

In Contempt of the Highest Court in the Land: A Commentary on *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State v Zuma and Others* 2021 (5) SA 327 (CC)

Romeo Shavhani*

Abstract

The Constitution of the Republic of South Africa (1996) is reputed to be 'the best Constitution' in the world. It is founded on a socio-political desire to move away from the historical realities of apartheid into the constitutional democracy in which the Constitution is the supreme law of the land. Ever since the dawn of constitutional democracy, so much has been achieved to provide practical meaning to the founding values of the Constitution. The basis for this case note is former President Jacob Zuma's actions in 2021 which culminated in contempt of court, which sought to undermine the Constitution's authority and legitimacy of the Constitutional Court. The ultimate view adopted in this case note is that Mr Zuma succeeded in his project to undermine the Constitution and the Constitutional Court. His actions would threaten to reverse the democratic gains achieved under the Constitution. This case note analyses the reactionary measures taken by the Constitutional Court to assert its authority in light of the attacks that Mr Zuma had launched on the court and its members.

Keywords

Commission of Inquiry; Constitutional Court; contempt of court; Jacob Zuma; public statements; rescission

1. Introduction

Following years of a tradition of impunity on the part of political superiors, and at a time when applying the law to political superiors was questioned, the Zuma case came at a time when the public had very little confidence in the work of commission of inquiries in general, and particularly in the work of the Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State, and in the results thereof. The subject of this case note is not the direct result of a successful prosecution as recommended by the Commission of Inquiry. However, the prosecution was incidental to the work of the Commission of Inquiry, and it gave substance to the work of the Commission and restored the Commission's dignity in the public's eyes. The events started with the release of the report by the then Public Protector, Advocate Thuli

* LLB (University of Limpopo), Candidate Attorney (PWJ Mashela Attorneys inc). <<https://orcid.org/0009-0006-1795-4419>> Email: romeoshavhani@gmail.com



Madonsela. This report was titled ‘State of Capture’,¹ and one of its damning findings was that, during Jacob Zuma’s presidency, private individuals exerted influence on Cabinet appointments, appointments to the boards of state-owned entities, and tenders.² One of the remedial actions of the report was that a Commission of Inquiry should be appointed by the President, and chaired by a judge selected by the then Chief Justice, Mogoeng Mogoeng.

Jacob Zuma appointed the Judicial Commission into State Capture, Corruption and Fraud in the Public Sector, including Organ of State in terms of section 84(2)(f) of the Constitution³ by way of a proclamation in the *Government Gazette*.⁴ Deputy Chief Justice Raymond Zondo, as he then was, was appointed as the chair of the Commission to investigate the allegations into state of capture, guided by the terms of reference.⁵ After the appointment of the Commission of Inquiry, Mr Zuma promulgated a regulatory framework which was applicable to the Commission of Inquiry, and included conferring powers on the chairperson to appoint his staff.⁶

Mr Zuma, who was one of those implicated in this Commission of Inquiry, made his first appearance at the Commission of Inquiry on 15 July 2019. He did so without any sign of resistance and attended the Commission of Inquiry’s proceedings as was stipulated in the summonses and directives of the Commission of Inquiry. The problem started when Mr Zuma was summonsed to appear at the Commission of Inquiry for a second time; this case note examines these events. With regard to his second appearance, Mr Zuma made a brief appearance at the Commission of Inquiry and suddenly left, thus disobeying the summonses and lawful directives of the Commission of Inquiry, which sought his attendance as a witness and also to assist the Commission in gathering evidence necessary for the Commission’s investigations.

This case note will discuss the institution of contempt of court proceedings with special reference to the *Commission of Inquiry*⁷ case. The author will limit the discussion of contempt of court to two forms, namely: non-compliance with an order of court and scandalising the court. The author will give a balanced account of the majority and minority judgments, and will thereafter provide a stand-alone comment on the case. This

1 Stature of Capture (14 October 2016) <<http://www.saflii.org/images/329756472-State-of-Capture.pdf>> accessed 16 September 2022.

2 *Ibid.*

3 Section 84(2)(f) of the Constitution of the Republic of South Africa, 1996 states that the President is responsible for appointing commissions of inquiry.

4 Stature of Capture (14 October 2016) <<http://www.saflii.org/images/329756472-State-of-Capture.pdf>> accessed 16 September 2022.

5 Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State: Terms of Reference (Notice 3) *Government Gazette* 41403 of 25 January 2018: 4-14.

6 Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State: Rules Governing Proceedings (Notice 396) *Government Gazette* 41772 of 13 July 2018: 4-15.

7 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) (29 June 2021).

case note seeks to bring to light the victory of the rule of law and the supremacy of the Constitution at a time when the dignity of the judiciary and the administration of justice were eroded by the continued attacks that Mr Zuma launched on the Constitutional Court and its members.⁸

2. Factual matrix

The Commission of Inquiry approached the Constitutional Court for an order subjecting Mr Zuma to direct imprisonment for defying the order of the Constitutional Court to attend the proceedings of the Commission. The salient facts of the case were as follows: The Commission of Inquiry first approached the Constitutional Court for an order compelling Mr Zuma to comply with its summonses and directives after Mr Zuma made a brief appearance at the Commission of Inquiry, and suddenly left without the permission of the chairperson of the Commission. Ruling in favour of the Commission, the Constitutional Court ordered Mr Zuma to comply with all summonses and lawful directives issued by the Commission of Inquiry. Mr Zuma disobeyed the Constitutional Court's judgment ordering him to attend the proceedings of the Commission. He published public statements in which he expressed his immovable intention not to comply with the Commission's directives as endorsed in the Court's order. In his public statements, he also criticised the Commission and the Constitutional Court, accusing both institutions of weaponising the law against him. In light of these events the Commission approached the Constitutional Court for a punitive order subjecting Mr Zuma to direct imprisonment for contempt of court on account of non-compliance and scandalising the court.

3. Legal question

The question was whether Mr Zuma was guilty of contempt of court for scandalising the court and for failing to comply with the order that the Constitutional Court had made in the *Commission of Inquiry*⁹ case where the Commission sought his attendance through a court application. In this case,¹⁰ the Constitutional Court had pronounced as follows in relation to Mr Zuma's non-compliance with the summonses and directives of the Commission:

- Mr Jacob Gedleyihlekisa Zuma is ordered to obey all summonses and directives lawfully issued by the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State (Commission).
- Mr Jacob Gedleyihlekisa Zuma is directed to appear and give evidence before the Commission on dates determined by it.

⁸ *Ibid* para 29.

⁹ *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State v Zuma* [2021] ZACC 2; 2021 (5) BCLR 542 (CC); 2021 (5) SA 1 (CC) (28 January 2021).

¹⁰ *Ibid* para 115.

- It is declared that Mr Jacob Gedleyihlekisa Zuma does not have a right to remain silent in proceedings before the Commission.
- It is declared that Mr Jacob Gedleyihlekisa Zuma is entitled to all privileges under section 3(4) of the Commissions Act, including the privilege against self-incrimination.

It is appropriate to shed light on the last two points of the above-quoted Constitutional Court order. Although Mr Zuma did not participate in these proceedings, where he would have had an opportunity to oppose the relief sought by the Commission ordering him to attend its proceedings, the court took cognisance of the argument raised by his representatives at the Commission on the day he abruptly left the Commission. Mr Zuma's representative had contended that if Mr Zuma had to appear before the Commission to give evidence, he would exercise his right to remain silent. The court stated that the right to remain silent as guaranteed by the Constitution in section 35(1)(a)¹¹ was not available to Mr Zuma as he was neither an accused person nor an arrested person at the Commission.

The court stated further that even though Mr Zuma was not entitled to the right to remain silent, he still was entitled to the protections enjoyed by witnesses in criminal proceedings as also guaranteed in section 3(4) of the Commissions Act 8 of 1947.¹² This meant that he still had the privilege against self-incrimination. In light of these events which were characterised by the act of non-compliance coupled with destructive criticisms by Mr Zuma, the following question was asked: 'Is Mr Zuma guilty of contempt of court?' The question of whether Mr Zuma was guilty of contempt of court led to the most logical question: what is this contempt of court?

4. Contempt of court

Contempt of court is defined as unlawfully and intentionally violating the dignity, repute or authority of a judicial body or a judicial officer in his judicial capacity; or publishing information or comment concerning a pending judicial proceeding which constitutes a real risk of improperly influencing the outcome of the proceeding or prejudicing the administration of justice in that proceeding.¹³ The rationale of the offence of contempt of court is to protect the dignity and authority of the judiciary in the public's eyes, to ensure that the decisions and directives of the court are carried out without resistance that could possibly undermine the authority of the judiciary; if met with resistance, such resistance

11 Everyone who is arrested for allegedly committing an offence has the right to remain silent.

12 Any person who has been summonsed 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 summonsed 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 summonsed to produce a book or document in such a court shall apply.

13 Snyman, CR *Criminal Law* (5th ed, Lexis Nexis 2014) 315.

should be corrected.¹⁴ The crime of contempt of court can be committed in many ways; however, it would not serve present purposes to discuss all of them individually. Therefore, contempt of court in the form of scandalising the court and failure to comply with an order of court are examined in this case note.

4.1 Scandalising the court

This form of contempt is committed by the publication, either in writing or verbally, of allegations which, objectively speaking, are likely to bring judges, magistrates or the administration of justice through the courts generally into contempt, or unjustly to cast suspicion on the administration of justice.¹⁵ This form of contempt is characterised by drawing a line between a bona fide comment on the affairs of the judiciary and destructive criticism of the affairs of the judiciary.¹⁶ This is because of the constitutionally guaranteed right to freedom of expression.¹⁷ The line between a bona fide comment on the affairs of the judiciary and scandalising the court is often blurred, and this often leads to a tension between the right to freedom of expression and protecting the dignity of the judiciary.¹⁸

4.2 Failure to comply with an order of court

Judicial pronouncements are binding on litigants until set aside through legally recognised avenues. A mere refusal to comply with a court order that someone does not agree with is an offence. The law provides avenues that one can take if one believes that the judgment has been awarded erroneously. A party to a civil case against whom a court has given an order, and who intentionally refuses to comply with it, commits contempt. Such contempt is, however, hardly ever charged as a criminal offence by the state, and it is left to the party in whose favour the order has been given to apply to court, if he so wishes, to convict the defaulting party.¹⁹

The focus now turns to how the Constitutional Court analysed Mr Zuma's act of non-compliance and the act of scandalising the court in the context of the offence of contempt of court.

5. Judgment

5.1 Majority judgment

In reaching the decision to convict and sentence Mr Zuma to direct imprisonment, the Constitutional Court, per Justice Khampepe, explored relevant and fundamental questions pertinent to deciding whether Mr Zuma was guilty of contempt of court, and

14 *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) para 24; *R v Davies* [1906] 1 KB 32 para 40; *Ambard v Attorney-General of Trinidad and Tobago* [1936] 1 All ER 704 (PC), per Lord Atkin para 709, quoted in *Argus Printing and Publishing Co Ltd and Others v Esselen's Estate* 1994 (2) SA 1 (A) 29E-F (per Corbett CJ).

15 Snyman (note 13 above) 322.

16 *S v Mamabolo* (note 14 above) para 38.

17 Section 16 of the Constitution.

18 *S v Mamabolo* (note 14 above) para 38.

19 Snyman (note 13 above) 322; *In re Phelan* (1877) Kotzé 5 at 7.

the appropriate sanction for the offence committed by Mr Zuma. The first and the most fundamental issue that the court was confronted with was a preliminary issue in this case, namely the admissibility of the evidence relied on by the Commission. It should be remembered that when Mr Zuma was ordered by the Constitutional Court to attend the Commission, he published, through his foundation, a series of continued attacks on the Commission and the Constitutional Court and its members, accusing them of politicising the law and using the law to target him personally.

The series of publications by Mr Zuma were used by the Commission in seeking recourse for contempt of court. The first issue that arose with the admissibility of the public statements was that they were extra-curial documents and therefore they constituted hearsay evidence. This was because the publisher of the statements refused to participate in the proceedings where he could have confirmed or denied the authenticity of the published statements.²⁰ Despite the problems that were presented by Mr Zuma's non-participation when deciding to admit these statements into evidence, the court admitted these statements as evidence as defined in section 3(4) of the Law of Evidence Amendment Act 45 of 1988.²¹ The reason for this was that it was practically impossible to secure the attendance of Mr Zuma at these proceedings where he would have admitted or refuted these statements, and the court therefore held that it was in the interest of justice to admit them into evidence.²² In admitting these statements into evidence, the court was mindful of the prejudice that Mr Zuma would suffer since the proceedings would result in a criminal sanction being imposed.²³

In disposing of the prejudicial question as it related to the admissibility of the evidence, the court held that such proceedings were neither criminal nor civil, but *sui generis* – these proceedings were unique in nature, a combination of criminal and civil proceedings.²⁴ Another issue was whether the Constitutional Court as a court of first and last instance had jurisdiction to entertain this matter. On this question of jurisdiction, the Commission had argued with special reference to the case of *Pheko v Ekurhuleni City*²⁵ that a court that grants an order retains jurisdiction to ensure that it is complied with, in order to vindicate its authority.²⁶ With regard to the question of jurisdiction, the court referred to section 173 of the Constitution,²⁷ pointing to the inherent powers of the Constitutional Court to protect and regulate its own processes, and to develop the

20 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture* (note 7 above) para 21.

21 'Hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.

22 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture* (note 7 above) para 19.

23 *See S v Ndhlovu* [2002] ZASCA 70; 2002 (6) SA 305 (SCA) (*Ndhlovu*) para 16.

24 [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (*Pheko II*) para 28, where the court held that '[t]he object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order.'

25 *Ibid.*

26 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture* (note 7 above) para 7.

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

common law when the Constitution and the administration of justice are threatened, provided this is in the best interests of justice.²⁸ The Constitutional Court as the sole guardian of the Constitution found it befitting to be the court of relevant jurisdiction to entertain this matter. The court buried the argument of jurisdiction by further referring to section 165 of the Constitution,²⁹ pointing to the powers vested in it to carry out judicial functions.

The question of jurisdiction at the level of the Constitutional Court usually goes hand-in-glove with the question of direct access to the Constitutional Court, and this case was not unique. Direct access to the Constitutional Court is governed by Rule 18(1) of the Constitutional Court³⁰ and section 167(6)(a) of the Constitution.³¹ The Commission approached the Constitutional Court on an urgent basis and asked for direct access to the Constitutional Court. On the question of urgency, the Constitutional Court relied on the case of *Protea Holdings Limited v Wriwt*³² to justify granting direct access to the Commission on an urgent basis. In this case, it was held as follows:

the element of urgency would be satisfied if in fact it was shown that [the] respondents were continuing to disregard the order. ... If this be so, the applicant is entitled, as a matter of urgency, to attempt to get the respondents to desist by the penalty referred to being imposed.

The court cited continued publications by Mr Zuma vulgarising the Commission and the Constitutional Court and its members, and his assertions in the publications that he would never participate in the Commission's proceedings as a continued disregard of the court's order.³³ On the question of direct access to the Constitutional Court, the court first considered the interests of justice. The court cited a series of attacks aimed at the Constitutional Court and the judiciary by Mr Zuma, labelling such attacks unprecedented

28 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture* (note 7 above) para 24.

29 Section 165 of the Constitution provides as follows:

(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of State may interfere with the functioning of the courts.

(4) Organs of State, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of State to which it applies.

(6) The Chief Justice is the head of the Judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

30 Rule 18(1) of the Constitutional Court states that an application for direct access as contemplated in section 167(6)(a) of the Constitution shall be brought on notice of motion, which shall be supported by an affidavit, which shall set forth the facts upon which the applicant relies for relief.

31 Section 167(6)(a) of the Constitution states that national legislation of the Rules of the Constitutional Court must allow a person to bring a matter directly to the Constitutional Court when it is in the interest of justice and with the leave of the Constitutional Court.

32 1978 (3) SA 865 (W) at 867G.

33 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture* (note 7 above) para 31.

and a threat to the supremacy of the Constitution and the administration of justice.³⁴ Such attacks on the judiciary warranted swift and effective judicial intervention, and therefore direct access to the Constitutional Court was justified.³⁵

The question of whether Mr Zuma was in contempt of court had to be answered in the context of the events that unfolded. The Constitutional Court examined the following elements used as a yardstick in *Pheko II*³⁶ to establish contempt on the part of the alleged contemnor: (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. The court relied on the Sheriff's return of service, which reflected a successful delivery of the judgment at two of Mr Zuma's properties, to show that Mr Zuma received and was aware of the judgment. To confirm his knowledge of the judgment, the court relied on Mr Zuma's inflammatory public statements, which spoke to the contents of the judgment of the Constitutional Court and confirmed that he was aware of the judgment.

The question of Mr Zuma's constitutional rights had to be answered in the context of proceedings that have a criminal element. The court gave sufficient consideration to Mr Zuma's right to freedom³⁷ and his right to a fair trial.³⁸ The court was mindful of the fact that every accused has a right to mitigation in proceedings where a criminal sanction will be imposed. In light of this, the court solicited Mr Zuma's mitigation in the event that the court found him guilty; however, Mr Zuma abandoned this right.

The court emphasised the need for the public's confidence in the judiciary, stating that Mr Zuma's negative and destructive criticism of the judiciary lowered the public's confidence in the judiciary. The court noted that contempt of court is not only an act of non-compliance with the court's order, but also includes the nature of that contempt, the extent of it, and the surrounding circumstances.³⁹ The court acknowledged and encouraged constructive criticism of the judiciary and held that Mr Zuma's public statements were not constructive criticism, but rather unfounded accusations and insults.⁴⁰

Mr Zuma's position as a former president was in the spotlight, and his former presidency was brought into the mix on the basis that, because he was a former president, he was not an ordinary contemnor. His former presidency status afforded him significant political influence, and that counted as an aggravating factor in determining the appropriate sanction. Although both minority and majority justices agreed that Mr Zuma was guilty of contempt of court, the question of the sanction befitting the conduct of Mr Zuma was a highly contested matter. The majority judgment found that Mr Zuma's conduct warranted a punitive order, and without quoting directives accompanying the enforcement of the judgment, the court held as follows:

34 *Ibid* para 34.

35 *Ibid* para 82.

36 *Pheko II* (note 24 above) para 32.

37 Section 12(1) of the Constitution.

38 Section 35(3) of the Constitution.

39 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture* (note 7) para 82.

40 *Ibid* para 88.

- It is declared that Mr Jacob Gedleyihlekisa Zuma is guilty of the crime of contempt of court for failure to comply with the order made by this Court in Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including *Organs of State v Jacob Gedleyihlekisa Zuma* [2021] ZACC 2.
- Mr Jacob Gedleyihlekisa Zuma is sentenced to undergo 15 months' imprisonment.⁴¹

5.2 Minority judgment

It would ordinarily serve no purpose, for obvious reasons, to engage fully with the minority judgment of Justice Theron, confirmed by Justice Jafta. However, it is important to engage with the logic behind the reasoning and what informed this judgment. Characteristically, this judgment used the traditional procedure of dealing with cases relating to the offence of contempt of court. Apart from the fact that the minority justices disagreed with everything else justifying a punitive order in the majority judgment, they agreed that Mr Zuma was guilty of contempt of court, and that the judicial authority had to be vindicated in those circumstances. In disagreeing with the majority judgment, the minority justices held as follows:

Had I commanded the majority, I would have made a coercive order of suspended committal, conditional upon Mr Zuma complying with this Court's order. But because the Commission's lifespan is at its end, I would order that the matter be referred to the DPP for a decision on whether to prosecute Mr Zuma for contempt open to the Commission to prosecute Mr Zuma privately in accordance with section 8 of the Criminal Procedure Act.⁴²

It should again be noted that this quote, without taking into account any compelling circumstances, assumes the traditional approach of dealing with issues as they relate to the offence of contempt of court. Given the compelling circumstances in the instance of Mr Zuma, the question is whether the minority judgment addressed the nature and extent of Mr Zuma's conduct. The writer will comment further on the minority judgment below.

6. Post-trial remedies

In normal circumstances, a post-trial remedy takes the form of an appeal or even a review in some instances, but the situation was different in this case. The Commission's decision to approach the Constitutional Court as a court of first and final instance on an urgent basis changed the battlefield altogether. Because the Constitutional Court is the highest court of the land, its decisions are not appealable. We learnt through the case of Mr Zuma that it is rescindable through a rescission application, provided that the requirements

⁴¹ *Ibid* para 142.

⁴² *Ibid* para 268.

for rescission are met. Another instance where a rescission application is available to a litigant is when the party bringing the rescission application was excluded from the main proceedings.⁴³ In essence, a rescission application is a process whereby a litigant brings an application to court, inviting the court to reconsider and set aside its own decision in the main case, based on sound and acceptable reasons.

Before Mr Zuma instituted rescission proceedings at the Constitutional Court, he first instituted a stay of execution of his arrest at the Pietermaritzburg High Court. The Commission's decision to approach the Constitutional Court as a court of first and final instance on an urgent basis infringed to some extent on Mr Zuma's right to appeal. The writer will later comment on the extent of this violation. However, the Constitutional Court eventually agreed to hear Mr Zuma's rescission application, which decreased the great deal of prejudice that Mr Zuma would have suffered in the absence of a post-trial remedy available to him to invite another court or the same court which handed down the decision to reconsider its own decision.

Mr Zuma then instituted rescission proceedings, seeking to overturn the Constitutional Court's judgment, which subjected him to 15 months' direct imprisonment. Mr Zuma averred that the Constitutional Court failed to take into account a number of factors, including his age, his ill-health and the pandemic.⁴⁴ In light of these mitigating factors, he argued that his imprisonment constituted cruel and degrading punishment.⁴⁵ He argued that had the Constitutional Court taken these factors into account, the court would have arrived at a different conclusion. He further argued that if the court rejected his application for rescission, the court should afford him an opportunity to present evidence with regard to whether direct imprisonment was a befitting sentence for contempt as he had not been afforded an opportunity to do so.⁴⁶ He went on to argue that he was detained without trial, in that the Constitutional Court failed to refer the matter to the National Director of Public Prosecutions, who would have decided whether to prosecute the matter.⁴⁷

He further averred that although he did not participate in the Commission of Inquiry for purposes of assisting the Commission to collect evidence and to answer to allegations, he always had the intention to participate, but he could not do so in the face of grave prejudice against him on the part of the chairperson of the Commission.⁴⁸ Mr Zuma pleaded poverty for his failure to participate in the two previous Constitutional Court proceedings, and said he did not have the financial means to fund his litigation in the Constitutional Court. He further argued that the Constitutional Court erred in admitting

43 Rule 42 of the Uniform Rules of Court.

44 *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, Including Organs of State and Others* [2021] ZACC 28 para 13.

45 *Ibid*; section 12 of the Constitution of the Republic of South Africa, 1996. See also *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

46 *S v Makwanyane* (note 45 above) para 14.

47 *Ibid*.

48 *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture* (note 44 above) para 16.

his public statements into evidence, which influenced the nature and severity of the sanction, and he averred that his public statements constituted hearsay evidence.⁴⁹

Mr Zuma argued that Pillay AJ was extremely biased against him, and the court's failure to assess and establish such bias in light of historical events amounted to an error which the court ought to correct.⁵⁰ Mr Zuma averred that the court did not adopt the principle of equality and treated him differently because of his position as a former president. Therefore, the court treated him harshly and imposed an unprecedented sentence of 15 months.⁵¹ Mr Zuma also took issue with the Commission seeking an order for his direct imprisonment through motion proceedings in that motion proceedings violated his constitutional right to remain silent⁵² and to be presumed innocent,⁵³ because in motion proceedings he was required to tender his defense before it was even clear whether the Commission had established a *prima facie* case against him.⁵⁴

The Constitutional Court dismissed the rescission application and held that Mr Zuma failed to prove rescindable errors in the Constitutional Court's judgment. The Constitutional Court held further that Mr Zuma's attempts to render the Constitutional Court judgment void through a rescission application constituted an attempt to re-open the case and argue points that he could have argued in the proceedings in which he personally elected not to participate.⁵⁵ The court went further to say that a rescission application is available and it exists to protect litigants whose presence was precluded, not those who elected to be absent, as in the case of Mr Zuma.⁵⁶

7. Comments

It is important to give character to Justice Khampepe's majority judgment. Firstly, it was characterised by protecting the judiciary and the administration of justice with a view to discouraging the failure to obey judicial pronouncements and destructive criticism aimed at judicial processes.⁵⁷ Secondly, it was centred around the principle that no one is above the law.⁵⁸ The Constitutional Court's approach may have violated some of Mr Zuma's rights. Although the court advanced sound justifications for these violations, it is critical to point out some of these perceived violations. The first violation that Mr Zuma suffered was subjecting him to the jurisdiction of the Constitutional Court, in that the Constitutional Court in this case was the court of first and last instance, thereby violating Mr Zuma's right to appeal.

49 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture* (note 7 above) para 18.

50 *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture* (note 44 above) para 19.

51 *Ibid* para 20; section 9 of the Constitution.

52 Section 35(1)(a) of the Constitution.

53 Section 35(3)(h) of the Constitution.

54 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture* (note 7) para 213.

55 *Ibid* para 20.

56 *Ibid* para 56. See also Rule 42 of the Uniform Rules of Court.

57 Marumoage, C 'Did the Constitutional Court Uphold or Breach the Law in the Zuma Matter?' <<https://www.withoutprejudice.co.za/free/article/7348/view>> accessed 15 May 2023.

58 *Ibid*; section 2 of the Constitution.

The second violation was the Constitutional Court's inability to appreciate the methodology of criminal procedure.⁵⁹ The Constitutional Court avoided giving this case the full status of a criminal case, because this would have changed the dynamics of the case with regard to jurisdiction and the manner in which Mr Zuma's arrest was sought by the Commission through motion proceedings. A criminal case is always conducted against the backdrop of a right to a fair trial, which is a comprehensive right that embraces the concept of substantive fairness.⁶⁰ Even though the criminal element of this case was ignored by the court, the criminal element of it always showed up and this was inherent in the sentence imposed.

With regard to the minority judgment, the minority justices failed to take into account compelling and exceptional circumstances necessitating the need to move away from the traditional approach and procedure of the courts when dealing with an offence related to contempt of court. In the present writer's view, the minority justices failed to take into account the following factors, hence the decision they arrived at: the person who committed the crime; the influence that the contemnor wields as a former president amongst ordinary members of the public; the significant influence that he wields amongst his fellow comrades; the court against which this offence was committed; the extent of the damage of his public statements; the continued attacks on and disregard of the court; and his complete disregard of the administration of justice.

In the first leg of the minority judgment, the minority justices stated that they would have preferred a coercive order, provided that Mr Zuma complied with the first order of the Constitutional Court directing him to participate in the Commission of Inquiry. This would have been appropriate for someone whose reasons for not complying with the court order were unknown to the court, but in this case, Mr Zuma had publicly declared himself a recalcitrant and expressed his intentions not to comply with the court order, which meant he still would not have complied even with the existence of a coercive order. The second leg of the minority judgment spoke of referring the matter to the National Director of Public Prosecutions to decide whether to prosecute Mr Zuma; should the National Director of Public Prosecutions refuse to do so, it would then be up to the Commission to prosecute Mr Zuma privately.

The mere fact that the highest court of the land might have been indecisive in dealing urgently with this matter, by outsourcing its decision-making powers to the National Director of Public Prosecutions and later to private prosecution, would have taken the administration of justice from pillar to post. This approach would have prolonged Mr Zuma's acts of defiance and probably given him more reason to continue to attack the court's dignity and the administration of justice. By the time the offender was stopped, the courts and the administration of justice would have suffered irreparable harm, and the offender would have possibly inspired a tradition of resistance amongst his fellow politicians and ordinary members of the public. Although the judgment of minority justices took the form of established traditional procedures in relation to contempt of court, given the circumstances, Mr Zuma's actions needed to be addressed immediately.

59 *Ibid.*

60 In *S v Dzukuda; S v Tshilo* 2000 (4) SA 1078 (CC) para 9.

8. Conclusion

This case is a good precedent on the consequences of disobeying orders of court and launching attacks on the judiciary and its members. Also, the status of the court against which this offence was committed gave this case the ingredients of a good precedent. The present writer's view is that without the public statements published by Mr Zuma, this case would not have attracted so much attention and possibly such drastic measures would not have been imposed by the court. Mr Zuma tested the Constitutional Court in that he showed little to no interest in participating in proceedings, did not care about judicial outcomes, and his primary aim was to win the public's sympathy with his ill-perceived allegations. Unfortunately, he did so at the expense of his own freedom.

The extraordinary nature of these proceedings was characterised by an unprecedented set of facts, which attracted the full wrath of the law. In light of the unprecedented nature of these proceedings, the court stated: 'never before has the authority and legitimacy of the Constitutional Court been subjected to the kind of attacks that Mr Zuma has elected to launch on the Constitutional Court and its members.'⁶¹ This case was good for constitutional jurisprudence, but bad for the recalcitrant litigant. It will definitely join the ranks of *S v Makwanyane and Another*,⁶² *Soobramoney v Minister of Health (Kwazulu-Natal)*,⁶³ *Prince v Minister of Justice and Constitutional Development and Others*,⁶⁴ *Shilubane and Others v Nwamitwa*,⁶⁵ among others.

How to cite:

Shavhani, R 'In Contempt of the Highest Court in the Land: A Commentary on *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State v Zuma and Others* 2021 (5) SA 327 (CC)' (2022) 2(2) *Turf Law Journal* 1-13.

61 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture* (note 7 above) para 29.

62 [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391 (CC); [1996] 2 CHRLD 164; 1995 (2) SACR 1 (CC) (6 June 1995).

63 [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) (27 November 1997).

64 [2017] ZAWCHC 30; [2017] 2 All SA 864 (WCC); 2017 (4) SA 299 (WCC) (31 March 2017).

65 [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008).