



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 52/21

**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

**MINISTER OF JUSTICE AND CORRECTIONAL  
SERVICES**

Fourth Respondent

**HELEN SUZMAN FOUNDATION**

Fifth Respondent

and

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

First Amicus Curiae

**DEMOCRACY IN ACTION**

Second Amicus Curiae

**Neutral citation:** *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28

**Coram:** Khampepe J, Jafta J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J

**Judgments:** Khampepe J (majority): [1] to [133]  
Jafta J (dissenting): [134] to [247]  
Theron J (concurring): [248]to [252]

**Heard on:** 12 July 2021

**Decided on:** 17 September 2021

**Summary:** Rescission — urgent application — direct access — rule 42 of the Uniform Rules of Court and common law of rescission

Res judicata — functus officio — legal certainty and finality

Not in the interests of justice to grant rescission — application dismissed with costs

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## ORDER

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On application for direct access to this Court:

1. Direct access is granted.
2. Council for the Advancement of the South African Constitution and Democracy in Action are admitted as amici curiae.
3. The application for rescission is dismissed.
4. Mr Jacob Gedleyihlekisa Zuma is ordered to pay the costs of the Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State and Raymond Mnyamezeli Zondo N.O., including the costs of two counsel.

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## JUDGMENT

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KHAMPEPE J (Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Tlaletsi AJ and Tshiqi J concurring):

### *Introduction*

[1] Like all things in life, like the best of times and the worst of times, litigation must, at some point, come to an end. The Constitutional Court, as the highest court in the Republic, is constitutionally enjoined to act as the final arbiter in litigation. This role must not be misunderstood, mischaracterised, nor taken lightly, for the principles of legal certainty and finality of judgments are the oxygen without which the rule of law languishes, suffocates and perishes.

[2] In this matter, this Court is being asked to rescind the judgment and order that it handed down in respect of contempt of court proceedings launched against former President Jacob Gedleyihlekisa Zuma for his failure to comply with an order of this Court. Ironically, the judgment now impugned, contains a thorough exposition of the rule of law and its fundamental importance to South Africa's constitutional democracy. Indeed, it says, “[n]o one familiar with our history can be unaware of the very special need to preserve the integrity of the rule of law” in South Africa.<sup>1</sup> Yet, with the finality of its decision questioned, this Court, once again, finds itself tasked with defending the integrity of the rule of law.

### *Background*

[3] This rescission application has arisen from a series of controversial and publicly scrutinised litigious events concerning the applicant, Mr Zuma, and the first respondent, the Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (Commission).

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<sup>1</sup> 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 (Helen Suzman Foundation as amicus curiae)* [2021] ZACC 18; 2021 JDR 1391 (CC); 2021 (9) BCLR 992 (CC) (contempt judgment) at para 97, where this Court cited *S v Mamabolo (E TV Intervening)* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (*Mamabolo*) at para 17.

Although these events can certainly be regarded as common knowledge by now, for the sake of clarity and completeness, they are briefly canvassed below.

[4] The history of this matter commenced in December 2020, when the Commission approached this Court on an urgent basis seeking an order to the effect that Mr Zuma was legally obliged to comply with the Commission's directives and summonses and appear before it to testify. The matter was unopposed and Mr Zuma refused to participate in the proceedings. After considering the application, this Court granted the relief sought, ordering Mr Zuma to attend the Commission and co-operate with its work.<sup>2</sup> This case will be referred to as *CCT 295/20*.

[5] Mr Zuma failed to comply with this Court's order in *CCT 295/20*. This failure was accompanied by a series of public statements issued on Mr Zuma's behalf by the Jacob Zuma Foundation. In these statements, Mr Zuma impugned the integrity and motives of this Court, the Commission and the Judiciary, and expressed an explicit and immovable intention not to co-operate with the work of the Commission, nor comply with this Court's order. In response to this, the Commission instituted contempt of court proceedings against Mr Zuma in this Court. Once again, Mr Zuma did not oppose or participate in those proceedings, save for addressing a disdainful letter to the

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<sup>2</sup> 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 (Council for the Advancement of the South African Constitution, Ngalwana SC, the Helen Suzman Foundation Amicus Curiae)* [2021] ZACC 2; 2021 JDR 0079 (CC); 2021 (5) BCLR 542 (CC) (*CCT 295/20*) where this Court made the following order, which I quote in relevant part:

- “4. Mr Jacob Gedleyihlekisa Zuma is ordered to obey all summonses and directives lawfully issued by the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State (Commission).
5. Mr Jacob Gedleyihlekisa Zuma is directed to appear and give evidence before the Commission on dates determined by it.
6. It is declared that Mr Jacob Gedleyihlekisa Zuma does not have a right to remain silent in proceedings before the Commission.
7. It is declared that Mr Jacob Gedleyihlekisa Zuma is entitled to all privileges under section 3(4) of the Commissions Act, including the privilege against self-incrimination.”

Chief Justice in response to directions seeking his submissions on the issue of possible sanction.<sup>3</sup>

[6] After considering the contempt application, this Court unanimously found Mr Zuma to be in contempt of its order in *CCT 295/20*. Notwithstanding Mr Zuma's refusal to participate in the contempt proceedings, this Court engaged in a rigorous process of determining the appropriate sanction in the circumstances. This iterative exercise resulted in two judgments being penned: the majority judgment sentenced Mr Zuma to imprisonment for a period of 15 months;<sup>4</sup> the minority held that a purely punitive sanction in civil contempt proceedings is unconstitutional and accordingly concluded that a coercive order, paired with a suspended period of imprisonment, was appropriate.<sup>5</sup>

[7] This Court handed down its judgment and order in the contempt proceedings on Tuesday, 29 June 2021.<sup>6</sup> The order required Mr Zuma to submit himself to the South

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<sup>3</sup> Contempt judgment above n 1 at paras 63 and 72.

<sup>4</sup> Id at para 102, where the majority held that “[t]he only appropriate sanction is a direct, unsuspended order of imprisonment. The alternative is to effectively sentence the legitimacy of the Judiciary to inevitable decay.”

<sup>5</sup> Id at para 267. See also para 268, where the minority concluded as follows:

“Had I commanded the majority, I would have made a coercive order of suspended committal, conditional upon Mr Zuma complying with this Court's order. But because the Commission's lifespan is at its end, I would order that the matter be referred to the DPP for a decision on whether to prosecute Mr Zuma for contempt of court. Should the DPP refuse to prosecute, it would be open to the Commission to prosecute Mr Zuma privately in accordance with section 8 of the Criminal Procedure Act.”

<sup>6</sup> Id, where this Court made the following order, which I quote only in relevant part:

“3. It is declared that Mr Jacob Gedleyihlekisa Zuma is guilty of the crime of contempt of court for failure to comply with the order made by this Court in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma* [2021] ZACC 2.

4. Mr Jacob Gedleyihlekisa Zuma is sentenced to undergo 15 months' imprisonment.
5. Mr Jacob Gedleyihlekisa 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 imposed in paragraph 4.
6. In the event that Mr Jacob Gedleyihlekisa Zuma does not submit himself to the South African Police Service as required by paragraph 5, the Minister of Police and the

African Police Service (SAPS) by no later than Sunday, 4 July 2021, failing which, the Minister of Police and National Commissioner of Police would be bound to effect his committal to incarceration by no later than Wednesday, 7 July 2021.

[8] On Friday, 2 July 2021, Mr Zuma filed an application in this Court, seeking the reconsideration and rescission of the order made in the contempt proceedings.

[9] At the outset, to avoid confusion, it is important to appreciate the difference between an appeal and a rescission application. A disgruntled litigant can appeal an order of the High Court or the Supreme Court of Appeal. However, as the apex Court of the Republic, orders of this Court are immune from appeal. A litigant may, however, seek the rescission of an order of court, including of this Court, where certain grounds have been met.<sup>7</sup>

[10] In his rescission application, Mr Zuma stated that the application was urgent, but did not plead urgency in terms of rule 12 of the Rules of this Court. On Saturday, 3 July 2021, this Court issued directions setting the matter down for hearing on Monday, 12 July 2021, on an urgent basis. Mr Zuma did not comply with the 4 July 2021 deadline prescribed by this Court in its contempt judgment, and only submitted himself to SAPS at the eleventh hour on Wednesday, 7 July 2021.

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National Commissioner of the South African Police Service must, within three calendar days of the expiry of the period stipulated in paragraph 5, take all steps that are necessary and permissible in law to ensure that Mr Jacob Gedleyihlekisa Zuma is delivered to a correctional centre in order to commence serving the sentence imposed in paragraph 4.

7. Mr Jacob Gedleyihlekisa Zuma is ordered to pay the costs of the Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, including the costs of two counsel, on an attorney and client scale.”

<sup>7</sup> These grounds, captured in rule 42 of the Uniform Rules of Court, which put the common law of rescission on a legislative footing, will be addressed comprehensively in the judgment. At this point, suffice to say that these grounds are particularly, and deliberately, narrow in scope in order to preserve the doctrine of finality and legal certainty. By contrast, an appeal is considerably broader and is premised on the allegation that a court made an error in fact or law in reaching a decision and granting an order.

[11] Other than Mr Zuma and the Commission, the other parties cited in these proceedings are as follows. The second respondent is Raymond Mnyamezeli Zondo N.O., cited in his official capacity as the Chairperson of the Commission. The third respondent is the Minister of Police, who was cited as a respondent in the contempt proceedings and thereafter, was bound by the order issued to the extent that it required the services of SAPS to secure Mr Zuma's arrest and committal. The fourth respondent is the Minister of Justice and Correctional Services. No relief is sought against the third and the fourth respondents. The Helen Suzman Foundation (HSF) was admitted as amicus curiae (friend of the court) in the contempt proceedings and is cited here as the fifth respondent. The Council for the Advancement of the South African Constitution (CASAC) and Democracy in Action (DIA) applied and are admitted as amici curiae.

[12] With this brief account of the matter behind me, I now turn to the parties' submissions.

*Submissions before this Court*

*Mr Zuma's submissions*

[13] Mr Zuma submits that this Court's jurisdiction is unequivocally engaged and that his application meets the requirements for direct access because no other court would have jurisdiction to rescind an order of the Constitutional Court. He submits that the order of imprisonment, understood in the light of his personal health challenges, his old age, and the risks posed by the global pandemic, constitutes cruel and degrading punishment.

[14] The thrust of Mr Zuma's arguments before this Court is that the majority judgment in the contempt proceedings constitutes a serial manifestation of rescindable errors and/or omissions susceptible to rescission in terms of rule 42 of the Uniform Rules of Court and the common law. He argues that paragraphs 3, 4, 5 and 6 of the contempt order should be rescinded and/or set aside. Alternatively, he argues that, if this Court rejects his application to reconsider and rescind its order, it ought to afford

him a “proper” opportunity to present evidence in relation to the question of whether direct imprisonment is an appropriate remedy for the crime of contempt of court. This is because, according to him, this Court summarily sentenced him to direct imprisonment without affording him the opportunity to advance mitigation after conviction. He submits that he was sentenced without a trial and this Court erred in failing to refer the matter to the National Director of Public Prosecutions (NDPP). On this basis, he contends that this Court did not act within the bounds of the Constitution. His application, he submits, is a bona fide attempt to protect his constitutional rights.

[15] The gravamen of Mr Zuma’s complaint is that the granting of the impugned order breached several of his fundamental rights, most notably those contained in sections 12, 34 and 35 of the Constitution. Accordingly, the judgment and order comprise a number of rescindable errors and/or omissions on the basis of which it should be rescinded. The most patent error made by the majority, so Mr Zuma submits, is that, in spite of the undeniable limitations of several of his constitutional rights, no section 36 limitations analysis was embarked upon. The judgment and order, he submits, cannot survive these “constitutional irregularities” when subjected to rule 42, read with rule 29 of the Rules of this Court. Mr Zuma argues that rule 42 must give effect to the proviso in rule 29, which incorporates rule 42 “with such modifications as may be necessary”. This, he submits, has the effect of bringing the meaning of a rescindable “error” within the constitutional framework and must be interpreted so as to include situations where a court grants an unconstitutional order.

[16] In his submissions, Mr Zuma concedes that he did not participate in the contempt proceedings in this Court, nor did he give evidence before the Commission on the dates so ordered. However, he submits that he had always indicated a wish to participate, but that it was simply intolerable for him to do so because, so he avers, the Chairperson was biased against him. He therefore, based on reasonable objections against perceived bias and abuse, and on account of medical reasons, which were not properly considered by either the Commission or this Court, refused to participate. Mr Zuma argues that, had this Court dealt with this information, it would have seen the picture of his non-



compliance in a different light – not as a disdainful attack on the Judiciary or the Commission’s processes – and may have approached the issue of sanction differently. Furthermore, Mr Zuma submits that he did not engage in the two previous applications of the Commission to this Court because of a lack of financial resources. In any event, his non-participation cannot be interpreted as a waiver of his constitutional rights, which he contends, simply cannot be waived.

[17] Mr Zuma also takes issue with the fact that the Commission sought an order securing his imprisonment by way of motion proceedings in this Court, rather than seeking to ensure his attendance at the Commission by invoking the Commissions Act,<sup>8</sup> the prescribed statutory route. He submits that this demonstrates that the Commission was simply determined to secure his imprisonment. Thus, his arrest and committal were erroneously sought within the meaning of rule 42(1)(a).

[18] In respect of the public statements of which this Court took cognisance, Mr Zuma disavows that they contained scandalous allegations that undermined the Judiciary and that, in any event, these statements constituted hearsay evidence. He thus submits that this Court, in permitting these statements to influence the nature and severity of the sanction, made a patent error.

[19] Mr Zuma goes on to submit that it was erroneous for this Court to overlook the fact that Pillay AJ formed part of the Bench. He avers that the failure to scrutinise her suitability, in the light of historical events, constitutes a patent error or omission.

[20] Finally, Mr Zuma submits that, far from upholding the principle that everyone is equal before the law, the majority judgment victimised him by treating him harshly on account of his unique position as former President. The fashioning of a particularly egregious punishment, “custom-made” only for him, constitutes a further patent error.

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<sup>8</sup> 8 of 1947.

[21] All of the above, Mr Zuma concludes, constitute grounds for a rescission in terms of rule 42(1)(a), as modified by rule 29, but in the event that he has not met those requirements, he says that he has established good cause for a rescission under the common law.

[22] Two days after Mr Zuma's incarceration, his legal representative filed a supplementary affidavit in which it was advanced, under the general rubric of "alternative relief" as sought in his notice of motion, read with sections 172 and 173 of the Constitution, that it would be just and equitable for this Court to order his release pending the outcome of this application.

*The Commission's submissions*

[23] To begin with, the Commission emphasises that Mr Zuma's affidavit is "riddled with falsehoods, factual misrepresentations and distortions of the law". The Commission further avers that Mr Zuma's application is defective because he perempted his right to rescission, for he explicitly and intentionally decided not to oppose the contempt proceedings. Accordingly, the application should be summarily dismissed with costs.

[24] However, turning to rule 42, the Commission opposes the rescission application on the basis that it does not meet the legal requirements for rescission and fundamentally lacks prospects of success. Firstly, the Commission submits that Mr Zuma cannot show that the order was granted in his absence. He was a party to the proceedings and was served with all the papers. The fact that he elected not to participate, when he was entitled to do so and had access to legal representation, cannot mean that the order was granted in his absence. The Commission contends that rescission is aimed at protecting a litigant who was unaware of proceedings affecting them, not a litigant who deliberately chose not to oppose. And, his non-participation has little to do with him being precluded – financially or otherwise – from participating, and everything to do with his conscientious objections, which objections cannot render the judgment and order erroneously granted.

[25] Furthermore, the Commission argues that an error does not merely arise because Mr Zuma believes his absence is capable of being explained. Firstly, the existence or non-existence of a defence on the merits is an irrelevant consideration, the Commission submits, and if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous one.<sup>9</sup> Secondly, relying on *Daniel*,<sup>10</sup> the Commission emphasises that an applicant for rescission must be capable of showing that, but for the error relied on, the court could not have granted the impugned order. In other words, the error must be something the court was not aware of at the time it granted the order. The Commission contends that Mr Zuma cannot establish this, and that the grounds on which Mr Zuma relies for rescission are vexatious and far from bona fide.

[26] The Commission disavows the suggestion made by Mr Zuma that it erred in seeking an order of his direct incarceration through contempt proceedings, rather than an order seeking his compliance with the Commission's directives and summonses through the Commissions Act. The Commission contends that it was entitled to approach this Court as it did, and in its notice of motion, heads of argument and oral submissions, made it clear that it was seeking his incarceration. Thus, when he elected not to file opposing papers, Mr Zuma knew what was at stake.

[27] In respect of the question whether this Court erroneously took account of hearsay evidence, the Commission maintains that Mr Zuma's public statements were relevant to the proceedings and were correctly taken into account. The statements were made with his knowledge and carried his endorsement. In any event, he had ample

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<sup>9</sup> In making this submission, the Commission relies on *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* [2007] ZASCA 85; 2007 (6) SA 87 (SCA) (*Lodhi 2*) at para 27.

<sup>10</sup> *Daniel v President of the Republic of South Africa* [2013] ZACC 24; 2013 JDR 1439 (CC); 2013 (11) BCLR 1241 (CC) at para 6, where this Court stated that:

“The 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.”

opportunity to refute them, but did not. This Court's reliance on these statements is therefore no ground for rescission.

[28] The Commission refutes Mr Zuma's complaints that his rights under sections 34 and 35, and, in particular, his right to appeal, were infringed. Mr Zuma was afforded multiple opportunities to participate, including being invited to make submissions on sanction and sentence. Accordingly, his submission that he has been afforded insufficient opportunity to address this Court on the appropriate sanction and sentence is unmeritorious. As for his right of appeal, this is only relevant to the issue of direct access, which right this Court knew it would be removing upon granting direct access. Thus, the fact that he has been left with no right of appeal cannot be construed as an error. And the idea that he was detained without trial is a distortion of the facts and the law. Imprisonment as a punishment for contempt of court, the Commission avers, has been confirmed as passing constitutional muster.<sup>11</sup> In any event, these questions formed the subject of the debate between the majority and the minority in the contempt judgment. Raising this concern now is nothing more than an attempt to re-open the contempt proceedings on the merits, which is not appropriate in a rescission application.

[29] The Commission further emphasises that the allegations made against Pillay AJ lack merit. In fact, so the Commission continues, Mr Zuma's affidavit confirms the degree of his persistent disrespect towards the Judiciary because it is littered with suggestions that this Court did not exercise "calmness and restraint" in handling the contempt proceedings.

[30] In response to Mr Zuma's contention that he was targeted by this Court with a particularly harsh punishment, the Commission submits that this Court was entitled to take account of his position as former President and the scope of his political influence when considering the appropriate sanction.

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<sup>11</sup> The Commission relies on *De Lange v Smuts N.O.* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC); *Nel v Le Roux N.O.* [1996] ZACC 6; 1996 (3) SA 562; 1996 (4) BCLR 592; and *Fakie N.O. v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (*Fakie*) at paras 21-33.

[31] Regarding the question whether Mr Zuma can succeed in securing a rescission in terms of the common law, the Commission submits that he has simply failed to make out a case for good cause.<sup>12</sup> Mr Zuma gives no reasonable or acceptable explanation for his failure to oppose the contempt proceedings. Thus, his application must fail. In any event, the application collapses because his prospects of success are so weak.

[32] In response to the suggestion that it is in the interests of justice that this Court expand, by interpretation, the meaning of the word “error” so as to include alleged constitutional errors, the Commission submits that this is an “astounding proposition”. In any event, so the Commission maintains, at the heart of the interests of justice enquiry is the importance of the principle of finality in litigation. And, if the public does not have confidence in the finality of litigation, the rule of law will be undermined.

*Helen Suzman Foundation*

[33] HSF, admitted as amicus curiae in the contempt proceedings, was joined to these proceedings as a respondent. It opposes Mr Zuma’s application and seeks punitive costs against him.

[34] First, HSF submits that rule 42 applies to instances where an adverse judgment is erroneously made against a party who is absent, typically in an ex parte application. It does not exist to offer recourse to a party who, with proper notice of the case and knowledge of the risk he or she runs, refuses to participate. Mr Zuma’s calculated abstention means that he effectively preempted any right to rescission. Thus, Mr Zuma has divested himself of an entitlement to an audience before this Court.

[35] Turning to the merits, HSF submits that Mr Zuma’s challenge has no prospects of success and constitutes nothing more than an attempt to revisit the merits of the

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<sup>12</sup> In making this submission, the Commission cites *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) which sets out, at 765A-E, that good cause must be shown by the party seeking rescission.

contempt proceedings. In any event, HSF contends that the rescission application is fatally defective because Mr Zuma has failed to make out a case for any of the grounds of rescission provided for in rule 42. It submits that the order was not erroneously granted and that no new test for rescission should be developed in these circumstances. HSF emphasises that Mr Zuma is essentially requesting this Court to re-evaluate the constitutionality of its contempt order. This is not a ground for rescission, especially in the light of the fact that the majority judgment dealt with the minority view and addressed the issue of Mr Zuma's committal through a procedure that deviated from an ordinary criminal trial.

[36] HSF argues that it is a well-established rule that once a court has made a final judgment or order, it does not have the authority to alter, correct or set aside that judgment or order. This is because the court becomes *functus officio* (of no further official authority). Any gripe a litigant harbours can only then be remedied via an appeal to another court. Alternatively, that court can only interfere with the principle of finality in very limited circumstances as provided for in the Uniform Rules of Court or the common law. HSF submits that this conforms to the principle of finality of litigation, which is an important incident of the rule of law. Of course, an order of this Court cannot be appealed. However, HSF submits that this Court was plainly aware of, and grappled with, the issues that Mr Zuma now raises. Accordingly, they have been adjudicated by this Court, and cannot be revisited through a rescission application.

[37] Furthermore, HSF submits that it is trite that the mere fact that there was evidence that could have been before a Court prior to a decision being taken does not render the judgment erroneous. An applicant must be able to show that, but for the error relied on, the Court could not have granted the impugned order. Because all of Mr Zuma's submissions were already considered by this Court, despite the fact that he did not place them before it timeously, it follows that the outcome of the Court's reasoning in the contempt proceedings would have been no different had Mr Zuma participated.

[38] HSF submits that an untenable, never-ending cycle would ensue if litigants were to be allowed to approach this Court and request it to reconsider a decision on the basis that, after it considered a process or piece of legislation, it erred in its finding and, as a result, acted in a manner that is inconsistent with the Constitution. HSF accordingly submits that Mr Zuma's application is an "invitation for chaos", opening a "Pandora's Box" and the door for courts repeatedly having to decide the same matter until litigants are exhausted of funds. HSF submits that Mr Zuma seeks to establish legal precedent that would paralyse the administration of justice because its effect would be that a party could opt not to participate in litigation and then, upon losing, demand another opportunity to make submissions. In short, should this application succeed, untold damage would be done to judicial process and the finality of orders. It would be an affront to the principles of *res judicata* (a matter already decided) and *functus officio*.

*Amici curiae*

*Council for the Advancement of the South African Constitution*

[39] CASAC applied to be admitted as amicus curiae in terms of rule 10(4) of the Rules of this Court. CASAC argues that this matter falls squarely within its organisational objectives: advancement of a society whose values are based on the core principles of the Constitution, namely judicial independence, the rule of law, public accountability and open governance. CASAC submits that it seeks to be of assistance to this Court by making submissions on three discrete arguments regarding rescission and its relationship to the rule of law, which arguments are distinct from those advanced by the respondents.

[40] The thrust of CASAC's submissions is that the rule of law requires the finality of judgments, and that certainty and the credibility of the legal system depend on litigants' acceptance of judgments as final, even where they disagree with the outcome. Furthermore, the rule of law is especially undermined when a litigant brings a rescission application after adopting an intentional legal strategy of indifference in the context of ample opportunities to ventilate genuine grounds of opposition. CASAC submits that

altering the law on rescission to permit litigants to revisit the merits of a matter under circumstances like these would destabilise the legal system and wreak havoc. This is because it would invite litigants to inundate court rolls with unmeritorious applications inspired by new legal strategies. And, already, Mr Zuma's rescission application has undermined the principles that underpin the rule of law: finality and certainty. CASAC maintains that once a court has decided a matter, it becomes *functus officio*. It is trite that litigants who lose in this Court must accept their losses.

[41] CASAC accepts that limited exceptions to these principles exist, one being the possibility of rescission in narrow circumstances where a patent error or omission is made. However, in the current circumstances, Mr Zuma has failed to meet the requirements. The strategic choice not to participate does not become "absence from litigation" for the purposes of rule 42(1)(a); the mistaken choices made by a litigant that ultimately disadvantages them and damages their prospects of success do not constitute an "ambiguity, patent error or omission" catered for by rule 42(1)(b); and the unilateral decision of one litigant as to their attitude to the litigation is not a "mutual mistake" as required by rule 42(1)(c). In fact, CASAC avers, Mr Zuma's purported rescission application is nothing more than a belated answer to the merits of the contempt case, and therefore, constitutes an abuse of court procedure.

[42] Finally, CASAC is of the view that this Court did not erroneously admit hearsay evidence when it took judicial note of his scandalous public statements. Mr Zuma's conduct, as well as his extra-curial statements, which were publicly available information and admissible, were pertinent to this Court's deliberations. Moreover, CASAC emphasises that Mr Zuma failed to explain why those statements were not attributable to him and has merely baldly averred that this Court should not have considered them.

*Democracy in Action*

[43] DIA, a non-profit civil society organisation whose mandate is to advance, support and defend democratic principles and the Constitution, and promote human



rights, also applied to be admitted as *amicus curiae*. It applied in terms of rule 10, on the basis that its submissions, far from regurgitating those of the parties, will be of assistance to this Court in the determination of the constitutional issues at the heart of Mr Zuma's rescission application.

[44] The crux of DIA's submissions concerns the question of fair trial rights: DIA espouses serious concern as to the far-reaching implications of this Court's decision to order an unsuspended custodial sentence for the crime of civil contempt of court. Firstly, DIA argues that section 35(3) fair trial rights do not find application only in relation to persons accused in criminal proceedings, as such a construction is too narrow. Rather, these rights also find application in motion proceedings and hybrid contempt proceedings. Ultimately, it submits that the section 12(1)(b) right not to be detained without trial and the section 35(3) fair trial rights of Mr Zuma have been infringed by the contempt order since he was not afforded the opportunity of a trial before his sentencing. For a contempt of court application to remain constitutional, the matter should be referred to the National Prosecuting Authority (NPA).<sup>13</sup> And, so DIA submits, the majority judgment erred in failing to conduct a limitations analysis upon depriving Mr Zuma of his rights.

[45] On a conspectus of the above, DIA submits that, unless set aside, the contempt order, which created an unconstitutional precedent, will have far-reaching and adverse implications on the rule of law and human rights jurisprudence in South Africa.

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<sup>13</sup> In making this submission, DIA relies on the recent Supreme Court of Appeal judgment of *Minister of Cooperative Governance and Traditional Affairs v De Beer* [2021] ZASCA 95 (*De Beer*). This judgment was handed down two days after the contempt judgment. In contrast with the approach taken by this Court, the Supreme Court of Appeal referred the contempt matter to the NPA, allowing the NDPP to determine whether Mr De Beer should be prosecuted for his conduct. At this early stage, it is worth noting that reference to this decision is not altogether appropriate as it concerned contempt *in facie curiae* (in the face of the court), not defiance of a court order. In *De Beer*, the litigant directly insulted the Court by way of scandalous correspondence addressed to the Registrar and the President of the Supreme Court of Appeal, and it was in respect of this correspondence that he was referred to the NPA (see paras 53, 117 and 119). Clearly, the factual matrix that was before the Supreme Court of Appeal is distinguishable from the instant matter. This was conceded by the DIA in its oral submissions.

*Admission of amici curiae*

[46] It is trite that any party hoping to be admitted as amicus curiae must meet the requirements of rule 10(6) of the Rules of this Court and aid the Court by bringing something new to the table.<sup>14</sup> In short, a prospective amicus must offer a relevant, yet alternative and novel perspective, which will assist the Court in reaching the correct decision. I am satisfied that the applications brought by CASAC and DIA meet these requirements. In this application, this Court is being asked to exercise extraordinary powers. It will thus benefit from the submissions of CASAC and DIA, which submissions differ from those already advanced. They are therefore admitted as first and second amicus curiae, respectively.

*Issues for determination*

[47] In these proceedings, the following main issues arise for determination. Firstly, I address the jurisdictional basis whereupon this Court may adjudicate this matter. And,

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<sup>14</sup> As detailed in the contempt judgment above n 1 at fns 12 and 13:

“Rule 10(6) of the Rules of this Court stipulates:

‘An application to be admitted as an amicus curiae shall–

- (a) briefly describe the interest of the amicus in the proceedings;
- (b) briefly identify the position to be adopted by the amicus curiae in the proceedings; and
- (c) set out the submissions to be advanced by the same amicus curiae, their relevance to the proceedings and his or her reasons for believing that the submissions will be useful to the Court and different to those of the other parties.’

[The role of an amicus was also espoused in] *CCT 295/20* . . . at paras 75-6, where this Court affirmed:

‘It is now settled that the role of an amicus is to help the Court in its adjudication of the proceedings before it. To this end, the applicant for that position must, in its application, concisely set out submissions it wishes to advance if admitted. It must also spell out the relevance of those submissions to the proceedings in question and furnish reasons why the submissions would be helpful to the Court. For the applicant’s argument to be useful, it must not repeat submissions already made by other parties.

It is not generally permissible for an amicus to plead new facts which did not form part of the record or adduce fresh evidence on which its argument is to be based. Nor can the amicus expand the relief sought or introduce new relief. This is because an amicus is not a party in the main proceedings and its role is restricted to helping the Court to come to the right decision.’ (Footnotes omitted.)”

more pertinently, whether Mr Zuma has met the requirements, either in terms of rule 42 or the common law, for rescission. Secondly, I turn to consider whether Mr Zuma has established any other grounds upon which this Court may rescind or reconsider its order. Thirdly, guided as I must be by what the interests of justice demand of this Court, I consider these arguments. And, finally, I address the question of what is to be made of Mr Zuma's last-minute request for interim relief, advanced in his supplementary affidavit.

*Jurisdiction and direct access*

[48] The question of jurisdiction is a peculiar misnomer in this matter. In his notice of motion, Mr Zuma grounds his application in section 167(3)(b) and/or section 167(6)(a) of the Constitution.<sup>15</sup> Section 167(3)(b) allows a party to approach this Court on the basis that the matter involves a constitutional issue or raises an arguable point of law of general public importance that ought to be considered. Section 167(6)(a) allows a litigant to approach this Court directly.

[49] Of course, it would be inappropriate for any other court to entertain a rescission application pertaining to an order made by this Court. Similarly, although direct access is only granted in rare and exceptional circumstances,<sup>16</sup> rule 42(1)(a) would never find operation in respect of an order of this Court without direct access being granted.

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<sup>15</sup> Section 167(3)(b) of the Constitution provides that this Court:

- “(b) may decide—
- (i) constitutional matters; and
  - (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court.”

Section 167(6)(a) provides that “[n]ational legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court to bring a matter directly to the Constitutional Court.”

<sup>16</sup> See the contempt judgment above n 1 at paras 28-9, where the existence of exceptional circumstances warranted the granting of direct access.

[50] These principles relating to jurisdiction and direct access are seemingly intuitive and uncontroversial. However, when a rescission application is brought, a litigant must meet the jurisdictional requirements for rescission, set out in rule 42(1)(a) or the common law, before a court can exercise its discretion to rescind an order.<sup>17</sup> Even if the specific pre-requisites are met, it must still be in the interests of justice for a court to exercise its discretion to entertain the matter. It is to these, more pertinent issues, that I now turn.

*Has Mr Zuma met the requirements for rescission?*

[51] Mr Zuma seeks rescission on the grounds that the order was erroneously granted in his absence. He relies, in the first instance, on rule 42 of the Uniform Rules of Court, as incorporated into the Rules of this Court, by rule 29.<sup>18</sup> Alternatively, he relies on the common law on rescission. I shall consider each in turn.

*Rescission in terms of rule 42 of the Uniform Rules of Court*

[52] Rule 42 of the Uniform Rules of Court provides:

“Variation and rescission of orders

- (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;

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<sup>17</sup> *Minister for Correctional Services v Van Vuren; In re Van Vuren v Minister for Correctional Services* [2011] ZACC 9; 2011 (10) BCLR 1051 (CC) at para 7.

<sup>18</sup> Rule 29 of the Rules of this Court provides:

“Application of certain rules of the Uniform Rules

The following rules of the Uniform Rules shall, with such modifications as may be necessary, apply to the proceedings in the Court:

...

42 Variation and rescission of orders.”

- (c) an order or judgment granted as the result of a mistake common to the parties.
- (2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.
- (3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.”

[53] It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, after all, postulates that a court “may”, not “must”, rescind or vary its order – the rule is merely an “empowering section and does not compel the court” to set aside or rescind anything.<sup>19</sup> This discretion must be exercised judicially.<sup>20</sup>

[54] As an affected party, Mr Zuma has a direct and substantial interest in the order sought to be rescinded. He has locus standi to approach this Court for rescission in terms of rule 42.<sup>21</sup> However, of course, having standing is not the end of the story. Any party personally affected by an order of court may seek a rescission of that order. But these sorts of proceedings have little to do with an applicant’s right to seek a rescission and everything to do with whether that applicant can discharge the onus of proving that the requirements for rescission are met. Litigants are to appreciate that proving this is no straightforward task. It is trite that an applicant who invokes this rule must show

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<sup>19</sup> *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) (*De Wet*) at 1034F and *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* [2003] ZASCA 36; 2003 (6) SA 1 (SCA) at para 5 where the Supreme Court of Appeal held that rule 42, understood in the context of the common law of rescission, caters for a mistake, but “rescission or variation does not follow automatically upon proof of a mistake. The rule gives the courts a discretion to order it, which must be exercised judicially.” See also *Theron N.O. v United Democratic Front (Western Cape Region)* 1984 (2) SA 532 (C) and *Chetty* above n 12 at 760F-G.

<sup>20</sup> *Chetty* id at 761D where the Court held as follows: “broadly speaking, the exercise of a court’s discretion [is] influenced by considerations of fairness and justice, having regard to all the facts and circumstances of the particular case”. One of the most important factors to be taken into account in the exercise of discretion, so the Court in *Chetty* found at 760H and 761E, was whether the applicant has demonstrated “a determined effort to lay his case before the court and not an intention to abandon it” for “if it appears that [an applicant’s] default was wilful or due to gross negligence, the court should not come to his assistance”. And, as stated in *Naidoo v Matlala N.O.* 2012 (1) SA 143 (GNP) at para [4], a court will not exercise its discretion in favour of a rescission application if undesirable consequences would follow.

<sup>21</sup> *Naidoo* id at para 7.

that the order sought to be rescinded was granted in his or her absence *and* that it was erroneously granted or sought. Both grounds must be shown to exist.

[55] Mr Zuma alleges that various rescindable errors were committed, and that both of the requirements in rule 42(1)(a) have been met. These allegations will now be addressed against the backdrop of rule 42(1)(a).

*Was the order granted in Mr Zuma's absence?*

[56] Mr Zuma alleges that this Court granted the order in his absence as he did not participate in the contempt proceedings. This cannot be disputed: Mr Zuma did not participate in the proceedings and was physically absent both when the matter was heard and when judgment was handed down. However, the words “granted in the absence of any party affected thereby”, as they exist in rule 42(1)(a), exist to protect litigants whose presence was precluded, not those whose absence was elected. Those words do not create a ground of rescission for litigants who, afforded procedurally regular judicial process, opt to be absent.

[57] At the outset, when dealing with the “absence ground”, the nuanced but important distinction between the two requirements of rule 42(1)(a) must be understood. A party must be absent, and an error must have been committed by the court. At times the party's absence may be what leads to the error being committed. Naturally, this might occur because the absent party will not be able to provide certain relevant information which would have an essential bearing on the court's decision and, without which, a court may reach a conclusion that it would not have made but for the absence of the information. This, however, is not to conflate the two grounds which must be understood as two separate requirements, even though one may give rise to the other in certain circumstances. The case law considered below will demonstrate this possibility.

[58] In *Lodhi 2*, for example, it was said that “where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of

the proceedings having been given to him, such judgment is granted erroneously”.<sup>22</sup> And, precisely because proper notice had not been given to the affected party in *Theron N.O.*,<sup>23</sup> that Court found that the orders granted in the applicants’ absence were erroneously granted. In that case, the fact that the applicant intended to appear at the hearing, but had not been given effective notice of it, was relevant and ultimately led to the Court committing a rescindable error.

[59] Similarly, in *Morudi*,<sup>24</sup> this Court identified that the main issue for determination was whether a procedural irregularity had been committed when the order was made. The concern arose because the High Court ought to have, but did not, insist on the joinder of the interested applicants and, by failing to do so, precluded them from participating. It was because of this that this Court concluded that the High Court could not have validly granted the order without the applicants having been joined or without ensuring that they would not be prejudiced.<sup>25</sup> This Court concluded thus:

“[I]t must follow that when the High Court granted the order sought to be rescinded without being prepared to give audience to the applicants, it committed a procedural irregularity. The Court effectively gagged and prevented the attorney of the first three applicants – and thus these applicants themselves – from participating in the proceedings. This was no small matter. It was a serious irregularity as it denied these applicants their right of access to court.”<sup>26</sup>

[60] Accordingly, this Court found that the irregularity committed by the High Court, insofar as it prevented the parties’ participation in the proceedings, satisfied the requirement of an error in rule 42(1)(a), rendering the order rescindable.<sup>27</sup> Whilst that

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<sup>22</sup> *Lodhi 2* above n 9 at para 24. See also *Fraind v Nothmann* 1991 (3) SA 837 (W) at 839G-H.

<sup>23</sup> *Theron N.O.* above n 19 at 535G-H; 536B-C; and 536H-537A.

<sup>24</sup> *Morudi v NC Housing Services and Development Co Limited* [2018] ZACC 32; 2019 (2) BCLR 261 (CC) at para 27.

<sup>25</sup> *Id* at para 31.

<sup>26</sup> *Id* at para 33.

<sup>27</sup> *Id* at para 34.

matter correctly emphasises the importance of a party's presence, the extent to which it emphasises actual presence must not be mischaracterised. As I see it, the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed.<sup>28</sup> I accept this. I do not, however, accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then, *ipso facto* (by that same act), plead the "absent victim". If everything turned on actual presence, it would be entirely too easy for litigants to render void every judgment and order ever to be granted, by merely electing *absentia* (absence).

[61] The cases I have detailed above are markedly distinct from that which is before us. We are not dealing with a litigant who was excluded from proceedings, or one who was not afforded a genuine opportunity to participate on account of the proceedings being marred by procedural irregularities. Mr Zuma was given notice of the contempt of court proceedings launched by the Commission against him. He knew of the relief the Commission sought. And he ought to have known that that relief was well within the bounds of what this Court was competent to grant if the crime of contempt of court was established. Mr Zuma, having the requisite notice and knowledge, elected not to participate. Frankly, that he took issue with the Commission and its profile is of no moment to a rescission application. Recourse along other legal routes were available to him in respect of those issues, as he himself acknowledges in his papers in this

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<sup>28</sup> It is of interest that, in certain instances, even when a party failed to oppose proceedings and was absent for reasons beyond their control, courts have held that the requirements of rule 42(1)(a) were not satisfied. See *Colyn* above n 19 at paras 7-9, where the Supreme Court of Appeal held as follows at para 9:

"The defendant describes what happened as a filing error in the office of his Cape Town attorneys. That is not a mistake in the proceedings. However, one describes what occurred at the defendant's attorneys' offices which resulted in the defendant's failure to oppose summary judgment, it was not a procedural irregularity or mistake in respect of the issue of the order. It is not possible to conclude that the order was erroneously sought by the plaintiff or erroneously granted by the Judge. In the absence of an opposing affidavit from the defendant there was no good reason for Desai J not to order summary judgment against him."



application. Our jurisprudence is clear: where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a). And, it certainly cannot have the effect of turning the order granted *in absentia*, into one erroneously granted.<sup>29</sup> I need say no more than this: Mr Zuma’s litigious tactics cannot render him “absent” in the sense envisaged by rule 42(1)(a).

*Was the order erroneously sought or granted?*

[62] Mr Zuma’s purported absence is not the only respect in which his application fails to meet the requirements of rule 42(1)(a). He has also failed to demonstrate why the order was erroneously granted. Ultimately, an applicant seeking to do this must show that the judgment against which they seek a rescission was erroneously granted because “there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if aware of it, not to grant the judgment”.<sup>30</sup>

[63] It is simply not the case that the absence of submissions from Mr Zuma, which may have been relevant at the time this Court was seized with the contempt proceedings, can render erroneous the order granted on the basis that it was granted in the absence of those submissions. As was said in *Lodhi 2*:

“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

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<sup>29</sup> See *Lodhi 2* above n 9 at paras 25-7 and *Colyn* id.

<sup>30</sup> *Nyingwa v Moolman N.O.* 1993 (2) SA 508 (TK) at 510D-G; see also *Daniel* above n 10 at para 6 and *Naidoo* above n 20 at para 6.

defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous one.”<sup>31</sup>

[64] Thus, Mr Zuma’s bringing what essentially constitutes his “defence” to the contempt proceedings through a rescission application, when the horse has effectively bolted, is wholly misdirected. Mr Zuma had multiple opportunities to bring these arguments to this Court’s attention. That he opted not to, the effect being that the order was made in the absence of any defence, does not mean that this Court committed an error in granting the order. In addition, and even if Mr Zuma’s defences could be relied upon in a rescission application (which, for the reasons given above, they cannot), to meet the “error” requirement, he would need to show that this Court would have reached a different decision, had it been furnished with one or more of these defences at the time.

[65] I accordingly proceed to address Mr Zuma’s *ex post facto* (after the fact) defences, which he claims disclose “rescindable errors”. Firstly, Mr Zuma takes issue with the Commission’s decision to approach this Court seeking his imprisonment by way of motion proceedings, rather than invoking the Commissions Act. It is not necessary to address these issues, which have been addressed by the majority in the contempt judgment: the Commission had standing to approach this Court; the possibility of committal for contempt in motion proceedings was the subject of debate between the majority and minority; and the fact that the Commission may have sought redress by way of the Commissions Act does not expunge the fact that it had a cause of action in terms of contempt proceedings.

[66] As explicated, Mr Zuma submits that this Court erroneously took into account hearsay evidence when determining the appropriate sanction. Again, the majority judgment reasoned that this Court was entitled to take these statements into account and found that to adjudicate the matter without considering them would be to do so with one

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<sup>31</sup> *Lodhi 2* above n 9 at para 27.

eye closed. We need not, nor can we, in rescission proceedings, return to an issue that has already been addressed. The same is true of his submissions in respect of how this Court “singled him out” and “tailor made” his sanction on account of his position as former President. And, his submissions in respect of Pillay AJ are unfounded and unmeritorious. These vitriolic comments beg only one question: if Mr Zuma took issue with Pillay AJ’s participation in this matter, why was this not raised upfront in the contempt application – why was no recusal application brought? None of the “grounds” advanced constitute rescindable errors.

[67] Finally, Mr Zuma alleges that the majority judgment infringed his constitutional rights in sections 12(1)(b), 34, and 35(3). Importantly, these issues were substantively ventilated in the contempt judgment, which did not, as Mr Zuma suggests, consider his absence as a waiver of his constitutional rights. These issues were debated at length, by both the majority and the minority judgments. Of course, Mr Zuma’s preference for the minority judgment’s conclusion over that of the majority was to be expected. But the fact that the minority differs from the majority does not give rise to a rescindable error.

[68] Whether we consider this application in terms of rule 42 or in terms of the common law, to which I will turn my focus next, the insuperable problem that Mr Zuma is confronted with is that the law of rescission is clear: one cannot seek to invoke the process of rescission to obtain a re-hearing on the merits.<sup>32</sup> The reason for this is that, as stated by this Court in *Daniel*: “the general principle is that once a court has duly pronounced a final order, it becomes *functus officio* and has no power to alter the order”.<sup>33</sup> Of course, rule 42 creates an exception to the doctrine of *functus officio*, but only in narrow circumstances. As stated in *Chetty*—

“a distinction is drawn between the rescission of default judgments, which had been granted without going into the merits of the dispute between the parties, and the

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<sup>32</sup> *Naidoo* above n 20 at para 4.

<sup>33</sup> *Daniel* above n 10 at para 5.

rescission of final and definitive judgments, whether by default or not, after evidence had been adduced on the merits of the dispute. In the case of a default judgment granted without going into the merits of the dispute between the parties, the Court enjoyed the relatively wide powers of rescission . . . . In the case of a final and definitive judgment, whether by default or not, granted after evidence had been adduced, the Court was regarded as *functus officio*.”<sup>34</sup>

In the contempt judgment, this Court traversed the merits of the submissions Mr Zuma is now making in this rescission application. Our discretion, at this stage, is unwaveringly narrow. Accordingly, this Court is unequivocally and irrevocably, *functus officio*.

[69] Because all the grounds advanced as constituting rescindable errors have already been dealt with by this Court at the time it granted the order, Mr Zuma cannot show, as he is required to, that but for the “errors”, this Court would have reached a different conclusion. Mr Zuma cannot possibly meet the “error” requirement of rule 42(1)(a).

[70] And so it is that Mr Zuma’s application falls decidedly short of the requirements of rule 42.

*Rescission in terms of the common law*

[71] As an alternative to rule 42, Mr Zuma pleads rescission on the basis of the common law, in terms of which an applicant is required to prove that there is “sufficient” or “good cause” to warrant rescission.<sup>35</sup> “Good cause” depends on whether the common law requirements for rescission are met, which requirements were espoused by the erstwhile Appellate Division in *Chetty*,<sup>36</sup> and affirmed in numerous

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<sup>34</sup> *Chetty* above n 12 at 761G-I. See also *De Wet* above n 19 at 1041C-D.

<sup>35</sup> *De Wet* id at 1033C and 1042G.

<sup>36</sup> *Chetty* above n 12 at 765A-E.

subsequent cases,<sup>37</sup> including by this Court, in *Fick*. In that matter, this Court expressed the common law requirements thus—

“the requirements for rescission of a default judgment are twofold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.”<sup>38</sup>

Thus, the existing common law test is simple: both requirements must be met. Mr Zuma must establish that he had a reasonable and satisfactory explanation for his failure to oppose these proceedings, and that he has a bona fide case that carries some prospects of success.

[72] In its submissions, the Commission correctly demonstrated that Mr Zuma has failed to meet both of these requirements. Firstly, and as canvassed above, Mr Zuma’s prospects of success, insofar as his defences are concerned, are undeniably remote: his arguments have already been dealt with and disposed of by this Court. Even if we overlook this, Mr Zuma’s case is wholly misguided, presented to us, as it is, in the form of a rescission application when it is a plea to substitute the judgment of the majority with that of the minority. His arguments constitute the stuff of an appeal.

[73] Secondly, even if Mr Zuma was at the helm of a meritorious application bearing some prospects, which he had managed to steer clear of the perilous dangers of the doctrine of *functus officio*, one cannot ignore the simple common law rule that both the requirements must be met:

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<sup>37</sup> See, for example, *Colyn* above n 19 at para 11 and *Naidoo* above n 20 at para 5.

<sup>38</sup> *Government of the Republic of Zimbabwe v Fick* [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) (*Fick*) at para 85.

“for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.”<sup>39</sup>

[74] In other words, even if Mr Zuma had prospects of success on the merits, he cannot escape the obligation to adequately explain his default. In *Chetty*, the Court dismissed the application for rescission because, it said, “I am unable to find . . . any reasonable or satisfactory explanation for his default and total failure to offer any opposition whatever to the [previous proceedings]”.<sup>40</sup> The Court said that “even if the [applicant’s] case was that he was ignorant of the proceedings which had been instituted against him, he would have been obliged to show a supremely just cause of ignorance, free from all blame whatsoever”.<sup>41</sup> And my concerns in this respect meet endorsement abroad: by way of example, the House of Lords, considering rescission, stated that it shall not re-apply itself except in circumstances where the parties have been prejudiced through no fault of their own.<sup>42</sup> The Court in *Chetty* concluded as follows:

“it appears to me that the most likely explanation of the appellant’s otherwise inexplicable failure to offer any opposition to the respondent’s application is that he was not consonant in his resolve to oppose it. Reviewing his verbal undertakings and his acts and omissions throughout that period, together with his *ex post facto* explanations, one gets the impression of moods fluctuating between a desire to achieve a particular goal and total indifference to its achievement - of a person now engaged in a flurry of activity, then supine and apathetic. . . [his behaviour] is indicative of a high degree of indifference or unconcern on his part in regard to the actions [being taken]

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<sup>39</sup> *Chetty* above n 12 at 765D-E.

<sup>40</sup> *Id* at 765E-F.

<sup>41</sup> *Id* at 762C. See also *De Wet* above n 19 at 1032E-F, which confirmed this general principle emanating from *Voet* 2.4.14 (*Gane’s* trans vol 1 at 278).

<sup>42</sup> *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577 (*Pinochet*) at 585-6.

against him, and is of a piece with his apathetic and ineffectual approach to the question of putting up opposition to the [proceedings].”<sup>43</sup>

[75] The same is true here. Mr Zuma intentionally declined to participate in the contempt proceedings, and disdainfully dismissed a further opportunity when invited to do so. Mr Zuma only now attempts to justify his absence from this Court. He goes to great lengths to point out that his failure to appear before the Commission was bona fide because, so he contends, the Chairperson was biased against him; the Commission is unconstitutional; he had received poor legal advice; and he lacked financial means to participate. Yet, he seems to overlook the fact that none of these reasons justify his refusal to participate in the proceedings before this Court. His plea of poverty is totally irreconcilable with his extra-curial statements that not only unequivocally evinced his resolve not to participate in the proceedings, but also displayed his attitude of utter derision towards this Court. This plea is quite plainly an afterthought, if not subterfuge. It falls to be rejected out of hand. Coming to the alleged poor legal advice, this makes sense only in the context of non-participation in the proceedings as a result of that advice. If the true reason for non-participation was lack of funds, it must follow that he would still not have had funds even if there was no poor legal advice. What then is the relevance of the alleged lack of funds? For these reasons, it is difficult to comprehend this assertion about poor legal advice. I make bold and say, because of this incomprehensibility, this assertion, too, smacks of being an afterthought.

[76] The truth is that Mr Zuma has failed to provide a plausible or acceptable explanation for his default. This being so, he cannot hope to succeed on the merits, for ultimately, “an unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits”.<sup>44</sup> In fact, and although I have considered the merits of this application, in the absence of a reasonable explanation for his default, we are not even obliged to assess Mr Zuma’s prospects, for—

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<sup>43</sup> *Chetty* above n 12 at 767A-H.

<sup>44</sup> *Id* at 768B-C.

“in the light of the finding that the appellant’s explanation is unsatisfactory and unacceptable it is therefore, strictly speaking, unnecessary to make findings or to consider the arguments relating to the appellant’s prospects of success.”<sup>45</sup>

[77] With this putting an end to the common law enquiry, I now turn to consider whether Mr Zuma has advanced any other grounds on which this Court can and should reconsider its order.

*Has Mr Zuma established any other grounds for this Court to rescind or reconsider its order?*

[78] In one last bid, Mr Zuma submits that if he fails to establish the requirements for rescission under rule 42 or the common law, this Court should nevertheless reconsider its order on the basis that the meaning of a rescindable error, as captured by rule 42, should be expanded to permit for rescission applications in which a litigant impugns the constitutionality, or part thereof, of an order of court. He submits that this is so because of the inclusion of the words “with such modifications as may be necessary” in the incorporating provision – rule 29. What are we to make of this bold suggestion?

[79] The position Mr Zuma advocates necessarily involves a broadening of the grounds for rescission. The first problem with this approach is that, far from inviting courts to expand the scope of rescission, every case to which I have had regard suggests we must do the exact opposite. Rule 42, so held the Supreme Court of Appeal in *Colyn*, is carefully and for good reason “confined by its wording and context”.<sup>46</sup> If what the Supreme Court of Appeal meant by saying this is not clear enough already, the Court went further, stating expressly that “the trend of the courts over the years is not to give a more extended application to the rule to include all kinds of mistakes or irregularities”.<sup>47</sup> De Villiers CJ in *Childerley*, reiterated by Trengove AJA in *De Wet*,

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<sup>45</sup> Id at 768C.

<sup>46</sup> *Colyn* above n 12 at para 7.

<sup>47</sup> Id at para 8.



specifically stated that he knew of no further, or extended, ground of rescission than that which exists at the common law. On the contrary, it is well established that the grounds upon which a judgment can be set aside are extremely narrow and the law of rescission intends to exclude any other grounds for setting aside judgments after an action has been fought to a finish.<sup>48</sup>

[80] Of course, these cases predate the Constitution. However, speaking on the common law grounds of rescission, subsequent to the advent of our constitutional dispensation, Thring J in *Vilvanathan* said:

“[I]t is apparent, I think, with respect, that over a long period the Appellate Division and, more recently, the Supreme Court of Appeal, while being astute to emphasise the need to preserve the width and flexibility of the Court’s discretion, has unambiguously settled the ambit of the common law powers of this Court to rescind its own judgments, the limits to those powers, and certain aspects of the manner in which the courts should exercise their discretion in considering such applications for rescission.”<sup>49</sup>

[81] It is thus not generally open to courts to expand grounds for rescission. To the contrary, Thring J warned against the development or adaptation of the common law, affirming that—

“a Court obviously has inherent power to control the procedure and proceedings in its Court . . . [but] this, in my view, does not include the right to interfere with the principle of the finality of judgments other than in circumstances specifically provided for in the Rules or at common law.”<sup>50</sup>

Deliberating over his own competence to extend the grounds of rescission, he concluded thus:

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<sup>48</sup> *Childerley Estate Stores v Standard Bank of South Africa Ltd* 1924 OPD 163 (*Childerley*) at 168-9 and *De Wet* above n 19 at 1040H-1041B.

<sup>49</sup> *Vilvanathan v Louw N.O.* 2010 (5) SA 17 (WCC) at 23I-24A, citing *De Wet v Western Bank Ltd* 1977 (4) SA 770 (T) at 780G-H.

<sup>50</sup> *Vilvanathan* id at 28J-29C.

“[I]t seems to me that what the applicants seek . . . is this Court’s participation in what would, I think, be tantamount to the publication of a fiction, that is to say, the creation of an impression, which would be false, that the judgment here concerned had not been lawfully, regularly, properly and competently granted in the first place. In *Venter v Standard Bank of S.A.*, Joffe, J said:

‘if there is a commercial need for judgments properly sought and granted in the courts to be rescinded it is for the Legislature to provide the necessary enactment. It is certainly not the function of the courts to make themselves a party to a fiction to satisfy what may be commercial needs.’

...

[T]here are, or may be, far-reaching consequences and ramifications to the rescission of judgments.”<sup>51</sup> (Footnotes omitted.)

[82] It is trite that orders of this Court are final and immune from appeal. They are, however, rescindable, and the Legislature has carefully augmented the common law grounds of relief by expressly providing for narrow grounds of rescission by crafting rule 42. Narrow those grounds are, for good reason,<sup>52</sup> for the very notion of rescission of a court order constitutes the exception to the ordinary rule that court orders, especially those of this Court, are final. By its nature the law of rescission invites a degree of legal uncertainty. So, to avoid chaos, the grounds upon which rescission can be sought have been deliberately carved out by the Legislature. It is true that—

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<sup>51</sup> Id at 29D-F and 30D.

<sup>52</sup> The importance of safeguarding the rule of law and the institutional integrity of an apex court through the principles of legal certainty and finality of judgments demands that rescission and reconsideration of an earlier order only be permitted in narrow and exceptional circumstances. This approach to rescission is also endorsed by foreign law. In *Northern India Caterers (India) v Lt Governor of Delhi* 1980 AIR 674; 1980 SCR (2) 650, the Supreme Court of India, confronted with a rescission application held that—

“[i]t is well settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when *circumstances of a substantial and compelling character* make it necessary to do so.”

Additionally, in *Likanyi v S* [2017] NASC 10 at paras 29 and 58, the Supreme Court of Namibia held that it “has the jurisdiction to revisit a prior decision” but can only reverse it in exceptional circumstances.

“whatever the position may have been . . . there can no longer be any equitable need to interfere with the principle of finality of judgments.

‘It should therefore no longer be necessary to seek adaptations to the common law, arguably by uncomfortable and artificial contrivance, to address the sort of unhappy predicament that the applicants in this case find themselves in.’

Whatever equitable need may in the past have been felt to exist for departing from the long-established principles of law to which I have referred, has now been more or less effectively dealt with by the Legislature.”<sup>53</sup> (Footnotes omitted.)

[83] Of course, all of the above refers to instances where courts have been required to grapple with the expansion of the common law, which is somewhat different from what we are being requested to do, which is more akin to an exercise of statutory interpretation. But I do not think it wise to ignore what our courts have said on the dangers of expanding the grounds of rescission. I can do no better than repeat what was held in *De Wet*:

“Since the common law defines the circumstances in which judgments may be set aside and since the Rules of Court make specific provision for such contingencies, it would be anomalous, indeed, if Courts had the inherent power to grant relief merely because of sympathy for litigants in default. Logic or common sense might suggest that a litigant should be afforded relief. Logic and common sense, however, are no basis for a general discretion or power particularly when it has been deemed necessary to make Rules specifically dealing with the position. It would be equivalent to legislating if the Courts . . . went beyond the common law. The power must be found in the Rules and in the common law because the ordinary principle is that when judgment has been pronounced the Court is thereupon *functus officio*.”<sup>54</sup>

[84] And this leads me to my next point: we are *functus*. Unfortunately for Mr Zuma, even if we were minded to interpret the meaning of “error” expansively, doing so would

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<sup>53</sup> *Vilvanathan* above n 49 at 30I-31E.

<sup>54</sup> *De Wet* above n 19 at 1034H-1035A.

not serve him. This is because what he would have this Court consider, we have already considered.<sup>55</sup> In any event, even if this were not the case, and if Mr Zuma had advanced a case with some prospects of success, it would be unwise to ignore the manner in which he has litigated. Our extending the grounds of rescission in terms of the Constitution, cannot, surely, escape the underlying principle that has, for decades, guided the law on rescission: a failure to adequately explain one's default is fatal.

[85] Ultimately, the qualification in our rule 29 of “such modifications as are necessary” provides no panacea to this ill-fated application for rescission. The modifications as they may be, do not change the nature of the rescission application as we know it in rule 42 or under the common law – far from it. And, based on all of the above, I can only conclude that Mr Zuma's case, pleaded in terms of rule 42 and the common law, has atrophied quite miserably.

*Do the interests of justice warrant rescission in these circumstances?*

[86] In the light of the preceding analysis, is this the end of the road for Mr Zuma's case? Perhaps not. If this Court were to adopt a generous approach in construing his pleaded case, it might be open to it to reconsider its contempt order if it would be in the interests of justice to do so. I am compelled to address this point squarely since it is, in part, pursuant to the interests of justice that my Colleagues Jafta J and Theron J see fit to rescind the order granted in the contempt proceedings. They emphasise the power of this Court to intervene where its earlier order results in an injustice.<sup>56</sup>

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<sup>55</sup> See *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* [2005] ZACC 18; 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC) at para 28 where this Court affirmed the following principles:

“Under common law the general rule is that a Judge has no authority to amend his or her own final order. The rationale for this principle is two-fold. In the first place a Judge who has given a final order is *functus officio*. Once a Judge has fully exercised his or her jurisdiction, his or her authority over the subject matter ceases. The other equally important consideration is the public interest in bringing litigation to finality. The parties must be assured that once an order of court has been made, it is final and they can arrange their affairs in accordance with that order.”

<sup>56</sup> Second judgment at [239]-[240].

[87] This power was alluded to by this Court in *Ka Mtuze* as follows:

“If the position were to be that this Court does have power outside of rule 29 read with rule 42 to reconsider and, in an appropriate case, change a final decision that it had already made, one can only think that that would be in a case where it would be in accordance with the interests of justice to re-open a matter in that way.”<sup>57</sup>

I should emphasise however, before we go any further, that this Court noted that “[t]he interests of justice would require that that be done in very exceptional circumstances”.<sup>58</sup>

[88] This alternative avenue through which this Court may revisit its orders was discussed and developed further in *Molaudzi*, where this Court held:

“The incremental and conservative ways that exceptions have been developed to the *res judicata* doctrine speak to the dangers of eroding it. The rule of law and legal certainty will be compromised if the finality of a court order is in doubt and can be revisited in a substantive way. The administration of justice will also be adversely affected if parties are free to continuously approach courts on multiple occasions in the same matter. However, legitimacy and confidence in a legal system demands that an effective remedy be provided in situations where the interests of justice cry out for one. There can be no legitimacy in a legal system where final judgments, which would result in substantial hardship or injustice, are allowed to stand merely for the sake of rigidly adhering to the principle of *res judicata*.”<sup>59</sup>

[89] In that matter, this Court held that it was appropriate to relax the doctrine of *res judicata*. The applicant, an unrepresented and vulnerable member of society, was serving a life sentence of imprisonment and, in those circumstances, a grave injustice would have resulted from this Court declining to re-open the matter, especially because relief had been granted to his co-accused.<sup>60</sup>

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<sup>57</sup> *Ka Mtuze v Bytes Technology Group South Africa (Pty) Ltd* [2013] ZACC 31; 2013 (12) BCLR 1358 (CC) at para 19.

<sup>58</sup> *Id.*

<sup>59</sup> *S v Molaudzi* [2015] ZACC 20; 2015 (2) SACR 341 (CC); 2015 (8) BCLR 904 (CC) (*Molaudzi*) at paras 37-40.

<sup>60</sup> *Id.* at paras 38-40.

[90] In that matter, again, this Court emphatically held that “the circumstances must be wholly exceptional to justify a departure from the *res judicata* doctrine. The interests of justice is the general standard, but the vital question is whether there are truly exceptional circumstances.”<sup>61</sup>

[91] What, then, constitutes exceptional circumstances? The blood of the “exceptional circumstances” test finds life in section 17(2)(f) of the Superior Courts Act,<sup>62</sup> which section empowers the President of the Supreme Court of Appeal, either *mero motu* or upon application by an applicant, to reconsider a matter after a refusal of an application for leave to appeal, where exceptional circumstances warrant it. Although self-evidently circumscribed from finding application here, this Court has interpreted this section in several cases which are instructive on the meaning of the words “exceptional circumstances”.<sup>63</sup> Most notable among them, in *Liesching II*, this Court held that:

“[E]xceptional circumstances, in the context of section 17(2)(f), and apart from its dictionary meaning, should be linked to either the probability of grave individual injustice . . . or a situation where, even if grave individual injustice might not follow, the administration of justice might be brought into disrepute if no reconsideration occurs.”<sup>64</sup>

Following from this, this Court stated in no uncertain terms that section 17(2)(f) does not allow for a “parallel appeal process” or “additional bites at the proverbial appeal cherry”.<sup>65</sup> The provision exists only to allow the President of the Supreme Court of

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<sup>61</sup> *Id.*

<sup>62</sup> 10 of 2013.

<sup>63</sup> *S v Liesching* [2016] ZACC 41; 2017 (2) SACR 193 (CC); 2017 (4) BCLR 454 (CC) (*Liesching I*) at para 28 and *S v Liesching* [2018] ZACC 25; 2019 (4) SA 219 (CC); 2018 (11) BCLR 1349 (CC) (*Liesching II*) at para 138.

<sup>64</sup> *Liesching II id.*

<sup>65</sup> *Id.* at para 139. A further insightful case is *Cloete v S and a Similar Application* [2019] ZACC 6; 2019 (4) SA 268 (CC); 2019 (5) BCLR 544 (CC) at paras 20 and 37, which involved applicants who had been convicted of murder in the High Court, and who had applied unsuccessfully first for leave to appeal before the Supreme Court of Appeal and then for reconsideration of the decision to refuse leave to appeal. The applicants applied to this

Appeal to prevent injustice. And what is clear from the above is that, even if one is minded to suggest that a grave injustice would befall Mr Zuma in the event that this Court refuses to reconsider its order, the administration of justice would not be brought into disrepute if this Court declines to reconsider the matter. On the contrary, in fact, I am convinced that the administration of justice will be brought into disrepute if this Court does reconsider it.

[92] What becomes clear is this: reconsideration in terms of section 17(2)(f) is only triggered where exceptional circumstances exist, and is emphatically not a parallel appeal process. Overwhelmingly, a high threshold is set by the provision which allows for reconsideration. This is instructive. Although this high threshold, ushered in by the words “exceptional circumstances”, was met by the factual matrix in, for example, *Molaudzi*, Mr Zuma must similarly overcome this hurdle.

[93] The first difficulty with which I am confronted, in considering this enquiry, is the fact that Mr Zuma failed to make a proper case for this exceptional ground of reconsideration. This failure cannot be regarded as insignificant because, unlike Mr Molaudzi, Mr Zuma was comfortably represented by attorneys and a team of six counsel, including two senior counsel, throughout these proceedings. Although the jurisprudence of this Court favours substance over form, it is also trite that parties are expected to plead a clear cause of action, and that “[h]olding parties to pleadings is not pedantry”.<sup>66</sup> In oral argument, the Commission rightly pointed out that Mr Zuma has failed to cogently plead this ground of reconsideration in this Court.

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Court, which framed the question as whether this Court had jurisdiction to hear an appeal against a section 17(2)(f) decision made by the Supreme Court of Appeal. Answering this question, this Court held that it will not ordinarily have jurisdiction to hear this kind of appeal, as it will most likely turn on the factual findings of the President of the Supreme Court of Appeal on whether exceptional circumstances exist. However, this Court in that case went one step further and pronounced on the interests of justice in a section 17(2)(f) appeal, saying at para 38, that—

“[e]ven where an appeal against a section 17(2)(f) decision engages this Court’s jurisdiction, it will often not be in the interests of justice to grant leave to appeal. This is because the decision will often not be final, granting leave could create a dual appeal process, and no prejudice will result from a refusal to grant leave.”

<sup>66</sup> *SATAWU v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) at para 114.

[94] In any event, from where I sit, there is nothing in Mr Zuma’s case that can be construed as “truly exceptional” to the extent that this Court should depart from the underlying principles and ordinary tenets of the rule of law. By now it is quite clear that the only possible inference that can be drawn from Mr Zuma’s conduct in these proceedings is that this application constitutes an effort to backtrack on a failed, but deliberate, litigious strategy. Moreover, he has failed to place any new information before this Court that could have a bearing on the issues that formed the substance of the contempt proceedings, which enjoyed lengthy and rigorous engagement through two judgments. There is no modicum of exceptionality at issue that justifies a relaxation of the doctrine of *res judicata*. In fact, a relaxation of this doctrine under these circumstances would undeniably damage the integrity of this Court and render the finality of its orders laughable in the eyes of the public.

[95] On that note, I must remark on a troubling aspect of the second judgment. In reaching the conclusion that it is in the interests of justice for this Court to reconsider the contempt judgment because it is inconsistent with the Constitution, my Brother reasons that the precedent established by the Supreme Court of Appeal in *Fakie*<sup>67</sup> is “inconsistent with the principle of supremacy of the Constitution”.<sup>68</sup> The second judgment seems to suggest that this precedent ought to be overruled,<sup>69</sup> notwithstanding that it has been endorsed by this Court in *Pheko II*,<sup>70</sup> *Matjhabeng*,<sup>71</sup> and most recently in the contempt judgment.<sup>72</sup> The jurisprudence established by these cases, among others, was extensively considered in the contempt judgment, and formed an underlying basis for the tensions between the majority and minority decisions in that judgment. I do not intend to, and indeed cannot, revisit this debate in this judgment, for doing so

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<sup>67</sup> *Fakie* above n 11.

<sup>68</sup> Second judgment at [212].

<sup>69</sup> *Id.*

<sup>70</sup> *Pheko v Ekurhuleni City* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (*Pheko II*) at para 35.

<sup>71</sup> *Matjhabeng Local Municipality v Eskom Holdings Limited; Mkhonto v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2018 (1) SA 1 (CC); 2017 (11) BCLR 1408 (CC) (*Matjhabeng*) at paras 53 and 59.

<sup>72</sup> Contempt judgment above n 1 at para 77.



presupposes that Mr Zuma has succeeded in establishing a ground on which this Court can reconsider its order. I merely wish to emphasise that my Brother's suggestion that *Fakie* ought to be overturned is wholly unsupported by this Court's jurisprudence, and by the pleaded case before this Court in this matter. I shall say no more on this, other than that I am entirely unpersuaded that this has any bearing on what the interests of justice demand in this matter.

[96] Having established that the interests of justice do not compel me to expand the grounds of rescission or reconsider the application, let me delve deeper and demonstrate how the interests of justice, in fact, require this Court to dispose of this matter.

*Finality and legal certainty: the linchpins of the interests of justice enquiry*

[97] I am overwhelmingly persuaded that the rule of law requires not only that litigation must come to an end, but that this Court affirms itself as the final arbiter of disputes of law. After all—

“[t]he principle of finality in litigation which underlies the common law rules for the variation of judgments and orders is clearly relevant to constitutional matters. There must be an end to litigation and it would be intolerable and could lead to great uncertainty if courts could be approached to reconsider final orders made.”<sup>73</sup>

[98] There is a reason that rule 42, in consolidating what the common law has long permitted, operates only in specific and limited circumstances. Lest chaos be invited into the processes of administering justice, the interests of justice requires the grounds available for rescission to remain carefully defined. In *Colyn*, the Supreme Court of Appeal emphasised that “the guiding principle of the common law is certainty of judgments”.<sup>74</sup> Indeed, a court must be guided by prudence when exercising its discretionary powers in terms of the law of rescission, which discretion, as expounded

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<sup>73</sup> *Minister of Justice v Ntuli* [1997] ZACC 7; 1997 (3) SA 722 (CC); (1997) BCLR 677 (CC) at para 29.

<sup>74</sup> *Colyn* above n 19 at para 4.

above, should be exercised only in exceptional cases,<sup>75</sup> having “regard to the principle that it is desirable for there to be finality in judgments”.<sup>76</sup>

[99] The Commission, HSF and CASAC all persuasively demonstrated that any development of the grounds of rescission would have profoundly detrimental effects on legal certainty and the rule of law. I too, cannot see how it would be in the interests of justice for this Court to expand the definition of “error” to provide for any allegation of unconstitutionality. We must ponder the possible outcomes of doing so carefully, for if we do not, this Court might soon find itself inundated with similarly unmeritorious applications, all raising any number of allegations of unconstitutionality. Lest we wish to invite every litigant who has enjoyed their day in this Court, but nevertheless found themselves with an order against them, to approach us again armed with a so-called rescission application that would have us reconsider the merits of their case, it is sagacious to entertain this matter no further. The principles of finality and legal certainty lie at the heart of this case, and I fear that significant damage has already been done to these principles.

*Mr Zuma’s dirty hands: swinging the pendulum of the interests of justice enquiry*

[100] Finally, it would be remiss of me to avoid confronting the fact that Mr Zuma has, at every turn, refused to participate in these proceedings. The Commission and HSF went so far as to argue that Mr Zuma preempted his right to bring this application through his disdainful conduct which indicated a clear intention to communicate that he was not in the least concerned with what this Court’s decision might be. I must address this argument, as it is relevant to the interests of justice enquiry.

[101] It is trite that the doctrine of peremption finds application across our legal landscape. The doctrine tells us that “[p]eremption is a waiver of one’s constitutional

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<sup>75</sup> *De Wet* above n 19 at 1042G.

<sup>76</sup> *Id* at 1033C-D.

right to appeal in a way that leaves no shred of reasonable doubt about the losing party's self-resignation to the unfavourable order that could otherwise be appealed against".<sup>77</sup> The principle that underlies this doctrine 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".<sup>78</sup> Notwithstanding this, our law does allow for some flexibility where policy considerations exist that militate against the enforcement of peremption.<sup>79</sup> Although the doctrine has its origin in appeals, the doctrine and its principles do apply equally in the case of rescission.

[102] I have reservations about extending the application of the doctrine of peremption to the present circumstances, where the alleged acquiescence occurred before the judgment was finalised. It is not wholly fair to state that Mr Zuma acquiesced in the judgment by acting in a manner synonymous with an intention to abide by it. In fact, as soon as the judgment was handed down, he made every effort to counter it.

[103] Nevertheless, the underlying principles of peremption do resonate. Mr Zuma's behaviour, albeit made manifest before the judgment and order were handed down, pointed indubitably to the conclusion that he had no intention of participating in the contempt proceedings, and had resigned himself to any decision that this Court might make, even one that might lead to his incarceration. With this in mind, to entertain Mr Zuma's application in these circumstances would be to permit him to "blow hot and cold, to approbate and reprobate". This would be wholly contrary to the interests of justice. What does this mean? While I do not perceive peremption as the death knell to Mr Zuma's application, his conduct and the impression created thereby substantially prejudice his case. If our law, through the doctrine of peremption, expressly prohibits litigants from acquiescing in a court's decision and then later challenging that same decision, it would fly in the face of the interests of justice for a party to be allowed to

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<sup>77</sup> *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2016] ZACC 38; 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC) (*SARS*) at para 26.

<sup>78</sup> *Hlatshwayo v Mare and Deas* 1912 AD 242 at 259.

<sup>79</sup> *SARS* above n 77 at para 25.

wilfully refuse to participate in litigation and then expect the opportunity to re-open the case when it suits them. It is simply not in the interests of justice to tolerate this manner of litigious vacillation. After all, that is why peremption has crystallised as a principle of our law, and that is why what Mr Zuma asks of this Court is wholly untenable.

[104] The above analysis can lead me to only one conclusion. Taking into account the importance of the principles of finality and Mr Zuma’s conduct displayed throughout these proceedings, the interests of justice can only be served by the dismissal of this application.

*The operation of international law and concerns relating to the second judgment*

[105] In the light of the second judgment penned by my Brother Jafta J, I am compelled to express my concerns in respect of his approach. He identifies the main issues for determination as: whether the impugned order had the effect of authorising Mr Zuma’s detention without a trial, in contravention of section 12(1)(b) of the Constitution; and whether the procedure leading up to his conviction and sentencing was in breach of his rights guaranteed by sections 34 and 35(3) of the Constitution.<sup>80</sup> My Brother, Jafta J argues that the determination of these issues depends largely on the proper interpretation of the Constitution, which requires recourse to international law.<sup>81</sup> He concludes that the order granted by this Court is not only unconstitutional, but is also incompatible

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<sup>80</sup> Second judgment at [172].

<sup>81</sup> Pursuant to this approach, directions calling for written submissions from the parties were issued. These directions, dated Friday, 6 August 2021, read as follows:

“The parties are directed to file written submissions, not exceeding 20 pages, on the following—

1. In light of section 39(1) of the Constitution, whether this Court is obliged to consider the United Nations International Covenant on Civil and Political Rights (Covenant) when construing sections 12(1)(b) and 35(3) of the Constitution;
2. If it should, what implications do articles 9 and 14(5) of the Covenant together with decisions of the Human Rights Committee have on the applicant’s detention?”

with international law, namely articles 9<sup>82</sup> and 14(5)<sup>83</sup> of the United Nations International Covenant on Civil and Political Rights (ICCPR).<sup>84</sup>

[106] It is incontrovertible that this Court is constitutionally enjoined to consider international law when interpreting any of the rights in the Bill of Rights. This is clear from the text of section 39(1)(b) of the Constitution, which provides thus:

“When interpreting the Bill of Rights, a court, tribunal or forum—

...

(c) must consider international law.”

And, of course, this interpretative injunction naturally extends to include any interpretation of the rights enshrined in sections 12(1)(b) and 35(3) of the Constitution.

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<sup>82</sup> Article 9 of the ICCPR provides:

1. 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 [or her] liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his [or her] arrest and shall be promptly informed of any charges against him [or her].
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a Judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
4. Anyone who is deprived of his [or her] liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his [or her] detention and order his [or her] release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

<sup>83</sup> Article 14(5) of the ICCPR provides:

“Everyone convicted of a crime shall have the right to his [or her] conviction and sentence being reviewed by a higher tribunal according to law.”

<sup>84</sup> South Africa signed the ICCPR on 3 October 1994 and ratified it on 10 December 1998. This gives the ICCPR “interpretative significance” vis-à-vis South Africa’s human rights obligations (*Sonke Gender Justice NPC v President of the Republic of South Africa* [2020] ZACC 26; 2020 JDR 2619 (CC); 2021 (3) BCLR 269 (CC) at para 57).

[107] This much all of the parties conceded in their further submissions, and I have no intention of disputing, especially in the light of the relevant jurisprudence that has emanated from this Court.<sup>85</sup> Similarly, it is incontrovertible that the ICCPR does indeed bind South Africa on the international plane.<sup>86</sup> I do not dispute this either. What I do, however, dispute is the import or relevance of the ICCPR to this rescission application in this Court.

[108] It is trite that international treaties, like the ICCPR, do not create rights and obligations automatically enforceable within the domestic legal system of the member State that ratifies and signs them. The architecture of international law is constructed around the recognition of State Sovereignty. That is why it is a cardinal tenet of international law, that to be given force and effect on the domestic plane of a dualist State, international treaties must be incorporated into a State's body of domestic law by way of an implementing provision enacted by that State's Legislature. This principle is put on a textual footing in our own Constitution by virtue of section 231(4), which maintains that a South African court cannot treat any international law as directly applicable on the domestic front unless it is first incorporated into domestic law by an enactment of national legislation.<sup>87</sup> It is worth noting that while South Africa has signed

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<sup>85</sup> In *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (*Glenister II*) at para 192, this Court emphasised the obligation on courts to consider international law when interpreting the Bill of Rights. See also *Sonke Gender Justice NPC* id at para 56, and *Women's Legal Centre Trust v President of the Republic of South Africa, Faro v Bingham N.O., Esau v Esau* 2018 (6) SA 598 (WCC) at paras 173-8.

<sup>86</sup> See *Glenister II* id.

<sup>87</sup> Section 231 provides for the operation of international treaties at the domestic level, and in full, provides thus:

“International agreements

- (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
- (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
- (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

and ratified the ICCPR, it has not incorporated it into domestic law. And, of course, it goes without saying that section 39(1)(b) does not, in and of itself, incorporate international law into domestic law. What this means is that, although the ICCPR binds the Republic at the international level, its provisions, which are not self-executing, do not create domestic rights and obligations that are capable of binding domestic courts or being invoked by litigants in this Court, or any court in this country.<sup>88</sup> Even my

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- (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
- (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.”

See also *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* [2014] ZACC 30; 2015 (1) SA 315 (CC); 2014 (12) BCLR 1428 (CC) at para 24.

<sup>88</sup> For a comprehensive exposition of the nature and application of international treaty law in South Africa, see *Glenister II* above n 85, in which the position of international law vis-à-vis South African law was examined by Ngcobo J, extensively at paras 89-92:

“The constitutional scheme of section 231 is deeply rooted in the separation of powers, in particular the checks and balances between the executive and the legislature. It contemplates three legal steps that may be taken in relation to an international agreement, with each step producing different legal consequences. First, it assigns to the national Executive the authority to negotiate and sign international agreements. But an international agreement signed by the Executive does not automatically bind the Republic unless it is an agreement of a technical, administrative or executive nature. To produce that result, it requires, second, the approval by resolution of Parliament.

The approval of an agreement by Parliament does not, however, make it law in the Republic unless it is a self-executing agreement that has been approved by Parliament, which becomes law in the Republic upon such approval unless it is inconsistent with the Constitution or an Act of Parliament. Otherwise, and third, an ‘international agreement becomes law in the Republic when it is enacted into law by national legislation’.

The approval of an international agreement, under section 231(2) of the Constitution, conveys South Africa’s intention, in its capacity as a sovereign State, to be bound at the international level by the provisions of the agreement. As the Vienna Convention on the Law of Treaties provides, the act of approving a convention is an ‘international act . . . whereby a State establishes on the international plane its consent to be bound by a treaty’. The approval of an international agreement under section 231(2), therefore, constitutes an undertaking at the international level, as between South Africa and other States, to take steps to comply with the substance of the agreement. This undertaking will, generally speaking, be given effect by either incorporating the agreement into South African law or taking other steps to bring our laws in line with the agreement to the extent they do not already comply.

An international agreement that has been ratified by resolution of Parliament is binding on South Africa on the international plane. And failure to observe the provisions of this agreement may result in South Africa incurring responsibility towards other signatory States. An international agreement that has been ratified by Parliament under section 231(2), however, does not become part of our law until and unless it is incorporated into our law by national legislation. An international agreement that has not been incorporated in our law cannot be a source of rights and obligations.” (Footnotes omitted.)

Brother accepts, as of course he must, that the ratification of international law instruments does not make them enforceable in our domestic courts, but rather, binds the Republic at the international level.<sup>89</sup>

[109] On a conspectus of all of the above, the simple truth that ossifies is that the ICCPR, an international treaty not incorporated into South African law, has no place being invoked in a national court, like this one, and litigants cannot purport to rely on section 39(1)(b) of the Constitution as the basis upon which to attempt to invoke its provisions. The parties at hand have not invoked the relevant ICCPR provisions – for they simply cannot – and it would be wholly inappropriate for this Court to do so on their behalf. I, unlike my Brother, am not satisfied that it is possible to resort to the direct application of international treaty law in this Court, namely certain of the provisions of the ICCPR.

[110] The pertinent point is this: if the ICCPR cannot be directly invoked by parties in domestic courts, then I fail to comprehend how its provisions can constitute a ground of rescission or reconsideration in a domestic court like this one. The answer is simple – the ICCPR and its provisions cannot possibly constitute a ground of rescission. Accordingly, I have difficulty understanding the relevance of any of the provisions of the ICCPR to the rescission application before us and I cannot agree with the conclusion that my Brother advances, namely that:

“even if the order . . . were to be consistent with our Constitution, it would still be susceptible to rescission if it breached article 9 or 14 of the ICCPR because it would expose South Africa to a claim under international law.”<sup>90</sup>

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See also *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) at para 26, in which this Court stated in no uncertain terms that “international conventions do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment”.

<sup>89</sup> Second judgment at [187].

<sup>90</sup> *Id* at [246].



[111] Firstly, I must say that I am troubled by the proposition that an alleged exposure to a claim under international law necessarily results in a ground for rescission. This is a *non sequitur* (a conclusion that does not follow), and nowhere in our law of rescission does this contention find any endorsement.

[112] Secondly, and most importantly, what my Brother seems to ignore in making this statement is that the import of it is that litigants can invoke the provisions of the ICCPR in domestic courts, relying on the incompatibility of an order with those provisions as a ground of rescission on the domestic plane. As should be incontrovertible by this point, no litigant can approach a domestic court alleging a violation of any provision of the ICCPR. How, then, can they approach a domestic court alleging a justiciable error on the basis of those same, un-invocable provisions? The answer is simple and ineluctable. They cannot. There is no jurisprudential basis for the direct application of the ICCPR to an application for rescission and its provisions simply cannot form a basis to rescind or reconsider an order of this Court. It is unfortunate that the second judgment has elided an important distinction between the operation of international law at the domestic and the international level, erroneously conflating the two.

[113] When closely scrutinised, I cannot help but conclude that the structural integrity of my Brother's approach self-implodes. He states that the ICCPR is not enforceable in South African courts. As he must, he recognises that "a claim based on the ICCPR will have to be made in the Human Rights Committee".<sup>91</sup> Yet, in the very same breath, he states that "[w]e mention [the articles of the ICCPR] here purely as a factor relevant to rescission".<sup>92</sup> Herein lies that with which I struggle most: although my Brother acknowledges the unavoidable limits of international law and, similarly, that the provisions of the ICCPR cannot form the basis of a justiciable claim in this, or any, domestic court, the premise of his approach suggests the exact opposite. I say this

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<sup>91</sup> Id.

<sup>92</sup> Id.

because his judgment would have this Court, at this domestic level, reconsider its previous order on the basis of an inconsistency with the ICCPR. Thus, one can only infer that, despite what he states expressly, my Brother is implicitly satisfied that the provisions of the ICCPR can be invoked in this Court as a ground of rescission. It is for this reason, among others, that the premise of my Brother's approach is, with all due respect, untenable.

[114] None of this is to say that international law is irrelevant, or rather, as this Court cautioned in *Glenister II*, “[t]his is not to suggest that the ratification of an international agreement by a resolution of Parliament is to be dismissed ‘as a merely platitudinous or ineffectual act’”.<sup>93</sup> To the contrary, section 39(1)(b) does, after all, provide an interpretative injunction that requires this Court, and all South African courts, to consider international law when interpreting the Bill of Rights.<sup>94</sup> However, the operative word is “consider”: this Court must “consider” international law.

[115] So, on that note, it should be pointed out that articles 9 and 14(5) of the ICCPR are not the only international provisions that could inform this Court's interpretation of sections 12(1)(b) and 35(3). As demonstrated by HSF in its further submissions, there is a vast body of international law that is of assistance to this Court in interpreting the Bill of Rights. However, given what I conclude above, it is not necessary to engage in this exercise. The point is that the interpretative obligation imposed by section 39(1)(b) ought not to be perceived as an invitation to jurisprudential cherry-picking of one specific international agreement in the interpretative exercise. There is nothing to

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<sup>93</sup> *Glenister II* above n 85 at para 96, where this Court went on to say that:

“The ratification of an international agreement by Parliament is a positive statement by Parliament to the signatories of that agreement that Parliament, subject to the provisions of the Constitution, will act in accordance with the ratified agreement. International agreements, both those that are binding and those that are not, have an important place in our law. While they do not create rights and obligations in the domestic legal space, international agreements, particularly those dealing with human rights, may be used as interpretative tools to evaluate and understand our Bill of Rights.”

<sup>94</sup> *Id* where the majority noted that undomesticated international agreements do not create binding rights and obligations within South Africa, but that section 39(1)(b) places an *interpretative injunction* on the courts to take such agreements into account when interpreting any rights in the Bill of Rights.

suggest that the provisions of the ICCPR ought to take precedence over any other provision of international law.

[116] Furthermore, and this cannot be overemphasised: no matter which international provision may be relevant, section 39(1)(b) enjoins us only to “consider” it. What section 39(1)(b) does not do is import some obligation on our domestic courts to depart from South African constitutional rights jurisprudence merely because similar or duplicative provisions exist, and their interpretations have been propounded, at the international level. As this Court itself noted in *Glenister II*:

“[T]reating international conventions as interpretative aids does not entail giving them the status of domestic law in the Republic. To treat them as creating domestic rights and obligations is tantamount to ‘incorporating the provisions of the unincorporated convention into our municipal law by the back door’.”<sup>95</sup>

[117] Lest international law be incorporated through the back door, section 39(1)(b) must not be conflated with section 233 of the Constitution, which applies to the interpretation of legislation, and requires something quite different of our domestic courts. Section 233 provides:

“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

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<sup>95</sup> *Glenister II* above n 85 at para 98. See also, *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 35, in which Chaskalson P, speaking on the interaction between international law and the interim Constitution recognised that international law is only an interpretative guide:

“International agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter Three.”

[118] Section 233 is markedly distinct from the interpretative injunction captured in section 39(1)(b) of the Constitution. According to the former, when interpreting legislation, courts must “prefer” an interpretation consonant with international law, over any other interpretation. According to the latter, when interpreting the Bill of Rights, our courts need only “consider” international law. Importantly, this is not the same as saying that courts are enjoined to defer to international law or prefer an interpretation of rights consonant with it. Once this distinction is properly understood, so can my main point be: international law is an interpretative tool to assist in the interpretation of our Bill of Rights and it does not oblige this Court to prefer a position taken in international law. I therefore take issue with my Brother’s interpretation of section 39(1)(b), because he holds that it enjoins this Court to “consider international law and prefer a meaning consistent with that law”.<sup>96</sup> What the ICCPR is not, is some supreme body of law that the Constitution ushers in to trump any and all application of our own domestic law. It must be considered, not necessarily preferred.

[119] In fact, far from international law being reified to some superior status, crystallised as a structural, even constitutional, principle of international law is the doctrine of subsidiarity, and, more regionally-specific, the margin of appreciation doctrine.<sup>97</sup> These hermeneutic devices have emerged as prominent concepts in legal

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<sup>96</sup> Second judgment at [246].

<sup>97</sup> Carozza “Subsidiarity as a Structural Principle of International Human Rights Law” (2003) 97 *The American Journal of International Law* 38 at 39-40, argues that subsidiarity “functions as a conceptual and rhetorical mediator between supranational harmonisation and unity, on the one hand, and local pluralism and difference, on the other” and that it should be regarded as a “structural principle of international human rights law” for it “is finding a place in the constitutional discourse of many legal systems”.

For an insightful exposition of the principles of subsidiarity and the margin of appreciation, see Follesdal “The Principle of Subsidiarity as a Constitutional Principle in International Law” (2013) 2 *Global Constitutionalism* 37, who, at 59, points out that although the principle of the margin of appreciation has its genesis in European law, it is no longer regionally bound and has been adopted at the international level more generally.

See also, Shany “Toward a General Margin of Appreciation Doctrine in International Law?” (2005) 16 *The European Journal of International Law* 907, who examines the contours of the doctrine and identifies two principle elements at 909-10. First, “judicial deference”, according to which international courts should defer to national authorities, respect their discretion in executing their international law obligations and ought to exercise judicial restraint. Second, Shany argues that underpinning the doctrine is the notion of “normative flexibility”, which denotes that international norms are characterised as open-ended and “provide limited conduct-guidance and preserve a significant ‘zone of legality’ within which States are free to operate”. Shany goes so far as to argue, for example at 908, that a variety of policy arguments relating to the quality and legitimacy of the operation

and political theory. Linchpins in the construction of international law, they operate at the intersection of the national with the international and address the confluence of respective spheres of legal authority that may, and often do, overlap. The foundation of the principle of subsidiarity is the simultaneous recognition, at the international level, of legal pluralism and the centrality of individual sovereign States to the international legal order.<sup>98</sup> As a principle, subsidiarity recognises the centrality of State consent in creating legal obligations and the exercise of discretion in binding themselves thereto.<sup>99</sup> It is a manifestation of an understanding, at the international level, that the main social function of international law is to supplement, not supplant, domestic law.<sup>100</sup> Thus, latitude is granted to States, the conduits through which international law is given effect, in recognition of the fact that national institutions are better situated and equipped to implement this law domestically.<sup>101</sup> And, far from reifying international law as some

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of international law supports the development of a general margin of appreciation, which, although not unlimited, grants deference to States to execute their international law obligations with minimal international interference.

See also, Vila “Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights” (2017) 15 *International Journal of Constitutional Law* 393.

<sup>98</sup> Carozza *id* at 49, who supports the idea that international law obligations generally “leave the parties a great deal of room for a diversity of systems”. See also Follesdal *id* at 38.

<sup>99</sup> Follesdal *id* at 38 and 55-6.

<sup>100</sup> *Id* at 38. At 39, Follesdal emphasises that “subsidiarity stands as the great limiting principle that will defend national sovereignty against incursion from ever-expanding [international law]”.

<sup>101</sup> See Shany above n 97 at 918-9, where it is emphasised that national actors at the domestic level, although executing international law obligations, retain far “superior law-application capabilities” to those of international courts. Whereas domestic institutions operate with an appreciation of local conditions, and can therefore apply the law context-specifically, international institutions cannot escape a degree of “physical detachment of international courts from the national societies whose compliance with the law they assess”.

See also, Vila above n 97 at 406 where it is stated that, for example, the European Court of Human Rights routinely applies the margin of appreciation doctrine, recognising “States’ prerogatives in sensitive areas. . . [for example] where there is no consensus among States and domestic authorities are in direct contact with the vital forces of their countries, and so are better situated to appreciate the social circumstances and decide how situations should be managed”.

In *S v Makwanyane* above n 95 at para 39, this Court noted that although it was bound to consider international law, it was best placed to interpret constitutional rights in the light of international law and was mindful that it had to do so with regard to the uniquely South African context in which that interpretation was to take place. It stated that—

“[i]n dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the Constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.”

ultimate paragon,<sup>102</sup> when measuring a State's compliance with international obligations, international fora exercise restraint and defer to the measures adopted by the member State.

[120] On this basis, HSF in its further submissions points out that it is not a foregone conclusion that Mr Zuma would find favour at the international level. And this is a concern that I share in respect of my Brother's conclusion. The ICCPR is not superior to national constitutional law, and the United Nations Human Rights Committee (Committee) is a body that cannot, in all fairness, profess to be better situated than domestic courts to advance the rights of peoples within their jurisdiction.<sup>103</sup> I do not,

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And, in Communication 255/02 *Garreth Anver Prince v South Africa*, 36th Ordinary Session, November 23 to 7 December, 2004 at paras 50-1, the African Commission stated that—

“[t]he 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. 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.”

<sup>102</sup> See, for example, *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) (*Grootboom*) at para 26.

<sup>103</sup> Carozza above n 97 emphasises that international human rights law has been characterised by mechanisms of supervision that grant latitude to States to implement and enforce international norms. At 60, Carozza states that:

“[T]he interpretative efforts of international institutions like the Human Rights Committee, while adding to the understanding of some of the basic norms, cannot ordinarily impose their interpretations of the treaties on the States party to them. Thus, the relatively open meaning of the basic norms of international human rights law leaves a great deal of interpretative latitude to States.”

Then, at 62-3, and of particular note:

“States remain the primary authorities responsible for human rights within their jurisdictions. . . [and] basic features of human rights law serve to place the States themselves in the position of principal avenues of implementation and enforcement. Many of the provisions of human rights treaties are by their nature dependent on the particularities of domestic legal norms and institutions, like the requirements for a criminally accused person to have a ‘fair and public hearing by a competent, independent and impartial tribunal established by law’ . . . where violations do occur, rules regarding the exhaustion of remedies ensure that States will remain the primary recourse. And those domestic proceedings and determinations open up a wide range of possibilities for the precise role of international norms; the treaties themselves do not specify that domestic law must follow any particular pattern of incorporation. Rather, the relationship

by any stretch of the imagination, see it fit to comment on Mr Zuma’s prospects at the international level, as to do so is entirely inappropriate in the context of this rescission application. However, I make the point merely to say that the interplay between international and domestic law in the face of a thorough and constitutionally-sourced response of this Court in respect of civil contempt of court, is not as simple as my Brother suggests.<sup>104</sup> I hasten to point out that the recommendations of the Committee, relied on in the second judgment, are not only distinguishable from the case at hand,<sup>105</sup> but also do not bind South Africa at the international level.<sup>106</sup> It is with this in mind, and in the context of all of the above, that the role of international law, including the ICCPR, must be understood.

[121] Finally, the Commission and HSF rightly submitted that the South African Constitution provides extensive and comprehensive protections of the rights at issue, which just so happen to find their international counterparts in articles 9 and 14(5) of the ICCPR. They submit that South African law not only provides protections that are in line with the standard required by international law, but provides more comprehensive protections than the relevant, duplicative, ICCPR articles. It is thus

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of international treaties to domestic law will be subject to the requirements and possibilities of domestic constitutional and statutory law.”

<sup>104</sup> At [191] of the second judgment, Jafta J suggests that Mr Zuma has a case against the Republic at the international level. At [245] my Brother explicitly states that “Mr Zuma would be entitled to approach the Committee on a claim that articles 9 and 14 of the ICCPR have been violated”. This Court is not competent to make this sort of pronouncement, akin to a legal opinion, when seized with a rescission application. Doing so is entirely inappropriate.

<sup>105</sup> For a start, unlike the circumstances in the *Spisso* matter, Mr Zuma was afforded ample opportunity to oppose the contempt proceedings. These opportunities extended beyond the ordinary process for opposition. As for the *Dissanayake* matter, also relied on by my Brother, the contempt of court arose from public comments made by Mr Dissanayake impugning the integrity of the Supreme Court of Venezuela in relation to a pending decision. This category of contempt of court pertains to acts of contempt that impede the administration of justice while a court is in the process of adjudicating a matter, and is distinguishable from contempt for failing to obey a court order – the relevant form of contempt that was before this Court in these proceedings.

See contempt judgment above n 1 at para 63; *Vincencio Scarano Spisso v Bolivarian Republic of Venezuela* CCPR/119/D/2481/2014 (*Spisso*) at para 3.4; and *Dissanayake v Sri Lanka* CCPR/C/93/D/1373/2005 (*Dissanayake*) at paras 2.3-2.5.

<sup>106</sup> Aside from my concern about the inappropriateness of this Court pronouncing on what case Mr Zuma may or may not have at the international level, it is trite that recommendations of the Committee, whilst instructive to all member States as to how to comply with their international obligations, are not legally binding. In other words, the recommendations of the Committee do not constitute a body of jurisprudence that this Court should apply above or before it applies its own domestic jurisprudence.

relevant to note that we do not find ourselves in a situation whereby domestic protections of these fundamental rights are weak, vague or ambiguous.<sup>107</sup> To the contrary, this Court, in its contempt judgment, explored in great detail this country's law on civil contempt as well as the relevance of sections 12 and 35 of the Constitution, and their applicability within the context of civil contempt proceedings. It does not necessarily follow that, merely because protections of these rights exist at the international level, international law would have required of this Court something wholly different from the judgment and order handed down.

[122] After all, the Constitution, along with the rights it enshrines in the Bill of Rights, remains the ultimate lodestar, and our constitutional rights' jurisprudence, to which this Court deferred when navigating the contempt proceedings, constitutes the touchstone of our constitutional order. The supremacy of our Constitution must be placed beyond all doubt. And, as seductive as certain perspectives of international law may appear to those who disagree with the outcome of the interpretative exercise conducted by this Court in the contempt judgment, sight must not be lost of the proper place of international law, especially in respect of an application for rescission. The approach that my Brother adopts may be apposite in the context of an appeal, where a court is enjoined to consider whether the court a quo erred in its interpretation of the law. Although it should be clear by now, I shall repeat it once more: this is not an appeal, for this Court's orders are not appealable.

[123] Ultimately, whether Mr Zuma has a case in an international forum is entirely beside the point and is a wholly irrelevant consideration in this application. We cannot afford to forget that this is a rescission application brought squarely under rule 42(1)(a) read with the common law. What this Court is seized with is the question whether the impugned order was erroneously granted, not whether the scope of rule 42 should be expanded to include considerations of international law as a novel ground of rescission

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<sup>107</sup> In *Grootboom* above n 102 at para 28, this Court held that “[t]he differences between the relevant provisions of the [International Covenant on Economic, Social and Cultural Rights] and our Constitution are significant in determining the extent to which the provisions of the Covenant may be a guide to an interpretation of section 26”.



or reconsideration. Nothing material turns on articles 9 or 14(5) of the ICCPR, provisions which are not, I must add, themselves capable of even being invoked in this Court. I am deeply concerned that seeking to rely on articles of the ICCPR as a basis for rescission constitutes nothing more than sophistry. I can only conclude that my Brother has misconstrued the case before us and is inadvertently permitting an appeal of this Court's thorough and reasoned decision on the law of contempt.<sup>108</sup> The question must remain whether the applicant has proven the grounds of rescission in terms of our well-established domestic law on the subject, and the answer to that question remains categorically that he has not.

### *Interim relief*

[124] Before I conclude and deal with the issue of costs, I turn briefly to the question of interim relief in terms of which Mr Zuma's release from prison, pending the finalisation of this matter, was sought.

[125] Mr Zuma sought this relief by way of a supplementary affidavit. It was not formally pleaded in the notice of motion, but rather was sought in terms of the broad prayer for "further and/or alternative relief" in the notice of motion. Of note is that, although he pursued this relief, Mr Zuma did not apply for a stay of the contempt order when he filed this application, nor did he apply to amend his notice of motion to include this interim relief.

[126] In the light of my findings on the main application, there is no need to determine the issue of the interim relief sought. This is a hopeless case for rescission, and making a pronouncement on the interim relief sought would serve no purpose. In any event, the need for the relief sought has been superseded by events.<sup>109</sup>

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<sup>108</sup> At [244] of the second judgment, Jafta J states that the main problem is "whether the motion procedure followed in convicting and sentencing [Mr Zuma] to imprisonment is consistent with the Constitution". Given that what is being impugned is the majority's conclusion on the constitutionality of direct and unsuspended committal for civil contempt of court, from [173]-[180] of the second judgment, Jafta J is positioning himself in the realm of appeal and not rescission. This is not appropriate in a rescission application in respect of an order of this apex Court which is immune from appeal.

<sup>109</sup> At the time of writing this judgment, Mr Zuma has been granted medical parole.

### *Costs*

[127] The final issue to dispose of is costs. The Commission seeks costs. Mr Zuma has provided no argument against this. Since his application has failed and considering the history of this matter, the insidious litigious strategies adopted and irregular procedures followed by Mr Zuma and his attorneys, the *Biowatch* principle<sup>110</sup> cannot come to his rescue. I accordingly see no reason that the ordinary approach to costs should not apply: Mr Zuma must pay the costs of the Commission.

### *Conclusion*

[128] Whereas the judgment I penned pursuant to the contempt proceedings was, as far as contempt cases have in the past been required to go, somewhat of a jeremiad – a catalogue of woes – and a subsequent exposition of the rule of law, what I pen here in respect of this rescission application is quite simple. Mr Zuma has met neither the requirements of a rescission in terms of rule 42(1)(a), nor the requirements of one as governed by the common law. It is also contrary to the interests of justice to expand the grounds of rescission to recall that matter to life by reconsidering the judgment and order handed down by this Court on 29 June 2021.

[129] It is unfortunate, to say the very least, that Mr Zuma failed to bring the submissions with which he now arms himself to this Court before we reached this point. For, as Cloete J stated, and I, aghast, see apt to repeat: “the predicament in which the present [applicant] find[s] [himself] is not the making of the courts nor does the solution lie with the courts”.<sup>111</sup> At this late litigative stage, our hands are bound. And, in an ironic twist of this complex plot, it would not be incorrect to say that it was Mr Zuma, himself, who bound them.

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<sup>110</sup> *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

<sup>111</sup> *Lazarus v Nedcor Bank Ltd; Lazarus v Absa Bank Ltd*; 1999 (2) SA 782 (W) at 786E-F.

[130] What is true is that Mr Zuma's behaviour has resulted in a monumental waste of judicial resources. At the heart of this matter, there is a potent need, to uphold the integrity of the administration of justice and to send a message to all litigants that rescission as an avenue of legal recourse remains open, but only to those who advance meritorious and bona fide applications, and who have not, at every turn of the page, sought to abuse judicial process.

[131] The prelude to Mr Zuma's rescission application, in his own words, is that the order granted consequent upon the contempt proceedings "constituted [a] serial manifestation of many rescindable errors and/or omissions". The epilogue:

"If we are correct in that simple proposition, the application must succeed. If we are not, it must fail."

[132] It is, at this point, perspicuous: the contempt order was no serial manifestation of either rescindable error or rescindable omission, but was the product of a lengthy and iterative judicial process. And so it is that Mr Zuma's epilogue to his application becomes my parting remarks to it. It fails. And with costs as set out in the order. With the closing of this chapter, wherein once again the vitality of the rule of law found itself tested and tried, so this trilogy of litigation comes to an end.

### *Order*

[133] The following order is made:

1. Direct access is granted.
2. Council for the Advancement of the South African Constitution and Democracy in Action are admitted as amici curiae.
3. The application for rescission is dismissed.
4. Mr Jacob Gedleyihlekisa Zuma is ordered to pay the costs of the Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State and Raymond Mnyamezeli Zondo N.O., including the costs of two counsel.

JAFTA J (Theron J concurring):

[134] I have had the benefit of reading the judgment prepared by my colleague Khampepe J (first judgment). I am unable to agree that the application should be dismissed. In my view the applicant has met the requirements for consideration and determination of his rescission application. I also hold the opinion that on the merits, the application must succeed, for reasons set out below.

[135] At the outset I must point out that the applicant does not seek to appeal against the order issued by this Court on 29 June 2021. On that day, the Court granted an order framed in these terms:

- “3. It is declared that Mr Jacob Gedleyihlekisa Zuma is guilty of the crime of contempt of court for failure to comply with the order made by this Court in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma* [2021] ZACC 2.
4. Mr Jacob Gedleyihlekisa Zuma is sentenced to undergo 15 months’ imprisonment.
5. Mr Jacob Gedleyihlekisa 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 imposed in paragraph 4.
6. In the event that Mr Jacob Gedleyihlekisa Zuma does not submit himself to the South African Police Service as required by paragraph 5, the Minister of Police and the National Commissioner of the South African Police Service must, within three calendar days of the expiry of the period stipulated in paragraph 5, take all steps that are necessary and permissible in law to ensure that Mr

Jacob Gedleyihlekisa Zuma is delivered to a correctional centre in order to commence serving the sentence imposed in paragraph 4.

7. Mr Jacob Gedleyihlekisa Zuma is ordered to pay the costs of the Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, including the costs of two counsel, on an attorney and client scale.”<sup>112</sup>

[136] Since this Court is the apex court in the structure of our Judiciary, no appeal may lie against its orders. To this extent the orders it issues are final. Those orders may not be challenged in any forum on the basis that they were wrong in law or fact. This kind of challenge may not be brought even before the Court itself. For this Court cannot sit on appeal against its own orders. Ordinarily therefore, a decision of this Court brings about finality in litigation. And this finality in turn engenders legal certainty which produces legitimacy and public confidence in our legal system. Both finality and certainty are components of the rule of law, a founding value of our Constitution.

[137] It was these laudable objectives which animated some of the participants in this litigation and drove them to arguing that the rule of law demands respect for finality and legal certainty. They cautioned against allowing parties, disappointed by the outcome of litigation, to reopen it as that would undermine finality, legal certainty and the position of this Court in the judicial hierarchy. Of course all of them conceded rightly that there are circumstances under which the validity of orders issued by this Court may be impugned and set aside. On this point, CASAC submitted that rescission by this Court of an earlier order is “permissible only in the limited case of a judgment obtained by fraud, mistake of law or erroneous default”.

[138] Whether rescission should be limited to cases where these grounds have been established, is a matter that we address later. For now it behoves us to point out that rescission is not a novel process available in this Court alone. It is a form of remedy available in most, if not all, courts in this country. There are various pathways through

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<sup>112</sup> Contempt judgment above n 1.

which it may be sought. These include the rules of courts, the common law and the Constitution. The grounds on which the applicant for rescission relies may reveal the pathway adopted in approaching the court for rescission.

[139] This kind of relief is also recognised by courts, including apex courts, in other democratic jurisdictions. This Court has already accepted that apex courts in Canada, India and the United Kingdom are empowered to reconsider their final decisions in limited circumstances.<sup>113</sup> In *Pinochet*, the House of Lords declared:

“In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered.

...

However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.”<sup>114</sup>

[140] The Constitution of India empowers the Supreme Court of India to review its judgments and orders.<sup>115</sup> About the position in India this Court said in *Molaudzi*:

“The Supreme Court of India has held that this power is reserved for the correction of serious injustice. It is for the correction of a mistake, not to substitute a view. The ordinary position is that a judgment is final and cannot be revisited. The power to review is statutory. It can be exercised when there is a patent and obvious error of fact or law in the judgment. The injustice must be apparent and should not admit contradictory opinions.”<sup>116</sup>

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<sup>113</sup> *Molaudzi* above n 59 at paras 24-30.

<sup>114</sup> *Pinochet* above n 42 at 585.

<sup>115</sup> Article 137 of the Constitution of India, 1950.

<sup>116</sup> *Molaudzi* above n 59 at para 29.

[141] All these jurisdictions, like ours, place a premium on the principles of litigation finality and legal certainty. But all of them recognise that finality and certainty cannot take precedence over an injustice and they also acknowledge that errors resulting in an injustice do occur in the process of granting orders by courts. Where it is established that the order issued causes an injustice, courts in those jurisdictions have the power to rescind such an order. As the Supreme Court of India observed, “to perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience.”<sup>117</sup>

[142] Returning to our own jurisdiction, *Molaudzi*<sup>118</sup> reminds us that the power of this Court, the Supreme Court of Appeal and the High Court to reconsider final orders is endorsed by section 173 of the Constitution.<sup>119</sup> But our jurisprudence emphasises that this power should be exercised sparingly.<sup>120</sup> What is clear from our jurisprudence is that the Court would exercise its inherent power to intervene in order to correct an injustice, without insisting on adherence to the rules. We will return to this issue in a moment. It is now convenient to outline the factual background.

### *Background*

[143] On 28 January 2021, this Court issued an order that directed Mr Zuma to obey all summonses and directives lawfully issued by the Commission. He was also ordered “to appear and give evidence before the Commission on dates determined by it”. The order was duly served by the Sheriff on Mr Zuma. Pursuant to service of the order, the Commission issued summons that directed Mr Zuma to appear before it from 15 to 19 February 2021. This summons was also served on him. Having informed the

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<sup>117</sup> *M.S. Ahlawat v State of Haryana* 1999 Supp (4) SCR 160.

<sup>118</sup> *Molaudzi* above n 59 at paras 31-4.

<sup>119</sup> Section 173 of the Constitution provides:

“The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”

<sup>120</sup> *Molaudzi* above n 59 at para 33; *Mukaddam v Pioneer Foods (Pty) Ltd* [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC); and *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC).

Commission through his lawyers that he would not honour the summons, Mr Zuma failed to appear before the Commission on the fixed dates. This failure constituted disobedience of the order of 28 January 2021.

[144] Aggrieved by Mr Zuma's conduct, the Commission instituted, on the basis of urgency basis, an application in which it sought an order declaring that Mr Zuma was in contempt of Court and that he be sentenced to two years' imprisonment. Mr Zuma, despite service of the application on him, failed to oppose the relief sought. This Court rendered two judgments, following the hearing of the matter. The majority convicted Mr Zuma of contempt of court, for his failure to appear before the Commission on the specified dates in February 2021. He was sentenced to 15 months' imprisonment for that contempt. He was also directed to submit himself to the South African Police Service within five calendar days from the date of the order, failing which the police were authorised to deliver him to a correctional centre for purposes of serving his imprisonment sentence.

[145] The minority judgment acknowledged that civil contempt proceedings have dual remedial and punitive purposes and held that the application by the Commission sought to achieve a criminal sanction only. To the extent that the Commission sought a sentence of imprisonment without any civil remedy, the minority held that the motion proceedings in question violate sections 12 and 35(3) of the Constitution.<sup>121</sup> Where the applicant in civil contempt proceedings does not seek compliance with the court order, held the minority, the proper approach is to refer the matter to the National Prosecuting Authority. But if the criminal sanction is sought together with an order coercing compliance with the disobeyed order, the minority held that a court may impose a criminal sentence. And since in that matter only a criminal sanction was sought, the minority would have referred the matter to the Director of Public Prosecutions for prosecution.<sup>122</sup> Judgment in that matter was delivered on 29 June 2021.

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<sup>121</sup> Contempt judgment above n 1.

<sup>122</sup> Id at paras 267-8.



*Current Proceedings*

[146] Unhappy with the outcome, Mr Zuma instituted this application in terms of section 167(3)(b) and (6)(a) of the Constitution. Subsection (3) provides that this Court is the highest court of the Republic and may decide constitutional matters and any other matter that raises an arguable point of law of general public importance if the Court grants leave to appeal.<sup>123</sup> Whereas subsection (6)(a) provides that legislation or the rules of the Constitutional Court must allow litigants to bring their cases directly to the Court if it is in the interests of justice and with the Court's leave.<sup>124</sup>

[147] Apart from stating that the application would be made in terms of section 167 of the Constitution, the notice of motion also requested the Acting Chief Justice to issue directions for the conduct and disposal of the matter in terms of rule 11 of the Constitutional Court rules. If directions were not issued, the notice of motion required the respondent to file a notice of intention to oppose on or before 9 July 2021 and an answering affidavit on or before 30 July 2021.

[148] It must be pointed out at this early stage that Mr Zuma's notice of motion is not a model of clarity. In its heading, it states that the application is brought in terms of

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<sup>123</sup> Section 167(3) of the Constitution provides:

- “(3) The Constitutional Court—
- (a) is the highest court of the Republic; and
  - (b) may decide—
    - (i) constitutional matters; and
    - (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and
  - (c) makes the final decision whether a matter is within its jurisdiction.”

<sup>124</sup> Section 167(6) of the Constitution provides:

- “(6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
- (a) to bring a matter directly to the Constitutional Court; or
  - (b) to appeal directly to the Constitutional Court from any other court.”

rule 29 of the Constitutional Court rules. But this rule does not regulate applications. Instead it incorporates certain rules of the Uniform Rules of Court into the rules of the Constitutional Court. Yet in the body the notice tells us that the application would be made in terms of section 167(3)(b) and (6)(a) of the Constitution.

[149] Section 167(3)(b) is not applicable because that provision is a jurisdiction empowering section. It authorises this Court to entertain any arguable point of law of general public importance, if leave to appeal is granted by this Court. Mr Zuma's matter is not an appeal. On the contrary, he sought reconsideration and rescission of the order of 29 June 2021. Alternatively, he sought that certain paragraphs of that order be set aside. Rescission is expressly sought in terms of rule 42 of the Uniform Rules of Court and that rule is expressly limited to the rescission of paragraph 3 of the order of 29 June 2021. This paragraph deals with the conviction for contempt of court only.

[150] Prayer 2 of the notice of motion is directed at the rescission of the sentence of 15 months' imprisonment and prayer 3 of the notice of motion sought that paragraphs 3, 4, 5 and 6 of the order of 29 June 2021 be set aside. The latter prayer is framed as an alternative to the rescission of paragraphs 3 and 4 sought in prayers 1 and 2 of the notice of motion. Evidently, the alternative prayer is not sought in terms of rule 42. It appears that the alternative prayer is sought in terms of the application brought under section 167(6)(a) of the Constitution. As mentioned, this provision permits litigants to have direct access to this Court if it is in the interests of justice and if leave is granted.

[151] In support of the relief sought, Mr Zuma in his founding affidavit alleged that the order of 29 June 2021 violated his right to a fair trial, including the right to be afforded an opportunity to place mitigating circumstances before the Court after conviction. He also said his right of appeal enshrined in sections 34 and 35 of the Constitution was infringed. Thirdly, he contended that the sentence of 15 months' imprisonment imposed constituted a "detention without trial in direct breach of section 12(1)(b) of the Constitution".

[152] Flowing from the alleged violations of the Bill of Rights, Mr Zuma contended that the order issued was not competent and that the Court exceeded its judicial authority in granting the order.

[153] The Commission, its Chairperson, the Minister of Police, the Minister of Justice and Correctional Services and the Helen Suzman Foundation were cited as respondents. However, it appears that the Foundation was wrongly cited as a respondent because its role in this litigation was that of an *amicus curiae* (friend of the court). Among parties it was only the Commission and its Chairperson who opposed the relief sought and filed opposing papers. In the answering affidavit deposed to by the Commission's Secretary, it is contended that the grounds for rescission are vexatious. With regard to the complaint that after conviction, Mr Zuma was not afforded an opportunity to place before the Court mitigating circumstances, the Commission pointed out that the opportunity was given to him before conviction and that he rejected it scornfully.

[154] In relation to the complaint that the impugned order violated Mr Zuma's right of appeal under sections 34 and 35, the Commission asserted that the contention is without substance. The Commission argued that this complaint is no longer relevant because when the Court granted direct access, it appreciated that no appeal would lie against its decision. Therefore, concluded the Commission, there was no error in the order issued on 29 June 2021.

[155] On the complaint that Mr Zuma was detained without trial, the Commission gave an answer that was set out in three paragraphs. It is necessary to quote the entire answer. It reads:

**“The Complaint about “Detention Without Trial” (para 86)**

56. Mr Zuma also contends that he has effectively been detained without trial. This is a deliberate distortion of the facts and the law.

57. This case is about imprisonment for contempt of court. The constitutionality of the procedure of imprisonment for contempt has been the subject of numerous judgments in this Court, the Supreme Court of Appeal and the High Court. It has been authoritatively held that the procedure is a constitutional one.
58. The fact of the matter is that Mr Zuma's incarceration as punishment for contempt is part and parcel of South Africa's common law, which has been held to be consistent with the Constitution. Whether the incarceration should have direct or only after an order of compliance was the subject of debate between the Judges. The majority was fully aware of the opposing arguments. Accordingly, there is no basis for the allegation that the issue of detention without trial was not properly considered. If Mr Zuma had wishes to urge this Honourable Court not to deal with the matter without a criminal trial, he should have participated in the proceedings and should have made that submission to the Court. He elected not to do so. He cannot complain now."

### *Direct access*

[156] The first issue that requires determination is whether Mr Zuma should be granted direct access to this Court. Except in matters that fall within the exclusive jurisdiction of this Court, access depends on whether the interests of justice warrant it and that leave for such access is granted. This is what section 167(6) of the Constitution contemplates, regardless of whether access is sought to initiate proceedings in this Court or to pursue a direct appeal. This provision requires legislation or the rules of this Court to facilitate that access. Rule 18 of the rules of this Court regulates direct access in relation to proceedings initiated in this Court.<sup>125</sup> The rule requires an application for direct access

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<sup>125</sup> Rule 18 of the Rules of this Court provides:

- “(1) An application for direct access as contemplated in section 167(6)(a) of the Constitution shall be brought on notice of motion, which shall be supported by an affidavit, which shall set forth the facts upon which the applicant relies for relief.
- (2) An application in terms of subrule (1) shall be lodged with the Registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out—
- (a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted;
- (b) the nature of the relief sought and the grounds upon which such relief is based;

to be in the form of a notice of motion, supported by an affidavit that sets out reasons why it is in the interests of justice to grant direct access. The affidavit must also outline the relief sought and the grounds on which the applicant relies for that relief. Here Mr Zuma's notice of motion suggested that the application be dealt with in terms of rule 11, that was wrong. The correct rule is rule 18.

*Interests of justice*

[157] The question where the interests of justice lie in a particular case is determined with reference to a wide range of factors. Factors in favour of direct access must be weighed against factors which do not support such access.<sup>126</sup> In the judgment under reconsideration, the majority relied on the exceptionality of the matter and urgency to ground direct access. It was said at paras 29-30:

“The matter is self-evidently extraordinary. It is thus in the interests of justice to depart from ordinary procedures. Never before has this Court's authority and legitimacy been subjected to the kinds of attacks that Mr Zuma has elected to launch against it and its members. Never before has the judicial process been so threatened. Accordingly, it is appropriate for this Court to exercise its jurisdiction and assert its special authority as the apex Court and ultimate guardian of the Constitution, to the exclusion of the aegis of any other court. It goes without saying that neither the public's vested interests, nor the ends of justice, would be served if this matter were to be required to traverse the ordinary, and lengthy, appeals process that would render the litigation protracted. The urgency with which this matter must be disposed of, a subject I deal with next, does not admit of that kind of delay.

Not only is Mr Zuma's behaviour so outlandish as to warrant a disposal of ordinary procedure, but it is becoming increasingly evident that the damage being caused by his ongoing assaults on the integrity of the judicial process cannot be cured by an order down the line. It must be stopped now. Indeed, if we do not intervene immediately to send a clear message to the public that this conduct stands to be rebuked in the strongest

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- (c) whether the matter can be dealt with by the Court without the hearing of oral evidence and, if it cannot;
  - (d) how such evidence should be adduced and conflicts of fact resolved.”

<sup>126</sup> See *S v Dlamini*, *S v Dladla*; *S v Joubert*; *S v Schietekat* [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC).

of terms, there is a real and imminent risk that a mockery will be made of this Court and the judicial process in the eyes of the public. The vigour with which Mr Zuma is peddling his disdain of this Court and the judicial process carries the further risk that he will inspire or incite others to similarly defy this Court, the judicial process and the rule of law.”

[158] By parity of reasoning, it is in the interests of justice to grant direct access in this application which requires reconsideration of the matter described by the majority. Both elements of urgency and exceptional circumstances continue to exist. There can be no denying that proceedings which seek the release of an individual from detention are by nature urgent. This is because our Constitution places a premium on personal freedom and that an individual ought not to be deprived of the freedom unlawfully, even for the shortest period of time. In order to prevent unlawful detention, section 35(2)(d) of the Constitution confers the right on every detained person, including a sentenced prisoner, to challenge the lawfulness of his or her detention.<sup>127</sup>

[159] Significantly the right to challenge the lawfulness of a detention is conferred without any restrictions. This means that a detained person is entitled to approach a competent court and challenge the lawfulness of his or her continued detention. In *Moloto* this Court cautioned against reading implicit restrictions into constitutional rights. It said:

“Constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them, and when legislative provisions limit or intrude upon those rights they should be interpreted in a manner least restrictive of the right if the text is reasonably capable of bearing that meaning.”<sup>128</sup>

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<sup>127</sup> Section 35(2)(d) of the Constitution provides:

- “(2) Everyone who is detained, including every sentenced prisoner, has the right—
- ...
- (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released.”

<sup>128</sup> *SATAWU v Moloto and Another N.N.O.* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC) (*Moloto*) at para 44.

[160] Whether he is right or wrong, Mr Zuma in his application challenges the lawfulness of his detention. He says:

“In my view, the Constitutional Court must reconsider its orders that completely strip me of so many of my guaranteed constitutional rights. It is unconstitutional to issue orders that violate the law and undermine constitutional rights. My view, belief and opinion that the orders of the Constitutional Court in both of its judgements are unconstitutional and do not justify the excessive judicial condemnation that has been heaped on me, even if I were held to be wrong in holding those views. Imprisoning me for holding and expressing opinions, views and beliefs is not only oppressive, it is out of kilter with the very ethos of our constitutional system. Sections 15 and 16 of the Constitution guarantees my right to hold opinions, belief and views and to express them freely without fearing unjustified judicial reprisal. Summarily sentencing me to jail for exercising my constitutional rights to hold and express beliefs, views and opinions about judges and the Courts is not only unlawful, but it is oppressive and unjustified in terms of section 36 of the Constitution. I am entitled to hold and express the view that Courts are wrong, have acted unconstitutionally and should revisit this grave injustice and unconstitutional conduct. Only the Constitutional Court may rectify these unconstitutional orders and give their democratic system its true value restoring the rule of law and the public’s confidence in its power to reflect on its conduct. Our constitutional culture is a break with the past and our Constitutional Court must act with circumspect when it handles the demands of entrenching a constitutional culture in which the rule of law reigns high within an environment of dignity, Ubuntu, freedom and the protection of constitutional rights and a society in which retribution should be a shield and not a sword.”

[161] The fact that when he launched the application, he was not as yet detained is immaterial. He was already a “sentenced prisoner” who was yet to commence his imprisonment. Section 35(2)(d) confers the right to challenge the lawfulness of detention on every sentenced prisoner, including those who have not commenced serving their sentences. In any event at the time of hearing the matter, Mr Zuma had started serving his sentence.

[162] Of vital importance in the inquiry on the interests of justice is Mr Zuma's contention that only this Court is competent to reconsider and rescind the order of 29 June 2021. This warrants that the matter be approached on a footing similar to the one that applies to matters which fall within the exclusive jurisdiction of this Court. In those circumstances direct access must be allowed. If it were to be refused, a litigant would have nowhere else to take his or her case. Indeed this makes the case exceptional.

[163] It is necessary to point out that rule 42 of the Uniform Rules of Court plays no part in the interests of justice inquiry. This rule applies where direct access has already been granted. The inquiry under the rule is aimed at establishing that requirements for rescission under the rule have been met. That determination requires consideration of the merits of the request for rescission. And that is a stage that comes after the granting of direct access. This much is clear from the jurisprudence of this Court where it has implicitly allowed direct access and proceeded to consider the merits of the rule 42 applications.<sup>129</sup>

[164] Moreover, direct access for the purposes of reconsidering and rescinding an earlier order may even be initiated by this Court, acting of its own accord. This is what happened in *Molaudzi*. In that matter Mr Molaudzi applied for leave to appeal in 2013. He sought to challenge on appeal the factual findings of the trial court without establishing jurisdiction of this Court. Accordingly his application was dismissed for lack of jurisdiction. Later in 2014, two of his co-accused applied separately for leave to appeal against their conviction and sentence of life imprisonment. They established jurisdiction by raising a constitutional issue about the fairness of their trial. They asserted that their conviction was based on inadmissible evidence in the form of extra-curial statements which were wrongly ruled admissible at the trial. They were granted leave and eventually their conviction was overturned by this Court.

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<sup>129</sup> *Daniel* above n 10 and *Baphalane Ba Ramokoka Community v Mphela Family* [2011] ZACC 15; 2011 (9) BCLR 891 (CC).



[165] The question confronting this Court was what should happen to Mr Molaudzi whose request for leave to appeal was refused and yet his conviction suffered the same defect. The difficulty he was facing was that the dismissal of his application for leave was a final order of this Court which resulted in him serving life imprisonment based on a legally defective conviction. In order to prevent the injustice, this Court *mero motu* issued directions, inviting Mr Molaudzi to reapply for leave to appeal in view of the judgment rendered in favour of his co-accused.<sup>130</sup> The Court did this in the exercise of its inherent power recognised in section 173 of the Constitution.

[166] In the second application Mr Molaudzi raised the contentions that were successfully advanced by his co-accused. But the issue that stood in the way of success in his case was the earlier order. Extending the principle of *res judicata* to criminal appeals, this Court examined whether it was barred from entertaining the second application.<sup>131</sup> After reviewing authorities here and in other jurisdictions, this Court held:

“Where significant or manifest injustice would result, should the order be allowed to stand, the doctrine ought to be relaxed in terms of ss 173 and 39(2) of the Constitution in a manner that permits this court to go beyond the strictures of rule 29 to revisit its past decisions. This requires rare and exceptional circumstances, where there is no alternative effective remedy. This accords with international approaches to *res judicata*. The present case demonstrates exceptional circumstances that cry out for flexibility on the part of this court in fashioning a remedy to protect the rights of an applicant in the position of Mr Molaudzi.”<sup>132</sup>

[167] Evidently, what prompted this Court to act in the manner it did in *Molaudzi*, was the interests of justice. The Court sprung into action to prevent a grave injustice and did not slavishly adhere to the principles of finality and *res judicata*. The Court observed:

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<sup>130</sup> *Molaudzi* above n 59 at para 11.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at para 45.

“The applicant is serving a sentence of life imprisonment, of which he has already served 10 years. His co-accused, convicted on similar evidence, had their convictions and sentences overturned. A grave injustice will result from denying him the same relief simply because in his first application he did not have the benefit of legal representation, which resulted in the failure to raise a meritorious constitutional issue. The interests of justice require that this court entertain the second application on its merits, despite the previous unmeritorious application, and relax the principle of *res judicata*.”<sup>133</sup>

[168] This plainly illustrates that where the interests of justice so require, this Court is willing to reconsider and effectively rescind or set aside its earlier order. The order challenged here is no different. If it is established that allowing that order to stand would result in “substantial hardship or injustice”, it must be set aside.

[169] For all these reasons, direct access must be granted to Mr Zuma to enable this Court to evaluate the assertion that his detention was unlawful. If it was lawful, then he must continue serving the imposed sentence. But if it was unlawful or it was authorised in a manner that violated the Constitution, he must be released from detention forthwith.

### *Merits*

[170] Before considering the issues that arise on the merits it is necessary to remind ourselves that here we are not concerned with an appeal against the decision of the majority that was delivered on 29 June 2021. The purpose of this inquiry is not to determine whether that decision was right or wrong. The objective is a narrow one. It is whether the detention ordered is vitiated by non-compliance with the relevant provisions of the Bill of Rights. Put differently, the question is whether the impugned order gives rise to an injustice, as was the position in *Molaudzi*. The fact that this issue might have arisen in an appeal as well does not alter the nature of the inquiry. It remains

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<sup>133</sup> Id at para 40.

a reconsideration of the impugned order with a view to setting it aside if it is inconsistent with the Constitution.

[171] This is because the Constitution is supreme and section 8(1) declares that the Bill of Rights binds all arms of the State, including the Judiciary.<sup>134</sup> This suggests that a court of law may not make an order that is inconsistent with the provisions of the Bill of Rights unless it is satisfied that the inconsistency meets the requirements of section 36(1) of the Constitution.<sup>135</sup> Moreover, it is the Constitution which creates the various courts, including the Constitutional Court and gives them judicial power and the responsibility to interpret and uphold provisions of the Constitution. In addition, courts are required to exercise the judicial authority vested in them subject to the Constitution and the law.<sup>136</sup>

### *Issues*

[172] The main issues that emerge from the careful reading of Mr Zuma’s founding affidavit are whether—

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<sup>134</sup> Section 8(1) of the Constitution provides:

“The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.”

<sup>135</sup> Section 36(1) of the Constitution provides:

- “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
- (a) the nature of the right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the relation between the limitation and its purpose; and
  - (e) less restrictive means to achieve the purpose.”

<sup>136</sup> Section 165(1) and (2) of the Constitution provides:

- (1) The judicial authority of the Republic is vested in the courts.
- (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.”

- (a) the impugned order authorised his detention without trial in contravention of section 12(1)(b) of the Constitution; and
- (b) the procedure leading up to his conviction and sentencing was in breach of his rights guaranteed by sections 34 and 35(3) of the Constitution, including the right of appeal.

[173] The determination of these issues depends largely on the proper interpretation of the relevant provisions of the Constitution and whether the motion court procedure followed here in convicting Mr Zuma and sentencing him to 15 months' imprisonment was constitutionally compliant. As far as we are aware, this is the first occasion that this Court is called upon to determine whether the common law process of motion proceedings complies with sections 12(1)(b) and 35(3) of the Constitution. The courts below have had occasion to consider the continued use of the motion procedure in contempt of court proceedings and tested it against the requirements of section 35(3).

[174] The Eastern Cape Division of the High Court in *Maninjwa*<sup>137</sup>, *Mtwa*<sup>138</sup> and *Burchell*<sup>139</sup> had favoured adapting the common law motion procedure to contempt proceedings. However, the application of all requirements of section 35(3) to motion proceedings proved too difficult to achieve. This arose from the fact that contempt of court proceedings are a hybrid of civil and criminal proceedings under the common law. And yet the Constitution draws a clear distinction between these proceedings and does not explicitly cater for the hybridity in civil contempt.

[175] In *Fakie*<sup>140</sup> the Supreme Court of Appeal grappled with the question whether section 35(3) of the Constitution applies to the common law motion procedure. Having

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<sup>137</sup> *Uncedo Taxi Service Association v Maninjwa* 1998 (3) SA 417 (E).

<sup>138</sup> *Uncedo Taxi Service Association v Mtwa* 1999 (2) SA 495 (E).

<sup>139</sup> *Burchell v Burchell* [2005] ZAECHC 35.

<sup>140</sup> *Fakie* above n 11.

recognised that this section confers rights on accused persons, the Supreme Court of Appeal concluded that the contemnor in civil contempt of court proceedings is not an accused person and therefore the provision does not apply to him or her. Instead, the Court preferred to test the motion procedure against section 12 of the Constitution and concluded that the common law motion procedure must comply only with protections of that section which are compatible with motion proceedings. We revert to this conclusion later in this judgment. In *Fakie*, the Court also held that the standard of proof applicable was that of proof beyond a reasonable doubt which applies to criminal trials and not proof on a balance of probabilities. The reason for advocating for a higher standard was that committal to prison results in loss of liberty and the civil standard was not appropriate for such a drastic course.<sup>141</sup>

[176] The end result was that despite the good intentions to clarify the law on contempt of court proceedings, *Fakie* did not achieve the intended objective. Because of the nature of issues that arose in that matter, the Supreme Court of Appeal did not consider whether the common law motion procedure was consistent with section 12(1)(b) which entrenches the right not to be detained without trial.

[177] Recently, in *Matjhabeng*, this Court commented that our law remains unclear in relation to contempt of court proceedings and this Court cautioned that a coherent approach needs to be formulated so that the rights enshrined in section 12 may not be violated. The Court reasoned:

“Although our courts have dealt with the law of contempt over the years, the approach on certain aspects regarding this form of crime remains unclear. A formulation of a coherent approach is thus necessary. This is particularly so because a certain means of enforcement for non-compliance, including committal to prison, may violate certain rights of the alleged contemnor, including the right to freedom and security of the person in terms of s 12 of the Constitution, which includes the right ‘not to be deprived

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<sup>141</sup> Id at para 29.

of freedom arbitrarily or without just cause and the right ‘not to be detained without trial’.

It is important to note that it ‘is a crime unlawfully and intentionally to disobey a court order’. The crime of contempt of court is said to be a ‘blunt instrument’. Because of this, ‘(w)ilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence’. Simply put, all contempt of court, even civil contempt, may be punishable as a crime. The clarification is important because it dispels any notion that the distinction between civil and criminal contempt of court is that the latter is a crime, and the former is not.”<sup>142</sup>

[178] While this Court in *Matjhabeng* endorsed *Fakie* on benchmarking the hybrid process against section 12 of the Constitution<sup>143</sup>, this Court left open the question whether section 35(3) could still apply. This Court stated:

“The procedure and processes for contempt proceedings seeking committal should deviate from criminal prosecutions only to the extent necessary to make allowance for its unique status. In *Pheko* this court endorsed the holding in *Fakie* that, because contempt proceedings resulting in committal combine civil and criminal elements, ‘it seems undesirable to strait-jacket it into the protections expressly designed for a criminal accused under s 35(3) [of the Constitution]’. Instead, the rights of a respondent where civil contempt is sought are grounded in s 12(1) of the Constitution, which affords the alleged contemnors both substantive and procedural protections. *I do not understand this to suggest that the rights of a respondent where civil contempt resulting in committal is sought cannot be grounded in s 35(3).*

Because of its grounding in civil process, civil contempt is indeed peculiar. Some writers suggest that there may be reasons, therefore, for relaxing the requirements ordinarily expected of criminal proceedings in order to accommodate its hybrid status. This is so because a finding of contempt, may, for instance, be made even in motion proceedings and the rules of evidence may take a shape unlike those in criminal prosecutions. These adaptations of form do not, however, alter the constitutional imperative that a person's freedom and security must be protected.”<sup>144</sup>

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<sup>142</sup> *Matjhabeng* above n 71 at paras 49-50.

<sup>143</sup> *Id* at para 58.

<sup>144</sup> *Id* at paras 58-9.

[179] Then this Court proceeded to focus on the standard of proof and concluded that the standard of proof must be determined by the objective sought to be achieved. If only civil remedies are sought which excludes penal remedies like a fine or imprisonment, proof must be on a balance of probabilities. But if a criminal sanction is sought, proof beyond a reasonable doubt must apply.<sup>145</sup>

[180] However, it must be acknowledged that in *Matjhabeng* this Court did not clarify whether the common law motion procedure complies with the requirement that an individual may not be detained without a trial. This means that in this regard the law remains unclear on whether the motion procedure constitutes a trial envisaged in section 12(1)(b) of the Constitution. There is no judgment that we know of which has construed that section and determined that the motion procedure followed in contempt of court proceedings amounts to a trial.

*Proper approach to interpreting the Constitution*

[181] It is now well-established that the language of the Bill of Rights must be given a purposive and generous meaning so as to give individuals full protection of their fundamental rights and freedoms. This Court imported this principle from other democratic jurisdictions in this region and abroad. In *Mhlungu*<sup>146</sup> this Court endorsed the following statement from the decision of the Supreme Court of Appeal of Namibia:

“A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the ‘austerity of tabulated legalism’ and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government.”<sup>147</sup>

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<sup>145</sup> Id at para 67.

<sup>146</sup> *S v Mhlungu* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) (*Mhlungu*) at para 8.

<sup>147</sup> *Government of the Republic of Namibia v Cultura 2000* [1993] NASC 1; 1994 (1) SA 407 (NMS) at 418.

[182] And in *Zuma*<sup>148</sup> this Court unanimously adopted similar statements made in other jurisdictions. The first was a statement made by Lord Wilberforce in the decision of the Privy Council in *Fisher* which reads:

“A constitution is a legal instrument giving rise, among other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this and with the recognition that rules of interpretation may apply, to take as a point of departure, for the process of interpretation a recognition of that character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms.”<sup>149</sup>

[183] The second is a statement made by Dickson J in the Canadian decision of *Big M Drug Mart Ltd* with reference to the Canadian Charter of Rights:

“The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be . . . a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and the securing for individuals the full benefit of the Charter's protection.”<sup>150</sup>

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<sup>148</sup> *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) (*Zuma*) at paras 14–5.

<sup>149</sup> *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC).

<sup>150</sup> *R v Big M Drug Mart Ltd* 1985 SCC 69; [1985] 1 SCR 295 (*Big M Drug Mart Ltd*) at 395-6 (18 CCC (3d) 385).



[184] However, it is apparent from these statements that while the language of the Bill of Rights must be afforded a generous interpretation to afford individuals the full measure of protection, there is a limit to the liberal interpretation. The generous construction must not extend to a meaning beyond what the language of the provision may reasonably carry. For example, here, the language of section 12(1)(b) must be construed generously so as to achieve the purpose of affording individuals like Mr Zuma full protection against detention without trial. But the scope of that protection depends on what the language chosen by the framers of the Constitution is reasonably capable of meaning.

[185] In addition to these principles, in construing the relevant provisions of the Bill of Rights we are enjoined by the Bill itself to promote values like human dignity, equality, freedom and advancement of human rights. We are also obliged to consider international law. These injunctions are triggered by the interpretation of the Bill and do not depend on whether the parties to a particular litigation have asked for them.<sup>151</sup> But here the parties were afforded an opportunity to make submissions on the bearing that international law might have on the determination of the issues. In our law courts may raise *mero motu* points of law apparent on the papers and require the parties to make submissions on those points.<sup>152</sup> However, it bears emphasis that the role of international law is limited to the exercise of interpreting the Bill of Rights. That law cannot be used as a benchmark for invalidating the order of 29 June 2021.

[186] In this regard, a court is under an obligation to interpret provisions of the Bill, to the extent that its language reasonably permits, in a manner that is consistent with the relevant international law. This is the purpose for considering international law and it is done in order to avoid divergence between the Constitution and international law instruments that are binding on South Africa.

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<sup>151</sup> *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society* [2019] ZACC 47; 2020 (2) SA 325 (CC); 2020 (4) BCLR 495 (CC) at para 2.

<sup>152</sup> *CUSA v Tao Ying Metal Industries* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 68 and *Matatiele Municipality v President of the Republic of South Africa* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC).

[187] Although the ratification and signing by South Africa of these instruments do not make them enforceable in domestic courts, they remain binding and enforceable against South Africa, at an international level. This means that where domestic courts construe the South African Constitution in a manner dissonant with international law, South Africa may be held liable at the level of international law, if its actions violate international law despite the fact that she would have acted in compliance with her Constitution. There are many examples of States that were held liable in the sphere of international law for incarcerating their citizens for contempt of court, even if their constitutions and national laws were followed.

[188] Two examples would suffice to illustrate the point. In *Spisso*<sup>153</sup> the Constitutional Chamber of the Supreme Court of Venezuela had convicted Mr Spisso, a former mayor of San Diego, for contempt of court and sentenced him to 10 months 15 days' imprisonment. He had failed to obey a court order. The hearing leading to the conviction and sentence was held in the Supreme Court which is the apex court of Venezuela.

[189] In a complaint to the Committee, Mr Spisso contended that the Supreme Court had violated various rights under articles 9, 10, 14 and 25 of the ICCPR. The Committee held that if the hearing is conducted in the highest court, there must be provision for an appeal or review of the conviction and that the court in question must not follow a process that differs from the normal criminal justice system to avoid protections in that system. The Committee concluded that the Republic of Venezuela had breached the relevant provisions of the ICCPR and ordered Venezuela to compensate Mr Spisso and take steps to prevent similar convictions from occurring in the future.

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<sup>153</sup> *Spisso* above n 105.

[190] In *Dissanayake*,<sup>154</sup> the Supreme Court of Sri Lanka had convicted a former Minister of Agriculture for contempt of court and sentenced him to two years' imprisonment with hard labour. In trying Mr Dissanayake for contempt of court, the Supreme Court of Sri Lanka had acted in terms of the Constitution of Sri Lanka. He too complained to the Committee that his rights under articles 9, 14, 15, 19 and 25 of the ICCPR were violated. The Committee concluded that indeed his rights under the ICCPR were violated and ordered Sri Lanka to compensate him and change its laws to prevent recurrence of such a conviction.

[191] What emerges from these two decisions of the Committee is that acting in consonance with domestic law or a national Constitution does not insulate a State party from liability if a violation of the ICCPR is established. This would be the case here even if this Court had acted in accordance with the common law principles which are consistent with our Constitution. For as long as Mr Zuma's detention is found to be in violation of the ICCPR, South Africa would be liable to provide him with an adequate remedy and may be ordered to make changes to the common law to avoid similar violations in the future. But this claim cannot be pursued in the South African courts. Instead, it may be made to the Committee. This is the backdrop against which international law must be considered in construing sections 12(1)(b) and 35(3) of our Constitution. It is now convenient to consider those provisions.

### *Meaning of section 12(1) of the Constitution*

[192] Section 12(1) of the Constitution provides:

- “(1) Everyone has the right to freedom and security of the person, which includes the right—
- (a) not to be deprived of freedom arbitrarily or without just cause;
  - (b) not to be detained without trial;
  - (c) to be free from all forms of violence from either public or private sources;

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<sup>154</sup> *Dissanayake* above n 105.

- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.”

[193] Textually, apart from the general right to freedom and security of the person provided for in the opening words of section 12(1), the section also lists specific rights which form part of that general right. These include the right not to be deprived of freedom arbitrarily or without just cause and the right not to be detained without trial. In relation to the general right, the framers of our Constitution borrowed word for word from article 9 of the ICCPR which also prohibits arbitrary detention.<sup>155</sup> Therefore, it cannot be gainsaid that section 39(1) of the Constitution obliges us to have recourse to article 9 of the ICCPR when interpreting section 12(1) of our Constitution.

[194] Over the years the Committee has built a body of authoritative decisions on how article 9 must be read and understood. On 16 December 2014 the Committee issued General Comment No 35 in which it collated principles deduced from its decisions on the interpretation and application of article 9.<sup>156</sup> Of importance for present purposes are the principles that the word “arbitrary” must be assigned a wide meaning. Drawing from its decisions, the Committee says in the General Comment:

“An arrest or detention may be authorised by domestic law and nonetheless be arbitrary. 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 the law, as well as elements of reasonableness, necessity and proportionality.”<sup>157</sup>

[195] It is apparent from this broad interpretation of arbitrariness that it encompasses both elements of the right enshrined in section 12(1)(a) of our Constitution and extends beyond those elements. While acknowledging that article 9 recognises that individuals

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<sup>155</sup> See above n 82.

<sup>156</sup> United Nations Human Rights Committee *General Comment No 35 – Article 9: Liberty and Security of Person* CCPR/C/GC/35 (2014).

<sup>157</sup> *Id* at para 12.

may be detained on criminal charges, the Committee concludes that article 9 requires that regimes authorising deprivation of liberty on such charges must be clearly established by law and must be accompanied by procedures that prevent arbitrary detention.<sup>158</sup> This means that here, the common law procedure under which Mr Zuma was sent to prison must be established by law and that it must contain adequate protections to prevent arbitrariness as broadly defined by the Committee.

[196] Relying on its decisions, the Committee also concludes that a regime envisaged in the article “must not amount to an evasion of the limits on the criminal justice system by providing the equivalent of criminal punishment without the applicable protections”. A State party like South Africa cannot side-step the protections in its criminal justice system and rely on the common law to have a criminal punishment imposed on an individual without applicable criminal law protections. Of course this does not mean that all protections must be met. At a bare minimum the common law must have protections that are sufficient to prevent an arbitrary detention.

[197] The last principle relevant to the present exercise which was formulated by the Committee in the General Comment is:

“The imposition of a draconian penalty of imprisonment for contempt of court without adequate explanation and without independent procedural safeguards is arbitrary.”<sup>159</sup>

[198] Therefore, in interpreting the right not to be detained without trial, we must give the words used by the framers a generous meaning they are reasonably capable of, so that the purpose of affording individuals full protection against deprivation of freedom may be achieved. Implicit in the language of section 12(1)(b) is the requirement that a detention based on a criminal charge must be preceded by a trial. Thus the provision prohibits detention in the absence of a trial.

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<sup>158</sup> Id at para 14.

<sup>159</sup> Id.

[199] The word “trial” is not defined in the Constitution and therefore it must bear its ordinary meaning.<sup>160</sup> In the Bill of Rights that word is used in sections 12 and 35 which are not only interconnected by the subject matter they are addressing but also by the nature of protections they provide to individuals. This link between the two provisions reinforces the proposition that “trial” as used in both provisions must carry the same meaning.<sup>161</sup> It is beyond question that the trial envisaged in section 35 is a criminal trial, as we know it. And the specific rights guaranteed by that section can fittingly apply only to a criminal trial. Of course this is not to suggest that for proceedings to constitute a criminal trial, there must be adherence to all rights enumerated in section 35(3). Nor does it mean that for a criminal trial to be fair all those rights must be met. This much is clear from the text of section 35(5) which permits acceptance of evidence obtained in a manner that violates rights in the Bill of Rights unless such evidence would render the trial unfair or its admission would be detrimental to the administration of justice.<sup>162</sup>

[200] Where the framers of the Constitution did not intend court proceedings to amount to a trial, they expressly said so. For example, section 34 speaks of “a fair public hearing” instead of a trial. The word “hearing” carries a wider meaning than trial and is inclusive of all judicial proceedings which incorporate motion proceedings. But what is clear is that motion proceedings do not constitute a criminal trial. A criminal trial may only be conducted by a court and yet motion proceedings may be pursued even before a tribunal like the Competition Tribunal established in terms of the Competition Act<sup>163</sup> or before other fora.

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<sup>160</sup> *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.

<sup>161</sup> *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC).

<sup>162</sup> Section 35(5) of the Constitution provides:

“Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.”

<sup>163</sup> 89 of 1998.

[201] Once it is accepted, as it must be, that “trial” is used in the same sense in sections 12(1) and 35(3) of the Bill of Rights, the inevitable conclusion is that here Mr Zuma was detained without a trial in breach of section 12(1)(b) unless it is found that the procedure under which he was detained constitutes a reasonable and justifiable limitation as contemplated in section 36 of the Constitution.

[202] It bears emphasis that the interpretation of “trial” preferred here is in harmony with the purpose of affording individuals full protection against deprivation of liberty. It is also consonant with international law as outlined in the jurisprudence of the Committee referred to earlier.

[203] Counsel for the Commission argued that the procedure of motion proceedings has been found, by this Court and the Supreme Court of Appeal, to be compliant with the Constitution. Reliance was placed on decisions of this Court in *Nel*<sup>164</sup> and *De Lange*<sup>165</sup>. The decision of the Supreme Court of Appeal in *Fakie*<sup>166</sup> was also invoked. Heavy reliance was placed on the following statement that was made in *Nel*:

“The s 11(1) right relied upon by the applicants is the ‘right not to be detained without trial’. The mischief at which this particular right is aimed is the deprivation of a person’s physical liberty without appropriate procedural safeguards. In its most extreme form, the mischief exhibits itself in the detention of a person pursuant to the exercise by an administrative official of a subjective discretion without any, or grossly inadequate, procedural safeguards. The nature of the fair procedure contemplated by this right will depend upon the circumstances in which it is invoked. The ‘trial’ envisaged by this right does not, in my view, in all circumstances require a procedure which duplicates all the requirements and safeguards embodied in s 25(3) of the Constitution. In most cases it will require the interposition of an impartial entity,

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<sup>164</sup> *Nel* above n 11.

<sup>165</sup> *De Lange* above n 11.

<sup>166</sup> *Fakie* above n 11.

independent of the Executive and the Legislature to act as arbiter between the individual and the State.”<sup>167</sup>

[204] But reliance on both *Nel* and *De Lange* for the proposition that the motion procedure was found to be constitutionally compliant is misguided. These decisions did not even remotely suggest that the word “trial” in section 12(1)(b) of the Constitution includes motion proceedings. The statement in *Nel* relied on by the Commission does not say that. That statement must not be read in isolation but it must be understood in the context of the preceding paragraph 13. When read in this way it becomes clear that in the relevant statement this Court was addressing a specific argument raised in paragraph 13, which reads:

“It was argued that the ‘trial’ contemplated in s 11(1) was the ‘fair trial’ provided for in s 25(3) of the Constitution and which entitled the applicant more specifically in terms of para (a) of the latter subsection to ‘a public trial’ before ‘an ordinary court’ and in terms of para (b) ‘to be informed with sufficient particularity of the charge’. It is difficult to understand how, without any textual link between the ‘trial’ referred to in s 11(1) and the ‘trial’ referred to in s 25(3), such a conclusion can possibly be reached.”

[205] Evidently the nub of the argument addressed was that the trial envisaged in section 11(1) of the interim Constitution was a fair trial that complied with all protections in section 25(3). This Court made it plain that the trial contemplated in section 11(1) need not duplicate “all requirements and safeguards embodied in section 25(3) of the [interim] Constitution”.<sup>168</sup> To deduce from this that trial in section 11(1) meant motion proceedings is wholly unjustified. What the statement means is that as contemplated in section 11(1), a trial may not comply with all requirements of section 25(3). It may comply with some but not all. The bottom line is that it must remain a trial, regardless of whether all requirements of section 25(3) were met or not.

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<sup>167</sup> *Nel* above n 11 at para 14.

<sup>168</sup> *Id.*



[206] This was later clarified by Ackermann J in *De Lange*. Talking now about section 12(1)(b) of the Constitution he said:

“Although para (b) of s 12(1) only refers to the right ‘not to be detained without trial’ and *no specific reference is made to the other procedural components of such trial it is implicit that the trial must be a ‘fair’ trial, but not that such trial must necessarily comply with all the requirements of s 35(3)*. This was the Court’s unanimous holding in respect of s 11(1) of the interim Constitution in *Nel’s* case and is equally applicable to s 12(1)(b) in the context of the entrenchment of the ‘right to freedom and security of the person’ in s 12(1) of the 1996 Constitution, there being no material difference between the two provisions.”<sup>169</sup>

[207] In *Fakie* too the Supreme Court of Appeal did not determine whether the motion procedure complied with section 12(1)(b) of the Constitution. In that matter the Court expressly defined the issue it was called upon to determine as:

“The issue before us is whether the circumstances in which the Auditor-General complied so late with Hartzenberg J’s order justify De Vos J’s finding that he was in contempt, and her consequent imposition of suspended imprisonment. That depends on the circumstances of the admitted default. But the proper approach to considering those circumstances must first be determined. This requires a consideration of the nature of this form of contempt of court, and – what was much argued before us – whether in these civil proceedings the standard of proof to be applied in determining whether the Auditor-General was in contempt is a balance of probabilities or beyond reasonable doubt.”<sup>170</sup>

[208] At best for the Commission, a careful reading of the judgment in *Fakie* suggests that the Supreme Court of Appeal was of the view that the motion procedure could be followed in civil contempt proceedings. But as the Court was troubled by the consequence of a conviction of contempt which is a punishment of a fine or imprisonment, it concluded that the motion procedure does not provide sufficient

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<sup>169</sup> *De Lange* above n 11 at para 24.

<sup>170</sup> *Fakie* above n 11 at para 5.

safeguards before conviction. To remedy this defect the Court concluded that the common law which imposed a reverse onus on an accused in contempt of court proceedings should be developed to say where there is proof of non-compliance with a court order, the accused has an evidential burden to establish that the non-compliance was not wilful or *mala fide*. Addressing this point, Cameron JA said:

“The decisions deal with statutory presumptions and reverse onuses. But they undoubtedly entail that where the State prosecutes an alleged contemnor at common law for non-compliance with a civil order, the requisite elements must be established beyond reasonable doubt. In such a prosecution the contemnor is plainly an ‘accused person’ in terms of section 35(3) of the Bill of Rights, and enjoys the inter-related rights that section 35(3)(h) confers: to be presumed innocent, to remain silent in the face of the charges and not to testify during the proceedings. By developing the common law in conformity with the Constitution, the reverse onus the accused bore in prosecutions such as *Beyers* must now be reduced to an evidential burden (as Mbenenge AJ rightly envisaged in the second *Uncedo* decision). Once the prosecution has established (i) the existence of the order, (ii) its service on the accused, and (iii) non-compliance, if the accused fails to furnish evidence raising a reasonable doubt whether non-compliance was wilful and *mala fide*, the offence will be established beyond reasonable doubt: the accused is entitled to remain silent, but does not exercise the choice without consequence.”<sup>171</sup>

[209] Then in paragraph 24 the learned Judge observed that the section 35(3) safeguards which apply to a contemnor in a criminal trial for contempt of court should “apply also where a civil applicant seeks an alleged contemnor’s committal to prison as punishment for non-compliance”. However, he emphasised that in those proceedings the contemnor is not an “accused person” envisioned in section 35 of the Bill of Rights. He then preferred to measure the fairness of the proceedings against section 12 of the Bill of Rights. He said:

“Section 12 of the Bill of Rights grants those who are not accused of any offence the right to freedom and security of the person, which includes the right not only ‘not to be

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<sup>171</sup> Id at para 22.

detained without trial’, but ‘not to be deprived of freedom arbitrarily or without just cause’. This provision affords both substantive and procedural protection, and an application for committal for contempt must avoid infringing it.”<sup>172</sup>

[210] The difficulty with the reasoning in *Fakie*, is that after concluding that section 35(3) did not apply and that instead section 12 was the relevant provision, the Supreme Court of Appeal did not determine whether the motion procedure meets the requirement of a trial contemplated in section 12(1)(b) of the Bill of Rights. This is crucial to the inquiry whether the motion procedure is in line with the Constitution. Since it cannot be disputed that in contempt of court proceedings, the motion procedure may lead to the limitation of personal freedom, this limitation may only be consistent with the Constitution if it meets the requirements of section 36 of the Constitution.<sup>173</sup>

[211] Proceeding from the premise that it must be the constitutional protections in section 12 which must be followed in that common law process, the Supreme Court of Appeal held:

“And in interpreting the ambit of the right’s procedural aspect, it seems to me entirely appropriate to regard the position of a respondent in punitive committal proceedings as closely analogous to that of an accused person; and therefore, in determining whether the relief can be granted without violating section 12, to afford the respondent such substantially similar protections as are appropriate to motion proceedings. For these reasons, the criminal standard of proof is appropriate also here.”<sup>174</sup>

[212] We cannot support the approach followed by that Court in *Fakie*. It is inconsistent with the principle of supremacy of the Constitution and suggests that the enjoyment of the rights guaranteed by the Bill of Rights depends on whether those rights are “appropriate to motion proceedings”. Effectively this approach places the common

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<sup>172</sup> Id at para 24.

<sup>173</sup> Section 7(3) of the Bill of Rights provides:

“The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.”

<sup>174</sup> *Fakie* above n 11 at para 25.

law process above the Constitution from which it derives its force. Therefore, the adaptation of motion procedure to constitutional requirements in *Fakie* was limited to those Constitutional requirements which were compatible with motion proceedings. In that case, the Court did not determine whether a motion court application may constitute a trial envisaged in section 12(1)(b) of the Constitution. It also appears that the motion procedure cannot be adapted to all the requirements of section 35(3) of the Constitution because some of them may apply only to a trial. While it is true that *Fakie* was endorsed by this Court in *Pheko II* and *Matjhabeng*, the endorsement related to statements other than that the protections of section 12 to be afforded to the contemnor are limited to those that are “appropriate to motion proceedings”. It must be emphasised that neither *Fakie* nor decisions of this Court say a motion procedure constitutes a trial envisaged in section 12(1)(b). The real issue here is whether by the procedure followed in convicting and sentencing Mr Zuma, this Court complied with section 12(1)(b), especially the requirement relating to a trial.

[213] However, it is significant to note that the Supreme Court of Appeal, in paragraph 26 of its judgment in *Fakie*, implicitly acknowledged that the civil process followed in motion proceedings cannot be equated with the trial of a criminal charge. This accords with the meaning assigned to “trial” here when interpreting section 12(1)(b) of the Bill of Rights. And that puts to rest the construction of that provision advanced by the Commission.

#### *Whether section 35(3) was violated*

[214] At the outset we must point out that the inquiry into whether section 35(3) was breached when the order of 29 June 2021 was made is limited to cases dealing with contempt of court in circumstances where a conviction is made and a criminal penalty imposed. This is because a wilful or intentional disobedience of a court order amounts to a criminal offence and this was affirmed in *Fakie*:

“It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the

essence of which lies in violating the dignity, repute or authority of the court. The offence has in general terms received a constitutional ‘stamp of approval’, since the rule of law – a founding value of the Constitution – ‘requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained’.”<sup>175</sup>

[215] Ordinarily, criminal offences are prosecuted in a criminal trial and a sentence imposed must be preceded by a conviction of the sentenced person. It is that conviction which grounds or justifies the imposition of the sentence. If on appeal or review the conviction is set aside, as a matter of law the sentence falls away because it cannot remain standing when its foundation has been removed.

[216] Before 1968 our law was not clear on whether the disobedience of a civil order could be prosecuted like any other crime. *Beyers* clarified the position:

“It cannot be doubted that there is an established procedure whereby a litigant who has obtained an order against his opponent can approach the Court in his own interests for the punishment of his opponent for contempt of court in order to enforce obedience of the order. It is a process of a dual nature which is dealt with in accordance with civil procedures. . . . Following English law the contempt is then described civil contempt. It is equally clear, however, that at no stage has this form of contempt lost a criminal law content. It is often described and treated as a crime with no indication that it is considered as anything other than the common law contempt of court. Whether this is in accordance with English law is at least doubtful, but in my opinion of little relevance, because the definition of the crime in our law is not determined by English law.”

[Translation by the Editors]<sup>176</sup>

[217] The key propositions emerging from that statement are that a wilful failure to obey a court order constitutes a crime in our law and that in English law it is described as a civil contempt. But despite this label, in our law the disobedience in question is a crime. Another proposition arising from the same statement is that the English law

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<sup>175</sup> Id at para 6.

<sup>176</sup> *S v Beyers* 1968 (3) SA 70 (A) (*Beyers*) at 80C-E, translated by the editors of Juta in *De Lange* above n 11 at para 152.

procedure by which a litigant in whose favour a court order was granted may, upon non-compliance, approach the court with a request that his or her opponent be convicted and punished “for contempt of court in order to enforce obedience of the order”, was imported into our law. This was received together with the confusing label that this is civil contempt.

[218] However, in *Beyers* the Court concluded that the so-called civil contempt is not only a crime but that it may also be prosecuted in the ordinary course in a criminal court. This meant that the person who has failed to obey a court order might be charged, arraigned and be tried in a criminal trial for the offence of contempt of court. But *Beyers* did not abolish the civil process inherited from English law and that process continues to be invoked in our courts. There is no case that we know of which considered the constitutional validity of invoking the civil procedure for the sole purpose of convicting and sentencing the person who had failed to obey a court order. This was also not addressed by the majority in the decision that contains the impugned order.

[219] But *Beyers* makes two further important propositions. The first is that in the civil process the primary objective is not to punish the contemnor for the offence of contempt of court but to enforce the disobeyed order. This is so vital to the applicant’s competence for invoking the civil process that if enforcement is not sought, the criminal punishment may not be available to the applicant. Even where obedience of the disregarded court order was sought and punishment was imposed, ordinarily that punishment is suspended on condition of compliance with the order. If the contemnor complies, the suspended punishment falls away. The same happens if after punishment was imposed, the applicant abandons the order granted in his favour. Here, if the Commission were to abandon the order of 29 June 2021, the sentence of 15 months’ imprisonment would fall away.

[220] This is because in the so-called civil contempt the imposition and execution of the punishment is intrinsically linked to the enforcement of the disobeyed order. This position was affirmed in *Beyers*:

“Even though enforcement of a civil obligation is the primary purpose of the punishment, it is nevertheless not imposed merely because the obligation has not been observed, but on the basis of the criminal contempt of court that is associated with it. *The fact that the punishment is generally suspended on condition of compliance with the order in issue, and that the punishment is thus not enforced if the applicant should abandon his rights under the order, does not detract from this at all. Depending on the nature and seriousness of the contempt, the court would accordingly be able to suspend only a portion of the punishment, and then the abandonment of rights by the applicant would not affect the unsuspended portion.*”<sup>177</sup>

[221] This is the context in which the question whether section 35(3) was violated must be assessed. In that process sight must not be lost of the international law requirements in relation to fairness of the procedure and the denial of an appeal. Section 35(3) fixes the fairness standard that must be observed in every criminal trial by conferring a basket of rights upon those who face criminal charges. It is those rights which safeguard the fairness of the criminal process which may culminate in the loss of liberty.

[222] By design, the motion procedure followed in the proceedings that led to the order of 29 June 2021, does not incorporate the protections in section 35(3) of the Constitution. In fact, it is incompatible with the operation of many of those protections. It was this incompatibility that drove the Court in *Fakie* to hold that a contemnor enjoys only those protections which “are appropriate to motion proceedings”.<sup>178</sup> We have already pointed out the fallacy in this conclusion which must be seen in the context that it is the litigant in whose favour the order was granted who makes the choice between laying a criminal charge or invoking motion procedures to achieve punishment for a failure to obey a court order. If the applicant chooses to lay a criminal charge and thereby set in motion a process leading to a criminal trial, the contemnor would be entitled to all protections afforded by section 35(3). But if the applicant opts for the

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<sup>177</sup> *Beyers* id at 80C-H, translated in *Fakie* above n 11 at para 11.

<sup>178</sup> *Fakie* id at para 42.

civil procedures, the contemnor loses those protections and may retain only those that “are appropriate to motion proceedings”. This is absurd.

[223] The operation of the Bill of Rights which is the cornerstone of our democratic order, cannot depend on the whims of litigants or their preferences in a particular case. In addition, the applicability of the Bill in a given case may not be circumvented by simply choosing a procedure that is incompatible with it. To compound issues, this occurs in circumstances where the contemnor, as the holder of rights, has no say in a decision taken by his or her opponent to strip him or her of the rights conferred by the Constitution.

[224] For all these reasons, it appears to us that the incompatibility between section 35(3) of the Constitution and the motion procedure that was followed here renders the latter procedure inappropriate to proceedings that are conducted for determining whether a contemnor is guilty of contempt of court for failing to obey a court order and sentencing him or her for such disobedience. It must be emphasised that what is inappropriate is the motion procedure and not some of the protections in the Bill of Rights.

[225] This conclusion is not at variance with the jurisprudence of this Court in decisions like *Nel* and *De Lange* as those cases did not deal with the crime of contempt of court. Contempt of court, albeit in a different form, was addressed in *Mamabolo*.<sup>179</sup> That case was concerned with, among other issues, whether the summary procedure which entitled a Judge initiating contempt of court proceedings by summoning the contemnor who had scandalised the Court, to appear before him or her to answer to the charge, constituted a limitation of rights in the Bill of Rights. Having found that the person so summoned is the accused person as envisaged in section 35(3) of the Constitution, this Court proceeded to test the summary procedure in question against that section. This Court found that the procedure fundamentally departed from a normal

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<sup>179</sup> *Mamabolo* above n 1.



criminal trial in which the summoned person would have been entitled to the section 35(3) protections.<sup>180</sup>

[226] In *Mamabolo* this Court identified the respects in which the summary procedure limited the rights of the accused person. The Court observed:

“There is no adversary process with a formal charge-sheet formulated and issued by the prosecutorial authority in the exercise of its judgment as to the justice of the prosecution; there is no right to particulars of the charge and no formal plea procedure with the right to remain silent, thereby putting the prosecution to the proof of its case. Witnesses are not called to lay the factual basis for a conviction, nor is there a right to challenge or controvert their evidence. Here the presiding judge takes the initiative to commence proceedings by means of a summons which he or she formulates and issues; at the hearing there need be no prosecutor, the issue being between the judge and the accused. There is no formal plea procedure, no right to remain silent and no opportunity to challenge evidence.”<sup>181</sup>

[227] The defects identified in *Mamabolo* are present in the motion procedure followed in this matter. This means that both procedures limit the fair trial rights in section 35(3) of the Constitution. It is inconceivable that the same defects would have different impacts on those rights based solely on the distinction between the summary procedure and the motion procedure. Both procedures do not safeguard the protections in section 35(3). On the approach that was adopted in *Fakie*, the motion procedure tolerates only those protections in section 12 which are appropriate to it.

[228] For reasons already articulated, the proposition that a contemnor is not an accused person, although attractive at first blush, is no answer to the problem flowing from the hybrid process. Indeed, it would be extraordinary for this Court, as the upper guardian of the Constitution, to endorse a procedure that avoids the application of the Bill of Rights when there is another procedure that embraces it. The

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<sup>180</sup> Id at paras 55-6.

<sup>181</sup> Id at para 54.

Commission's right to lay a criminal charge would have equally vindicated the authority and dignity of this Court. And that criminal procedure would have been consistent, not only with the Constitution but also with international law. It will be recalled that the ICCPR, as construed by the Committee, requires that a procedure that leads to a conviction for contempt of court must incorporate adequate protections against conviction and deprivation of liberty.

[229] In *Spisso* the Committee explicitly held that the right to a fair trial “extends to acts that are criminal in nature, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity”.<sup>182</sup> The fact that this Court found serious aggravating circumstances in the contempt we are concerned with here, cannot justify the departure from the Constitution and at the level of international law, the ICCPR. The egregious aggravation noted in the majority judgment can sufficiently be catered for in a criminal trial by imposing a severe sentence. But that conduct had no bearing on the interpretation of the Bill of Rights which confers rights on everyone. In our law facts of a case play no role in the interpretation of the Constitution and legislation. What remains for consideration is whether the motion procedure meets the requirements of section 36(1) of the Constitution.

### *Justification*

[230] This Court, having found in *Mamabolo* that the summary procedure followed there to punish contempt of court was a limitation of the contemnor's constitutional rights, proceeded to consider whether it was a reasonable and justifiable limitation contemplated in section 36(1) of the Constitution. The Court held that it was inappropriate for a court of law, “the constitutionally designated primary protector of personal rights and freedoms”, to apply the summary procedure that was “a wholly unjustifiable limitation of individual rights”.<sup>183</sup> And the Court concluded that justice

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<sup>182</sup> *Spisso* above n 105 at para 7.8.

<sup>183</sup> *Mamabolo* above n 1 at para 58.

would have been better served if the matter was reported to the Director of Public Prosecutions instead.

[231] These conclusions were based on the following reasoning:

“The next question to be asked is whether the summary procedure is saved by section 36(1) of the Constitution. Accepting that the rules of the common law which sanction the procedure qualify as “law of general application” within the meaning of the subsection, the question is whether the limitation they pose is reasonable and justifiable in an open and democratic society. If one keeps in mind that the enquiry is limited to the use of the summary procedure in cases of alleged scandalising of the court, there can be only one answer. In such cases there is no pressing need for firm or swift measures to preserve the integrity of the judicial process. If punitive steps are indeed warranted by criticism so egregious as to demand them, there is no reason why the ordinary mechanisms of the criminal justice system cannot be employed.”<sup>184</sup>

[232] The constitutional defects in this matter are similar to those identified in *Mamabolo*. The only difference between these matters is that one was a summary procedure initiated by the court and the other is a motion procedure initiated by a litigant. Here, like in *Mamabolo*, the Commission could have laid a criminal charge. There was no pressing need for swift action. This is because Mr Zuma was convicted of his failure to obey the order of 28 January 2021. The order of 29 June 2021 explicitly states that he was “guilty of the crime of contempt of court for failure to comply with the order” of 28 January 2021. That failure manifested itself in not appearing before the Commission on specified dates, as was required in the summons issued by the Commission pursuant to the order of 28 January 2021.

[233] For him to comply with that part of the order, he needed the Commission to fix fresh dates. It did not do so as it initiated contempt of court proceedings in which the Commission chose not to seek an order coercing him to comply. The purpose of the Commission’s application was to punish him pure and simple. And that punishment

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<sup>184</sup> Id at para 57.

related to his past conduct. As we all know one can be convicted of a crime only if his or her past conduct constitutes a crime.

[234] Just like in *Mamabolo*, here the offensive conduct did not take place *in facie curiae* (during court proceedings) and as such did not disrupt the administration of justice. The Court was not required to act on the spot to protect its functioning. But even if the matter deserved an urgent response, there can be no justification for not holding a trial as required by section 12(1)(b), if this Court was minded to impose imprisonment. It could have held, if justified by the facts, a summarised form of a trial. But a trial it should have been. The fact that this Court is not suited to conducting trials because it sits *en banc* (in bench) did not relieve it from the duty to uphold section 12(1)(b) of the Bill of Rights. If anything, that fact underscored the inappropriateness of the Commission's choice in pursuit of the matter. The matter should have been prosecuted as a criminal charge before a competent court.

[235] The urgency in which the matter had to be addressed did not justify non-compliance with the need to hold a trial. Even in the case of motion proceedings, if the matter is extremely urgent to the extent that time does not allow for the drafting of papers, our courts permit the leading of oral evidence and cross-examination of the witnesses who testified. A similar approach can be adopted so as to comply with the holding of a trial envisaged in section 12(1)(b). This means that the objectives of contempt of court such as maintaining the judicial authority of the Republic and the dignity of its courts, may be achieved through other ways that are less intrusive upon the contemnor's rights, entrenched in the Bill of Rights.

[236] A further consideration militating against justifiability is that the motion procedure is so out of step with international law that its recognition as a lawful process for convicting persons for contempt of court, would expose South Africa to liability under international law. This may include a directive by the Committee to the effect

that South Africa must change its laws to avoid similar violations in the future, as the Committee did in *Dissanayake*.<sup>185</sup>

[237] There can be no doubt that Mr Zuma's disobedience of this Court's order deserves to be dealt with firmly and that it calls for an appropriate punishment that may include imprisonment. But the egregiousness of his conduct cannot, as the majority held,<sup>186</sup> justify a departure from "ordinary procedures" and be an endorsement of a procedure that is inconsistent with section 12(1)(b) of the Constitution.

[238] Therefore the motion procedure followed here does not constitute a reasonable and justifiable limitation of the relevant rights in the Bill of Rights. Consequently, the procedure which was inherited from the English law is, in the eyes of our Constitution, invalid. This invalidity in turn vitiates what was done in terms of that procedure. This means that Mr Zuma was incarcerated in terms of an invalid procedure. The supremacy of the Constitution tells us that his detention too was invalid.

### *Rescission*

[239] As was observed by the Court in *Molaudzi*, this Court has the power to intervene where its earlier order results in an injustice. In criminal matters the intervention may occur, irrespective of whether the process was initiated by the person on whom the order applies or by the Court itself. In *Molaudzi*, this Court answered the question it left open in earlier decisions like *Baphalane Ba Ramokoka Community* on whether it has power outside rule 42 to reconsider and change a final order it had issued. In the latter case, the Court hinted that notionally an intervention outside rule 42 could occur where the interests of justice so demand.<sup>187</sup> And this was also stated in *Ka Mtuze*.<sup>188</sup>

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<sup>185</sup> *Dissanayake* above n 105 at para 10.

<sup>186</sup> Contempt judgment above n 1 at paras 29-30.

<sup>187</sup> *Baphalane Ba Ramokoka Community* above n 129 at para 27.

<sup>188</sup> *Ka Mtuze* above n 57 at para 19.

[240] However, decisions of this Court suggest that an intervention based on the interests of justice must be undertaken where there are exceptional circumstances warranting intervention. This high standard serves the purpose of maintaining the principles of certainty and finality in litigation, coupled with the rule that no appeal lies against the decisions of this Court. The test seeks to strike a balance between the prevention of an injustice and the principles mentioned here.

[241] But where it is established that the impugned order is inconsistent with the Constitution, this Court has no choice but to declare it invalid and set it aside,<sup>189</sup> regardless of the form followed in placing the matter before the Court. This is so because the exercise of the power and the discharge of the obligation imposed on the Court by section 172(1) cannot be hamstrung by procedural missteps or failures by the applicant for reconsideration. For as long as it is established that the order is inconsistent with the Constitution, it must be declared invalid and be set aside.

[242] This is a separate ground for intervention which does not require the interests of justice and exceptional circumstances for a court to reconsider and set aside its order. An order which is inconsistent with the Bill of Rights is invalid if the inconsistency is not reasonable and justifiable as contemplated in section 36 of the Bill. The fact that such order is not yet declared invalid by the court is immaterial because its invalidity flows from it being inconsistent with the Constitution.<sup>190</sup> The declaration of invalidity by the court merely serves to clarify the position. The invalidity in such a case predates the impugned court order. In those circumstances there can be no justification for a

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<sup>189</sup> Section 172(1) of the Constitution provides:

- “When deciding a constitutional matter within its power, a court—
- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
  - (b) may make any order that is just and equitable, including—
    - (i) an order limiting the retrospective effect of the declaration of invalidity; and
    - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

<sup>190</sup> *Ferreira v Levin N.O.*; *Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 28.

court not to declare its order invalid once it is established that it is inconsistent with the Constitution. An appeal is not a precondition for such declaration where no appeal can be mounted. Nor does the declaration depend on whether the requirements of rule 42 are met. This conclusion renders it unnecessary to decide whether this rule was satisfied.

[243] The duty to uphold the Constitution and especially the Bill of Rights is not limited to decisions and conduct of the other arms of the State, that is decisions of the Executive and the Legislature. That duty extends to decisions of the Judiciary as well. Section 8 of the Bill of Rights reminds us that the Bill binds all three arms of the State and furthermore section 165 of the Constitution informs us that the judicial power vested in our courts must be exercised subject to the Constitution and the law of the Republic. It is true that the motion procedure we are concerned with here constitutes a law of the Republic. However we also know that the Constitution reigns supreme. A court decision that conforms with the common law would be invalid if it is inconsistent with the higher law, the Constitution. And where, as here, an order was granted after hearing only one party because the other party chose not to participate, the risk for an error occurring in the process is higher. If the error indeed occurs, it must be corrected so as to avoid its recurrence in the future.

[244] Summing up: the problem in this matter is not whether Mr Zuma may be convicted and be punished for contempt of court. Instead, it is whether the motion procedure followed in convicting and sentencing him to imprisonment is consistent with the Constitution. In other words, whether that procedure amounts to a trial contemplated in the Constitution. On the interpretation assigned to section 12(1)(b) here, the motion procedure does not constitute a trial and as a result the detention is not consistent with the right not to be detained without a trial. Accordingly, the validity of the detention is not tested against the ICCPR but against our Constitution.

*The interface between the Constitution and the ICCPR*

[245] Since the ratification of the ICCPR by South Africa,<sup>191</sup> South Africans enjoy rights under the ICCPR as well as under the Constitution. Some of those rights overlap. For example, the rights in sections 12 and 35 of the Bill of Rights are similar to the rights in articles 9 and 14 of the ICCPR. This means that at a domestic level South Africans may have claims based on the Bill of Rights and at international level, they may have similar claims based on the ICCPR. But significantly, claims based on the ICCPR may be pursued only after exhausting domestic claims. However, here since no appeal lies against a decision of this Court if the order of 29 June 2021 is not set aside, Mr Zuma would be entitled to approach the Committee on a claim that articles 9 and 14 of the ICCPR have been violated. This is what happened in *Dissanayake* where the apex Court of Sri Lanka convicted a citizen of that country for contempt of court and imposed a sentence of imprisonment of two years with hard labour. The Committee entertained the claim and ruled that the conviction and sentence were arbitrary as envisaged in article 9(1) of the ICCPR because the procedure followed by the Sri Lankan Supreme Court did not have “independent procedural safeguards” of the kind found in sections 12 and 35 of our Constitution. This finding was made despite the fact that the Constitution of Sri Lanka empowered the Supreme Court to punish those in contempt of it.

[246] This then suggests that a claim under the ICCPR may succeed even if a national court had acted within national law, including a national constitution. If what has been done by the national court is inconsistent with the ICCPR, the claim by the citizen would be successful. And this is the genesis of the injunction imposed by section 39(1) of the Constitution to the extent that it obliges our Courts when interpreting the Bill of Rights, to consider international law and prefer a meaning consistent with that law. Therefore, even if the order of 29 June 2021 were to be consistent with our Constitution, it would still be susceptible to rescission if it breached article 9 or 14 of the ICCPR because it would expose South Africa to a claim under international law. Since the motion

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<sup>191</sup> South Africa ratified the ICCPR in 1998.



procedure followed here contains no “independent procedural safeguards”, it appears to be inconsistent with article 9(1). And the fact that this Court acted as a court of first and last instance also may constitute a breach of article 14(5) of the ICCPR. In *Spisso*, the Committee held that this kind of system is incompatible with the article unless there is a reservation for an appeal or review built in to the system.<sup>192</sup> Here no appeal or review is reserved in cases of contempt of court. But this does not mean that the ICCPR is enforceable in South African Courts. A claim based on the ICCPR will have to be made in the Committee. We mention it here purely as a factor relevant to rescission.

[247] For all these reasons we would declare that the order granted on 29 June 2021 is invalid and should be set aside. We would also refer the matter to the office of the relevant Director of Public Prosecutions, as was done by the Supreme Court of Appeal<sup>193</sup> and the High Court.<sup>194</sup>

THERON J:

[248] I have had the pleasure of reading the first and second judgments.

[249] My Brother Jafta J reasons that “where it is established that the impugned order is inconsistent with the Constitution, this Court has no choice but to declare it invalid and set it aside”. He holds that “[t]his is a separate ground for intervention which does not require the interests of justice and exceptional circumstances, for a court to reconsider and set aside its order.” It is on this basis, and because he finds that the order in the contempt proceedings is inconsistent with the Constitution, that Jafta J would uphold the application.

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<sup>192</sup> *Spisso* above n 105 at para 7.11.

<sup>193</sup> *De Beer* above n 13.

<sup>194</sup> *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* 2015 (5) SA 1 (GP).

[250] In my view there is no need to craft a “separate ground for intervention”. *Molaudzi*<sup>195</sup> tells us that an order of this Court may be reconsidered in exceptional circumstances, and where the interests of justice “cry out” for intervention.

[251] This is such a case. For the reasons set out in the second judgment, the order made by the majority in the contempt proceedings was made pursuant to an unconstitutional procedure. Most notably, it resulted in Mr Zuma’s incarceration without affording him a right of appeal. This is an unprecedented state of affairs and to uphold the order, which is fruit of the poisoned tree, would result in substantial hardship and injustice to Mr Zuma.

[252] Subject to this qualification, I concur in the second judgment.

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<sup>195</sup> *Molaudzi* above n 59 at para 11.

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