

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 295/20

In the matter between:

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

Applicant

and

JACOB GEDLEYIHLEKISA ZUMA

Respondent

APPLICANT’S HEADS OF ARGUMENT

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INTRODUCTION

1. This application is fundamentally about the enforcement of the constitutional principle and duty of accountability.¹
2. The applicant approaches this Court for an order compelling Mr Zuma to account to the public, through the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (“**the Commission**”), for the exercise of his public powers and performance of his constitutional obligations when he served as the President of the Republic.
3. Mr Zuma has defied the Commission and refused to cooperate with its inquiry, notwithstanding that his personal role in allegedly committing or facilitating acts of state capture, corruption and fraud are central to the Commission’s inquiry.²
4. For a prolonged period, Mr Zuma has delayed giving evidence to the Commission and repeatedly failed to make good on undertakings that he would do so.³ The matter came to a head in the week of 16 November 2020, when Mr Zuma refused to remain in attendance and give evidence at the Commission, in accordance with the summons directing him to do so.
5. The Commission has indicated that it will lay criminal charges against Mr Zuma, as the failure to heed a summons is an offence under the Commissions Act.⁴ But

¹ Enshrined in section 1(d) and 195 of the Constitution, amongst other provisions.

² Founding affidavit (“FA”) paras 17-18, pp 14-15. The Commission’s terms of reference appear in Annexure IM1 as the schedule to the Proclamation, at pp 78-82.

³ See the history of the Commission’s engagement with Mr Zuma detailed in the founding affidavit at paras 62 to 68 and 71 to 115, pp 37-62.

⁴ FA para 70, p 46.

that cannot be the end of the matter, as doing so will not effectively remedy the constitutional violation at issue.

6. Mr Zuma's defiance of the Commission is a blatant violation of the foundational constitutional value of accountability, which underpins the rule of law⁵ and South Africa's commitment to democratic government,⁶ and which is binding on those that govern. As this Court said in *Nkandla* –

“One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck. It is against this backdrop that the following remarks must be understood:

“Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillars-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy.”⁷

⁵ Most obviously because the rule of law requires *congruence* between the laws or the ‘rules as announced’ and conduct or ‘actual administration’: L L Fuller *The Morality of Law* revised ed (1969) 39, 46–91.

⁶ The centrality of accountability, together with the related values of responsiveness and openness, in South Africa's system of democratic government is expressly recognised in section 1(d) of the Constitution, which provides:

“The Republic of South Africa is one, sovereign, democratic state founded on the following values:

...

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.”

⁷ *Nkandla* at para 1, citing *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) at para 80.

7. Accountability has at least two aspects. On the one hand, it entails taking responsibility for, or being held liable for, the exercise of public power. On the other hand, accountability entails the element of justification, and requires the responsible office-bearer to explain and give an account of his or her decisions or actions when called upon to do so. The Commission's summons of Mr Zuma is directed at both aspects of the accountability exercise.
 - 7.1. The Commission has called upon Mr Zuma to give an account of his exercise of power in the highest office in the land and to answer questions concerning the allegations of his involvement in serious abuses of power. This is quintessentially an exercise in the 'justification leg' of accountability.
 - 7.2. The Commission's work is also directed at making findings of wrong-doing and responsibility, and recommendations on the further steps to be taken to ensure that persons responsible for abuses of power are indeed held responsible. This is the 'liability leg' of accountability. Findings of wrong-doing must be based on evidence; the Commission's insistence that Mr Zuma attends to give evidence is directed at fulfilling this part of its mandate too.
8. Even if a criminal penalty were, in due course, to be imposed on Mr Zuma for his defiance of the Commission's summons, it could never vindicate the principle of accountability – on either the justification or the liability leg.
9. Mr Zuma's refusal to give evidence at the Commission has a further constitutional dimension given the unusual provenance of the Commission.

- 9.1. The establishment of the Commission has its origins in the investigation conducted and report issued by the former Public Protector entitled “State of Capture”, which was released in October 2016.⁸ The Public Protector made *prima facie* findings of improper and unethical conduct implicating Mr Zuma, who was the President of the Republic at the time. However, given the extent of the issues to be traversed and the resources required to investigate them, the Public Protector was unable to complete her investigation. Her remedial action accordingly directed the President to appoint a commission of inquiry to complete this task by investigating “*all the issues using the record of [her] investigation and the report as a starting point*”.⁹
- 9.2. The Commission is accordingly mandated by both the Public Protector and the President, in the exercise of their constitutional powers, to investigate the matters in its terms of reference in order to promote accountability, including on the part of the former President. In frustrating the Commission’s investigation, Mr Zuma is also undermining the exercise and purpose of the powers under sections 84(2)(f) and 182(1)(c) of the Constitution.
10. The particular subject-matter of the Commission’s inquiry also informs the nature of the constitutional violation at issue. The Commission is charged with investigating allegations of corruption, fraud and serious irregularities in the public sector. As this Court has repeatedly held, corruption and related offences imperil the foundations of our constitutional democracy and the ability of the state to fulfil

⁸ Public Protector *State of Capture Report*, Report No. 6 of 2016/17 (14 October 2016).

⁹ Public Protector *State of Capture Report* at page 354, para 8.6.

the socio-economic rights in the Bill of Rights.¹⁰ The mandate of the Commission thus has serious implications for the constitutional project more broadly, including the country's commitment to the Bill of Rights. As the Secretary of the Commission rightly put it –

*“When a former President frustrates the ability of the Commission to perform its duty to investigate such matters, he is frustrating the ability of the country to know what, if anything, happened to funds that could have been used for the fulfilment of socio-economic rights in the Bill of Rights and its ability to address the scourge of corruption and malfeasance”.*¹¹

11. In response to the Commission's application to this Court, Mr Zuma has again avoided accountability for his conduct. He has refused to participate in these proceedings at all, to explain his conduct at the Commission. This, we submit, compounds the problem and reinforces the need for this Court's intervention.

¹⁰ In *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC), Chaskalson P held for the Court at para 4:

“Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They were the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State.

In *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC), Ngcobo CJ observed at para 57:

“Corruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights.”

See also paras 175-176 of the majority judgment of Moseneke DCJ and Cameron J, who held:

“Endemic corruption threatens the injunction that government must be accountable, responsive and open; that public administration must not only be held to account but must also be governed by high standards of ethics, efficiency and must use public resources in an economic and effective manner. As it serves the public, it must seek to advance development and service to the public...”

¹¹ FA para 35.6, p 26.

12. Mr Zuma either does not appreciate the duty to account imposed on all public office-holders, including the President of the Republic, or he simply does not care to comply with that duty. Whichever it is, this Court's intervention is evidently required.

JURISDICTION

13. The applicant approaches this Court on the basis that –

- 13.1. this Court has exclusive jurisdiction to determine the application under section 167(4)(e) of the Constitution, which states:

“(4) Only the Constitutional Court may—

(e) decide that Parliament or the President has failed to fulfil a constitutional obligation”; and

- 13.2. granting direct access is in the interests of justice.

14. On either of these grounds, the Court ought to determine the matter.

Exclusive Jurisdiction

15. The test for exclusive jurisdiction under section 167(4)(e) is now fairly well established.¹² It entails the application of the following key principles:

- 15.1. Section 167(4)(e) applies only where the constitutional obligation that allegedly has not been fulfilled is one that rests on the President or

¹² The test was helpfully restated and applied in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (“*Nkandla*”) paras 16 to 19.

Parliament; and only where the obligation is of the kind envisaged by section 167(4)(e). The obligation must be one that is specifically imposed on the President or Parliament, as opposed to one that is shared with other organs of state.

15.2. Section 167(4)(e) must be interpreted narrowly, having due regard to the other provisions of the Constitution, so as not to intrude on the jurisdiction of the other courts. As this Court recognised in *SARFU I*, section 167(4)(e) cannot, therefore, be construed as applying to all questions concerning the constitutional validity of conduct of the President, as this would be in conflict with section 172(2)(a) (which empowers the High Court and the Supreme Court of Appeal to make orders concerning the constitutional validity of any conduct of the President).¹³

15.3. Further, having regard to the special role of this Court, the questions to be determined must have serious political implications, or raise sensitive and important separation of powers considerations, such as to require this Court's determination to maintain comity between the judiciary and the other branches of government. This point was emphasised in both *SARFU II* and *Doctors for Life*.¹⁴ In *Doctors for Life*, Ngcobo J stated the principle as follows:

"The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important

¹³ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1998] ZACC 21; 1999 (2) SA 14; 1999 (2) BCLR 175 (CC) (*SARFU I*) at para 25. See also *Van Abo v President of the Republic of South Africa* (CCT 67/08) [2009] ZACC 15; 2009 (10) BCLR 1052 (CC); 2009 (5) SA 345 (CC) para 35.

¹⁴ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) (*SARFU II*) at paras 72-73; and *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) paras 22-26.

questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court.”¹⁵

16. In *Nkandla*, this Court was called upon to assume exclusive jurisdiction on the basis of the alleged failure by President Zuma to fulfil his constitutional obligations under sections 83, 96, 181 and 182 of the Constitution, specifically for failing to give effect to the Public Protector’s remedial action. The Public Protector had directed the President to re-pay to the fiscus a portion of the undue benefits that had accrued to him and his family in the upgrades of his home in Nkandla.
17. In assessing whether it had exclusive jurisdiction under section 167(4)(e), this Court recognised the breadth of the language of section 83 of the Constitution, and the scope of the constitutional obligations it imposed on the President. This Court accordingly cautioned against the assumption that this Court has exclusive jurisdiction in respect of every alleged infringement of section 83 (or indeed section 96). The Court reasoned that:

“...[T]o meet the section 167(4)(e) requirements, conduct by the President himself that tends to show that he personally failed to fulfil a constitutional obligation expressly imposed on him, must still be invoked, to establish the essential link between the more general section 83 obligations and a particular right or definite obligation.”¹⁶

18. The Court recognised that the particularity in the obligation required may arise in the context of a personal failure by the President to comply with the remedial

¹⁵ At para 24.

¹⁶ Id at para 33. Emphasis added.

action of the Public Protector, with which the President was personally obliged to comply under section 182(1)(c) of the Constitution.¹⁷ The crux of this Court's reasoning is at paragraph 35 of the judgment, which reads:

“In this case, the requirement that the President failed to fulfil a constitutional obligation that is expressly imposed on him is best satisfied by reliance on both sections 83(b) and 182(1)(c) of the Constitution. Very much in line with the narrow or restrictive meaning to be given to section 167(4)(e) and mindful of the role that the other courts must also play in the development of our constitutional law, section 182(1)(c) does in this case, impose an actor-specific obligation. Although section 182 leaves it open to the Public Protector to investigate State functionaries in general, in this case, the essential link is established between this section and section 83 by the remedial action actually taken in terms of section 182(1)(c). In the exercise of that constitutional power, the Public Protector acted, not against the Executive or State organs in general, but against the President himself. Compliance was required only from the President. He was the subject of the investigation and is the primary beneficiary of the non-security upgrades and thus the only one required to meet the demands of the constitutionally-sourced remedial action.”¹⁸

19. This case, like *Nkandla*, is an extraordinary one in which alleged violations of the broadly-stated constitutional obligations of the President are given particularity and immediate political consequences by the remedial action of the Public Protector.
20. In this case, it is alleged that President Zuma violated his constitutional obligations as the President under sections 83(b), 83(c), 96 and the President's oath of office in a series of respects reflected in the Public Protector's report, for which alleged failures and abuses of power he has failed to account. The Public Protector's remedial action is specifically directed at ensuring that Mr Zuma accounts for his alleged abuse of the President's office, and at enforcing the ongoing duty of accountability on the part of those entrusted to govern. Accordingly, the remedial action in the *State of Capture Report* specifically

¹⁷ Id at paras 34-36, 40.

¹⁸ At para 35.

required that President Zuma's alleged constitutional violations must be investigated by a presidential commission of inquiry, with investigative capacity and coercive powers.¹⁹

21. As in *Nkandla*, Mr Zuma is personally frustrating the remedial action of the Public Protector, by refusing to be examined and to answer the allegations of his alleged constitutional violations. In doing so, Mr Zuma is infringing section 182(1)(c) of the Constitution, which is specifically directed at enforcing the constitutional obligations he held as the President under section 83 (amongst others), as well as his continuing constitutional obligation of accountability for his exercise of power as the President. This combination – of specific breach and defiance of remedial action that is directed at enforcing the President's constitutional duties – justifies the activation of this Court's exclusive jurisdiction.

22. The only difference between what has transpired in this case and what transpired in the *Nkandla* matter, is that Mr Zuma is no longer the President of the Republic. However, since the constitutional obligation at issue is that of accountability – which, by its very nature, is one that may operate retrospectively in respect of what has occurred in public office – this is not a material distinction.²⁰

¹⁹ See paragraphs 8.6 and 8.7 of the remedial action in the Public Protector's State of Capture Report, which read:

“8.6. The judge to be given the power to appoint his/her own staff and to investigate all the issues using the record of this investigation and the report as a starting point.

8.7. The commission of inquiry to be given powers of evidence collection that are no less than that of the Public Protector.”

²⁰ As is stated at paragraph 26 of the founding affidavit, p 18:

“The constitutional obligation of public accountability for conduct in public office is an ongoing one. Mr Zuma's duty of accountability did not end with the termination of his holding of office as the President, but persists in respect of his conduct and exercise of public power in that office. As the former President, Mr Zuma always has a constitutional obligation to account for his exercise of public power and performance of his constitutional duties in the highest office. By its very nature, the duty of accountability may be backward looking.”

23. In this matter, there is a further dimension which calls for this Court to assume jurisdiction, and not any other. This stems from the peculiar nature and composition of the Commission, which raises unique political sensitivities in resolving the dispute between the Commission and the former President. Although the Commission is a presidential commission of inquiry established under section 84(2)(f) of the Constitution, it is peculiarly headed by the Deputy Chief Justice at the selection of the Chief Justice. This arrangement was required by the Public Protector to avoid a conflict of interest arising should then President Zuma select the Chairperson charged with investigating the President's own conduct. The composition of the Commission is indicative of the intensity of the political issues involved in this case, and raises a further dimension in that the integrity of the Deputy Chief Justice as the Chairperson of the Commission and, by extension the Chief Justice (as the person responsible for selecting the Chairperson), is being threatened by Mr Zuma's conduct.²¹ This too requires the intervention of this Court.

Direct Access

24. The applicant has also approached this Court for direct access under section 167(6) of the Constitution, as it requires final relief in a matter of considerable constitutional and public importance, on an urgent basis.

25. The key principles governing direct access applications are the following:²²

²¹ This is apparent both from the recusal application and the unfounded public attacks against the Commission, made by Mr Zuma's lawyers and the Jacob Zuma Foundation. In respect of the latter, see the founding affidavit at para 44, p 32 and paras 65-66, p 44.

²² *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC) at paras 7-9; *Mkontwana v Nelson Mandela Metropolitan Municipality and Another* 2005 (1) SA 530 (CC) at para

- 25.1. The exceptional nature of direct access requires that “compelling reasons” are given to persuade this Court that it should exercise its discretion to grant such access in the interests of justice. These reasons must go beyond the grounds upon which leave is granted in the ordinary course.
- 25.2. Proof of exceptional circumstances, in the form of sufficient urgency or public importance and proof of prejudice to the public interest or the ends of justice and good governance, must be established. A demonstrable need for certainty and to avoid prolonged litigation will favour granting direct access.
- 25.3. The Court will also have regard to the prospects of success and the nature of the issues in dispute – if they are crisp and defined, do not raise disputes of fact, and do not require the development of the common law or customary law, the Court will be more inclined to grant direct access.
26. All of these considerations are met in this case.
- 26.1. This is undoubtedly an “exceptional case”, and the reasons the Commission has given for approaching this Court directly are compelling.²³
- 26.2. The relief sought is required to enforce foundational constitutional values, of which this Court is the ultimate guardian.²⁴ The duty of accountability looms large in this case. The rule of law and the principle of equality before the law are also implicated. The former President is no ordinary

11; *Mazibuko v Sisulu* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) at para 35-36; *Electoral Commission v Mlhope* 2016 (5) SA 1 (CC) at para 76.

²³ These are detailed in the founding affidavit at paras 35-45, pp 24-32.

²⁴ *SARFU II* para 72; *Doctors for Life* para 38.

witness – a sitting President has been described by this Court as a “constitutional being by design”.²⁵ Mr Zuma is required to answer specific allegations that he abused the office of the President for the benefit of third parties and his family, in a commission of inquiry that is directed at investigating crimes involving the state, including corruption and fraud, that strike at the heart of our constitutional democracy. Ensuring the effectiveness of the Commission is manifestly in the public interest.

26.3. The effect of Mr Zuma’s conduct at the Commission is to frustrate the remedial action of the Public Protector and the order of the High Court, which confirmed the validity of that remedial action and required its implementation.²⁶ This is an important constitutional matter that requires this Court’s intervention.

26.4. Since this matter is unopposed, there are no disputes of fact arising for this Court to determine.

26.5. The legal issues are relatively straightforward, as they entail the application of statutory provisions and constitutional duties to the facts. The meaning of the statutory provisions the applicant relies on has not been disputed by Mr Zuma in these proceedings, or at any time before. As the Secretary of the Commission notes in the founding affidavit, Mr

²⁵ *Nkandla* para 20.

²⁶ *President of the Republic of South Africa v Office of the Public Protector and Others* 2018 (2) SA 100 (GP) at para 191 (the order).

Zuma has never contested the power of the Commission to summons a witness under section 3(1) of the Commission Act.²⁷

26.6. To be effective, final relief must be granted as a matter of urgency. The Commission explains that it must complete its work by 31 March 2021 (although it may seek an extension for the finalisation of its report, it will not seek an extension for hearing evidence). The only remaining time for the hearing of Mr Zuma's evidence is between January and the end of February 2021. The Commission explains that it is critical to have certainty as to whether or not Mr Zuma will be compelled to give evidence, in order for the Commission to plan how to use its remaining time.

26.7. Mr Zuma is not only avoiding giving evidence at the Commission, but is actively attacking the legitimacy and credibility of the Commission, its Chairperson and its work. This requires urgent intervention by the Court, to authoritatively countermand the negative impact of these attacks and protect the integrity and legitimacy of the Commission.

26.8. Given the unprecedented nature of the Commission and the extraordinary nature of this matter, it is highly unlikely that any similar matter will arise in the future. Granting direct access in this case will thus not invite frivolous direct access applications in future.

27. We submit that on the strength of these considerations, taken together, it is manifestly in the interests of justice for direct access to be granted.

²⁷ Founding affidavit at para 117, p 63.

28. If the Court is satisfied that direct access should be granted in this case, it need not decide the question of exclusive jurisdiction.²⁸

THE ALLEGATIONS OF ABUSES OF POWER AND BREACH OF CONSTITUTIONAL DUTY BY MR ZUMA

29. The Commission is mandated to investigate the Public Protector's *prima facie* findings of unlawful and unethical conduct implicating Mr Zuma when he was the President of the Republic. In the Public Protector's *State of Capture Report*, Adv. Madonsela did not make firm findings, but made "observations", implicating Mr Zuma (at paragraph 7 of her Report) and required their further investigation by a commission of inquiry. The High Court has described these observations as "prima facie findings".²⁹ These include (amongst others):³⁰

29.1. That President Zuma improperly and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son, to be involved in the process of removal and appointment of the Minister of Finance in December 2015 (involving the removal of Minister Nene and appointment of Mr Des Van Rooyen in his place). The Public Protector observed:

7.1.1 President Zuma was required to select and appoint Ministers lawfully and in compliance with the Executive Ethics Code.

²⁸ This is the approach adopted, for instance, in *Mazibuko v Sisulu* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) at para 74 and *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21; 2017 (8) BCLR 1061 (CC); 2017 (5) SA 300 (CC) at para 27.

²⁹ This is the description of the High Court in *President of the Republic of South Africa v Office of the Public Protector and Others* 2018 (2) SA 100 (GP). The Full Court stated at para 107:

"The Public Protector's observations set out in paragraph 7 of the Report constitute prima facie findings that point to serious misconduct or impropriety on the part of the President, the Gupta family and the persons, functionaries and entities referred to in the Report. These observations are supported by a considerable body of corroborative evidence."

³⁰ *State of Capture Report*, Report No. 6 of 2016/17 at page 343ff.

- 7.1.2 *It is worrying that the the Gupta family was aware or may have been aware that Minister Nene was removed 6 weeks after Deputy Minister Jonas advised him that he had been allegedly offered a job by the Gupta family in exchange for extending favours to their family business*
- 7.1.3 *Equally worrying is that Minister Van Rooyen who replaced Minister Nene can be placed at the Saxonwold area on at least seven occasions including on the day before he was announced as Minister. This looks anomalous given that at the time he was a Member of Parliament based in Cape Town.*
- 7.1.4 *Another worrying coincidence is that Minister Nene was removed after Mr Jonas advised him that he was going to be removed*
- 7.1.5 *If the Gupta family knew about the intended appointment it would appear that information was shared then in violation of section 2.3(e) of the Executive Ethics Code which prohibits members of the executive from the use of information received in confidence in the course of their duties or otherwise than in connection with the discharge of their duties.*
- 7.1.6 *The provision of Section 2.3(c) which prohibits a member of the Executive from acting in a way that is inconsistent with their position. There might even be a violation of Section 2.3(e) of the Executive Ethics Code which prohibits a member of the Executive from using information received in confidence in the course of their duties otherwise than in connection with the discharge of their duties.*
- 7.1.7 *In view of the fact that the allegation that was made public included Mr Jonas alleging that the offer for a position of Minister was linked to him being required to extend favours to the Gupta family, failure to verify such allegation may infringe the provisions of Section 34 of Prevention and Combatting of Corrupt Activities Act, 12 of 2004 which places a duty on persons in positions of authority who knows or ought reasonably to have known or suspected that any other person has committed an offence under the Act must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official.*

29.2. That President Zuma improperly and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son, to be involved in

the process of removal and appointment of various members of Cabinet.³¹

In this regard, the Public Protector referred to–

29.2.1. the allegations of the former ANC Member of Parliament, Ms Vytjie Mentor, that she was offered the post of Minister for Public Enterprises by one of the Gupta brothers, in exchange for cancelling the South African Airways' route to India, and that President Zuma was present at the Gupta family's residence in Saxonwold when the offer was made;³²

29.2.2. the allegations of the former Deputy Minister of Finance, Mr Mcebisi Jonas that he was offered the post of Minister of Finance shortly before Minister Nene's firing in 2015 by Mr Ajay Gupta, in exchange for payment of R600 million and on condition that he worked with the Gupta family, which offer he refused.³³

29.3. That President Zuma improperly and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son, to be involved in the process of appointing members of Boards of Directors of State-Owned Enterprises (SOEs).³⁴ On this issue, the Public Protector referred in particular to –

29.3.1. the allegations of the former Chief Executive Officer of Government Communication and Information System, Mr Themba Maseko that Mr Ajay Gupta pressured him into placing government advertisements in

³¹ Para 7.2 of the State of Capture Report.

³² See also para 5.15 of the State Capture Report, describing the Public Protector's interview with Ms Mentor.

³³ See also paras 5.17 to 5.19 of the State Capture Report, describing the Public Protector's interview with Mr Jonas, Mr Nene and Mr Gordhan.

³⁴ Para 7.3 of the State of Capture Report.

the *New Age* newspaper which was being set up by the Gupta family. Mr Maseko further alleged that, shortly before his meeting at the Gupta family's residence where this pressure was imposed, President Zuma personally called to ask him to "help" the Gupta family.³⁵ Mr Maseko also alleged that, when he resisted cooperating, Mr Ajay Gupta threatened him by saying "I will talk to your seniors in government and you will be sorted out", and that he would be replaced by people who will co-operate;

29.3.2. the allegations that the Eskom Chief Executive Officer, Mr Brian Molefe had a "cozy relationship" with the Gupta family and the directors of Tegeta Exploration and Resources, which had sourced major contracts with Eskom and in which company the Gupta family (through Oakbay Investments), Mr Zuma's son, Duduzane Zuma (through Mabengela Investments) and other associates of the Gupta family held a stake;³⁶

29.3.3. the allegations of former Minister of Public Enterprises, Ms Barbara Hogan, pertaining inter alia to President Zuma's and then-ANC Secretary General Gwede Mantashe's interest in SOE-Board appointments, and President Zuma's obstruction of her performance of her job as Minister, including that at a certain point he would not even allow her to appoint a Director General in her Department.³⁷ The Public Protector observed that *"the allegations made by Ms Hogan also deserve a closer look to the extent that they suggest Executive and*

³⁵ See also para 5.20 of the State Capture Report, describing the Public Protector's interview with Mr Maseko.

³⁶ See also paras 5.4 to 5.6, 5.42 to 5.44, 5.95 to 5.101, 5.111ff of the Report.

³⁷ See also para 5.16 of the State Capture Report, describing the Public Protector's interview with Ms Hogan.

party interference in the management of SOEs and appointments thereto".³⁸

29.4. That President Zuma enabled or turned a blind eye, in violation of the Executive Ethics Code, to alleged corrupt practices by the Gupta family and his son in relation to allegedly linking appointments to quid pro quo conditions.³⁹ The Public Protector emphasised in this regard that there seemed to be no evidence showing that Mr Jonas' allegations that he was offered money and a ministerial post in exchange for favours were ever investigated by the Executive.⁴⁰ She reasoned that if correct, then section 2.3 (c) of the Executive Ethics Code may have been infringed.

29.5. That President Zuma and other Cabinet members improperly interfered in the relationship between banks and Gupta owned companies thus giving preferential treatment to such companies on a matter that should have been handled by independent regulatory bodies.⁴¹

29.6. The Public Protector recognised that the following related issues also required further investigation:

29.6.1. Whether President Zuma improperly and in violation of the Executive Ethics Code exposed himself to any situation involving the risk of conflict between his official duties and his private interest or use his position or information entrusted to him to enrich himself and

³⁸ Para 7.3.

³⁹ Para 7.4 of the Report.

⁴⁰ This point is repeatedly made by the Public Protector: see, for instance, paras 4 (a) and (b), 6(a) and 7.2 of the Report.

⁴¹ Para 7.4 of the Report.

businesses owned by the Gupta family and his son to be given preferential treatment in the award of state contracts, business financing and trading licences; and

29.6.2. Whether any one was prejudiced by the conduct of President Zuma.⁴²

30. The Public Protector describes in her report how then-President Zuma failed to cooperate with her investigation. She describes her engagements with Mr Zuma, his technical objections and avoidance of responding to the allegations she was investigating. The Public Protector records that she advised the President that he was obliged to provide responses as “he is accountable to the people of the Republic”.⁴³ Nevertheless, she notes (at paragraph 5.28 of the report) that:

“I met with the President on 6 October 2016 to solicit his response to the above allegations. He did not respond to any of my questions.”⁴⁴

31. The Commission’s Terms of Reference reflect that the Public Protector’s investigation into abuses of power and breach of duty on the part of Mr Zuma underpins its mandate.⁴⁵ The Commission has received evidence in the form of

⁴² Paras 7.5 and 7.6 of the Report.

⁴³ Para 3.21 of the Report.

⁴⁴ See also paras 3.20 to 3.41 of the Report.

⁴⁵ The relevant terms read:

“1. The Commission shall inquire into, make findings, report on and make recommendations concerning the following, guided by the Public Protector’s state of capture report, the Constitution, relevant legislation, policies, and guidelines, as well as the order of the North Gauteng High Court of 14 December 2017 under case number 91139/2016:

- 1.1 whether, and to what extent and by whom attempts were made through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including Deputy Ministers), office bearers and/or functionaries employed by or office bearers of any state institution or organ of state or directors of the boards of SOE’s. In particular, the commission must investigate the veracity of allegations that former Deputy Minister of Finance, Mr Mcebisi Jonas and Ms Mentor were offered Cabinet positions by the Gupta family;
- 1.2 whether the President had any role in the alleged offers of Cabinet positions to Mr Mcebisi Jonas and Ms Mentor by the Gupta family as alleged;

affidavits and sworn oral testimony from more than thirty witnesses that implicate Mr Zuma for alleged breaches of his constitutional duties as President of the Republic.⁴⁶ The relevant evidence has been presented to Mr Zuma, in the form

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- 1.3 whether the appointment of any member of the National Executive, functionary and /or office bearer was disclosed to the Gupta family or any other unauthorised person before such appointments were formally made and/or announced, and if so, whether the President or any member of the National Executive is responsible for such conduct;
 - 1.4 whether the President or any member of the present or previous members of his National Executive (including Deputy Ministers) or public official or employee of any state owned entities (SOEs) breached or violated the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders by SOE's or any organ of state to benefit the Gupta family or any other family, individual or corporate entity doing business with government or any organ of state;
 - ...
 - 1.7 whether any member of the National Executive and including Deputy Ministers, unlawfully or corruptly or improperly intervened in the matter of the closing of banking facilities for Gupta owned companies;
 - ...
 - 1.9 the nature and extent of corruption, if any, in the awarding of contracts and tenders to companies, business entities or organizations by Government Departments, agencies and entities. In particular, whether any member of the National Executive (including the President), public official, functionary of any organ of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest". (Emphasis added)

⁴⁶ See the list of Rule 3.3 Notices in Annexure IM11, p 172. The Commission's Rules were promulgated in the General Notice No 397 of 2018 in the Government Gazette No. 41774 (16 July 2018). Rule 3.3 provides:

- "3.3 If the Commission's Legal Team intends to present to the Commission a witness, whose evidence implicates or may implicate another person, it must, through the Secretary of the Commission, notify that person ("implicated person") in writing within a reasonable time before the witness gives evidence:
- 3.3.1. that he or she is, or may be, implicated by the witness's evidence;
 - 3.3.2. in what way he or she is, or may be, implicated and furnish him or her with the witness's statement or relevant portions of the statement;
 - 3.3.3. of the date when and the venue where the witness will give the evidence;
 - 3.3.4. that he or she may attend the hearing at which the witness gives evidence;
 - 3.3.5. that he or she may be assisted by a legal representative when the witness gives evidence;
 - 3.3.6. that, if he or she wishes:
 - 3.3.6.1. to give evidence himself or herself;
 - 3.3.6.2. to call any witness to give evidence on his or her behalf; or
 - 3.3.6.3. to cross-examine the witness;
- he or she must, within two weeks from the date of notice, apply in writing to the Commission for leave to do so; and
- 3.3.7. that the Chairperson will decide the application."

of Rule 3.3 notices issued to him, inviting him to respond to the allegations. Some, but not all, of these notices are attached to the founding papers.⁴⁷ The same evidence is the subject of the summons the Commission issued to Mr Zuma in October 2020, and which he defied in the week of 16 November 2020.⁴⁸ Regulation 10(6) directives have also been issued to Mr Zuma directing him to respond to some of the allegations on affidavit.⁴⁹

32. Without purporting to be exhaustive, we highlight some of the allegations that Mr Zuma has been called on to address and which he has, to date, failed to address on the merits:⁵⁰

32.1. Mr Themba Maseko's allegations that (i) in or about September/ October 2010, Mr Zuma had a telephonic conversation with him in which Mr Zuma required him to accede to the demands from the Guptas for government advertising to be placed with their new media company, with the purpose of benefitting that company without due respect and regard for compliance with procurement obligations under s 217 of the Constitution and s 53(1)(a) of the Public Finance Management Act, 1999 ("**PFMA**"); and (ii) in early 2011, Mr Zuma removed or caused him to be removed from his

⁴⁷ Annexure IM12, at pp 173ff.

⁴⁸ The summons is Annexure IM2, pp 84-86. Annexure A to the summons lists the witnesses whose evidence Mr Zuma was called upon to answer at the Commission, under questioning by the Evidence Leaders.

⁴⁹ The Regulation 10(6) directives are annexures IM7 and IM8 at pp 143-151.

Regulation 10.6 provides:

"(6) For the purposes of conducting an investigation the Chairperson may direct any person to submit an affidavit or affirmed declaration or to appear before the Commission to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on the matter being investigated, and may examine such person".

Noncompliance with a regulation 10(6) directive is an offence, under regulation 12(2).

⁵⁰ Although Mr Zuma appeared at the Commission for examination in July 2019, he did not meaningfully address the merits of the allegations and evidence put to him at the hearing. See founding affidavit para 83, p 50.

position of CEO, of the Government Communication and Information Service when he refused to accede to the demands of Mr Ajay Gupta.⁵¹

32.2. Ms Vytjie Mentor's allegations that (i) she was removed from the position of the Chairperson of the Portfolio Committee on Public Enterprises for refusing to meet with Mr Zuma in China in 2010; (ii) in October 2010, at the Gupta residence in Saxonwold, Mr Ajay Gupta told her that Mr Zuma would be reshuffling the Cabinet the following week and offered her the position as Minister of Public Enterprises if she facilitated the closure of the SAA-India route; and (iii) when she told Mr Zuma about this discussion, he did not negate or contradict what she conveyed about her discussion with Mr Ajay Gupta.⁵²

32.3. Ms Barbara Hogan's allegations that (i) in and around 2009, Mr Zuma unlawfully sought to interfere in the management of Eskom by pressurising her to reinstate Mr Jacob Maroga as the CEO of Eskom, after the Eskom Board had unanimously decided not to do so; (ii) Mr Zuma unlawfully sought to interfere in the management of Transnet by insisting on the appointment of Mr Siyabonga Gama as CEO of Transnet, when the Board had already nominated an excellent candidate and determined that Mr Gama was not CEO material and when Mr Gama was facing an inquiry regarding certain irregularities; and that (iii) Mr Zuma unlawfully prevented Ms Hogan from nominating the Transnet Board's chosen candidate for

⁵¹ Rule 3.3. Notice issued in respect of Mr Maseko's evidence, pp 174-175.

⁵² Rule 3.3. Notice issued in respect of Ms Mentor's evidence, p 178.

CEO and from designating a new Chairperson to the Transnet Board when the incumbent's term had expired.⁵³

32.4. The allegations of the Minister of Public Enterprises and former Minister of Finance, Mr Pravin Gordhan that –

32.4.1. During November 2011 to December 2015, Mr Zuma initiated and coordinated the process to procure 9.6GW of nuclear energy from the Russian Federation without ensuring the conclusion of prior feasibility studies and finance modelling to ensure affordability, and without ensuring an open and competitive bidding process, in contravention of the PFMA; and that Mr Zuma sought and purported to bind the Republic to a substantial financial obligation under such nuclear build programme without any prior vote of expenditure by Parliament or budget allocation, in contravention of the budgeting requirements of the PFMA;

32.4.2. In or around April 2014, Mr Zuma unlawfully sought to execute or cause to be executed the Petronas transaction without due diligence being conducted, exposing National Treasury to financial risk in the amount of R18,6 billion, at an inflated cost of R6 billion.

32.4.3. In and around 2016, Mr Zuma was aware of the refusal by the Commissioner of the South African Revenue Services (SARS), Mr Tom Moyane to account to Mr Gordhan as the Minister of Finance, and Mr Moyane's campaign to discredit Mr Gordhan and the National Treasury, and orchestrate a criminal prosecution against Mr Gordhan, and that Mr Zuma failed to take appropriate action against Mr Moyane and to

⁵³ Rule 3.3. Notice issued in respect of Ms Hogan's evidence, pp 181-182.

protect Mr Gordhan as a member of his national Executive in the performance of his duties.⁵⁴

32.5. Mr Nhlanhla Nene's and Mr Mcebisi Jonas' allegations that Mr Zuma unlawfully sought to pressurise Mr Nene, then the Minister of Finance, to sign a letter of agreement for the proposed nuclear build programme with the Russian Federation, and further agreed to proceed with the nuclear build programme at a Cabinet meeting in December 2015 and permitted the Department of Energy to issue a Request for Proposals in circumstances where there was no approved funding model to show affordability; the programme would have had material and negative financial consequences for South Africa; and National Treasury had advised against the programme and raised concerns over its feasibility and the fiscal implications.⁵⁵

32.6. The allegations of Mr Mahlodi Sam Muofhe that, in 2014 and 2015, Mr Zuma took a personal interest in and sought to influence the appointment of Mr Mzwanele "Jimmy" Manyi as the Director General of the Department of Mineral Resources, despite the former Minister, Mr Ramatlhodi advising that Mr Manyi did not have the necessary qualifications for the post.⁵⁶

32.7. The allegations of General Sipiwe Nyanda and former Minister of Finance, Mr Trevor Manuel that in and around 2011, Mr Zuma was unlawfully influenced by one of the Gupta brothers in appointing Mr Fikile

⁵⁴ Rule 3.3. Notice issued in respect of Mr Gordhan's evidence, pp 186-189.

⁵⁵ Rule 3.3. Notice issued in respect of Mr Nene's evidence, pp 192-193; Rule 3.3. Notice issued in respect of Mr Jonas' evidence, p 220 and affidavit at pp 225-226.

⁵⁶ Rule 3.3. Notice issued in respect of Mr Muofhe's evidence, p 197.

Mbalula as Minister of Sports and Recreation, and that Mr Zuma failed to take any action in response to Mr Mbalula's allegations that he had been informed of his pending appointment as the Minister of Sports and Recreation by Mr Atul Gupta before Mr Zuma had officially announced it.⁵⁷

32.8. The allegations of former Provincial Head of the Directorate of Priority Crimes Investigation (the Hawks) in KwaZulu-Natal, Mr Johan Booysen that (i) Mr Zuma unduly interfered in (i) the investigative independence of the National Prosecuting Authority (NPA), the Hawks and the South African Police Services (SAPS); (ii) Mr Zuma unduly declined, delayed or obstructed recommended prosecutions; (iii) Mr Zuma participated in the undue persecution of officials of the NPA, the Independent Police Investigative Directorate (IPID) and the Hawks; and (iv) Mr Zuma destabilised the NPA, the Hawks and the SAPS.⁵⁸

32.9. The allegations of the former National Director of Public Prosecutions (NDPP), Mr Mxolisi Nxasana that Mr Zuma (i) failed to intervene to cause disciplinary action to be taken against leaders in the NPA, Advocates Jiba, Mrwebi and Mzinyathi; (ii) took steps to suspend him without adequate grounds; and (iii) falsely stated under oath the Mr Nxasana had requested to vacate the office of the NDPP.⁵⁹

32.10. The allegations of Mr Popo Molefe (the former Chairperson of PRASA) that Mr Zuma personally sought to intervene to have Mr Lucky Montana

⁵⁷ Rule 3.3. Notice issued in respect of Mr Nyanda's evidence, pp 200 & 202; Rule 3.3. Notice issued in respect of Mr Manual's evidence, p 204 and 206-207.

⁵⁸ Rule 3.3. Notice issued in respect of Mr Booysen's evidence, pp 210-211.

⁵⁹ Rule 3.3. Notice issued in respect of Mr Nxasana's evidence, p 215.

reinstated as CEO of PRASA, after the Board had decided to accept Mr Montana's resignation following a damning report by the erstwhile Public Protector on maladministration, corruption and impropriety in procurement and management at PRASA.⁶⁰

32.11. The allegations of Ms Bongwiwe Dube, a former employee at Bosasa, that Bosasa provided catering for Mr Zuma's birthday in Pretoria.⁶¹

32.12. The allegations of an anonymous witness that Mr Zuma was involved in the diversion of the proper mandate of the Special Operations Unit of the State Security Agency and used the Unit for (i) his own private VIP protection and that of Ms Dudu Myeni, amongst others; and (ii) to provide parallel technical surveillance counter-measures.⁶²

32.13. The allegations of Mr Brent Simons that during 2014, he personally witnessed Mr Zuma using his position as President to secure government contracts for members of his family, in particular funds and contracts from the National Youth Development Agency, the Government Communications and Information Service (GCIS) and the Department of Public Service and Administration.⁶³ Mr Simons also alleges that Minister Collins Chabane had confided in him that Mr Zuma had instructed him to remove Mr Themba Maseko as CEO of the GCIS and to replace him with Mr Mzwanele Jimmy Manyi.

⁶⁰ Rule 3.3. Notice issued in respect of Mr Popo Molefe's evidence, p 228, read with affidavit at pp 231-237.

⁶¹ Rule 3.3. Notice issued in respect of Ms Dube's evidence, pp 238-9 and para 5.4 of her affidavit at p 243.

⁶² Rule 3.3. Notice at p 246 and redacted affidavit at pp 248 to 261.

⁶³ Rule 3.3. Notice issued in respect of Mr Brent's evidence at pp 262-267.

32.14. The allegations of Mr Abegnigo Hlungwani (Mr Chabane's private secretary) that Mr Zuma had instructed Minister Collins Chabane to remove Mr Themba Maseko as CEO of the GCIS and to replace him with Mr Mzwanele "Jimmy" Manyi.⁶⁴

32.15. The allegations of Mr Lizo Gibson Njenje (the former head of domestic intelligence at the State Security Agency) that Mr Zuma (i) prevented the State Security Agency from investigating the Gupta family; (ii) assisted Mr Ajay Gupta in their bid to acquire mineral rights from Kumba and Arcelor Mittal; (iii) was aware of the meeting between then Minister of Mineral Resources, Ms Shabangu and Mr Ajay Gupta to fast-track their application for mineral rights; and (iv) instructed the Minister Cwele (then Minister of State Security) to instruct Mr Njene to cease the prosecution of Mr Arthur Fraser, despite a strong case of Mr Fraser's involvement in the unlawful Principal Agent Network Programme.⁶⁵

32.16. The allegations of Mr Riaz "Mo" Shaik (the former head of the State Security Agency) and Mr Mzuvukile Maqetuka (former head of intelligence at the State Security Agency) that (i) Mr Zuma prevented the State Security Agency from investigating the Gupta family, and failed to heed the advice of senior directors at the Agency with regard to the Guptas and the negative impact that Mr Zuma's relationship with them was having on the country; (ii) Mr Zuma removed the top three executives at the State Security Agency (Mr Shaik, Mr Njenje and Mr Maqetuka) to protect the Gupta family, and in so doing, Mr Zuma undermined the agency and

⁶⁴ Rule 3.3. Notice issued in respect of Mr Hlungwani's vidence at pp 269-270.

⁶⁵ Rule 3.3. Notice issued in respect of Mr Njenje's evidence at pp 273-274.

security of the Republic; and (iii) Mr Zuma offered Mr Shaik an ambassadorship to Japan to secure his removal from South Africa, and when this was refused, arranged for the transfer of the Ambassador to Canada to Japan to arrange for Mr Shaik's appointment as Ambassador to Canada.⁶⁶

33. It is apparent from these allegations that Mr Zuma is accused of the most serious abuses of power and breach of his constitutional duties as President of the Republic, including his duty –
- 33.1. to uphold, defend and respect the Constitution as the supreme law of the Republic, under section 83(a) of the Constitution;
 - 33.2. to promote unity and that which will advance the Republic, under section 83(b) of the Constitution;
 - 33.3. to act in accordance with the prescribed Code of Ethics for members of Cabinet, under section 96(1) of the Constitution;
 - 33.4. not to act in any way that is inconsistent with his office as President and member of Cabinet, or to expose himself to any situation involving the risk of a conflict between his official responsibilities and private interests, under section 96(2)(b) of the Constitution;
 - 33.5. not to use his position as President and member of Cabinet, or any information entrusted to him, to enrich himself or improperly benefit any other person, under section 96(2)(c) of the Constitution; and

⁶⁶ Rule 3.3. Notice issued in respect of Mr Shaik's evidence at pp 276-277; and Mr Maqetuka's evidence at pp 280-281.

33.6. to act in accordance with his oath of office, under section 87 and Schedule 2 of the Constitution – namely, to “*be faithful to the Republic of South Africa, and [to] obey, observe, uphold and maintain the Constitution and all other law of the Republic; and ... [to] always –*

- *promote all that will advance the Republic, and oppose all that may harm it;*
- *protect and promote the rights of all South Africans;*
- *discharge [his] duties with all [his] strength and talents to the best of [his] knowledge and ability and true to the dictates of [his] conscience;*
- *do justice to all; and*
- *devote [himself] to the well-being of the Republic and all of its people.”*

34. Mr Zuma must respond to the allegations of his alleged breach of constitutional duty, and give an account of his conduct as the President of the Republic, when called upon to do so at a commission of enquiry established for the very purpose of establishing the truth and enforcing accountability in respect of these alleged violations.

THE MATERIAL FACTS

35. Since the Commission commenced its hearings in August 2018, every effort has been made for Mr Zuma to furnish the Commission with his version of events on affidavit and to appear before the Commission to be questioned on matters that are the subject of its investigation.

36. These efforts are detailed in the founding affidavit.⁶⁷ In summary, they entailed the following:

36.1. In 2018 Mr Zuma was asked to file an affidavit in respect of Ms Mentor and Mr Maseko's evidence. Two years later, Mr Zuma has not filed it. Mr Zuma has never given an explanation for his failure to do so.

36.2. Mr Zuma appeared before the Commission on 15 July 2019 and gave testimony for two and half days. However, at a stage in his testimony, Mr Zuma declined to answer further questions and effectively withdrew from the proceedings. Mr Zuma unreasonably objected to the manner in which he was being questioned.⁶⁸

36.3. On 19 July 2019, Mr Zuma and his legal representatives reached an agreement with the Commission's legal team with regard to Mr Zuma's delivery of affidavits that would address a scheduled list of areas of interest, which agreement was announced publicly by the Chairperson. Despite the agreement, and repeated undertakings by Mr Zuma's legal representatives that Mr Zuma's affidavit or affidavits would be delivered,⁶⁹ Mr Zuma has not delivered an affidavit addressing any of the areas of interest. Mr Zuma has never furnished the Commission with any explanation for his failure to honour the agreement.

36.4. At the end of July 2019, the Chairperson directed that Mr Zuma's examination was rescheduled to recommence from 14 October to 25

⁶⁷ Founding affidavit at paras 71 to 115, pp 47-60.

⁶⁸ Founding affidavit para 83, p 50.

⁶⁹ See, for instance, the letters in annexures IM22 and IM26, pp 172 and 333-334.

October 2019 and from 11 November to 15 November 2019. Mr Zuma's legal representative unreasonably objected to the Chairperson's 'unilateral' set down of these dates. Mr Zuma later advised the Commission that he could not attend in October 2019 due to Mr Zuma's scheduled appearance in the criminal court; and Mr Zuma subsequently declined to attend in November 2019 for reasons of ill health.

36.5. The Commission then decided to apply to the Chairperson for the issuing of a summons directing Mr Zuma to appear for examination. That application was initially scheduled to be heard in January 2020, but had to be postponed as a result of the belated filing of Mr Zuma's answer in the summons application.

36.6. Mr Zuma was served with the Chairperson's directive of 27 August 2020, issued under regulation 10(6), requiring him to deliver an affidavit dealing with the evidence of certain witnesses on or before 18 September 2020. Mr Zuma has failed to deliver such affidavit to date, notwithstanding that non-compliance with a regulation 10(6) directive is an offence.⁷⁰

36.7. Mr Zuma was served with the Chairperson's directive of 8 September 2020, also issued under regulation 10(6), requiring him to deliver an affidavit dealing with another witness's evidence on affidavit on or before 28 September 2020. Mr Zuma has to date failed to furnish the affidavit, notwithstanding that such non-compliance is an offence.⁷¹

⁷⁰ This directive is annexure IM7, pp 143-146. See regulation 12(2), read with regulation 10(6) of the Commission's Regulations.

⁷¹ This directive is annexure IM8, pp 147-151.

- 36.8. Mr Zuma has not explained why he did not comply with either of these binding directives.
- 36.9. Mr Zuma has declined to respond to any of the thirty-six Rule 3.3 Notices issued to him, inviting him to respond to the evidence of witnesses at the Commission that implicates or may implicate him.
37. Mr Zuma's repeated failure or refusal to co-operate with the Commission made it necessary to compel his attendance by way of a summons. The Secretary for the Commission, having obtained authorisation from the Chairperson, issued a summons against Mr Zuma on 20 October 2020 requiring Mr Zuma to appear before the Commission on 16 to 20 November 2020 (both dates included) for the purpose of giving evidence and being questioned on certain matters being investigated by the Commission. The summons was duly served on Mr Zuma in accordance with section 3(2) of the Commissions Act 8 of 1947.⁷²
38. On 11 November 2020, on the eve of Mr Zuma's scheduled appearance to give evidence, Mr Zuma brought an application for the recusal of the Chairperson. That application was lodged after the summons to appear had been issued and served on him;⁷³ more than two years after the Chairperson first invited Mr Zuma to give evidence; and nearly three years after Mr Zuma (in his capacity as

⁷² The summons is annexure IM2, pp 83-86. Annexure A to the summons describes the evidence in the form of affidavits or statements of certain witnesses on which Mr Zuma was required to testify and be questioned.

⁷³ The notice of motion in the recusal application was filed with the Commission on 11 November 2020 and the application for the Deputy Chief Justice's recusal was brought at the commencement of the Commission's proceedings on 16 November 2020 – the same day Mr Zuma was due to testify in terms of the summons.

President) had appointed the Chairperson, to chair the Commission, on the selection of the Chief Justice.⁷⁴

39. On 16 November 2020, Mr Zuma attended the proceedings of the Commission. Mr Zuma's legal representatives moved the application for the recusal of the Chairperson. This took the whole day on 16 November 2020. At the end of argument, the Chairperson reserved his ruling, the preparation of which took up the following day. Mr Zuma's counsel advised the Chairperson that Mr Zuma wished to attend a funeral on Wednesday, 18 November and requested that Mr Zuma be excused from attending the Commission the next day. The Chairperson gave Mr Zuma permission to attend the funeral on the Wednesday but made it clear that Mr Zuma should return and appear before the Commission on 19 November 2020, when the proceedings would continue.⁷⁵
40. On Thursday, 19 November 2020, the Chairperson delivered his ruling together with the reasons in terms of which he dismissed the recusal application.⁷⁶ Upon the dismissal of the recusal application, the Head of the Commission's Legal Team indicated that they intended to proceed with Mr Zuma's examination, in accordance with the summons. However, Mr Zuma's legal representative, Mr Sikhakhane informed the Chairperson that Mr Zuma had decided "to excuse himself" from the proceedings.
41. Mr Zuma's legal representative further informed the Chairperson that Mr Zuma intended to take the Chairperson's decision on the recusal application on review

⁷⁴ In accordance with the remedial action of the Public Protector in the *State of Capture Report*, paragraph 8.4.

⁷⁵ The facts as to what transpired at the Commission in the week of 16 to 20 November 2020 are addressed in the founding affidavit at para 62, pp 37-40.

⁷⁶ The ruling is annexure IM3, at pp 87ff.

and to file a complaint against the Chairperson with the Judicial Service Commission on the basis that, by deciding Mr Zuma's recusal application, the Chairperson had decided a matter in which he was a party. In response, the Commission's legal representative, Mr Pretorius emphasised that Mr Zuma was under a summons that was valid and binding on him and he could not excuse himself but needed the Chairperson's permission to leave. Mr Pretorius made it clear that if Mr Zuma left the proceedings without the Chairperson's permission, that would be a criminal offence.⁷⁷

42. After these submissions were made, the Chairperson announced that he would adjourn the proceedings for the tea break. It was clear from what the Chairperson said that, after the tea break, the proceedings would resume. However Mr Zuma left the proceedings during the tea break. He did so without requesting to be excused from the proceedings by the Chairperson. Mr Zuma thus acted in defiance of the summons issued by the Commission.
43. When the Commission resumed after the tea break, Mr Zuma had left the proceedings without permission. The Chairperson indicated that Mr Zuma had left; that he had left without permission; that this was regarded as a serious matter; and that the Commission would need to reflect further on the matter. The Chairperson publicly noted that the Commission could not proceed any further that day or the following day, as it had prepared to conduct Mr Zuma's examination which had become impossible. The proceedings were, accordingly, adjourned shortly after 12h00.

⁷⁷ The relevant extract of the transcript of 19 November 2020 is annexure "IM4", pp 117ff.

44. It is clear from what preceded and transpired in the week of 16 November 2020 that, although Mr Zuma attended the proceedings at the Commission, he never intended to give evidence and be examined under oath, as required under the summons. Mr Zuma only intended to attend the hearing of his application for the recusal of the Chairperson and, if determined against him, to take the decision on review and refuse to take the witness stand, give evidence and be questioned in compliance with the summons. This appears from the following:

44.1. In the run-up to Mr Zuma's scheduled appearance at the Commission, the Commission sought an assurance from Mr Zuma's attorneys that he would comply with the summons. Mr Zuma's attorneys failed to give this assurance, but accused the Commission of "embarrassing" them by addressing the question. They avoided answering the question and said only that Mr Zuma had not indicated that he would defy the summons.⁷⁸ When the Commission followed up with another letter asking Mr Zuma's attorneys to take instructions on whether Mr Zuma was going to comply with the summons, Mr Zuma's attorneys still either refused or avoided answering this simple question.⁷⁹

44.2. In arguing the recusal application, Mr Zuma's counsel, Mr Sikhakhane, advised the Commission that, should the application be dismissed, Mr Zuma would take the decision on review and would "say nothing" if compelled to give evidence at the Commission.⁸⁰

⁷⁸ See annexure IM5A at p 126.

⁷⁹ Founding affidavit para 63.1, pp 41-42.

⁸⁰ The excerpts from the transcript of 16 November 2020 are in annexure IM5B, pp 130ff. The key statements are quoted in the founding affidavit at paras 63.3.1 63.3.3, p 43.

- 44.3. When the Chairperson dismissed Mr Zuma's application for his recusal, Mr Zuma defied the summons and walked out of the Commission's proceedings, without the Chairperson's permission, and never returned.
45. Following Mr Zuma's departure from the Commission's proceedings on 19 November 2020, the Jacob Zuma Foundation issued a public statement in which it stated, amongst other things, that "*President Zuma assures us that he would rather face jail than allow himself to be bullied by an irregular, manipulated and unlawful process*".⁸¹ Mr Zuma has not publicly countermanded the statement of the Jacob Zuma Foundation, of which he is the founder and patron, and so must be taken to have fully associated himself with the Foundation's statement.⁸² The Commission invited Mr Zuma to distance himself from the statements of the Foundation, but he has failed to do so.⁸³
46. Mr Zuma is thus not only avoiding giving evidence at the Commission, but is actively attacking the legitimacy and credibility of the Commission, its Chairperson and its work.
47. The Commission has since issued two fresh summonses against Mr Zuma, requiring his attendance for examination from 18 to 22 January 2021 (both days inclusive) and 15 to 19 February 2021 (both days inclusive).⁸⁴ The Commission asks the Court for orders directing Mr Zuma, inter alia, to comply with these new summonses. As the Secretary has stated, while Mr Zuma has defied the

⁸¹ This statement is annexure IM6A, p 138.

⁸² See also the Foundation's statement of 23 September 2020 in annexure IM6B at p 140, which is of a similar tenor and tone.

⁸³ See the invitation extended in the founding affidavit at para 65, p 44.

⁸⁴ These summonses are annexures IM9A and IM9B, pp 152-159 and the returns of service are in annexure IM9C at p 160.

Commission and its Chairperson, the Commission does not believe that Mr Zuma will defy an order of this Court, directing him to comply with the new summons and directives of the Chairperson, and to account for his conduct in the highest office by giving evidence and answering questions put to him concerning the matters the Commission is investigating.⁸⁵

THE COMMISSION OF INQUIRY AS AN ACCOUNTABILITY MECHANISM

48. This Court recognised the important public purpose served by commissions of inquiry in *Minister of Police v Premier of the Western Cape and Others*.⁸⁶ That case concerned a challenge to the constitutional validity of a commission of inquiry established by the Western Cape Premier (under s 206(5) of the Constitution) into the state of policing in Khayelitsha. In confirming the validity of the commission and its coercive powers, Moseneke DCJ emphasised the “deeper public purpose” that it served. He held:

“In addition to advising the executive, a commission of inquiry serves a deeper public purpose, particularly at times of widespread disquiet and discontent. In the words of Cory J of the Canadian Supreme Court in *Phillips v Nova Scotia*:⁸⁷

“One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover ‘the truth’. . . . In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an

⁸⁵ Founding affidavit para 15, p 13.

⁸⁶ *Minister of Police v Premier of the Western Cape and Others* 2014 (1) SA (1) (CC) at para 45.

⁸⁷ [1995] 2 SCR 97 at 137-8.

excellent means of informing and educating concerned members of the public.”

49. Moseneke DCJ recognised the particular importance of vesting coercive powers in commissions of inquiry. Moseneke DCJ held that without coercive powers, the Commission “would be no different from an investigation” and would be unable to fulfil its mandate.⁸⁸ It would also undermine the public accountability of those subject to the commission’s inquiry (in that case, the police), as well as the provincial government’s performance of its constitutional duty to exercise oversight over the police and ensure accountability and transparency.⁸⁹
50. Similar considerations apply, arguably with even greater force, to the present Commission. Its work is fundamental to ensuring accountability and transparency in government and state-owned enterprises; for truth-finding on matters of substantial public interest and concern; and to help to restore public confidence in the institutions and process of government as a whole.
51. The importance of the value of accountability in government, as a pillar-stone of South Africa’s democracy, was forcefully stated by this Court in the *Nkandla* judgment.⁹⁰ This Court has also recognised the special role that the Constitution vests in the Public Protector, to expose prejudice, corruption and abuses of power, and to enforce accountability and good governance.⁹¹ It emphasised the importance of her office being effectual and her remedial action binding. Those perceptions must also inform an assessment of the role and importance of the

⁸⁸ At para 50.

⁸⁹ At paras 51-52.

⁹⁰ See para 1 of the *Nkandla* judgment, quoted above.

⁹¹ *Nkandla* paras 50-56.

work of the Commission, as it was established as an extraordinary remedial measure required by the Public Protector to achieve her mandate.

52. The establishment and mandate of the Commission is thus pre-eminently an exercise in constitutional accountability given (i) the special status of this Commission as a remedial measure taken by the Public Protector, and (ii) its subject-matter – tasked as it is with investigating allegations of state capture, corruption and fraud in the highest echelons of government –has a bearing on the very foundations of our constitutional democracy.

THE DUTY TO ANSWER QUESTIONS AT THE COMMISSION

53. The question whether Mr Zuma has a duty to answer questions put to him at the Commission, or is entitled to remain silent, arises for determination as Mr Zuma’s legal representative advised the Commission that this is the course Mr Zuma may follow should he be compelled to give evidence.⁹²
54. To ensure that the Commission’s summons is effective, and that the Commission is able to perform its functions when it examines Mr Zuma, the Commission seeks the order in prayer 4 of its Notice of Motion, namely:

“4. It is ordered that, when appearing before the Commission and after he has taken the oath of office or affirmation, the respondent shall answer any questions put to him by the designated Evidence Leader(s) and the Chairperson of the Commission, subject to the privilege against self-incrimination, and may not rely on the right to remain silent.”

55. Mr Zuma’s duty to answer questions when under examination at the Commission stems, firstly, from section 3(1) of the Commissions Act 8 of 1947. The

⁹² See the statements made by Mr Zuma’s counsel at the Commission on 16 November 2020, quoted in the founding affidavit at para 63.3, pp 42-43; and the excerpt of the transcript of the Commission’s proceedings of 16 November 2020 in annexure IM5B, pp 132-137.

Commission's Terms of Reference make clear that the Commissions Act applies to it.⁹³ Section 3(1) provides:

“(1) For the purpose of ascertaining any matter relating to the subject of its investigations, a commission shall in the Union have the powers which a Provincial Division of the Supreme Court of South Africa has within its province, to summon witnesses, to cause an oath or affirmation to be administered to them, to examine them, and to call for the production of books, documents and objects.” (Emphasis added.)

56. A person who has been summoned to appear as a witness has a legal duty to comply with the terms of that summons, including by subjecting themselves to examination in accordance with the summons. Under section 6(1) of the Commissions Act, it is an offence for a summoned person to fail, without sufficient cause (the onus of proof whereof rests upon that person), to attend at the time and place specified in the summons.

57. The Regulations governing the Commission further specify the powers of the Commission and the duty to answer questions under examination.⁹⁴ Regulation 8(1) provides that –

“(1) No person appearing before the Commission may refuse to answer any question on any grounds other than those contemplated in section 3(4) of the Commissions Act, 1947 (Act No. 8 of 1947)”.

58. Regulation 12(2) (as amended)⁹⁵ creates a corresponding offence for non-compliance with regulation 8(1):

“(2) Any person who—

⁹³ Paragraph 4 of the Terms of Reference: annexure IM1, p 81.

⁹⁴ The Regulations were promulgated in Government Notice No. 105, Government Gazette No. 41436 (9 February 2018), and are amended by Proclamation No. 8 of 2018 in Government Gazette No. 41522 (21 March 2018); Proclamation No. 1 of 2020 in Government Gazette No. 42947 (10 January 2020); Proclamation No. 8 of 2020, in Government Gazette No. 42994 (4 February 2020); and Proclamation No. 24 of 2020 in Government Gazette No. 43563 (28 July 2020).

⁹⁵ In Proclamation No. 8 of 2020, Government Gazette No. 42994 of 4 February 2020.

- (a) appears before the Commission and refuses or fails, on any grounds other than those contemplated in section 3(4) of the Commissions Act, 1947, to answer or to answer fully and satisfactorily, any question lawfully put to him or her;

...

is guilty of an offence and liable on conviction—

- (i) in the case of an offence referred to in paragraph (a), (c), (d) or (e), to a fine, or to imprisonment for a period not exceeding 12 months.”

59. The right to remain silent that Mr Zuma threatens to invoke is only available to an arrested person or accused person in criminal proceedings, under section 35(1)(a) and 35(3)(h) of the Constitution. Neither of these provisions apply to Mr Zuma when he appears at the Commission.

60. President Zuma is thus a compellable witness and does not have a right to remain silent before the Commission. Although he retains his privilege against self-incrimination,⁹⁶ he cannot rely on this privilege to resist appearing as a witness or to refuse to answer at all (i.e. to remain silent). Rather, the privilege

⁹⁶ Under section 3(4) of the Commissions Act, read with Regulation 8(1).

Section 3(4) provides:

(4) Any person who has been summoned to attend any sitting of a commission as a witness or who has given evidence before a commission shall be entitled to the same witness fees from public funds, as if he had been summoned to attend or had given evidence at a criminal trial in a superior court held at the place of such sitting, and in connection with the giving of any evidence or the production of any book or document before a commission, the law relating to privilege as applicable to a witness giving evidence or summoned to produce a book or document in such a court, shall apply.” (Emphasis added.)

In addition, Regulation 8(2) provides a form of “direct use immunity” to witnesses who give incriminating evidence before the Commission, rendering such evidence inadmissible in subsequent criminal proceedings against them. It should be noted, however, that this protection does not extend so far as to prevent law enforcement agencies from using this information for investigative purposes. The information may also be used to prosecute other implicated or accused persons. Regulation 8(2) provides:

“(2) No evidence regarding questions and answers contemplated in sub-regulation (1), and no evidence regarding any fact or information that comes to light in consequence of any such questions or answers, shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned is charged with an offence in terms of section 6 of the Commissions Act, 1947 (Act No. 8 of 1947), or regulation 12.”

must be claimed in respect of each question⁹⁷ and the judicial officer, before allowing the claim of privilege, must satisfy himself that “there is reasonable ground to apprehend danger to the witness from his being compelled to answer”.⁹⁸ This danger must be “real and appreciable and not of an imaginary and unsubstantial character”.⁹⁹

MR ZUMA’S REVIEW OF THE RECUSAL DECISION HAS NO BEARING ON HIS DUTY TO GIVE EVIDENCE AT THE COMMISSION

61. Mr Zuma has instituted an application in the High Court to review the Chairperson’s decision to dismiss Mr Zuma’s application for his recusal. We attach a copy of the Notice of Motion to these submissions, marked “**A**”, which was filed and served on 15 December 2020. Mr Zuma’s review application has no bearing on Mr Zuma’s duty to give evidence at the Commission. No prayer for a stay of the Commission’s proceedings is sought in Mr Zuma’s Notice of Motion, and a stay of incomplete proceedings to allow for *in media res* appeals or reviews is not available as a matter of right.

62. A court will only permit such interruption of incomplete proceedings in “very rare cases”¹⁰⁰ where it is shown that “grave injustice”,¹⁰¹ “a gross irregularity”¹⁰² or “such serious prejudice as would result in a miscarriage of justice” would result.¹⁰³

There are several reasons for this: it is desirable that the actual merits should be

⁹⁷ *R v Kuyper* 1915 TPD 308 at 316.

⁹⁸ *R v Boyes* (1861) 1 B & S 311 at 330, 121 ER 730 at 738.

⁹⁹ *S v Carneson* 1962 (3) SA437 (T) at 439H.

¹⁰⁰ This is the language used in *Maswanganyi v Road Accident Fund* 2019 (5) SA 407 (SCA) at para 21.

¹⁰¹ *Wahlhaus & others v Additional Magistrate, Johannesburg & Another* 1959 (3) SA 113 (AD).

¹⁰² *R v Marais* 1959 (1) SA 98 (T).

¹⁰³ *Id.*

speedily disposed of, and that appeals or reviews are not decided piecemeal; redress by means of review or appeal will ordinarily be available at the conclusion of the proceedings (so there can accordingly be no miscarriage of justice or abuse of process of the court if the ordinary procedure is followed); and impartiality in adjudication is presumed.

63. The general rule and its rationale was recently reiterated by the Supreme Court of Appeal in *Maswanganyi v Road Accident Fund*, where the Supreme Court of Appeal held:

“[21] ... The authorities are clear that it is only in very rare circumstances that a court will review a decision, or allow an appeal before the proceedings have been terminated. As Howie P stated in *S v Western Areas Ltd*:

‘Long experience has taught that in general it is in the interests of justice that an appeal await the completion of a case whether civil or criminal. Resort to a higher Court during proceedings can result in delay, fragmentation of the process, determination of issues based on an inadequate record and the expenditure of time and effort on issues which may not have arisen had the process been left to run its ordinary course.’

[22] Even where there is a power of review, as is the case with uncompleted proceedings in a magistrates’ court, there is long-standing authority that such proceedings will not ordinarily be reviewed by the High Court until they have run their full course, at which stage an appeal or review may be brought. In *Ismail and Others v Additional Magistrate, Wynberg and Another*, applying the decision in *Wahlhaus*, the following was stated:

‘(I)t is not every failure of justice which would amount to a gross irregularity justifying interference before conviction. . . . (W)here the error relied upon is no more than a wrong decision, the practical effect of allowing an interlocutory remedial procedure would be to bring the . . . decision under appeal at a stage when no appeal lies.’¹⁰⁴

¹⁰⁴ Citing *S v Western Areas Ltd* 2005 (5) SA 214 (SCA); *Walhaus and Another v The Additional Magistrate, Johannesburg & Another* 1959 (3) SA 113 (AD) and *Ismail & others v Additional Magistrate, Wynberg & Another* 1963 (1) SA 1 (A).

See also for a discussion of the principles and authorities: *Motata vs Nair NO and Another* 2009 (1) SACR 263 (TPD), per Hancke and Pickering JJ, paras 9-10.

64. The general rule applies equally in cases where an application for recusal has been refused, and where that refusal is sought to be reviewed or appealed before the merits of the matter are disposed of. This Court made the position clear in *SA Commercial Catering & Allied Workers Union v Irvin & Johnson Ltd*, where Cameron AJ (as he then was) held:

“... An applicant for recusal cannot be said to be ‘entitled’ to prosecute an appeal immediately. Two considerations suggest the contrary. First, though there is some early authority that a decision by an applicant for recusal to proceed with the merits of the matter instead of insisting on challenging the refusal to recuse by way of appeal may constitute a waiver of the recusal objection, it is clear from subsequent authority that waiver in these circumstances occurs only if it is unambiguous. The recusal point unless so abandoned therefore remains good for a later appeal. There can accordingly be no question of an ‘entitlement’ to proceed immediately.

Second, a court that has dismissed a challenge to its composition has ruled that it is properly constituted. In these circumstances, the Labour Appeal Court had the power to regulate its own proceedings, including the power to direct that the party whose challenge has been dismissed should proceed with the merits of the matter before it. Generally considerations point strongly against piecemeal appeals, though the matter remains overridingly one of convenience. Whether a court that has dismissed a recusal application permits the applicants to bring appeal proceedings first will depend on a range of factors. These include the nature of the matter, the nature of the objection to the court's composition, the prospects of success in the recusal, and, in the case of an appellate Court, the length of the record. The decision on these factors lies with the court itself. The applicants were therefore not entitled to proceed as of right with the application for leave to appeal.”¹⁰⁵

65. In *Take and Save Trading CC*, Harms JA (writing for a unanimous Supreme Court of Appeal) emphasised that “an appeal *in medias res* in the event of a refusal to recuse, although legally permissible, is not available as a matter of right and it is usually not the route to follow because the balance of convenience more often than not requires that the case be brought to a conclusion at the first level

¹⁰⁵ *SA Commercial Catering & Allied Workers Union v Irvin & Johnson Ltd* (Seafoods Division Fish Processing) [2000] ZACC 10; 2000 (3) SA 705 (CC) para 4-5.

and the whole case then be appealed.”¹⁰⁶ The unlikelihood of an appeal *in media res* being permitted, on a balance of convenience, was underscored in *R v Silber*, where the Appellate Division observed:

“Neither counsel has been able to find any reported case in which an application for recusal has been made in the course of a trial on the ground that the judicial officer has shown bias by his conduct of the proceedings. And this is not surprising, since the ordinary way of meeting any apparent bias shown by the court in its conduct of the proceedings would be by challenging his eventual decision in an appeal or review. Bias, as it is used in this connection, is something quite different from a state of inclination towards one side in the litigation caused by the evidence and the argument, and it is difficult to suppose that any lawyer could believe that recusal might be based upon a mere indication, before the pronouncement of judgment, that the court thinks that at that stage one or the other party has the better prospects of success.”¹⁰⁷

66. In addition, Mr Zuma has not opposed the relief the Commission seeks in this Court, to compel Mr Zuma to attend at the Commission and give evidence in January and February 2021, in accordance with the fresh summons issued to him. Those summonses have been validly issued and served,¹⁰⁸ and are binding on Mr Zuma. That is not contested in these proceedings.
67. Mr Zuma is, accordingly, obliged to appear at the Commission and give evidence in accordance with the fresh summons, regardless of his review of the Chairperson’s dismissal of the recusal application.

¹⁰⁶ *Take and Save Trading CC and Others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) at para 4.

¹⁰⁷ *R v Silber* 1952 (2) SA 475 (A) at 481C-H.

¹⁰⁸ FA para 69, p 46 and annexures IM9A, 9B and 9C, pp 152 to 163.

THE RELIEF SOUGHT

68. The Commission seeks declaratory orders (in prayer 2 of the Notice of Motion) and mandatory relief (in prayers 3 to 7).
69. The declaratory orders in prayer 2 serve a two-fold purpose:
- 69.1. Prayers 2.1 and 2.2 are directed at ensuring that there can be no doubt as to what Mr Zuma's constitutional and statutory obligations are in respect of his appearance and examination at the Commission, notwithstanding Mr Zuma's review of the Chairperson's decision on recusal.
- 69.2. Prayers 2.3 and 2.4 are required under s 172(1)(a) of the Constitution, as Mr Zuma's conduct in taking leave of the Commission on 19 November 2020 without the Chairperson's permission and in not complying with the Commission's summons is unlawful and inconsistent with the Constitution.
70. The mandatory orders in prayers 3 to 7 are directed at securing Mr Zuma's responsiveness, which is required without delay. These orders are required to effectively remedy the constitutional wrong, which is an essential component of a just and equitable order under section 172(2)(b) of the Constitution.¹⁰⁹
71. Given the history of Mr Zuma's non-compliance with the Commission's directions and his repeated avoidance of giving evidence and being examined, even despite undertaking to the Commission that he would do so, the Commission has a well-

¹⁰⁹ *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) para 69; *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* [2019] ZACC 30; 2019 (11) BCLR 1358 (CC) ; 2019 (6) SA 597 (CC) paras 48, 65-66.

founded concern that Mr Zuma will continue to avoid to account, unless he is expressly directed by this Court to do so.

72. For this reason, the Commission requires the mandatory orders directing –

72.1. Mr Zuma to comply with the fresh summons by requiring Mr Zuma to appear at the Commission and to remain in attendance unless excused by the Chairperson, for examination at the Commission on 18 to 21 January 2021 and on 15 to 19 February 2021 (prayers 3 and 5);

72.2. Mr Zuma to answer questions put to him, subject only to the privilege against self-incrimination, and not a right to remain silent (prayer 4); and

72.3. the directions issued by the Chairperson under regulation 10(6) that Mr Zuma furnish his versions and responses to certain witnesses on affidavit by no later than 10 January 2021 (prayer 6).

73. To avoid the need for the Commission to have to approach this Court again, the Commission also seeks the order in prayer 7, directing Mr Zuma to comply with any directives the Chairperson may validly issue in the future against Mr Zuma in respect of matters being investigated by the Commission.

74. All the requirements for the mandatory relief are met, namely: a clear right; an injury to the right actually committed or reasonably apprehended; and the lack of a suitable alternative remedy.

74.1. The Commission has a clear right to require the appearance and examination under oath of any person; to require a person under examination to answer questions put to him (subject only to the privilege

against self-incrimination); and to direct any person to submit an affidavit, on any matter being investigated for the purposes of its investigations.

74.2. These rights are vested under section 3(1) of the Commissions Act and regulations 8, 10(6) and 12 of the Commission's Regulations.

74.3. In respect of the former President of the Republic, the Commission's statutory rights to summons and examine are bolstered by the constitutional obligation of accountability that remains binding on Mr Zuma, to account for his alleged abuses of power and breaches of constitutional duty in office of the President.

74.4. Mr Zuma has injured and threatened the aforesaid rights by failing to comply with the previous summons and the Chairperson's directions under regulation 10(6), and by intimating that should he be compelled to give evidence he will "say nothing".

74.5. There is no suitable alternative remedy available. No other remedy will secure Mr Zuma's compliance with the fresh summons and directions issued by the Chairperson for submission of affidavits before the Commission's term expires.

75. The applicant accordingly prays for an order in terms of the Notice of Motion. Since Mr Zuma has not opposed this application, the applicant does not persist in seeking punitive costs, but it does persist in seeking costs against Mr Zuma. This application has had to be brought at the taxpayer's expense as a result of Mr Zuma's continued breach of his duty to be accountable and his blatant violation of the law in defying the Commission's summons. Mr Zuma's response to this

application – by addressing a letter to the Registrar advising that he would not participate in these proceedings at all – is yet a further instance of Mr Zuma’s refusal to account for his unlawful conduct. The court should take a dim view of this response. There is no good reason why the Commission, which relies on public funds to do its work, should pay the costs of this application.

T Ngcukaitobi SC

J Bleazard

Applicant’s counsel

Chambers, 18 December 2020

TABLE OF AUTHORITIES

CASES:

Bruce and Another v Fleecytex Johannesburg CC and Others 1998 (2) SA 1143 (CC)

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Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (“Nkandla”)

Electoral Commission v Mlhope 2016 (5) SA 1 (CC)

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

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

Ismail & others v Additional Magistrate, Wynberg & Another 1963 (1) SA 1 (A)

Maswanganyi v Road Accident Fund 2019 (5) SA 407 (SCA)

Mazibuko v Sisulu [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC)

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

Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bisset and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government & Housing in the Province of Gauteng & Others 2005 (1) SA 530 (CC)

Motata vs Nair NO and Another 2009 (1) SACR 263 (TPD)

Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another [2019] ZACC 30; 2019 (11) BCLR 1358 (CC) ; 2019 (6) SA 597 (CC)

President of the Republic of South Africa v Office of the Public Protector and Others 2018 (2) SA 100 (GP)

President of the Republic of South Africa and Others v South African Rugby Football Union and Others [1998] ZACC 21; 1999 (2) SA 14; 1999 (2) BCLR 175 (CC) (SARFU I)

President of the Republic of South Africa and Others v South African Rugby Football Union and Others [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) (SARFU II)

R v Boyes (1861) 1 B & S 311 at 330, 121 ER 730

R v Kuyper 1915 TPD 308

R v Marais 1959 (1) SA 98 (T)

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S v Carneson 1962 (3) SA437 (T)

S v Western Areas Ltd 2005 (5) SA 214 (SCA)

SA Commercial Catering & Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing) [2000] ZACC 10; 2000 (3) SA 705 (CC)

South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) SA 883 (CC)

Take and Save Trading CC and Others v Standard Bank of SA Ltd 2004 (4) SA 1 (SCA)

United Democratic Movement v Speaker of the National Assembly and Others (CCT89/17) [2017] ZACC 21; 2017 (8) BCLR 1061 (CC); 2017 (5) SA 300 (CC)

Van Abo v President of the Republic of South Africa (CCT 67/08) [2009] ZACC 15; 2009 (10) BCLR 1052 (CC); 2009 (5) SA 345 (CC)

Wahlhaus & others v Additional Magistrate, Johannesburg & Another 1959 (3) SA 113 (AD)

LEGISLATION:

Commissions Act No. 8 of 1947

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

Amendments to the aforesaid Regulations, in:

- Proclamation No. 8 of 2018 in Government Gazette No. 41522 (21 March 2018);
- Proclamation No. 1 of 2020 in Government Gazette No. 42947 (10 January 2020);
- Proclamation No. 8 of 2020, in Government Gazette No. 42994 (4 February 2020); and
- Proclamation No. 24 of 2020 in Government Gazette No. 43563 (28 July 2020).

OTHER:

L L Fuller *The Morality of Law* revised ed (1969)

Public Protector *State of Capture* Report No. 6 of 2016/17 (14 October 2016)

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: *66/103/20*

In the matter between:

JACOB GEDLEYIHLEKISA ZUMA

Applicant

and

RAYMOND MNYAMEZELI ZONDO

First Respondent

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

Second Respondent



NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE that the above-named Applicant intends to bring an application on a date to be determined by the Registrar for an order in the following terms:

1. Reviewing and setting aside the ruling of the Chairperson of the Judicial Commission of Inquiry into Allegations of State Capture and Fraud in the Public Sector Including Organs of State, Deputy Chief Justice Raymond Mnyamezeli Zondo dated 23 November 2020 refusing the application to recuse himself from presiding over those issues that pertain to the Applicant and his family.
2. Further and/or alternative relief.

TAKE NOTICE FURTHER that the accompanying affidavit of **JACOB GEDLEYIHLEKISA ZUMA** together with the annexures thereto will be used in support of the review application.

BE PLEASED TO TAKE NOTICE that the:

- a) First and/or Second Respondents are called upon to show cause why such ruling should not be reviewed and corrected or set aside; and

- b) The First and/or Second Respondents are called upon to despatch, within fifteen (15) days after receipt of this notice of motion, to the Registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as they are by law required or desired to give or make, and to notify the Applicant.

BE PLEASED TO TAKE NOTICE that the Applicant may, within ten (10) days after the Registrar has made the record available to him, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his notice of motion in support of the review application and supplement the supporting affidavit.

BE PLEASED TO TAKE NOTICE that should the First or Second Respondents desire to oppose the granting of the order prayed in terms of this application to review, correct or set aside the ruling of the First Respondent in terms of the order prayed for in this notice of motion, such party or parties shall:

- I. within 15 (fifteen) days after receipt of the notice of motion or any amendment thereof, deliver a notice to the Applicant that he or it intends so to oppose and shall in such notice appoint an address within 8km of the office of the Registrar at which he or it will accept notice and service of all process in such proceedings; and
- II. within 30 (thirty) days after the expiry of the time referred to in sub rule 53(4) of the Uniform Rules of Court, deliver any affidavits he or it may desire in answer to the allegations made.

DATED AT JOHANNESBURG ON THIS 14TH DAY OF DECEMBER 2020.



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

AND TO: **RAYMOND MNYAMEZELI ZONDO**
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