IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 52/21

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA	Applicant
and	
THE SECRETARY OF THE JUDICIAL COMMISSION OF INQUIRY INTO STATE CAPTURE, FRAUD AND CORRUPTION IN THE PUBLIC SECTOR, INCLUDING ORGANS OF STATE	First Respondent
RAYMOND MNYAMEZELI ZONDO *NO*	Second Respondent
MINISTER OF POLICE	Third Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Fourth Respondent
THE HELEN SUZMAN FOUNDATION	Fifth Respondent
COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	First Amicus Curiae
DEMOCRACY IN ACTION	Second Amicus Curiae

FILING SHEET

Presented herewith for service and filing:

1. The fifth respondent's written submissions.

Dated at **Johannesburg** on **18 August 2021**.

WEBBER WENTZEL
Attorneys for the seventh respondent
90 Rivonia Road, Sandton
Johannesburg
2196
Tel: +27 11 530 5867
Fax: +27 11 530 6867
Email: vlad.movshovich@webberwentzel.com;
pooja.dela@webberwentzel.com;
dylan.cron@webberwentzel.com;
daniel.rafferty@webberwentzel.com;
dee-dee.qolohle@webberwentzel.com
Ref: V Movshovich / P Dela / D Cron /
D Rafferty / D Qolohle
3041349

TO: **THE REGISTRAR OF THE ABOVE HONOURABLE COURT**

AND TO: **NTANGA NKHULU INCORPORATED**
Attorneys for the applicant
Unit 24 Wild Fig Business Park
1492 Cranberry Street
Honeydew
Tel: +27 10 595 1055
Email: mongezi@ntanga.co.za
Tel: +27 72 137 7104

AND TO: **THE STATE ATTORNEY, JOHANNESBURG**
First, second, third and fourth
respondents' attorneys
95 Albertina Sisulu Road
10th Floor North State Building
Johannesburg
Per: Mr Johan van Schalkwyk
Cell: 071 401 6235
Email: johvanschalkwyk@justice.gov.za
Ref: J/Van Schalkwyk/1544/18/P45

AND TO: **WERKSMANS ATTORNEYS**
Attorneys for the first Amicus Curiae
95 Albertina Sisulu Road
The Central, 96 Rivonia Road
Sandton, 2196
Tel: +27 11 535 8199
Fax: +27 11 535 8623
Email: dsingo@werksmans.com
Ref: Mr D Singo/PROB20192.366

AND TO: **K D MAGABANE AND ASSOCIATES INCORPORATED**
Attorneys for the second Amicus Curiae
c/o **B D MNDITAYA ATTORNEYS**
21st Floor 222 Smith Street
Braamfontein
Johannesburg
Tel: +27 82 6900 580 / +27 82 212 3525
Email: admin@kdmagabaneinc.co.za

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT52/21

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA	Applicant
and	
SECRETARY OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE	First respondent
RAYMOND MNYAMEZELI ZONDO N.O.	Second Respondent
MINISTER OF POLICE	Third Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Fourth Respondent
THE HELEN SUZMAN FOUNDATION	Fifth Respondent
COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	First Amicus Curiae
DEMOCRACY IN ACTION	Second Amicus Curiae

HELEN SUZMAN FOUNDATION'S WRITTEN SUBMISSIONS: 6 AUGUST 2021 DIRECTIVES

TABLE OF CONTENTS

INTRODUCTION

1 This Court has sought further submissions on the following:

1.1 Whether, in light of section 39(1) of the Constitution, this Court is obliged to consider the International Covenant on Civil and Political Rights (**ICCPR**) when construing sections 12(1)(b) and 35(3) of the Constitution; and

1.2 if it is so obliged, what implications do articles 9 and 14(5) of the ICCPR together with decisions of the Human Rights Committee have on Mr Zuma's detention?

2 These queries raise several interrelated issues. In addressing these:

2.1 *First*, we begin by drawing attention to the material features of the present matter, which is an attempt to rescind this Court's final orders in *Zuma 2*.[1] We do so to situate our analysis of the section 39(1) interpretative injunction.

2.2 *Second*, we consider the section 39(1) interpretative injunction within the broader constitutional approach to international law.

2.3 *Third*, we deal with the implication of international human rights law for this Court's interpretation of sections 12(1)(b) and 35(3) of the Constitution, which were considered in detail when this Court ordered Mr Zuma's committal for contempt.

THE CONTEXT OF *ZUMA 2*

3 Any consideration of international law's interpretative value must be situated in the context of the matter at hand. In this case, the matter at hand has certain exceptional features that will frame later

---

[1] *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* [2021] ZACC 18 (29 June 2021) (***Zuma 2***).

considerations.

4 ***First***, this is a rescission application brought in terms of Rule 42 of the Uniform Rules, read with Rule 29 of this Court's Rules. Therefore, the ambit of inquiry before this Court remains constitutionally limited and is not turbo-charged or expanded simply by reference to international law.

4.1 As this Court has held, "*[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.*"[2] Importantly, this Court emphasised that any such "*error*" must have "*precluded*" the granting of the order, not merely been a factor that ought to have but was not taken into account.

4.2 Moreover, if a party chose not to defend a matter, as Mr Zuma chose in *Zuma 2*, then if a court grants judgment against that party, it "*cannot be said to have been granted erroneously in the light of a subsequently disclosed defence…. 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.*"[3]

5 ***Second***, Mr Zuma was afforded every opportunity to oppose the Commission's direct access application, to this the highest and final Court, in which the Commission sought orders to declare him in contempt and commit him to prison for two years. He expressly and clearly chose not to oppose the application or place any facts or legal defences before this Court. So, he could have opposed the granting of direct access, *but didn't*. He could have opposed the finding of contempt, *but didn't*. He could have opposed the sanction of imprisonment, *but didn't*. Despite these unequivocal elections, this

---

2 *Daniel v President of the Republic of South Africa and Another* 2013 (11) BCLR 1241(CC) para 6, read with para 5, emphasis added.
3 *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) para 27, emphasis added.

Court *mero motu* gave Mr Zuma the further opportunity to place evidence (by filing an affidavit) and argument before the Court in relation to the sanction to be imposed. Once again, he could have opposed the grant of an order of imprisonment on substantive or procedural grounds. But again, *he didn't*. He repeatedly, expressly, unequivocally, and with full knowledge of his rights, refused to oppose the Commission's application or place any facts or legal submissions before the Court. Indeed, precisely because the civil contempt proceedings are brought on motion, Mr Zuma was in a far more favourable position than had Mr Zuma been faced with civil action proceedings, because in motion proceedings the Commission and the Court were required to accept Mr Zuma's factual account on affidavit.[4]

6 ***Third***, this Court held that Mr Zuma was in contempt of court and ordered his imprisonment in a contempt of court application where **he was the respondent**. As a matter of our law, this Court and the Supreme Court of Appeal (**SCA**) have affirmed, "*a respondent in contempt proceedings . . . is not an 'accused person' as envisioned by section 35 of the Constitution*".[5] Moreover, this Court and the SCA have affirmed that "*[t]he civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements*".[6]

7 ***Fourth***, imprisonment is a permissible sanction in South African law in contempt of court applications where the circumstances warrant this, as affirmed by this Court and the SCA.[7]

8 ***Fifth***, the Constitution expressly empowers this Court, South Africa's highest court, to act as a court of first and final instance.[8] And to protect its own dignity and processes – section 173. This Court has

---

4 See *Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 638D.
5 *Pheko v Ekurhuleni City* 2015 (5) SA 600 (CC) (***Pheko II***) at para 36; *Fakie N.O. v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) (***Fakie***) para 42.
6 Ibid.
7 See e.g. *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* 2018 (1) SA 1 (CC) para 54; *Fakie*, and *Pheko II*.
8 Section 167(6)(a) of the Constitution, and *Zuma 2* para 8.

done so in many cases.[9]

SECTION 39(1)(b) IN ITS CONSTITUTIONAL SETTING

9 Section 39(1)(b) "*enjoins South African courts, tribunals and other fora to consider international law when interpreting the Bill of Rights*".[10]

10 To understand the nature of the obligation created by section 39(1)(b), it is helpful to have regard to specific points.

11 ***First***, the Court should have regard to "*international law*", not any specific international treaty or treaties. This includes both customary international law and treaty law, and includes non-binding sources too.[11]

12 ***Second***, section 39(1)(b) is an interpretative injunction that only requires courts to consider international law as part of an interpretative exercise. It is merely "*a tool to interpretation of the Bill of Rights*".[12] International law is not a jurisprudential trump or a constitutional override.

13 And section 39(1)(b) does not "*incorporate international agreements into our Constitution.*"[13] Moreover, it is <u>not</u> an obligation that requires rights in the Bill of Rights to be interpreted in *accordance with international law*; it merely requires international law *to be considered*. In this regard, as this Court has recognised, the Constitution distinguishes between interpreting the Bill of Rights, which is governed by section 39(1)(b), and interpreting legislation, which is governed by section 233.[14]

---

[9] See e.g. *Black Sash Trust v Minister of Social Development and Others* 2017 (3) SA 335 (CC); *Justice Alliance of South Africa v President of Republic of South Africa and Others* 2011 (5) SA 388 (CC).

[10] *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre & Another* 2015 (1) SA 315 (CC) (*National Commissioner*) para 23.

[11] *Government of the Republic of South Africa & others v Grootboom & Others* 2001 (1) SA 46 (CC) (***Grootboom***) para 26; *S v Makwanyane & Another* 1995 (3) SA 391 (CC) (***Makwanyane***) para 35.

[12] *Grootboom* para 26.

[13] *Sonke Gender Justice NPC v President of the Republic of South Africa and Others* [2021 (3) BCLR 269 (CC) para 57, quoting *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) (***Glenister II***) para 182.

[14] See e.g. *Law Society of South Africa & Others v President of the Republic of South Africa & Others* 2019 (3) SA 30 (CC) (***Law Society v***

It is only in the case of interpreting legislation that every court – under section 233 – "*must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law*." When interpreting the Bill of Rights, the Court only has to have regard to international law.

14 ***Third***, the international law interpretative injunction in subsection 1(b) is just one of the obligatory interpretative requirements in section 39. It sits alongside section 39(1)(a), which requires a court when interpreting the Bill of Rights to "*promote the values that underlie an open and democratic society based on human dignity, equality and freedom*". These values, which *must* be actively promoted (as opposed to merely "*considered*"), include the rule of law, the supremacy of the Constitution, and accountability.[15] What was actively promoted in Mr Zuma's case is "*the obligation to obey court orders [which] has at its heart the very effectiveness and legitimacy of the judicial system . . . and is the stanchion around which a State founded on the supremacy of the Constitution and the rule of law is built*."[16] Therefore, as this Court held, "*a court in contempt proceedings is charged with the critical constitutional obligation of defending the rule of law, and that this imperative permeates contempt proceedings as a whole*."[17] In that context, and on the scales of interpretation, the requirement to "*consider*" international law includes the weighty obligation to "*promote*" the value of the rule of law which "*permeates*" contempt proceedings. In understanding the weight of that obligation, this Court has stressed that there is an international law obligation on South Africa to ensure that the rule of law is not undermined[18] – an interpretative obligation accentuated for the Court through the very threat that Mr Zuma's conduct portended.

President) para 5; and *National Commissioner* paras 21 and 22. Section 233 refers to "*legislation*" evidently does not refer to the Constitution itself: see section 239 definition of legislation; section 39(1)(b). Any interpretation of obiter comments in *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC) as suggesting otherwise is clearly inconsistent with section 239, read with section 233, and section 39, and this Court's later decisions.

15 Section 2 of the Constitution.

16 *Department of Transport v Tasima (Pty) Limited* [2017 (2) SA 622 (CC) para 183.

17 *Zuma 2* para 115.

18 *Law Society v President* para 51, with reference to articles 4(c) and 6(1) of the South African Development Community Treaty, which South Africa is a party to.

15 ***Fourth***, international law is always but a guide to be considered, while the Constitution itself remains the ultimate lodestar. So, where there are material differences between how a right is framed in the Bill of Rights and an international human rights treaty, this Court has been forthright in following the Constitution. For instance, this Court held in considering the relevance of the International Covenant on Economic, Social and Cultural Rights for this Court's interpretation of section 26 of the Constitution, that "*[t]he differences between the relevant provisions of the Covenant and our Constitution are significant in determining the extent to which the provisions of the Covenant may be a guide to an interpretation of s 26.*"[19]

16 Similarly, given the Constitution's treatment of international law, and the enunciation of its own supremacy, it is evident that "*consistency with our Constitution is a critical requirement for the acceptability and applicability of international law to our country*."[20]

17 ***Fifth***, given certain confusing comments made by Democracy in Action (**DIA**) in their further written submissions, it is also important to distinguish between two sources of international law: customary international law (general practice of states, accepted by states as law) and international treaties (international agreement entered into by states).[21] DIA appears to suggest that ratified international agreements become part of our law as a species of customary international law by virtue of section 232 of the Constitution.[22] This is not correct and conflates customary international law and binding international agreements.

18 The domestication of international agreements is dealt with by section 231 of the Constitution, not section 232. International agreements become binding on South Africa on the international plane in accordance with their own terms (generally international agreement requires a state to deposit an

---

19 *Grootboom* para 28.
20 *Law Society v President* para 5.
21 See Article 38(1) of the Statute of the International Court of Justice; see *Makwanyane* para 35.
22 See e.g. DIA's submissions paras 9 and 10, 30, 44, and 58.

instrument of ratification) and pursuant to prior compliance with the requirements of section 231 of the Constitution (parliamentary approval is required before the executive can ratify a treaty, save as provided by section 231(3)).[23] International agreements only become part of South African law when, after they have become binding on the international plane (generally by ratification or accession after approval by parliament, as required by section 231(2)), they are then domesticated by national legislation (as required by section 231(4)). As this Court has explained, "*international-treaty law only becomes law in the Republic once enacted into domestic legislation*."[24] The only exception to this is self-executing provisions of treaties that have been approved by parliament, which can automatically become part of our law, if not inconsistent with the Constitution and national legislation.

19 The ICCPR has been ratified by South Africa, after parliamentary approval, and is therefore binding on South Africa on the international plane. But it has **not** been domesticated by national legislation. Consequently, it is **not** law in South Africa. No court has ever held that the ICCPR and its provisions are self-executing, and at least one court has expressly held that the ICCPR is not self-executing.[25] The ICCPR is thus not a binding source of law for this Court or any other South African court.

20 ***Sixth***, as this Court has emphasised, "*[t]he internal evidence of the Constitution itself suggests that the drafters were well informed regarding provisions in international, regional and domestic human and fundamental rights*".[26] Thus one sees that our Bill of Rights provides fully and generously for international law human rights. Indeed, the Bill of Rights is "*extensive and covers conventional and less conventional rights in detail*."[27] Put differently, international human rights are already given domestic expression in one of the most progressive human rights Constitutions in the world. And this Court's interpretation and application of those rights has advanced those rights both domestically and

---

[23] *Earthlife Africa and Another v Minister of Energy and Others* 2017 (5) SA 227 (WCC) para 114.
[24] See *National Commissioner* para 24; see also *Glenister II* para 181.
[25] *Claassen v Minister of Justice and Constitutional Development and Another* 2010 (6) SA 399 (WCC) para 36.
[26] *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) para 106.
[27] *Kaunda* para 35.

internationally.[28]

INTERPRETING SECTIONS 12(1) AND 35(3) IN LIGHT OF INTERNATIONAL LAW AND THE DOCTRINE OF SUBSIDIARITY AND THE MARGIN OF APPRECIATION

21 So far we have underlined that the interpretative injunction in section 39(1)(b) is not a basis to contend for the binding nature of the ICCPR as an obligatory source of law, nor an invitation to jurisprudential cherry-picking of one specific international agreement in the interpretative exercise. Instead, what must be had regard to is international law, in all its variegated forms. And, even if particular consideration is given to binding international agreements, there is no reason merely to consider one.

22 Thus, if one wishes to consider international human rights law, the ICCPR is but one guide. One would at least also need to have regard to African international human rights jurisprudence. In particular, the African Charter on Human and People's Rights (**the African Charter**), which South Africa is also a party to, and the decisions of the African Commission and the African Court. Furthermore, account would also have to be extended to the international human rights jurisprudence in other regions.

23 This is essential since different regions have developed their own context-specific jurisprudence for the implementation of human rights. The same is true of each country. It is precisely for those reasons that international human rights jurisprudence **adopts a deferential and flexible approach to each country's own domestic implementation of human rights** – it does not impose international law or reify it from above. International human rights law recognises that rights are given effect to domestically (the doctrine of subsidiarity). That is why when international human rights bodies consider a state's compliance with international human rights obligations, they apply a margin of appreciation (deference) to the domestic courts' and organs of state's understanding and implementation of these rights under their autochthonous constitutional schemes. The African

[28] See e.g. Christine Chinkin "Sources" in Moeckli (ed) et al, *International Human Rights Law* (2nd ed, 2014, Oxford) pg 88.

Commission has helpfully summarised the position in *Prince v South Africa*:[29]

"The principle of subsidiarity indeed informs the African Charter, like any other international and/or regional human rights instrument does to its respective supervisory body established under it, in that the African Commission could not substitute itself for internal/domestic procedures found in the Respondent State that strive to give effect to the promotion and protection of human and peoples' rights enshrined under the African Charter.

51. Similarly, the margin of appreciation doctrine informs the African Charter in that it recognises the Respondent State in being better disposed in adopting national rules, policies and guidelines in promoting and protecting human and peoples' rights as it indeed has direct and continuous knowledge of its society, its needs, resources, economic and political situation, legal practices, and the fine balance that needs to be struck between the competing and sometimes conflicting forces that shape its society. (emphasis added)

24 The *Prince* matter provides a valuable example of how regional human rights bodies will approach South Africa's domestic implementation of human rights and this Court's place within that constitutional scheme. As this Court will recall, Mr Prince, a Rastafarian, wished to be admitted as an attorney, notwithstanding convictions for possession of cannabis and his stated intention to continue using it. He lost before this Court. Mr Prince averred that his rights under the African Charter had been violated. He took his complaint to the African Commission, challenging this Court's failure to make provision for an exemption in respect of the possession and use of cannabis by Rastafari.[30]

25 In considering Mr Prince's complaint, the African Commission affirmed the principle of subsidiarity and the margin of appreciation applied by it and other international human rights bodies (as quoted above). It held that "*[b]oth doctrines establish the primary competence and duty of the Respondent State to promote and protect human and peoples' rights within its domestic order*", and emphasised that the African Charter accordingly gives "*Member States the required latitude under specific Articles in allowing them to introduce limitations*".[31] It, therefore, found no violation of Mr Prince's rights under the Africa Charter. In coming to that conclusion, the African Commission, no doubt with a view

---

[29] Garreth Anver Prince / South Africa (255/02) (7 December 2004) (***Prince v South Africa***), available at http://www.achpr.org/communications/decision/255.02/.

[30] *Prince v President, Cape Law Society, And Others* 2002 (2) SA 794 (CC).

[31] *Prince v South Africa* para 52.

to the fact that the Court had already considered and pronounced on the case, held that "*[t]he African Commission is aware of the fact that it is a regional body and cannot, in all fairness, claim to be better situated than local courts in advancing human and peoples' rights in Member States*".[32]

26 Subsidiarity and the margin of appreciation in international human rights law are fundamental to understanding the interpretative role of international human rights law. International human rights law does not seek to second-guess the careful and good faith application of human rights by a state and its courts.

27 More generally, a proper understanding of section 39(1)(b), as discussed above, clarifies that recourse to international law is not a jurisprudential trump, nor does it supplant this Court's own home-grown human rights jurisprudence, nor could it do so in respect of this Court's own carefully-articulated and deeply-reasoned basis for deciding to assert, by way of direct access, jurisdiction in relation to Mr Zuma's contemptuous conduct in respect of the Court's own orders.

28 In *Zuma 2*, this Court gave careful, detailed and anxious consideration to Mr Zuma's right to freedom and security of the person and his fair trial rights, and did so within the context of the unprecedented threat posed by Mr Zuma's recalcitrance to the rule of law, constitutional supremacy, and administration of justice[33] (as it was required to do in terms of section 39(1)(a)). As the ultimate guardian and interpreter of the rights in the Bill of Rights, and having undertaken this exercise, it found that the pressing and extraordinary facts and circumstances of this case required committal for contempt as the necessary and appropriate sanction to vindicate a most pressing challenge to the Constitution itself.

29 This Court's judgment would thus attract deference under the international law principle of

---

[32] *Prince v South Africa* para 52, emphasis added.
[33] *Zuma 2* para 138.

subsidiarity, and will be accorded a margin of appreciation for its domestically-driven and constitutionally-sourced response to an unprecedented affront to the Court's dignity and directed threat to the country's rule of law.

30 In any event, as we show next, further recourse to international human rights law would not have changed this Court's determination. If anything, it affirms its approach.

Freedom and security of the person

31 Section 12(1) provides, in relevant part, that "*[e]veryone 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*".

32 In *Zuma 2*, this Court gave considered attention to Mr Zuma's rights under section 12, and this Court's and the SCA's jurisprudence on the interpretation of section 12.[34] Indeed, this Court accepted that in terms of section 12, there must be a fair procedure followed before a person can be detained. This Court had regard to the fact that, in *Fakie*, the SCA did not find that section 12 precluded civil contempt proceedings on motion. Rather the SCA held that what had to be ensured was substantive and procedural safeguards "*to afford the respondent such substantially similar protections as are appropriate to motion proceedings*."[35] In other words, our courts have never interpreted section 12's guarantees as requiring that where committal is sought in civil contempt proceedings, these must be brought by way of action proceedings. Motion proceedings are permissible and consistent with section 12, while protections as appropriate to motion proceedings should be maintained.

33 It was precisely for this reason that, even after Mr Zuma elected not to oppose the Commission's

---

[34] *Zuma 2* paras 67 – 73.
[35] *Fakie* para 25.

application and elected to place no evidence or submissions before this Court, this Court still, after the hearing, *mero motu* afforded Mr Zuma an opportunity to make factual and legal submissions on affidavit as to what an appropriate sanction would be.[36] But he refused to do so – choosing instead to file his letter scandalising the Court and proclaiming publicly that he knew what he was doing and accepted the consequences.

34 Would consideration of international law change this Court's careful interpretative approach? Certainly not, for the reasons set out below.

35 Section 12(1) has its parallel, *inter alia*, in the following international agreements:

35.1 Article 9(1) of the ICCPR, which provides that: "*Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law*."

35.2 Article 6 of the African Charter, which provides that: "*Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained*."

35.3 Article 5(1) of the European Convention on Human Rights (**European Convention**), which provides, in relevant part, that: "*Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for noncompliance with the*

[36] *Zuma 2* paras 68 – 70.

lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;…."

36 None of these international human rights instruments precludes imprisonment by a court for refusing to comply with a court order, after a duly instituted court proceeding in accordance with existing procedures and laws. What is prohibited is *arbitrary* imprisonment, where this is not provided for by law. This is entirely consistent with how section 12 has been interpreted and applied generally, and was interpreted and applied by this Court in *Zuma 2* in particular. This Court set out clearly and deliberately what the "*existing procedures and laws*" were in relation to civil contempt, and applied them to Mr Zuma. In fact, the Europe Convention in article 5(1) specifically delineates, as an instance where deprivation of liberty is permissible, "*detention of a person for noncompliance with lawful order of a court"*. This is precisely why the Court ordered Mr Zuma to be imprisoned.

37 The African Commission in its interpretation Article 6 of the African Charter, in *Hadi v Sudan*, has explained that: "*The Commission observes that the right to liberty as enshrined in the Charter does not grant complete freedom from arrest or detention, given that deprivation of liberty is one of the legitimate forms of state control over persons within its jurisdiction. However, any arrest or detention must be carried out in accordance with the procedure established by domestic law otherwise such arrest would be considered to be arbitrary*."[37] Mr Zuma's imprisonment followed the procedure established by our domestic law – this Court made that clear after comprehensive examination.

38 In the European Court of Human Rights' Guide to Article 5, it notes that "*[t]he domestic authorities must strike a fair balance between the importance in a democratic society of securing compliance with a lawful order of a court, and the importance of the right to liberty. Factors to be taken into consideration include the purpose of the order, the feasibility of compliance with the order, and the*

[37] Abdel Hadi, Ali Radi & Others v Republic of Sudan (Communication 368/09, 5 November 2013), para 79, https://www.achpr.org/sessions/descions?id=249.

duration of the detention."[38] Again, this Court did just that: it noted that the purpose of the order was to protect the rule of law from a concerted attack by Mr Zuma, given Mr Zuma's repeated defiance it held that it was not feasible to imagine any compliance by him with the order (hence direct imprisonment was the only justifiable sanction), and it carefully weighed the duration of the detention in light of all the factors.

39 In Mr Zuma's further submissions, attention is drawn to certain of the Human Rights Committee's decisions that consider when detention will be arbitrary.[39] The Human Rights Committee's General Comment 35 summarises the Human Rights Committee's jurisprudence as follows: "*The notion of 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality*."[40]

40 Thus, having regard to what the African Commission, the European Court, and the Human Rights Committee has held, the critical point is this: international human rights instruments permit imprisonment by a court for refusing to comply with a court order, so long as the process is not arbitrary and within existing procedures and laws. It does not answer how, in a particular situation, on the peculiar facts at issue, and in the specific constitutional and democratic setting, the court should ultimately determine what is appropriate and necessary. And, international law recognises that it is precisely for this reason that principles of subsidiarity and a margin of appreciation afford deference to domestic courts' conclusions in this regard.

41 In *Zuma 2*, this Court, consistent with an international human rights approach, carefully determined and weighed up why imprisonment, and the period thereof, was not only warranted, appropriate and

---

[38] European Court's Guide on Article 5 of the European Convention on Human Rights, 21 April 2021, para 69, emphasis added, https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf

[39] Zuma's further submissions paras 34 and 35.

[40] General Comment 35 para 12, https://digitallibrary.un.org/record/786613?ln=en.

justified and provided for in law, but also the constitutionally necessary and required sanction for Mr Zuma's contempt to vouchsafe the rule of law.[41]

42 Therefore, recourse to international law, as a tool for interpretation, would have only reaffirmed that this Court's order of imprisonment did not violate Mr Zuma's right to security and freedom.

Fair trial rights

43 Section 35(3) provides for an "*accused person's*" "*right to a fair trial*", and delineates the aspect of that right, which includes the right "*(o) of appeal to, or review by, a higher court*."

44 In *Zuma 2*, this Court judiciously considered whether and to what extent section 35(3) was applicable. In particular, it had regard to the fact that in our law section 35(3) is not directly applicable, since the respondent in a contempt application is not an accused person. However, as noted above, it bent over backwards to afford Mr Zuma equivalent safeguards, including the further right to file an affidavit in relation to the sanction to be imposed, after the hearing, with the benefit of Plascon Evans in his favour.

45 However, this Court made clear that (a) since Mr Zuma was not an accused person, he did not have an accused person's right of appeal, and (b) because the Constitution expressly provides for direct access to this Court, as the highest and final court, it expressly excludes a right of appeal where direct access is warranted.[42] Direct access, in this case, was warranted (and not opposed by Mr Zuma), because "*[a]t its core, this matter is about an egregious threat posed to the authority of the Constitution, the integrity of the judicial process, and the dignity of this Court*", which warranted "*swift and effective judicial intervention*".[43]

---

41 See e.g. *Zuma 2* para 60.
42 *Zuma 2* para 80.
43 *Zuma 2* para 82.

46 Would consideration of international law change this Court's carefully and contextually sensitive interpretative approach? Again, certainly not, for the reasons set out below.

47 Section 35(3)(o) has its parallel in the following international human rights instruments:

47.1 Article 14(5) of the ICCPR, which provides that: "*Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*"

47.2 Article 2 of Protocol 7 to the European Convention, which provides that:

> "1 Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
>
> 2 This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

47.3 The African Charter does not provide a direct parallel, but Article 7(1)(a) provides more generally that: "*Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force*".

48 While international law's principles are interpretative guides, they bow to four distinct features of the Constitution, which warrant caution when considering international law's interpretative value: (a) section 35(3) directly applies only to "*accused persons*"; (b) the Constitution gives this Court's jurisdiction to act as a court of first and last instance; (c) the Constitution, as this Court stressed in *Zuma 2*, gives this Court power [in contempt situations] to protect its own processes in terms of section 173 of the Constitution – said the Court: "*Indeed, section 173 gives this Court the flexibility to be responsive in an emergent and transforming democracy. When the constitutional safeguards for the*

Judiciary are undermined so egregiously, section 173 empowers this Court to respond swiftly and effectively in its own interests and in the interests of justice";[44] and (d) this matter (in this Court's words) also "*concerns the protection of the authority of the Judiciary to carry out its constitutional functions vested in it by section 165 of the Constitution*".[45]

49 Therefore, even leaving aside the distinction drawn in our Constitution between civil contempt respondents and accused persons, the approach taken by the European Convention is evidently more compatible with our Constitution, since it directly recognises an exception to the right of appeal in criminal proceedings where the "*person concerned was tried in the first instance by the highest tribunal*". This is precisely what occurred in this matter, when this Court held Mr Zuma was in contempt and ordered his imprisonment. As this Court held, by virtue of its status as the highest court in the country, there could be no right of appeal or review to a higher Court (indeed, there is no higher court).

50 Moreover, despite the differences in the framing of article 14(5) of the ICCPR and section 35(3) (which provides for the rights of accused persons), the Human Rights Committee, in its General Comment 32, has similarly affirmed that article 14(5) does not apply to all proceedings: "*Article 14, paragraph 5 does not apply to procedures determining rights and obligations in a suit at law or any other procedure not being part of a* ***criminal appeal process*****,** ***such as constitutional motions***."[46]

51 This distinction finds its equivalent in this Court's determination (based on prior decisions by this Court and the SCA) that Mr Zuma does not enjoy an accused person's right of appeal guaranteed by section 35(3)(o), because as a respondent in a civil contempt application, he is not an accused person in a criminal trial. And obviously, a direct access case such as this is pre-eminently a "constitutional

---

[44] *Zuma 2* para 24.
[45] *Zuma 2* para 25.
[46] General Comment 32, para 46, emphasis added, available at https://digitallibrary.un.org/record/606075?ln=en.

motion" in which a procedure of direct access pre-ordained by the Constitution determined the rights and obligations of Mr Zuma firstly to obey a summons of the State Capture Commission, and thereafter to justify why he should not be held in contempt of this Court's order compelling his obedience with that summons.

52 Similarly, the African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provides that, "*Everyone convicted in a criminal proceeding shall have the right to review of his or her conviction and sentence by a higher tribunal*."[47]

53 In our law, civil contempt procedures on motion are not criminal proceedings. Therefore where, in accordance with the Constitution's express empowering, this Court has found a person in contempt of court in civil motion proceedings, and after careful consideration determined that imprisonment is the appropriate and necessary sanction, then evidently, by virtue of this Court's position as South Africa's highest court, no appeal or review can lie to any higher court.

54 In the context of article 7(1)(a) of the African Charter, DIA also draws attention to the African Court's decision in *Anaclet Paulo v United Republic of Tanzania*, and points out that the Court "*dismissed a complaint founded on article 7(1)(a) of the African Charter because the complainant had elected not to participate in the court proceedings that culminated in his conviction and sentencing*."[48] Having drawn attention to this case, which lends support to this Court's decision in *Zuma 2*, DIA seeks to distinguish the decision by submitting that: "*It is true that the applicant in this case was afforded an opportunity to make written submissions to this Court about the appropriate sentence should he be found to have been in civil contempt of this Court. In our respectful submission, that opportunity cannot fairly be*

---

47 African Commission, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, sections N10(a), https://www.achpr.org/legalinstruments/detail?id=38.

48 DIA's further submissions para 53.

categorised as an opportunity to state one's case on the merits of the case <u>in a trial setting</u>."[49] But, DIA's desperate attempt to distinguish *Zuma 2* is flawed in every respect:

54.1 **<u>First</u>**, Mr Zuma was the respondent in the Commission's application seeking his committal for contempt. He had the express right and opportunity to oppose that application and file an affidavit to set out his factual and legal defences to the merits of the case, as well as procedural aspects (including direct access). Had he done so, unlike in an action proceeding, his version of the facts would have bound the Commission and the applicant. Yet, he thumbed his nose at the Court and elected not to oppose the application.

54.2 **<u>Second</u>**, even after he was provided and refused this opportunity, the Court did not merely give him a further opportunity to file "*written submissions*". Rather, he was afforded the right to file an affidavit, in which, once again, he could have placed evidence and legal submissions before this Court in respect of whether imprisonment was appropriate. But, again, he refused to do so.

55 Therefore, recourse to international law reaffirms that to order Mr Zuma's imprisonment in the circumstances of this matter would not violate his fair trial rights.

CONCLUSION

56 For these reasons, and alive to the deference that is afforded to this Court under international law for the approach it takes to constitutional questions before it, consideration of international human rights law as an interpretative tool does not lead to any different result for Mr Zuma. If anything, it confirms the Court's approach. And of course, lest we forget what the case before this Court is actually about: recourse to international law does not alter the fact that Mr Zuma has made out no case for recission of this Court's orders in *Zuma 2*.

---

[49] DIA's further submissions para 54, emphasis in the original.

57 Finally, we note with concern that even now, when Mr Zuma has been found guilty of ongoing and egregious contempt of court, in his further written submissions through his Counsel he describes this Court's judgment as an "*angry judgment which was 'imposed in passion or pettiness' *".[50] To say this about this Court's carefully reasoned judgment, which anxiously weighed the exceptional facts, our courts' jurisprudence, the foundational values of our constitutional democracy, and Mr Zuma's rights, including the countervailing points raised by the minority decision, is astounding.

58 While depressing to read, it does have the benefit of clarifying – if any further clarification were needed – why this Court must dismiss the rescission application. Even now, Mr Zuma's written submissions are being used as a vehicle for continued attacks on the integrity and legitimacy of this Court, and by implication, the very foundations of our constitutional democracy established on the rule of law.[51]

MAX DU PLESSIS SC
ANDREAS COUTSOUDIS
JABU THOBELA-MKHULISI

HSF's Counsel
Ubunye Chambers, Durban
18 August 2021

[50] Zuma's further submissions para 39.
[51] *Zuma 2* para 60 to 62.