IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 295/20

In the Application of

VUYANI NGALWANA Applicant

Re: Application for admission as *Amicus Curiae*

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

<u>REVISED</u> WRITTEN SUBMISSIONS:
VUYANI NGALWANA as APPLICANT FOR THE STATUS OF *AMICUS CURIAE*

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A. Introduction

> "This application is fundamentally about the enforcement of the constitutional principle and duty of accountability."

1. Thus begins the heads of argument filed in this court on behalf of the applicant ("the Commission") – and rightly so.

2. Counsel begins with that submission not only because they consider it central in the determination of what is now unopposed relief, but also – I venture – because executive accountability has increasingly become a rarity in South Africa. Indeed, accountability, responsiveness and transparency or openness in public administration are foundational constitutional values and principles that form the backbone of the Commission's application[1] to have this court intervene to compel Mr Zuma, as former leader of the executive arm of government,

   2.1 to appear at the Commission on specified dates,
   2.2 to answer all questions put to him,
   2.3 subject only to his privilege against self-incrimination.

3. Sadly, not even by general national and provincial elections every five years do South Africans hold their elected public representatives to account at the polls. And so, politicians have generally tended to take heart from that electorate apathy, conducting themselves almost as Roman Emperors accountable to no one.

4. It should thus come as little surprise that a former President should defy a summons. It should come as no surprise, too, if the former President should defy the orders of this court, if media reports in this regard are a true account of what he has reportedly conveyed to the registrar of this court. This is because lack of

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[1] See, for example, FA page 66, paras 127 to 129; Commission Heads paras 1, 6 to 7, 22, 50

executive accountability in South Africa has become endemic. So, this court stands stoically as a beacon of light between a society that is governed by reasonable laws that apply **equally** to everyone, at one end of the spectrum, and a further precipitous slide into the Hobbesian jungle – characterised by the survival of the politically powerful and financially fittest never held accountable – at the other.

5. The former President must be held accountable for his role as head of government insofar as that role falls within the Commission's Terms of Reference that he devised. About that, Counsel for the Commission is absolutely correct. **Equally**, the former President's fellow travellers must be held to account for their roles in conduct that falls within the Commission's Terms of Reference. Those fellow travellers include, among others:

5.1 President Cyril Ramaphosa, who was Deputy President in President Zuma's cabinet since 25 May 2014, leader of President Zuma's government business in terms of s 91(4) of the Constitution, and Chair of President Zuma's Inter-Ministerial Committee ("IMC") since August 2016 which was **"responsible for overseeing the stabilisation and reform of state-owned entities"** during the period when the Gupta family is alleged to have engaged in **"state capture"** of state-owned entities and organs of state in South Africa. The need for his evidence at the Commission engages

5.1.1 supremacy of the Constitution and the rule of law[2];

5.1.2 accountability, responsiveness and openness in public administration[3];

5.1.3 accountability and responsibilities of the cabinet[4]; and

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2 s 1(c) & s 2

3 s 1(d) & s 195(1)(e), (f), (g)

4 s 92

5.1.4 equality before the law[5].

5.2 Mr Pravin Gordhan, who has served in President Zuma's cabinet throughout Mr Zuma's presidency, serving as Minister of Finance in President Zuma's cabinet from May 2009 until May 2014 and again from 14 December 2015 until 31 March 2017. The need for his evidence at the Commission engages

5.2.1 supremacy of the Constitution and the rule of law[6];

5.2.2 accountability, responsiveness and openness in public administration[7];

5.2.3 accountability and responsibilities of the cabinet[8]; and

5.2.4 equality before the law[9].

5.3 Mr Fikile Mbalula, who has served in President Zuma's cabinet almost throughout Mr Zuma's presidency, serving as Minister of Sports and Recreation in President Zuma's cabinet from 1 November 2010 until 31 March 2017, and as Minister of Police from 31 March until 26 February 2018. He also served as Deputy Minister of Police since May 2009 until appointed by President Zuma in November 2010 in the Sports and Recreation portfolio. As in the case of Messrs Ramaphosa and Gordhan, the necessity for Mr Mbalula's evidence engages

5.3.1 supremacy of the Constitution and the rule of law[10];

5.3.2 accountability, responsiveness and openness in public administration[11];

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5 s 9(1) & (2)
6 s 1(c) & s 2
7 s 1(d) & s 195(1)(e), (f), (g)
8 s 92
9 s 9(1) & (2)
10 s 1(c) & s 2
11 s 1(d) & s 195(1)(e), (f), (g)

5.3.3 accountability and responsibilities of the cabinet[12]; and

5.3.4 equality before the law[13].

5.4 Mr Johan Rupert, who is a businessman. The necessity for his evidence engages

5.4.1 supremacy of the Constitution and the rule of law[14];

5.4.2 accountability, responsiveness and openness in public administration[15]; and

5.4.3 equality before the law[16];

5.5 Eskom, an embattled state-owned entity which has caused much grief to many ordinary South Africans dependant on it for the supply of electricity, and which appears to have become the battleground for socio-economic fealty over the years. The evidence of Eskom executives, past and present, engages

5.5.1 accountability, responsiveness and openness in public administration[17]; and

5.5.2 efficient, economic and effective use of public resources[18].

6. I demonstrate below why the evidence of these persons is crucial to the work of the Commission, and why the Commission's work without their evidence (heard and scrutinised free of undue haste) will be incomplete and potentially vulnerable to a review challenge.

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12 s 92
13 s 9(1) & (2)
14 s 1(c) & s 2
15 s 1(d) & s 195(1)(e), (f), (g)
16 s 9(1) & (2)
17 s 1(d) & s 195(1)(e), (f), (g)
18 s 195(1)(b)

7. But before embarking on that exercise, I consider it important to make this observation. There is considerably more evidence that the Commission should already have invited or welcomed – even compelled – over the past two years, but which it has not entertained. For example, former Group Chief Executive at PRASA, Mr Lucky Montana, appears to have taken the initiative of applying to the Commission with a view to sharing his experiences relating to matters that he believes are within the Commission's Terms of Reference. The Commission staff apparently first sought to have him excise what he considered important evidence from his statement, and then effectively rejected his offer to give evidence that seems to implicate some witnesses that the Commission has already treated as "star witnesses". One example is one Mr Popo Molefe who was Chair of the PRASA board of directors when Mr Montana resigned. Another is Mr Pravin Gordhan. By pointing this out, I do not seek to champion Mr Montana's cause – whatever it may be – but merely to illustrate what could easily be interpreted by the public to be selective targeting by the Commission of certain individuals and shielding of others from scrutiny on matters that seem to form the subject of its Terms of Reference, thus creating a risk that the Commission's credibility may be questioned. It could be reasoned – not without some justification – that the evidence of a former Group Chief Executive of a state-owned entity, who himself has been implicated in **"state capture"** by witnesses at the Commission under oath, should be welcomed by the Commission. But, alas, it appears that his apparent desire to be accountable for his role in alleged **"state capture"** is something that the Commission does not plan to probe. This may leave a question mark in the minds of the public.

8. The Chair of the Commission has himself lamented the fact that many ministers in Mr Zuma's cabinet have not voluntarily come forward to share their evidence with the Commission on matters that fall within the Commission's Terms of Reference. One such occasion was during a media briefing that the Chair gave on Monday 21 December 2020. The request that I make in this application could, if granted, serve to assist the Chair and the Commission in obtaining the evidence

of those ministers without first having to approach a court again in relation specifically to each of them.

B. A Broad Outline

9. In these submissions I shall

9.1 show why it is in the public interest for me to be admitted as *amicus curiae* in relation to the issues raised;

9.2 demonstrate why this court should, in granting the relief sought by the Commission in relation to Mr Zuma, also take into account the Commission's **"deeper public purpose"** by including other persons in such relief as this court may consider appropriate and in the public interest;

9.3 address the issue of costs.

10. But before embarking upon that exercise, it is important to deal with the Commission's curious and belated opposition to my application – even to the extent of seeking a costs order against me.

C. The Commission's Belated Opposition

11. The Commission's rather hostile approach to my intervention is, with respect, surprising because neither do I oppose nor place hurdles in the path of its application. On the contrary, I in fact seek to complement it by introducing a constitutional dimension that is intended to assist it in achieving its mandate. CASAC, the other applicant for *amicus* status whose application and written submissions I have read, seeks to do the same thing on a different constitutional dimension. But the Commission has granted its consent to CASAC to be admitted as *amicus* and has not sought a costs order against it.

12. This heavy-handed and inconsistent approach seems to be informed by a faulty assessment of my intentions, of which the Commission (or its lawyers) seems to have convinced itself. As I said in my supporting affidavit, I bring this intervention application in good faith, guided only by the Constitution and the rule of law, and in the public interest.[19]

13. The Commission alleges

    13.1 that I am on a frolic of my own, seeking my own relief based on entirely new facts which have no prospects of meeting the requirements of rule 31 (*"the frolic argument"*);

    13.2 that I fail to make a case for direct access and that I seek relief that should be sought in the high court (*"the direct access argument"*);

    13.3 that the relief I seek is premature and has no prospects of success (*"the prematurity argument"*); and

    13.4 that I persisted in filing my application "prematurely" and notwithstanding the Commission's clear opposition on pain of a costs order (*"the opposition argument"*).

14. It is convenient that I deal first with the opposition argument: the suggestion that I may have misled this court when submitting, in my original submissions, that the Commission had not opposed my application and, in my affidavit, that I had not received a response from the Commission when filing my application.

(i) *<u>The Opposition Argment</u>*

15. The Commission's allegation is serious and regrettable in its clear accusation that a senior legal practitioner, who has acted as a judicial officer on many occasions and served in numerous positions of trust both within the legal profession and outside of it, may have committed an act of mendacity in the apex

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19 Ngalwana Affidavit, paras 5, 6, 12, 13

court. It is an accusation that should never be lightly made. It is particularly regrettable because it is an accusation that has no basis in fact.

16. The Commission says:

> "6. I note that Mr Ngalwana contends that he has not received a response from the parties to his proposed intervention in these proceedings. Mr Ngalwana [had] addressed a letter to the Commission on 14 December 2020. …
> 7. The Commission's legal representatives did indeed respond to Mr Ngalwana, and advised him that it would oppose his proposed intervention and that a costs order would be sought against him should he persist with it. The Commission's letter was emailed to Mr Ngalwana at 13h40 on 17 December 2020. …
> 8. It appears that Mr Ngalwana proceeded to file his application prematurely, before he received the Commission's response, and before the Commission had filed its written submissions as contemplated in rule 10. Mr Ngalwana has clearly persisted with his application notwithstanding that the Commission has made its opposition to his application clear."

17. The true facts are borne out by the affidavit filed by me on 17 December 2020 and the email correspondence. They are:

17.1 My notice of intervention[20] to the Commission was transmitted on Monday, 14 December 2020 at 10:09AM.

17.2 The notice requested a response **"by 16h00 on Wednesday 16 December 2020"**.

17.3 The notice said **"I intend filing papers by 17 December 2020"**.

17.4 By the morning of Thursday 17 December 2020, the Commission had still not responded to my request for intervention. So, I prepared my application.

17.5 By about 12h00 noon on Thursday 17 December 2020, when I finished preparing my application, I had still not received a response from the Commission.

17.6 I had my affidavit commissioned and filed electronically that afternoon shortly before 15h00. After several delays in transmission, perhaps owing

[20] AA1 to the Commission's Opposing affidavit

to network issues in Cape Town, it appears to have gone through only at 16h13. By that time, I had assumed – reasonably, since I had expected the Commission's response the previous day – that the Commission would have no difficulty with my intervention in the public interest.

17.7 The Commission's opposition – of which I learnt only during the evening of Thursday 17 December 2020 and long after I had filed my application – came as a complete surprise to me. I then responded to the Commission's attorneys in an email on Friday 18 December 2020 at 10h55 as follows:

> "Many thanks for your letter which I received after I had already deposed to my affidavit and scanned through.
> You will note by its contents that you may have misunderstood the import of my intervention. I seek neither to oppose your client's application nor to take up the cudgels for the respondent.
> Mine is a conditional application on grounds that are clear ex facie the papers.
> One would have thought your client would welcome attempts at complementing its efforts in carrying out its task – which my intervention is – and not seek to rebuff such attempts by threatening opposition and costs orders.
> It is my hope that you will see my intervention for what it is: an attempt to assist the Commission in getting to the bottom of what it has been tasked to do – with neither fear nor favour – and leave the assessment of that endeavour to the court."

17.8 I received no further response from the Commission's lawyers in this regard. Instead, they filed and sent me their heads of argument later that afternoon, which I received at 15h10. The document said nothing about the Commission's opposition to my intervention. So, I assumed it had understood my true intention as being what I conveyed to it.

17.9 But, only on Wednesday 23 December 2020, came the Commission's affidavit opposing my intervention application. This came as a surprise after I thought I had clarified whatever misunderstanding the Commission may have had of my intentions in my email of the previous Friday.

18. The Commission's opposition argument is, with respect, misdirected and not well founded. I am not its enemy.

(ii) *The Folic Argument*

19. This argument misconstrues my intervention. As I explain in my supporting affidavit,[21]

> "This is a **conditional** application. It is conditional upon this Court granting the Commission's application on the grounds advanced by the Commission in support of the prayers in paragraphs 2.1, 2.2, 3, 4, 5, and 7 of its notice of motion. It is founded on those same grounds: provided that the provisions of the Constitution referred to in paragraph 2.1 are substituted with the following provisions: s 1(c), s1(d), s 2, s 9(1) & (2), 92, s 195(b), (e), (f), (g), and provided further that the dates and times referred to in paragraphs 3 and 5 of the notice of motion are substituted with such dates and times as the Commission may in its discretion, judiciously exercised, consider appropriate in the achievement of its task.
>
> Mine is thus not a veiled opposition to the relief sought by the Commission against Mr Zuma. Far from it. It is in fact an attempt at complementing it in the public interest."
>
> (emphasis is original text)

20. The application takes nothing away from the relief sought by the Commission. Instead, it adds to it. It complements it, just as the CASAC application seeks to do, albeit from a different constitutional dimension.

21. Specifically,

21.1 The same declaratory relief that is sought by the Commission against Mr Zuma in prayer 2.1 – that Mr Zuma, as former member of the national executive, is constitutionally obliged to appear at the Commission and account for his failure in that capacity to fulfill his constitutional obligations in terms of identified provisions of the Constitution – is relevant in respect of other former members of Mr Zuma's national executive in relation to their failure, in their respective capacities as members of Mr Zuma's cabinet, to fulfill their constitutional roles in terms

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[21] At paras 7 & 8

of the provisions of the Constitution that I have identified, namely, s 91(4), s 92, s 195(e), (f) and (g), with a view to facilitating the fulfilment of the Commission's mandate fully, not to retard it.

21.2 The same declaratory relief sought in prayer 2.2 – that Mr Zuma, as former national executive member, is obliged to comply with any summons issued and served on him – is relevant also in respect of other former members of Mr Zuma's national executive who are implicated, in their capacities as members of Mr Zuma's cabinet, in conduct that falls within the Commission's Terms of Reference, with a view to facilitating the fulfilment of the Commission's mandate fully, not to retard it.

21.3 The same relief sought in prayers 3 and 5 – that Mr Zuma be ordered to comply with the summons directing him to appear at the Commission on specified dates, and remain in attendance until excused by the Chair – is relevant in respect of other members of his national executive implicated, in their capacities as members of Mr Zuma's cabinet, in conduct that falls within the Commission's Terms of Reference, but on dates and times determined by the Commission in its discretion, exercised judiciously, also with a view to facilitating the fulfilment of the Commission's mandate fully, not to retard it.

21.4 The same relief sought in prayer 4 – that Mr Zuma be ordered to answer all questions put to him by evidence leaders and the Chair, subject only to the privilege against self-incrimination – is relevant in respect of other members of his national executive who will have been invited or summoned to appear at the Commission to account for their role in terms of their individual and collective accountability under s 92 of the Constitution, all with a view to facilitating the fulfilment of the Commission's mandate in full, not to retard it.

21.5 The same relief sought in prayer 7 – that Mr Zuma be ordered to comply with all directives that the Chair may validly issue in future against him in relation to matters being investigated by the Commission – is relevant in respect of other members of his national executive implicated in

conduct that falls within the Commission's Terms of Reference. This prayer in respect of Mr Zuma's fellow travelers is intended to complement the relief sought by the Commission so that it can more fully achieve its mandate. There is no bad faith behind it.

22. All this relief is already relief sought by the Commission but only in relation to one former member of the national executive. The point I make in the public interest is that

22.2 the Deputy-President and Ministers are responsible for the powers and functions assigned to them by the President,[22]

22.2 members of the national executive are **"individually and collectively"** accountable,[23]

and so, those members of Mr Zuma's cabinet who have been implicated in conduct that falls within the Commission's Terms of Reference must be held accountable together with their former President.

23. Far from being an *"abuse"* of rule 10, as claimed by the Commission, this application seeks to reinforce the very foundational values of transparency, accountability, responsiveness and openness that form the backbone of the Commission's application. It seeks to have members of the executive who are implicated in conduct that fall within the Commission's Terms of Reference treated equally in terms of s 9 of the Constitution.

24. The arguments on which I rely, and which the Commission advances in support of the prayers listed above, include, among others:

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[22] s 92(1)
[23] s 92(2)

24.1 the centrality of transparency, accountability, responsiveness and openness in public administration;[24]

24.2 the **"deeper public purpose"** of commissions of inquiry;[25]

24.3 alleged executive interference with the functioning of a state-owned entity (Eskom);[26]

24.4 the sharing of cabinet information with unauthorized persons;[27]

24.5 time limitations in the life of the Commission.[28]

25. These are all submissions that are relevant to the nuanced orders in relation to which I am asking this court to take into account the persons identified. No additional relief is being sought by me *"against the Commission"* as alleged by the Commission; merely the taking into account of members of Mr Zuma's cabinet in the granting of the relief already sought by the Commission – in the name of transparency, accountability, responsiveness, openness, equality of treatment, individual and collective accountability of cabinet members – to the extent that they are implicated in conduct that falls within the Commission's Terms of Reference. There is no personal frolic. There are no materially new facts of the sort that must meet the rule 31 test. Such new facts as have been provided are extracted from the transcripts of the Commission, and the Commission evidence leaders have had an opportunity to question Mr Zuma, Mr Koko and others on them. The facts set out and issues decided by the Labour Court in *Koko v Eskom Holdings Soc Limited* (J200/18) [2018] ZALCJHB 76 (21 February 2018) cannot be said to be *"contentious"* because, as far as I am aware, the judgment has not been set aside on appeal or review. The Eskom 2019 financial report – which is the only annexure to my supporting affidavit – can hardly be said to be contentious. The Commission has never so suggested.

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24 Commission FA paras 20, 127 to 129; Commission Heads, paras 1, 6 to 7, 22, 50

25 Commission Heads, paras 48, 50, 52

26 Commission Heads, para 32.3

27 Commission Heads, para 29.1 (citing 7.1.5 to 7.1.7 of Public Protector's "State of Capture" Report)

28 Commission FA, para 21; Commission Heads, para 26.6 where the Commission says: **"although [the Commission] may seek an extension for the finalisation of its report, it will not seek extension for the hearing of evidence"**. The relevance of this is that the Chair has indicated that President Ramaphosa's appearance at the Commission is **"likely to be in March"**. That will leave little or no time for his cross-examination on his evidence by those parties who may wish validly to do so.

26. The Commission says I failed to give it notice of my intention to apply for intervention as *amicus*. This is incorrect. The Commission (or perhaps its legal team) seems to have read what it wanted to read in my notice of 14 December 2020, except the clear text of the notice or request. It is clear from the notice that I do not seek to intervene as a litigant party in my own interests. This is conveyed in no ambiguous terms as follows in the notice:

> "It is, in my view, in the interests of justice and in the ineluctable interests of the pursuit of the aims and objectives of the Commission (the achievement of its Terms of Reference) that the persons I have identified appear before the Commission and be questioned on the issues I have identified. Without their evidence on the issues I have identified, the Commission will have heard insufficient evidence for purposes of making findings and recommendations on the role and/or culpability of the national executive (under Mr Zuma), officials and employees of organs of state and state-owned entities as envisaged in the Commission's Terms of Reference."

27. This is hardly language that is synonymous with one who seeks to litigate in his own interests. On the contrary, it is language that engages the **"deeper public purpose"** of which the Commission speaks so eloquently in paragraph 48 of its heads of argument. Indeed, it is language that demonstrates an intention on my part to assist the Commission **"help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole"**[29].

28. In any event, the consent (or refusal of consent) by the Commission is not determinative of one's application to be admitted as *amicus*. Rule 10(4) contemplates this as it says:

> "If the written consent referred to in subrule (1) has not been secured, any person who has an interest in any matter before the Court may apply to the Chief Justice to be admitted therein as an amicus curiae, and the Chief Justice may grant such

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[29] See Commission Heads, para 48 citing Moseneke J in *Minister of Police v Premier of the Western Cape and Others* 2014 (1) SA 1 (CC) at para 45, who in turn cites a judgment of the Canadian Supreme Court in *Phillips v Nova Scotia* [1995] 2 SCR 97, at 137 to 138

> application upon such terms and conditions and with such rights and privileges as he or she may determine."

29. I submit that I have sought the Commission's consent in terms of rule 10(1) and nonetheless applied to the Chief Justice in terms of rule 10(4). At the time of filing my application, I had not yet received the Commission's response to my request.

30. The Commission then says I have failed to consider the parties' submissions before filing my application. This is factually incorrect. It is precisely because I believe the Commission's submissions in its application could go deeper and further towards fulfilment of its **"deeper public purpose"** that I file this application to be admitted as *amicus*.

31. Yes, I made two requests to the Commission – one in July 2020 and another in November 2020 – that it invite the persons I have identified (and others) to appear and answer questions at the Commission on specific issues. But, that my request to be admitted as *amicus* in respect of the same issues was preceded by a request to the Commission cannot reasonably be regarded as conferring a personal interest in the matter, requiring me to qualify myself as a party in the main proceedings before this court. I have made it clear, both in this application and in my request to the Commission, that I have no political interest in the matter but am guided only by the Constitution. I make no secret of the fact that I have been critical of both Mr Zuma and Mr Ramaphosa as leaders. Far from that rendering me a partisan player who should qualify himself as a party, it should – I venture – be testimony to the fact that I favour neither Mr Zuma nor Mr Ramaphosa, and therefore am a candidate for *amicus* status. I have also been critical of the Commission – and continue to be – for reasons that I detail in these submissions and in my supporting affidavit. Mine, in my respectful submission, would seem to be a more non-partisan approach than that of the CASAC which is clearly heavily weighted against Mr Zuma – something that an *amicus* should resist.

32. The frolic argument is, with respect, not well founded.

(iii) *The Direct Access Argument*

33. Again, I rely on, and make common cause with, the Commission's own submissions in this regard as I am not seeking to qualify myself as a party independently of the Commission. CASAC, which also seeks to be admitted as *amicus*, has not – to my knowledge – been required by the Commission to make its own case for direct access. Neither has the Helen Suzman Foundation. Why this requirement is reserved only for me creates a risk of the Commission coming across as being selective without fair justification.

34. I make common cause with the submissions advanced on behalf of the Commission on this score in paragraphs 25 to 26.2 of its heads of argument as well as the submissions made in its founding affidavit.[30] It is in the public interest that the relief sought – which is no more than a request that other similarly implicated members of Mr Zuma's national executive be taken into account when granting the relief already being sought by the Commission in this court – also be determined by this court together with relief of the same sort. Even if the request that I make could be made in the high court, that would not be in the public interest or in the interests of justice because by the time that case winds its way through the courts and ultimately back in this court, the Commission will likely have completed its task or, at best, it will have completed the hearing of oral evidence in March 2021. This very suggestion by the Commission, it must be said, is startling in its implications as it could be interpreted by the general public as meaning that it may not probe the allegations made against the other implicated members of Mr Zuma's cabinet. This is concerning.

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[30] FA, paras 24 to 27, 29, 35.1 to 35.3, 35.5 to 35.6

35. The Commission says **"although it may seek an extension for the finalisation of its report, it will not seek extension for the hearing of evidence"**[31]. It is thus clear that a high court pursuit of the request that is made here for the **"deeper public purpose"** of the Commission would be an exercise in futility. It is surprising that the Commission should suggest that approach.

36. I seek no relief against the Commission. I seek no relief against the persons I have identified and so there is no need to join them. They will have their right to resist the Commission's invitation or summons when the Commission invites or summonses them to appear and answer questions as that will be directed at them. In *Economic Freedom Fighters and Others v Speaker of National Assembly and Others* [2016] 1 All SA 520 (WCC), and in holding that pragmatism should inform the principle of joinder, Binns-Ward J held:

> "That some degree of flexibility in the application of the principle of joinder of necessity may be permissible on pragmatic ground finds support in the full court judgment of Mohamed J in *Wholesale Provision Supplies CC v Exim International CC and Another* 1995 (1) SA 150 (T) at p. 158, where the future Chief Justice remarked that *"the rule which seeks to avoid orders which might affect third parties in proceedings between other parties is not simply a mechanical or technical rule which must ritualistically be applied, regardless of the circumstances of the case"*."[32]

37. This court has expressed similar sentiment. In *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89, it said:

> "Flexibility in applying requirements of procedure is common in our courts. Even where enacted rules of courts are involved, our courts reserve for themselves the power to condone non-compliance if the interests of justice require them to do so. Rigidity has no place in the operation of court procedures"[33]

38. Each of the persons that the Commission says must be joined is <u>*not*</u> a necessary party in proceedings involving the conduct of exercise by the Commission of its powers and functions. They will have the opportunity to answer for themselves

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31 Commission's Heads, para 26.6
32 At para 37
33 At para 39

at the Commission or to resist whatever summons or directives the Commission may serve on them. In any event, not only is non-joinder merely a dilatory defence, and so no basis for dismissing an application,[34] no case for non-joinder even exists here.

39. Moreover, the list of persons identified is not exhaustive but merely illustrative. It cannot reasonably be expected that all these must be joined.[35] My application is also not premised on summons and directives already issued, or on defiance of those and of the Commission. I have deliberately not relied on those prayers[36] in the Commission's notice of motion.

(iv) *The Prematurity Argument*

40. As pointed out earlier, I make no secret of the fact that I requested the Commission in July and November 2020 to invite the persons identified to answer questions at the Commission on specified issues. I did so not in my own interests but in the public interest and in terms of the rules of the Commission.

41. I now learn for the first time on 23 December 2020 in the Commission's affidavit filed in opposition to my application that the Commission had referred my request to Messrs Gordhan, Mbalula and Rupert on 31 October 2020, and that they have responded to the Commission. None of this had been communicated to me. The responses have not been made available to this court by the Commission. This being a public inquiry that should aim to **"uncover the truth"** and **"restore public confidence not only in the institution or situation investigated but also in the process of government as a whole"**[37], the non-transparent manner in which these responses are being treated by the

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34 *Ferris v Firstrand Bank Ltd* 2014 (3) SA 39 (CC) at para 17

35 *Compare, Equal Education v Minister of Basic Education* 2019 (1) SA 421 (ECB) at para 20

36 Prayers 2.3, 2.4 & 6

37 See Commission Heads, para 48 citing Moseneke J in *Minister of Police v Premier of the Western Cape and Others* 2014 (1) SA 1 (CC) at para 45, who in turn cites a judgment of the Canadian Supreme Court in *Phillips v Nova Scotia* [1995] 2 SCR 97, at 137 to 138

Commission may raise questions in the public's mind about the transparency of the Commission's processes.

42. All the Commission said to me on 2 November 2020 in response to my request of 15 July 2020 was

> "Please be informed that your application is being dealt with and investigated. You will be informed of the Chairperson's decision on your application in due course.
>
> Please note further that ordinarily the former President Mr J.G. Zuma would first be asked questions in order to clarify the detail of his evidence and allegations but this has not yet been possible."

43. The Commission said nothing about having written to the three persons concerned and having received responses from each of them. The suggestion that this investigation hinges on Mr Zuma appearing again – a prospect that was no longer good by 20 November 2020 – created a reasonable impression that the Commission would not pursue the investigation of the serious allegations falling within its Terms of Reference. More puzzling, as I pointed out in my reply to the Commission's letter of 2 November 2020, is why investigation into Mr Gordhan's speech – that not all corruption cases necessarily constitute criminal cases – should be dependent on Mr Zuma appearing at the Commission again to "clarify". Mr Gordhan's speech had not sprung from Mr Zuma's evidence.

44. But the Commission's obtaining of responses from the three persons does not detract from the foundational values of accountability, transparency, openness and responsiveness that are central to the Commission's application and its **"deeper public purpose"** mandate.

45. The Commission says the Chair has not yet decided whether these persons will be called to give oral evidence on the issues identified. This is surprising because the issue that brings the three persons together involves the alleged sharing of cabinet information (imminent dismissal of a cabinet minister) with unauthorized persons before the information has been formally made public, and

that is the same issue that forms part of an investigation in relation to Mr Zuma[38] and on which the Commission is keen to hear Mr Zuma's evidence and have him answer questions on it. It should thus be a simple issue to resolve. Either it happened or it did not. Either a threat was made to collapse the national currency or it was not. Either the value of the Rand was indeed deliberately collapsed as a result of the dismissal (or reshuffling) of a cabinet minister or it was not. These are serious allegations made under oath by a former head of cabinet involving other members of his cabinet and a civilian. It cannot be difficult to decide whether or not their oral evidence is necessary, especially since similar allegations are already part of the Commission's investigation in relation to Mr Zuma. There is no request that they be deprived of their liberty without due process. The request is that they be afforded an opportunity to clarify the allegations made in relation to them on matters that form part of the Commission's Terms of Reference.

46. We are now at the end of December 2020. Even if the Commission applies for an extension of its life, on its own version **"it will not seek extension for the hearing of evidence"**[39] which seems destined to end on 31 March 2021. Given that the request was made on 15 July 2020, forwarded to the three persons on 31 October 2020 with a 10-day deadline, and responses received from them presumably by 15 November 2020, it cannot reasonably be said that my application in that respect is *"premature"*. When I filed the application on 17 December 2020, more than five months had passed since the request had been made, and more than six weeks had passed since I had received a lukewarm non-comital response from the Commission. Given that the life of the Commission is, on its own version, fast coming to an end, my application raises matters that are as urgent as those to be determined in respect of Mr Zuma. The Commission should, with respect, be welcoming the determination of these issues, instead of mounting spirited resistance to an attempt at assisting it do its job.

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38 See Commission Heads, para 29.1 (citing paras 7.1.5 to 7.1.7 of the Public Protector's "State of Capture" Report

39 Commission's Heads, para 26.6

47. My second rule 9.1 request to the Commission was filed on 24 November 2020. The Commission says it and the Chair **"have simply not yet had an opportunity to deal with it"**. The request points to serious allegations some of which involve the current President's alleged interference in the affairs of Eskom – the same allegation being investigated against Mr Zuma[40] and on which the Commission seems keen to hear the evidence of Mr Zuma and have him answer questions on it. It should not be burdensome, therefore, for the Commission to make a decision on this issue or, in the Commission's parlance, **"to deal with it"** one way or another. For it to say it has **"simply not yet had an opportunity to deal with it"**, on 23 December 2020 and with only 3 months left for the hearing of oral evidence, is concerning.

48. CASAC filed its application on 18 December 2020, only one day after I had filed my application and on the same day the Commission filed its written submissions. The Commission does not complain that its application is premature.

D. Application to be Admitted as *Amicus Curiae*

49. The judgment of this court in *In Re: Certain Amicus Curiae Applications; Minister of Health and Others v Treatment Action Campaign and Others* (CCT8/02) [2002] ZACC 13 (5 July 2002) set out the standard for admission as *amicus curiae*. The principles arising from that judgment can be distilled as follows:

    49.1 A person may be admitted as an *amicus* either on the basis of the written consent of all the parties in the proceedings or on the basis of an application addressed to the Chief Justice.[41]

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40 See Commission Heads, para 32.3

41 Para 3

49.2 In the event of an application to the Chief Justice, admission is entirely in the discretion of the court.[42]

49.3 In the exercise of that discretion the court will consider whether the submissions sought to be advanced by the *amicus* will give the court assistance it would not otherwise enjoy.[43]

49.4 The fact that a person has obtained the written consent of all parties does not detract from these principles; nor does it diminish the court's control over the participation of the *amicus* in the proceedings.[44]

49.5 The application for *amicus* status must be made timeously and, failing that, condonation must be sought without delay.[45]

49.6 In return for the privilege of participating in the proceedings without having to qualify as a party, an *amicus* has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court.[46]

49.7 The *amicus* must not repeat arguments already made but must raise new contentions and, generally, these new contentions must be raised on the data already before the court.[47]

49.8 Ordinarily, it is inappropriate for an *amicus* to try to introduce new contentions based on fresh evidence.[48]

49.9 If the introduction of new contentions based on fresh evidence would necessitate the postponement of an otherwise urgent matter, and inevitable delay in resolving a matter that require urgent attention, it will not be in the interests of justice to admit an applicant as an *amicus*.[49]

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42 Ibid.
43 Ibid.
44 Ibid.; see also *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) para 9
45 Ibid.; see also *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) para 9
46 Para 5
47 Ibid.
48 Ibid.
49 Para 7

50. This application to be admitted as *amicus* has been brought **early**, before the period allowed for in Rule 10 of the rules of this court.

51. Rule 10(1) of the Constitutional Court rules, read together with rule 10(5), provides that a party interested in any proceedings before this court may, with the written consent of all the parties given not later than 5 days after the lodging of the respondent's written submissions, be admitted as *amicus curiae*.

52. Rule 10(4), read together with rule 10(5), provides that where no written consent of all the parties has been secured, an interested person may apply to the Chief Justice, not later than 5 days after the respondent's written submissions have been lodged, to be admitted as *amicus curiae*.

53. According to the Chief Justice's directions issued on 11 December 2020, the respondent (Mr Zuma) was required to file written submissions by Tuesday 22 December 2020, while the application was scheduled for hearing 5 court days later on Tuesday 29 December 2020.

54. This application was lodged on Thursday 17 December 2020, some three days before the respondent's written submissions were due for filing. It has since been reported that the respondent has elected not to file any such submissions. This court issued directions on 23 December 2020 directing that the three applicants for *amicus* status file their written submissions by 28 December 2020. The application was thus filed some eight days earlier than the rules permit. Consequently, an expeditious determination of the Commission's application has been facilitated rather than impeded by the early filing of this application. No postponement is necessary.

55. In the affidavit filed in support of my application, I sought condonation for seeking consent and filing this application for admission as *amicus curiae* earlier than the rules permit. This is because strict compliance with the rules would

mean that my request would reach the court either on the day of the hearing (on 29 December 2020) or shortly before the hearing, thus limiting my opportunity to file written submissions in sufficiently good time before the hearing. I also asked to file written submissions earlier than the prescribed period.[50] Before receiving the Chief Justice's directive of 23 December 2020, and the Commission's affidavit opposing this application, I had filed written submissions and explained in those that in filing them I did not seek to defy the court or to take the decision out of its hands as regards whether or not it required written submissions from me. I explained that I merely sought to be on the right side of any time constraints that may eventuate should the court decide to permit me to file written submissions.

56. It is respectfully submitted that neither of the parties is prejudiced by my application. The Commission's belated opposition to it seems misdirected as I seek only to assist. The issues raised are not burdensome to this court. The argument on which they are founded is the same argument advanced on behalf of the Commission, *mutatis mutandis*, in relation to prayers relating to

    56.1 the appearance of the respondent at the Commission
    56.2 to answer questions
    56.3 subject only to his privilege against self-incrimination.

57. In short, should this court be inclined to grant orders in these respects in relation to the respondent on the argument advanced on behalf of the Commission, it should have no difficulty in taking into account the persons identified in this application on the same argument. To be clear – since the Commission now seems to think I am invoking ALL its prayers – I do not rely on prayers 2.3, 2.4 and 6 of the Commission's notice of motion.

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50 Ngalwana affidavit, paras 17 to 21

E. President Cyril Ramaphosa

58. On Monday 21 December 2020, the Chair of the Commission announced in a media briefing that the date on which President Ramaphosa will appear at the Commission has not yet been determined but that **"as things stand it is likely to be in March [2021]"**. He added that the President is not the only potential witness whose dates of appearance have not yet been determined. He said **"there are many other people whose dates have not yet been determined"**. The Chair did not say who those **"many other people"** are. He gave no indication whether they include former cabinet members in Mr Zuma's government, whether they include Mr Gordhan and Mr Mbalula who have been implicated, under oath in conduct that falls within the Commission's Terms of Reference. The Chair also did not say – despite a direct question having been asked in that regard – on what specific issues President Ramaphosa will be called to give evidence and be questioned. It appears that this is left to the discretion of the evidence leaders.

59. In my respectful submission, this is all cold comfort, if any comfort at all. My submission is that it is in the public interest that President Ramaphosa be questioned on specific issues that have been identified in this application. These include the issues raised by Mr Koko in his evidence, under oath, that Mr Ramaphosa **"interfered in the affairs of Eskom"** and instructed the board of Eskom to **"find a reason to dismiss Mr Koko"**.[51] That instruction culminated in a government directive to the Eskom board **"to immediately remove all Eskom executives … including Mr Matshela Koko"**, which was subsequently declared unlawful by the Labour Court in *Koko v Eskom Holdings Soc Limited* (J200/18) [2018] ZALCJHB 76 (21 February 2018). The Commission should

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[51] Ngalwana affidavit, paras 33 to 35

have no difficulty in dealing with this issue in relation to Mr Ramaphosa as it is investigating the same allegation in respect of Mr Zuma.[52]

60. There is absolutely no indication in the Chair's media briefing that President Ramaphosa will be questioned on these issues, beginning with the questions raised in paragraph 35 of my affidavit, namely,

60.1 Did President Ramaphosa (as Deputy-President) order the dismissal of any executive of a state-owned entity?
60.2 Did he dismiss the executive?
60.3 Where did President Ramaphosa (as Deputy-President) source the power to dismiss an executive of a state-owned entity?
60.4 Is that power in writing?
60.5 Why did he dismiss Mr Koko?
60.6 When and where was that decision conceived?
60.7 By whom was that decision conceived?
60.8 Did President Zuma know about this decision?
60.9 When did he know about it?
60.10 Was President Zuma part of that decision?
60.11 Did the Minister of Public Enterprises (under which Eskom fell) know about this decision?
60.12 Did President Zuma's government (the executive) play any role in the constructive dismissal of Mr Koko even after the Labour Court had found his initial dismissal to be unlawful?

61. These are just some of the glaring questions that President Ramaphosa must answer and account on, and which the Chair has given no indication in his media briefing that they will be put to the President. The uncertainty created by the Chair's silence on this issue renders my application very much live still in relation to the President.

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52 Commission Heads, para 32.3

62. I address this issue in such detail because it may be tempting to avoid the issue by saying it has now been rendered moot by the Chair's indication in his media briefing that the President will appear at the Commission **"likely … in March"**. For the reasons advanced above, such a vague indication does not dispose the application.

63. Equally concerning is the timing of the President's mooted appearance at the Commission. The Chair has indicated that he intends approaching the High Court for a 3-month extension of the Commission's life until end-June 2021. It seems that he intends using those additional three months – beginning of April until the end of June – for writing his report. This is confirmed by the Commission's Counsel when they say

> "although [the Commission] may seek an extension for the finalisation of its report, it will not seek extension for the hearing of evidence"[53]

64. That means President Ramaphosa's evidence **"likely … in March"**, and the evidence of those **"many other people"** not identified by the Chair, will likely be given under considerable time constraints thereby impeding any meaningful engagement with it by evidence leaders and by other parties who may wish to apply to the Chair in terms of the Commission's rules to cross examine the President on his evidence. This is already foreseeable and may, if persisted in, constitute a reviewable irregularity.

65. The Commission has asked this court to compel Mr Zuma to appear at the Commission and answer questions on 18 to 22 January 2021 and 15 to 19 February 2021.[54] That would leave enough time for parties who may want to cross-examine Mr Zuma to make application to the Chair for that purpose. Neither the Chair nor the Secretary of the Commission has provided any reason

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53 Commission Heads, para 26.6

54 Commission notice of motion, paras 3 & 5

why members of Mr Zuma's cabinet who have been implicated in conduct that falls within the Commission's Terms of Reference should not be questioned on those issues at around the same time that their head of cabinet is being questioned, so that any other party who may wish to cross-examine them may also have the benefit of time to consider their options, brief lawyers and formulate their approach. An appearance of President Ramaphosa **"likely in … March"** could potentially be viewed by observers as designed to shield him and those **"many other people"** from effective cross-examination on their evidence.

66. The Constitution is the supreme law of South Africa. Law or conduct that is inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.[55]

67. The Deputy-President (which President Ramaphosa was at the time of the conduct in which he has been implicated) is in terms of the Constitution not only responsible for the powers and functions of the executive assigned to him by the President,[56] he is also accountable, **collectively and individually with other members of the same cabinet**, for the exercise of those powers and performance of those functions[57].

68. The appearance of President Ramaphosa at the Commission so late and at the tail end of the proceedings is likely to stifle the gathering of facts in relation to his conduct falling within the Commission's Terms of Reference, thereby impeding his being held properly accountable together with his fellow implicated cabinet members in the government of Mr Zuma, including Mr Zuma as head of that cabinet. While Mr Zuma will rightly be exposed to possible timely cross-examination by parties who may wish justifiably to question him, the truncated time at which President Ramaphosa is likely to appear will place him at a distinct advantage since the time for his cross-examination (if it were to arise) is likely

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55 s 1(c) & s 2
56 s 92(1) read together with s 91(4) of the Constitution
57 s 92(2)

to be limited as the Commission nears conclusion of oral evidence. This turn of events and inequity should be foreseeable by the Commission. It will be patently inconsistent with s 92 of the Constitution because

68.1 Mr Zuma will likely be held to greater scrutiny (appearing on 18 to 22 January 2021, more than two months before the end of the hearing of oral evidence, and 15 to 19 February 2021, more than a month before the end of the hearing of oral evidence, thereby on both occasions leaving enough time for his evidence to be thoroughly probed) while President Ramaphosa, who is scheduled to appear **"likely … in March"** together with **"many other people"** will likely, if at all, have his evidence probed only in a matter of a few days. Section 92(2) of the Constitution does not envisage a hierarchy of accountability when it talks of collective and individual accountability by members of the same cabinet. The law should apply equally to all members of the same cabinet implicated in conduct that is the subject of the Commission's Terms of Reference.

68.2 President Ramaphosa is responsible under s 92(1) of the Constitution for the powers and functions that Mr Zuma assigned to him under s 91(4) of the Constitution as leader of government business. From August 2016 he chaired Mr Zuma's IMC which was tasked to stabilise state-owned entities like Eskom, SAA and Denel. The financial health of these entities has, by government's own account, deteriorated. What role did President Ramaphosa play in that deterioration in his capacity as leader of government business and Chair of Mr Zuma's IMC? How, if at all, has President Ramaphosa been held accountable for his role in that deterioration? Why should Mr Zuma answer to all these issues alone, while his right-hand man as leader of government business and Chair of the Presidential Inter-Ministerial Committee, appointed to turn around and stabilise state-owned entities at a time when the Gupta family was allegedly running state-owned entities, is shielded from the collective

accountability demanded by s 92(2) of the Constitution? This inequality of treatment will be inconsistent with s 9(1), s 9(2), 91(4), s 92 and s 195(1)(f) of the Constitution.

68.3 The omission by the Commission to probe President Ramaphosa on his own role in these capacities will be inconsistent with the principles of responsiveness [s 195(1)(e)] and transparency [s 1(d) & s 195(1)(g)].

69. For these reasons, I thus ask this court – should it grant the relief sought against Mr Zuma in his capacity as former cabinet member and leader – to take into account the relief in prayers 2.1, 2.2, 3, 4, 5 and 7 of the Commission's notice of motion in relation to President Ramaphosa, in his capacity as former member of Mr Zuma's cabinet, on all these issues and to allow for as much time as is envisaged for Mr Zuma for purposes of cross-examination by those who may validly and justifiably so wish.

F. <u>Mr Pravin Gordhan</u>

70. Mr Gordhan has already appeared at the Commission. On neither occasion was he asked about the issues that are, with respect, validly raised in this application, namely,

70.1 his role in the divulging of an imminent cabinet reshuffle to an unauthorised person before the President had announced it, an allegation being investigated also in respect of Mr Zuma[58]; and

70.2 what cases of corruption he considers not to constitute criminal conduct.

71. The first issue falls within paragraphs 1.1 read together with 1.3 of the Commission's Terms of Reference, namely,

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[58] See Commission Heads, para 29.1 (citing paras 7.1.5 to 7.1.7 of the Public Protector's "State of Capture" Report

> "to inquire into, make findings, report on and make recommendations concerning … 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 … 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."
>
> (emphasis supplied)

72. Mr Zuma alleged, under oath, on 15 July 2019, as follows:

> "I have lived with people who do not know I know about them because that was not what I was trained for to use intelligence wrongly or carelessly but these comrades have provoked me and other people. Not only them. Some other people had said things for example one day Comrade Mbalula attend - attended an activity in the farm or home of Mr Rupert and then Rupert saw him he said Minister Mbalula -when that happened he was the Minister of Sports.
>
> If Zuma takes out – removes Pravin Gordhan it will shut down the economy of this country. You must go and tell him and indeed Mbalula came to tell me. I said but what has he to do with us. I – I did not know that he is a member of the ANC to decide how the ANC must deal with its matters. What is his problem? I said that he – go back to him to say that is his problem but he said we will shut down.
>
> We will make the Rand flat on the ground. Well fine indeed they did interfere with the land – with the Rand. I think there is one person who confessed not long – this year that they did so and I knew even at that time it was a deliberate move part of the agenda."

73. It thus falls within the Commission's Terms of Reference to inquire into, make findings, report on and make recommendations concerning:

73.1 Whether or not the alleged threat was indeed made by Mr Johan Rupert to **"shut down the economy of this country … [and to] make the Rand flat on the ground"** if President Zuma dared remove Mr Pravin Gordhan as Finance Minister.

73.2 Whether the alleged threat was indeed conveyed by Mr Mbalula to President Zuma, where, when, and who else was present and can corroborate President Zuma's evidence in this regard.

73.3 Whether **"indeed they did interfere with the land – with the Rand"** after Mr Gordhan's removal as Finance Minister, as alleged by President Zuma, and who **"they"** are.

73.4 Whether the alleged threat – seriously made or not – constitutes **"any form of inducement … to influence members of the National Executive"** (to wit, Mr Mbalula and President Zuma) by **"any other unauthorised person"** (to wit, Mr Johan Rupert) before removal of Mr Gordhan as Finance Minister was formally made.

73.5 Whether President Zuma or **"any member of the National Executive"** is responsible for the leak of news of the removal of Mr Gordhan as Finance Minister before the decision was formally made.

73.6 What the identity is of the person who, according to President Zuma, **"confessed not long – this year that they did [interfere with the Rand]"**.

74. These are some of the questions that remain unanswered after Mr Zuma's evidence on 15 July 2019. It is now <u>over 17 months</u> since that evidence was given under oath and the public has not heard a word from and through the Commission about whether or not the allegations made are true.

75. The second issue also falls squarely within the Terms of Reference of the Commission. In terms of its Terms of Reference, the Commission is appointed

> "to investigate matters of public and national interest concerning allegations of state capture, **<u>corruption</u>**, and fraud"

76. It ought to be a matter of serious concern to this court and the Commission – and a matter it must wish to probe as part of its Terms of Reference – for a public representative, a Minister in government who has taken an oath of office or solemn affirmation to **"obey, respect and uphold the Constitution and all other law of the Republic … to hold [his] office … with honour and dignity"**, to express the view that the Minister of Public Enterprises, Mr Gordhan, seems to hold. He is responsible, in his current cabinet portfolio, for Eskom which is embroiled in a financial scandal involving over a R5 billion overpayment that Eskom says was paid **"in error"**. There is information relating to Independent Power Producers that Eskom refuses to disclose to Parliament. When a minister of Public Enterprises (responsible for financially struggling state-owned entities that seem to be beached whales for greedy businessmen to feed on) not only believes but also tells Parliament that not all corruption cases are necessarily criminal cases, what hope can there be for the country to turn the tide against corruption following the report and recommendations of this Commission if that minister is not questioned on his remarks in this regard and asked to give examples of what he is talking about?

77. As in the case of President Ramaposa, the Chair has given no indication of when exactly Mr Gordhan will be called to give evidence on the serious issues identified in my application and which fall within the Commission's Terms of Reference. In fact, in his case there is no indication that he will be called at all. This could be regarded as a serious dereliction by the Commission of its duty. All the Commission has to say, as late as 23 December 2020, is that

> "The Chairperson is yet to decide if any or all of these witnesses are required to give oral evidence on the matters Mr Ngalwana has identified."[59]

78. This does not inspire confidence in the Commission's willingness to probe such serious questions falling within its Terms of Reference and involving very senior

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[59] Commission affidavit opposing my *amicus* application, para 21

members of government and a wealthy and seemingly powerful businessman with powers to instruct ministers on what to convey to a President. It may also conceivably bring into question in the minds of the public the concern raised by the Chair about ministers who have not voluntarily come forward to the Commission, if the Commission resists an invitation to question those ministers – such as Mr Gordhan – who have been implicated in matters that fall within its Terms of Reference.

79. I ask this court, should it grant the relief sought in respect of Mr Zuma in his capacity as former cabinet member and leader, to take into account the relief in prayers 2.1, 2.2, 3, 4, 5 and 7 of the Commission's notice of motion in relation to Mr Gordhan, in his capacity as former member in Mr Zuma's cabinet, so that he can answer questions on the two issues identified and be cross-examined on them by those parties who may validly and justifiably have an interest in doing so in terms of the rules of the Commission and for the **"deeper public purpose"** of the Commission.

80. The calling of Mr Gordhan engages the equality[60] and accountability[61] provisions of the Constitution in that the law applies equally to him as it does to any other member of Mr Zuma's cabinet, including Mr Zuma himself. If the orders sought by the Commission against Mr Zuma to (1) appear at the Commission, (2) to answer questions put to him, (3) subject only to his privilege against self-incrimination are granted, there should be no difficulty in taking into account Mr Gordhan as a member of Mr Zuma's cabinet on the same argument as advanced by the Commission in relation to Mr Zuma.

81. Mr Gordhan, like Mr Zuma and President Ramaphosa, is both collectively and individually accountable for the conduct of the cabinet of which he was a member throughout Mr Zuma's presidency. To treat him differently from Mr Zuma would be inconsistent with the equality and accountability provisions of

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60 s 9(1) & s 9(2)

61 s 92(1) & s 92(2), s 195(1)(f)

the Constitution unless he can show, at the Commission, that he has steadfastly sounded an alarm throughout, the ultimate manifestation of which would have been his resignation.

G. Mr Fikile Mbalula

82. Mr Mbalula's evidence is necessary to test Mr Zuma's evidence on the allegation of conduct engaged by paragraph 1.3 of the Commission's Terms of Reference, namely,

> "whether the appointment of any member of the National Executive, functionary and/or office bearer was disclosed to … **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."

83. Either Mr Rupert instructed Mr Mbalula as alleged by Mr Zuma or he did not. Either Mr Mbalula conveyed Mr Rupert's instruction to Mr Zuma or he did not. Either Mr Zuma told Mr Mbalula to go back to Mr Rupert with the message Mr Zuma alleges or he did not. Only Mr Mbalula, under oath, can confirm or deny what is alleged to have been conveyed to him by both Mr Rupert and Mr Zuma regarding the appointment and retention of a cabinet minister, and the threat of dire consequences to the country's economy by a civilian (**"unauthorised person"**) if his preference of a cabinet minister in the Finance portfolio were not retained by the President.

84. Without Mr Mbalula's evidence in this specific regard under oath, an important aspect of the Commission's Terms of Reference will remain unexplored. That could be regarded as a dereliction of duty by the Commission now that it is aware of this issue.

85. I thus ask this court, should it grant the relief sought in relation to Mr Zuma in his capacity as former cabinet member and leader, to take into account the relief

in prayers 2.1, 2.2, 3, 4, 5 and 7 of the Commission's notice of motion in relation to Mr Mbalula, in his capacity as former member of Mr Zuma's cabinet, on this important issue without delay and around the same time that Mr Zuma, Mr Ramaphosa and Mr Gordhan are to be questioned. January 2021 would, in my respectful submission, be most fitting in order to free up enough time for those parties who may validly and justifiably wish to apply for his cross-examination on that issue to do so without being needlessly constrained by time remaining for the hearing of oral evidence in the life of the Commission.

86. Mr Mbalula's evidence, like that of Mr Gordhan, engages the equality[62] and accountability[63] provisions of the Constitution in that the law applies equally to him as it does to any other member of Mr Zuma's cabinet, including Mr Zuma himself. If the orders sought by the Commission against Mr Zuma

86.1 to appear at the Commission,
86.2 to answer questions put to him,
86.3 subject only to his privilege against self-incrimination

are granted, there should be no difficulty in taking into account the same orders in relation to Mr Mbalula as a member of Mr Zuma's cabinet on the same argument as advanced by the Commission in relation to Mr Zuma in support of those specific orders.

87. Mr Mbalula – like Mr Zuma, Mr Gordhan and President Ramaphosa – is both collectively and individually accountable for the conduct of the cabinet of which he was a member during Mr Zuma's presidency. To treat him differently from Mr Zuma would be inconsistent with the equality and accountability provisions of the Constitution unless he can show, at the Commission, that he has steadfastly

62 s 9(1) & s 9(2)
63 s 92(1) & s 92(2), s 195(1)(f)

sounded an alarm throughout, the ultimate manifestation of which would have been his resignation.

H. Mr Johan Rupert

88. Mr Rupert's evidence, as that of Messrs Mbalula, Zuma and Gordhan[64], engages paragraph 1.3 of the Commission's Terms of Reference, namely,

> "whether the appointment of any member of the National Executive, functionary and/or office bearer was disclosed to … **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."

89. He is the **"unauthorised person"** envisaged in the paragraph, unless there is evidence that he is in fact authorised to receive such information of cabinet appointments before it is formally announced.

90. Either Mr Rupert instructed Mr Mbalula as alleged by Mr Zuma or he did not. Either he threatened to collapse the national currency as alleged by Mr Zuma or he did not. Either Mr Rupert did carry out his threat to collapse the national currency after Mr Zuma failed to acquiesce in his demand to retain Mr Gordhan or he did not carry out his threat. Only he, under oath, can clarify these important questions. Only he – and whoever told him about an imminent removal of a minister of his preference from the Finance portfolio – has knowledge of who told him about that imminent removal. Only he can explain to the nation at the Commission why (if he did) his preference for the Finance portfolio in cabinet lies with Mr Gordhan. These are important questions of national interest that simply cannot be left unanswered by the only person who can answer them, under oath, Mr Johan Rupert.

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64 The other issue in relation to Mr Gordhan is one where he expressed the view in parliament (to a parliamentary committee) that not all cases of corruption are necessarily criminal cases.

91. Without Mr Rupert's evidence in this specific regard under oath, an important aspect of the Commission's Terms of Reference will remain unexplored. That could be regarded as a dereliction of duty by the Commission now that it is aware of these issues.

92. I thus ask this court – should it grant the relief sought in respect of Mr Zuma in his capacity as former cabinet member and leader, to take into account the relief in prayers 2.2, 3, 4, 5 and 7 of the Commission's notice of motion in relation to Mr Rupert on these important issues without delay and around the same time that Mr Zuma, Mr Ramaphosa, Mr Mbalula and Mr Gordhan are to be questioned. Again, January 2021 would, in my respectful submission, be most fitting in order to free up enough time for those parties who may justifiably wish to apply for his cross-examination on these issues to do so without being needlessly constrained by time remaining for the hearing of oral evidence in the life of the Commission.

93. Mr Rupert's evidence engages the equality[65], accountability[66] and transparency[67] provisions of the Constitution in that

93.1 the law applies equally to him; and

93.2 South Africans are entitled to know whether or not cabinet appointments are made subject to the unofficial *imprimatur* of private citizens in business and, if so, who those private individuals are.

94. Without Mr Rupert's evidence on these specific issues, South Africans cannot be absolutely certain that their vote in general elections is indeed free and fair and not possibly manipulated by the hidden hand of business interests sponsoring specific persons for appointment in specific cabinet posts so that they can do their bidding and serve their business and personal interests. The **"sworn**

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65 s 9(1) & s 9(2)
66 s 195(1)(f)
67 s 195(1)(g)

responses" that the Commission now says Mr Rupert, Mr Mbalula and Mr Gordhan have provided to it[68] ought to be made public in order to restore public confidence in the processes of the Commission and in matters of state. Without public knowledge of the contents of those **"sworn responses"**, it is impossible for interested members of the public to decide whether or not to apply to the Chair for an opportunity to subject their responses to scrutiny. This is, with respect, not a decision that the Commission or the Chair can validly take for interested members of the public.

I. Eskom

95. My request for prayers 2.2, 3, 4, 5 and 7 in the Commission's notice of motion to be taken into account also in relation to Eskom Chief Executive, Mr De Ruyter, and such other current and former Eskom executives and senior government officials as may shed light on the issues I identify in my affidavit[69] engages

95.1 efficient, economic and effective use of public resources;
95.2 accountability; and
95.3 transparency

in public administration.

96. The relief that I ask should be so taken into account in relation to Eskom executives and senior government officials is that sought in prayers 2.2, 3, 4, 5 and 7 of the Commission's notice of motion, provided that the dates and times there mentioned are left to the Commission's discretion, judiciously exercised.

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68 Commission affidavit opposing this amicus application, para 21
69 See Ngalwana affidavit at paras 60 to 63, inclusive.

97. I referred this issue to the Public Protector as a complaint on 5 June 2020. Suspecting that the Office of the Public Protector may lack financial resources to investigate the complaint properly (its budget was reduced by a substantial amount), I then referred the matter to the Commission on 24 November 2020 in terms of Rule 9.1 of its Rules as I consider that the issues it raises fall squarely within its Terms of Reference, charged as it is with investigating *"state capture"*, corruption and fraud in state-owned entities.

98. The Commission has to date not even acknowledged receipt of that request. Instead, in a media briefing held on Monday 21 December 2020, the Chair indicated that the Commission may be hearing more evidence in relation to Eskom. No indication has been given as regards the issues that may be traversed, who will be questioned, and when that evidence will be procured in relation to the remaining life of the Commission. It thus seems likely that the Commission may very well not investigate the serious issues that are raised in this application, **in the public interest**, unless directed to do so by this court now that an opportunity has presented itself by the Commission's application in relation to Mr Zuma.

99. Now the Commission, in its affidavit of 23 December 2020, says it and the Chair **"have simply not yet had an opportunity to deal with it"**. Considering that an entire month had passed without even an acknowledgement of receipt of the request from the Commission, and 3 months remain for the hearing of oral evidence if it manages to secure a further extension from the high court, it is difficult to have confidence that the Commission intends investigating these issues, unless this court takes into account the relief in respect of Mr Zuma in relation to the Eskom Chief Executive and other current and former executives and government officials who may provide helpful information for the assistance of the Commission in these respects.

J. Costs

100. I ask for no costs.

101. I bring this application in good faith and in the public interest in terms of s 38(1)(d) of the Constitution. And so, in the event of this court refusing the application, I ask that no costs order be made. In this regard I refer to the Judgment of this court in *Barkhuizen v Napier*[70] and ask that those considerations be taken into account. These are, in sum

101.1 I have raised important constitutional issues relating to accountability, transparency, responsiveness, openness and the **"deeper public purpose"** of this Commission.

101.2 The determination of these issues is beneficial not only to the parties in this case but also to all those who are, and may in future be, engaged with this and any other judicial Commission of Inquiry.

101.3 In these circumstances, justice and fairness require that I should not be burdened with an order for costs.

101.4 To order costs against me in the circumstances of this case may have a chilling effect on individuals, armed only with good faith and public interest, who might wish to raise constitutional issues touching on politically and financially powerful individuals.

102. I ask this court not to allow the employment of even the threat of adverse costs orders as a tool to silence and snuff out endeavours to hold political and industry power to account in the public interest.

V NGALWANA SC
Cape Town
28 December 2020

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[70] (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (4 April 2007) at para 90

LIST OF AUTHORITIES

South African Cases

1. *Koko v Eskom Holdings Soc Limited* (J200/18) [2018] ZALCJHB 76 (21 February 2018)

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

3. *Economic Freedom Fighters and Others v Speaker of National Assembly and Others* [2016] 1 All SA 520 (WCC)

4. *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC)

5. *Ferris v Firstrand Bank Ltd* 2014 (3) SA 39 (CC)

6. *Equal Education v Minister of Basic Education* 2019 (1) SA 421 (ECB)

7. *In Re: Certain Amicus Curiae Applications; Minister of Health and Others v Treatment Action Campaign and Others* (CCT8/02) [2002] ZACC 13 (5 July 2002)

8. *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC)

9. *Barkhuizen v Napier* (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (4 April 2007)

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Constitution of the Republic of South Africa, 1996

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