance with the CC Order.

107. Given that Mr Zuma's application is an abuse of process and in view of his contumelious conduct, Mr Zuma should be mulcted in a punitive costs order.[49] The HSF was cited by Mr Zuma as a respondent in this litigation, presumably because the HSF had featured as an *amicus curiae* in the Constitutional Court litigation. If Mr Zuma's application is dismissed, then the HSF seeks the costs of having been drawn to Court by Mr Zuma as a named respondent. If Mr Zuma's application is granted, then the HSF contends that it should be exempted from paying any costs on the basis that its affidavits and arguments were clearly advanced by it as an NGO in the public interest, in good faith, and subject to the *Biowatch* principle.[50]

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MAX DU PLESSIS SC
ANDREAS COUTSOUDIS
JABU THOBELA-MKHULISI

HSF's Counsel
CHAMBERS, DURBAN
6 July 2021

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[49] See the Constitutional Court findings as to why punitive costs were warranted in *Secretary of the Judicial Commission of Inquiry* paras 130 to 136.

[50] *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC).