CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 52/21

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 First Respondent

MINISTER OF POLICE Second Respondent

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE Third Respondent

and

HELEN SUZMAN FOUNDATION Amicus Curiae

Neutral citation:	*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
Coram:	Khampepe ADCJ, Jafta J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J
Judgments:	Khampepe ADCJ (majority): [1] to [142] Theron J (minority): [143] to [268]
Heard on:	25 March 2021

Decided on: 29 June 2021

Summary: Rule of law — judicial integrity — vindicating the honour of courts

Contempt of court — urgent application — direct access — duty to comply with court orders — first respondent is in contempt of court

Appropriate sanction for crime of civil contempt — punitive sanction — unsuspended committal — punitive costs

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ORDER

On application for direct access to this Court:

1. The application for direct access is granted.
2. The Helen Suzman Foundation is admitted as amicus curiae.
3. It is declared that Mr Jacob Gedleyihlekisa Zuma is guilty of the crime of contempt of court for failure to comply with the order made by this Court in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma* [2021] ZACC 2.
4. Mr Jacob Gedleyihlekisa Zuma is sentenced to undergo 15 months' imprisonment.
5. Mr Jacob Gedleyihlekisa Zuma is ordered to submit himself to the South African Police Service, at Nkandla Police Station or Johannesburg Central Police Station, within five calendar days from the date of this order, for the Station Commander or other officer in charge of that police station to ensure that he is immediately delivered to a correctional centre to commence serving the sentence imposed in paragraph 4.

6. In the event that Mr Jacob Gedleyihlekisa Zuma does not submit himself to the South African Police Service as required by paragraph 5, the Minister of Police and the National Commissioner of the South African Police Service must, within three calendar days of the expiry of the period stipulated in paragraph 5, take all steps that are necessary and permissible in law to ensure that Mr Jacob Gedleyihlekisa Zuma is delivered to a correctional centre in order to commence serving the sentence imposed in paragraph 4.

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

JUDGMENT

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

> "We expect you to stand on guard not only against direct assault on the principles of the Constitution, but against insidious corrosion."[1] (Nelson Mandela, 1995)

Introduction

[1] It is indeed the lofty and lonely work of the Judiciary, impervious to public commentary and political rhetoric, to uphold, protect and apply the Constitution and the law at any and all costs. The corollary duty borne by all members of South African society – lawyers, laypeople and politicians alike – is to respect and abide by the law,

[1] Nelson Mandela (address by former President Nelson Mandela at the inauguration of the Constitutional Court, 14 February 1995).

and court orders issued in terms of it, because unlike other arms of State, courts rely solely on the trust and confidence of the people to carry out their constitutionally-mandated function.[2] The matter before us has arisen because these important duties have been called into question, and the strength of the Judiciary is being tested. I pen this judgment in response to the precarious position in which this Court finds itself on account of a series of direct assaults, as well as calculated and insidious efforts launched by former President Jacob Gedleyihlekisa Zuma, to corrode its legitimacy and authority. It is disappointing, to say the least, that this Court must expend limited time and resources on defending itself against iniquitous attacks. However, we owe our allegiance to the Constitution alone, and accordingly have no choice but to respond as firmly as circumstances warrant when we find our ability to uphold it besieged.

[2] This matter concerns the question whether Mr Zuma is guilty of contempt of court for failure to comply with the order that this Court made 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 Zuma*[3] (*CCT 295/20*). In that order, this Court directed Mr Zuma to comply with summonses issued by the Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (Commission) and to appear and give evidence on dates determined by the Commission. The order also directed Mr Zuma to comply with directives lawfully issued by the Commission. Notwithstanding that order, Mr Zuma did not appear before the Commission on the dates determined by the Commission nor did he file any affidavits in accordance with the Commission's directives. Consequently, the Secretary of the Commission, the applicant, now seeks

[2] *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (*Mamabolo*) at paras 16 and 19.

[3] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma (Council for the Advancement of the South African Constitution, Ngalwana SC, the Helen Suzman Foundation Amicus Curiae)* [2021] ZACC 2; 2021 JDR 0079 (CC); 2021 (5) BCLR 542 (CC) (*CCT 295/20*).

an order from this Court declaring that Mr Zuma, cited as the first respondent, is guilty of contempt of court,[4] and sentencing him to imprisonment for a period of two years.

[3] The Minister of Police and the National Commissioner for the South African Police Service (SAPS) are cited as the second and third respondents respectively. They are cited in their official capacities because the implementation of the order sought by the applicant may require their services. As expounded later, the Helen Suzman Foundation (HSF) is admitted as amicus curiae (friend of the court).

Background facts

[4] In December 2020, in the matter of *CCT 295/20*, the applicant approached this Court on an urgent basis for an order that would, in essence, compel Mr Zuma's co-operation with the Commission's investigations and objectives. It is unnecessary to repeat the particulars of that matter here, save to state that it culminated in this Court granting an order in favour of the applicant on 28 January 2021, in terms of which Mr Zuma was ordered to attend the Commission and give evidence before it.[5] The judgment and order were served on him by the Sheriff at both of his residences. Mr Zuma responded by releasing a public statement in which he alleged that the Commission and this Court were victimising him through exceptional and harsh treatment, and that both institutions were politicising the law to his detriment.

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[4] In *Consolidated Fish Distributors (Pty) Ltd v Zive* 1968 (2) SA 517 (C) (*Consolidated Fish*) at 522B, contempt of court was defined as "the deliberate, intentional (i.e. wilful), disobedience of an order granted by a court of competent jurisdiction".

[5] *CCT 295/20* above n 3 at para 115 where this Court made the following order, which I quote only in relevant part:

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

[5] On 15 February 2021, Mr Zuma did not attend the Commission as required by the summons, and by extension, this Court's order. Instead, his legal representatives informed the Commission that he would not be appearing before it from 15 to 19 February, these being the dates stipulated in the summons. When it became apparent that Mr Zuma did not intend to comply with the order of this Court and the summons issued by the Commission, the Chairperson announced that the Commission would institute contempt of court proceedings against him. On the same day, Mr Zuma published another statement in which he levelled serious criticisms against the Judiciary and confirmed that he would neither obey this Court's order in *CCT 295/20*, nor co-operate with the Commission in any respect.

[6] It is this regrettable series of events that led to the applicant, in February 2021, approaching this Court on an urgent basis to launch these contempt of court proceedings.

Submissions before this Court

Applicant

[7] The applicant submits that this matter unequivocally engages this Court's jurisdiction. The applicant refers to the decision of this Court in *Pheko II*[6] and submits that a court that grants an order retains jurisdiction to ensure its compliance and thereby to vindicate its authority. Furthermore, considering Mr Zuma's former and current political position in South Africa, the applicant submits that his conduct constitutes a particularly egregious affront on judicial integrity, the rule of law and the Constitution itself. On this basis, the applicant emphasises that this Court is the rightful guardian of the Constitution and the Judiciary, and it is therefore appropriate for it to respond to

[6] *Pheko v Ekurhuleni City* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (*Pheko II*) at para 28, in which it was 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."

Mr Zuma's calculated efforts to undermine the administration of justice and public trust in the Judiciary.

[8] The applicant submits that there are several reasons that warrant this Court considering the matter on an urgent basis. Firstly, Mr Zuma's conduct poses a grave threat to the administration of justice and the rule of law. Secondly, Mr Zuma is an influential political figure who wields the power to inspire others to defy courts. Thirdly, the public and forceful nature of Mr Zuma's defiance compounds the risk posed to the rule of law. Fourthly, Mr Zuma's contempt of the court order is ongoing as he continues to ignore the summons issued by the Commission, which has a limited lifespan. Thus, should any order issued by this Court require compliance with the previous order, it is necessary that this be ordered to take place before the mandate of the Commission expires at the end of its term.[7] Finally, the applicant submits that no prejudice is caused to Mr Zuma by this Court hearing the matter on an urgent basis because he has not opposed the application.

[9] On the merits, the applicant submits that Mr Zuma is guilty of the crime of contempt of court. The applicant draws on the decision of the Supreme Court of Appeal in *Fakie*,[8] and submits that, when the relevant legal test[9] is applied to the current facts, there can be no doubt that Mr Zuma had knowledge of this Court's order in *CCT 295/20* because it was served on him, and he plainly acknowledged it in his public statements. Additionally, the applicant submits that Mr Zuma has once again declined to participate in proceedings before this Court and has instead opted to malign this Court. Accordingly, he has failed to present any evidence whatsoever to avoid the conclusion that his non-compliance was wilful and mala fide.

[7] At the time the applicant filed its application, the term of the Commission was set to expire on 30 June 2021.

[8] *Fakie N.O. v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (*Fakie*).

[9] The applicant relies on the test set out by the Supreme Court of Appeal in *Fakie* id at para 22, which is that once it is proven that an order exists and was served on a litigant who did not comply therewith, contempt will have been established beyond reasonable doubt unless the respondent establishes a reasonable doubt relating to wilfulness and mala fides.

[10] The applicant further submits that, in ostensibly defending his disobedience of this Court's order, Mr Zuma has effectively conducted a politically-motivated smear campaign of this Court, the Commission and the Judiciary. According to the applicant, this approach is intended to bring the judicial process into disrepute, which tactic should count as an aggravating factor in the determination of the appropriate sanction. To substantiate this submission, the applicant refers to the specific serious insults that Mr Zuma has directed at this Court, the Commission and the Judiciary. In short, the crux of these insults is that these institutions are politicised and prejudiced. And that, instead of pursuing their legitimate and constitutional mandates, they seek to further their own political agenda and target Mr Zuma personally.

[11] Based on all of the above, the applicant seeks a punitive order in the form of an unsuspended term of imprisonment. To this end, the applicant distinguishes between coercive and punitive orders, and submits that only a punitive order is appropriate in this matter because it involves a unique and extreme case of contempt of court, for which there is no meaningful precedent. In short, the applicant submits that Mr Zuma did not merely defy a court order. He ventilated his defiance by making scurrilous statements about this Court and the Judiciary at large, and has repeatedly demonstrated disdain for the judicial process. The applicant submits that these unique features of this case, coupled with the fact that Mr Zuma is a former President, must be considered in the determination of the sentence, which must ultimately vindicate this Court's authority.

[12] In support of the proposed period of two years' imprisonment, the applicant submits that Mr Zuma's contempt of court has entailed several discrete and compounding acts of contempt. These include: his failure to appear at the Commission on any of the five days on which he was summoned to appear; his failure to file any affidavits at the Commission notwithstanding two directives requiring him to do so; his publicly stated intention to defy this Court's order; and his scurrilous statements made against this Court and the Judiciary, in which he purported to justify his contempt. The applicant points out that if Mr Zuma were to be tried for contempt in a criminal court in

terms of the Commissions Act,[10] each of these acts of contempt would be considered and counted individually in determining the sentence, and that would result in a court arriving at a period of four years and six months' imprisonment.[11] The applicant, however, instituting contempt of court proceedings rather than proceedings in terms of the Commissions Act, does not seek a sentence of this length.

[13] Finally, the applicant seeks punitive costs against Mr Zuma on an attorney and own client scale, including the costs of two counsel. This, the applicant submits, is justified because, but for Mr Zuma's reprehensible and malicious conduct, it would not have been required to approach this Court, yet again, at significant public expense.

First respondent

[14] Mr Zuma has not opposed this application, nor has he filed any submissions in this Court, notwithstanding that his submissions on a certain issue were directly sought by this Court after the matter was heard. I return to this in due course.

Second and third respondents

[15] As noted above, the second and third respondents are cited only because the services of SAPS may be required for the purpose of implementing the order sought by the applicant. They have not participated in these proceedings, and no costs are sought against them.

Amicus curiae

[16] HSF applied to be admitted as amicus curiae in this matter. In its submissions, it traversed several legal issues that were relevant to the matter at hand. For present

[10] 8 of 1947.

[11] The period of four years six months' imprisonment comprises six months for each of the five days that Mr Zuma failed to attend the Commission and an additional 12 months in respect of each of his failures to file an affidavit in compliance with the two directives issued in terms of regulation 10(6) of the Regulations of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, GN 105 *GG* 41436, 9 February 2018 (Regulations). These are the maximum periods permitted by the relevant statutory instruments which, the applicant submits, would have applied had he been tried in a criminal court.

purposes, however, I repeat only its main submission, which is that an appropriate sanction in contempt proceedings must play the dual role of vindicating the dignity of the court and compelling compliance with the impugned court order. Thus, it submits that the order of committal sought by the applicant falls short insofar as it fails to serve any coercive purpose. It submits that there is great constitutional and public value in compelling Mr Zuma to co-operate with the Commission which cannot be ignored and which, it submits, is a view it has adopted based on the pronouncements on the value of the Commission's work made by this Court in *CCT 295/20*.

[17] It accordingly suggests that the appropriate sanction may be an order for Mr Zuma's committal for a minimum compulsory period, coupled with either of the following: an order that would curtail any further imprisonment if Mr Zuma voluntarily complies with the obligation to testify before the Commission; or an order directing the Sheriff of the High Court to bring Mr Zuma to the Commission to testify following a mandatory period of imprisonment. It submits that such a sanction would serve the important objective of enabling the Commission to fulfil its truth-seeking purpose, while avoiding the possibility of Mr Zuma successfully and publicly flouting the work of the Commission.

[18] A prospective amicus curiae must satisfy the requirements of rule 10(6) of the Rules of this Court.[12] I am satisfied that HSF's application to be admitted as amicus curiae did indeed meet these requirements, because its submissions are relevant and of assistance to this Court,[13] particularly in relation to the question of sanction. In

[12] Rule 10(6) of the Rules of this Court stipulates:

> "An application to be admitted as an amicus curiae shall –
>
> (a) briefly describe the interest of the amicus curiae in the proceedings;
>
> (b) briefly identify the position to be adopted by the amicus curiae in the proceedings; and
>
> (c) set out the submissions to be advanced by the amicus curiae, their relevance to the proceedings and his or her reasons for believing that the reasons will be useful to the Court and different from those of the other parties."

[13] Id and *CCT 295/20* above n 3 at paras 75-6, where this Court affirmed:

> "It is now settled that the role of an amicus is to help the Court in its adjudication of the proceedings before it. To this end, the applicant for that position must, in its application, concisely set out submissions it wishes to advance if admitted. It must also spell out the

this regard, it has provided for an alternative sanction to that proposed by the applicant. Given that this matter is unopposed, and there is little guidance available to this Court in terms of the appropriate sanction, these submissions are useful to this Court. HSF is therefore admitted as amicus curiae.

Admissibility of evidence

[19] Before I deal with any of the issues for adjudication, I pause to address a preliminary concern that arose during the hearing in relation to the admissibility of certain evidence. The applicant's submissions rely, to a great extent, on the public statements made and issued by Mr Zuma.[14] Despite being extra-curial documents, these public statements are integral to the uniqueness and gravity of this case. It is thus necessary to immediately dispose of any doubt as to whether I am entitled to admit these documents and consider them as evidence. This doubt arises because Mr Zuma has declined to officially come on record to confirm or deny the veracity of these statements and, consequently, they must be regarded as hearsay evidence as defined by the Law of Evidence Amendment Act[15] (LEAA).

[20] I am mindful that this Court must exercise caution when admitting and relying on hearsay evidence, especially in the context of proceedings where a criminal sanction may be imposed.[16] I am accordingly guided by section 3(1)(c) of the LEAA, which provides the requirements for admission and reliance on hearsay evidence.[17]

> relevance of those submissions to the proceedings in question and furnish reasons why the submissions would be helpful to the Court. For the applicant's argument to be useful, it must not repeat submissions already made by other parties.
>
> It is not generally permissible for an amicus to plead new facts which did not form part of the record or adduce fresh evidence on which its argument is to be based. Nor can the amicus expand the relief sought or introduce new relief. This is because an amicus is not a party in the main proceedings and its role is restricted to helping the Court to come to the right decision." (Footnotes omitted.)

[14] In particular, the applicant refers to the public statements issued by Mr Zuma on 1 February 2021 and 15 February 2021.

[15] 45 of 1988 (LEEA). Section 3(4) defines hearsay evidence as "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".

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

[17] Section 3(1) of the LEAA provides:

Importantly, this Court must consider the nature of these proceedings and the evidence itself, the purpose for which the evidence is tendered, the probative value of the evidence, the reason that it is not given first-hand by the person upon whose credibility it depends, and any prejudice that the admission of the evidence may entail.

[21] These urgent proceedings are neither criminal nor civil, but a sui generis (unique) amalgamation of the two. More on this later. The evidence in question is a series of public statements purportedly made by Mr Zuma. The applicant relies on these statements as evidence of the severity of this particular case of contempt of court, and to demonstrate that it is part of a deliberate attack on this Court's authority. The probative value of these statements is merely that they exist in the public domain, and that they were publicised by, or on behalf of, Mr Zuma. The reason that they constitute hearsay evidence in these proceedings is obvious: Mr Zuma has brazenly refused to participate, and it was neither practical nor possible for this Court to secure his participation to admit or refute his connection to the statements.[18]

"Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—

. . .

(c) the court, having regard to—

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account;

is of the opinion that such evidence should be admitted in the interests of justice."

[18] The possibility and practicality of securing the co-operation of the person upon whose credibility the probative value of the hearsay evidence depends was considered relevant to the section 3(1)(c) enquiry by the Supreme Court of Appeal in *Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security* [2011] ZASCA 220; 2012 (2) SA 137 (SCA) (*Giesecke*) at para 29.

[22] The main question, then, is whether Mr Zuma will suffer any prejudice if this Court admits and relies on these statements as evidence of the sinister and extreme nature of the contempt. The reason that hearsay evidence is generally inadmissible is that it presents litigants, and particularly accused persons, with the procedural challenge of having to refute evidence without the benefit of cross examination.[19] It follows that this procedural prejudice "must be weighed against the reliability of the hearsay evidence in deciding whether, despite the inevitable prejudice, the interests of justice require its admission".[20]

[23] In this truly unique matter, the veracity of the hearsay evidence depends on the respondent. The statements were attached to the founding affidavit, and it is inconceivable that Mr Zuma could be unaware of their relevance to the sanction sought by the applicant. If the publication of these statements had no relation to him, he could have provided an explanation – either publicly or in these proceedings. He did not. He even had an additional opportunity to dispute his connection to these statements after the hearing of the matter. However, to date, Mr Zuma has made no attempt to distance himself from these statements. Although the admission of these statements will undoubtedly prejudice Mr Zuma's case, the intention behind section 3(1)(c) of the LEAA is to create flexibility so that hearsay evidence may be admitted when the interests of justice, and indeed common sense, demand it.[21] I am satisfied that these circumstances exist in this matter, and that there is nothing preventing this Court from admitting these statements as evidence. No more needs to be said on this.

Jurisdiction

[24] This matter engages this Court's constitutional jurisdiction. These being contempt proceedings, at issue is whether Mr Zuma has wilfully defied this Court's order in *CCT 295/20*. Accordingly, this Court's power to protect its own processes in

[19] See *Giesecke* id at paras 32-4 and *Ndhlovu* above n 16 at para 49.

[20] *Ndhlovu* id.

[21] *Giesecke* above n 18 at para 28 and *Ndhlovu* id at para 15.

terms of section 173 of the Constitution is implicated.[22] Indeed, section 173 gives this Court the flexibility to be responsive in an emergent and transforming democracy. When the constitutional safeguards for the Judiciary are undermined so egregiously, section 173 empowers this Court to respond swiftly and effectively in its own interests and in the interests of justice.

[25] This matter also concerns the protection of the authority of the Judiciary to carry out its constitutional functions vested in it by section 165 of the Constitution,[23] and the safeguarding of the rule of law, the supremacy of the Constitution, and the values that lie at the heart of our constitutional order.

[26] The thrust of section 165 of the Constitution was expounded by Nkabinde J in *Pheko II*, in which it was stated that—

> "[t]he rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of State to which they apply, and no person or organ of State may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery.

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[22] Section 173 of the Constitution provides:

> "The Constitutional Court . . . has the inherent power to protect and regulate [its] own process, and to develop the common law, taking into account the interests of justice."

[23] Section 165 of the Constitution provides:

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

> The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.
>
> Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of State. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest."[24]

[27] Contempt of court proceedings exist to protect the rule of law and the authority of the Judiciary. As the applicant correctly avers, "the authority of courts and obedience of their orders – the very foundation of a constitutional order founded on the rule of law – depends on public trust and respect for the courts". Any disregard for this Court's order and the judicial process requires this Court to intervene. As enunciated in *Victoria Park Ratepayers' Association*, "contempt jurisdiction, whatever the situation may have been before 27 April 1994, now also involves the vindication of the Constitution".[25] Thus, the issues at the heart of this matter are irrefutably constitutional issues that engage this Court's jurisdiction.

Direct access

[28] Whilst our jurisdiction is engaged, I must still apply myself to the question of whether it is in the interests of justice to grant direct access to this Court. This, because the applicant approaches this Court on an urgent basis and seeks direct access in terms of rule 18 of the Rules of this Court.[26] Rule 18 gives effect to section 167(6)(a) of the

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[24] *Pheko II* above n 6 at paras 1-2.

[25] *Victoria Park Ratepayers' Association v Greyvenouw CC* 2004 JDR 0498 (SE) at para 23.

[26] Rule 18 of the Rules of this Court provides:

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

Constitution.[27] In terms of these provisions, direct access will be granted when it is in the interests of justice to do so.

[29] The matter is self-evidently extraordinary. It is thus in the interests of justice to depart from ordinary procedures. Never before has this Court's authority and legitimacy been subjected to the kinds of attacks that Mr Zuma has elected to launch against it and its members. Never before has the judicial process been so threatened. Accordingly, it is appropriate for this Court to exercise its jurisdiction and assert its special authority as the apex Court and ultimate guardian of the Constitution, to the exclusion of the aegis of any other court. It goes without saying that neither the public's vested interests, nor the ends of justice, would be served if this matter were to be required to traverse the ordinary, and lengthy, appeals process that would render the

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(c) whether the matter can be dealt with by the Court without the hearing of oral evidence and, if it cannot;

(d) how such evidence should be adduced and conflicts of fact resolved.

(3) Any person or party wishing to oppose the application shall, within 10 days after the lodging of such application, notify the applicant and the Registrar in writing of his or her intention to oppose.

(4) After such notice of intention to oppose has been received by the Registrar or where the time for the lodging of such notice has expired, the matter shall be disposed of in accordance with directions given by the Chief Justice, which may include—

(a) a direction calling upon the respondents to make written submissions to the Court within a specified time as to whether or not direct access should be granted; or

(b) a direction indicating that no written submissions or affidavits need be filed.

(5) Applications for direct access may be dealt with summarily, without hearing oral or written argument other than that contained in the application itself: Provided that where the respondent has indicated his or her intention to oppose in terms of subrule (3), an application for direct access shall be granted only after the provisions of subrule (4)(a) have been complied with."

[27] Section 167(6) of the Constitution provides:

"National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—

(a) to bring a matter directly to the Constitutional Court; or

(b) to appeal directly to the Constitutional Court from any other court."

Section 29(3) of the Superior Courts Act 10 of 2013, which mirrors section 167(6), provides:

"The rules must, when it is in the interests of justice and with the leave of the Court, allow a person—

(a) to bring a matter directly to the Court; or

(b) to appeal directly to the Court from any other court."

litigation protracted. The urgency with which this matter must be disposed of, a subject I deal with next, does not admit of that kind of delay.

[30] Not only is Mr Zuma's behaviour so outlandish as to warrant a disposal of ordinary procedure, but it is becoming increasingly evident that the damage being caused by his ongoing assaults on the integrity of the judicial process cannot be cured by an order down the line. It must be stopped now. Indeed, if we do not intervene immediately to send a clear message to the public that this conduct stands to be rebuked in the strongest of terms, there is a real and imminent risk that a mockery will be made of this Court and the judicial process in the eyes of the public. The vigour with which Mr Zuma is peddling his disdain of this Court and the judicial process carries the further risk that he will inspire or incite others to similarly defy this Court, the judicial process and the rule of law.

[31] It is not insignificant that his assaults and his alleged contempt are ongoing and relentless, as this underscores the urgency. In *Protea Holdings*, the Court said that "if there was no continuing contempt of court . . . then the hearing of this application as a matter of urgency in the Court vacation would not be justified".[28] It held that—

> "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."[29]

[32] A similar point was made in *Victoria Park Ratepayers' Association*, in which it was said that—

> "[c]ontempt of court has obvious implications for the effectiveness and legitimacy of the legal system and the judicial arm of government. There is thus a public interest element in each and every case in which it is alleged that a party has wilfully and in

[28] *Protea Holdings Limited v Wriwt* 1978 (3) SA 865 (W) (*Protea Holdings*) at 867G.

[29] Id at 868H.

> bad faith ignored or otherwise failed to comply with a court order. This added element provides to every such case an element of urgency."[30]

[33] In that case, the Court went further to state that—

> "it is not only the object of punishing a respondent to compel him or her to obey an order that renders contempt proceedings urgent: the public interest in the administration of justice and the vindication of the Constitution also render the ongoing failure or refusal to obey an order a matter of urgency. This, in my view, is the starting point: all matters in which an ongoing contempt of an order is brought to the attention of a court must be dealt with as expeditiously as the circumstances, and the dictates of fairness, allow."[31]

[34] Accordingly, I am enjoined to take stock of the relentlessness of the alleged contempt at issue. It cannot be gainsaid that the longer that Mr Zuma's recalcitrance is allowed to sit in the light, and heat, of day, so the threat faced by the rule of law and the administration of justice, curdles. The ongoing defiance of this Court's order, by its very nature, renders this matter urgent.[32] In fact, rarely do matters arrive at the door of this Court so deserving of decisive and urgent intervention.

[35] I have had the benefit of reading the second judgment penned by Theron J. My Sister is of the view that, whilst this matter warrants consideration on an urgent basis, unless this Court seeks to compel compliance with the order in *CCT 295/20*, it was not appropriate for the applicant to bring an urgent application for a punitive sanction through motion proceedings.[33] To my Sister, this matter is infused with an element of urgency only if Mr Zuma is ordered to co-operate with the work of the Commission, and not if a punitive order of direct committal is made. I feel compelled to dispose of this argument, at this earliest opportunity to clarify that, whatever this

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[30] *Victoria Park Ratepayers' Association* above n 25 at para 5.

[31] Id at paras 26-7.

[32] Id at para 26, where the Court expressly said this.

[33] Second judgment at [230] and [244].

Court decides to do, it is to be done on an urgent basis. In the light of all of the above, let me reiterate that it is the continued and persistent contemptuous conduct that renders this matter urgent, because its persistence risks denigrating the rule of law and the authority of the Judiciary. Accordingly, it is not the lifespan of the Commission alone that justifies urgency, but rather the need to put an end to Mr Zuma's contempt and vindicate the authority of this Court. Ultimately, urgency does not depend on the nature of the sanction eventually to be imposed, and the second judgment incorrectly takes this approach.

[36] It is perspicuous that it is in the broad public interest that this Court sends an unequivocal message that its orders cannot simply be ignored with impunity. If this Court does not exercise its jurisdiction to do so and thereupon grant direct access, its authority becomes phantasmic, and the Constitution this Court exists to uphold, chimeric. No more needs to be said. Because of these exceptional circumstances it is in the interests of justice to grant direct access, and to do so on an urgent basis.

Is Mr Zuma in contempt of court?

[37] As set out by the Supreme Court of Appeal in *Fakie*, and approved by this Court in *Pheko II*, it is trite that an applicant who alleges contempt of court must establish that (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.[34] Once these elements are established, wilfulness and mala fides are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt.[35] Should the respondent fail to discharge this burden, contempt will have been established.

[34] See *Pheko II* above n 6 at para 32; *Fakie* above n 8 at para 22; and *Consolidated Fish* above n 4 at 522E-H, which affirms *Southey v Southey* 1907 EDC 133 at 137.

[35] *Fakie* id at paras 41-2 and endorsed by this Court in *Pheko II* id at para 36. Additionally, in *Uncedo Taxi Service Association v Maninjwa* 1998 (3) SA 417 (E) (*Maninjwa*) at 425C-G and 428A-C, it was held that the fundamental right to a fair criminal trial guaranteed by section 35(3) of the Constitution requires that, in order for an applicant in contempt proceedings to succeed, he or she must prove the elements of the offence beyond reasonable doubt. This principle was cited in *Victoria Park Ratepayers' Association* above n 25 at para 17.

[38] On the evidence placed before this Court, there can be no doubt that Mr Zuma is in contempt of court. It needs no repetition that this Court handed down a judgment and order in favour of the applicant in *CCT 295/20*. Mr Zuma was served with the order, which service was effected at both his properties in Forest Town and Nkandla. Proof of service can be found in the record. Also to be found in the record are the public statements Mr Zuma made in respect of the order against him in *CCT 295/20*. Accordingly, it is impossible to conclude anything other than that he was unequivocally aware of the order and had knowledge of exactly what it required of him.

[39] The applicant submits that Mr Zuma failed to appear and give evidence before the Commission on the dates so ordered. He also failed to file any affidavit in accordance with the Chairperson's directives under regulation 10(6).[36] He is therefore in violation of this Court's order in *CCT 295/20*, specifically paragraphs 4 and 5.[37]

[40] This Court cannot have reason to doubt the veracity of the applicant's assertions. And, in any event, the extent of the breach has not been challenged by Mr Zuma who, instead, has taken to multiple public platforms upon which he has affirmed the extent of his non-compliance. Those public utterances impliedly confirm not only that he is aware of the order and its contents, but also that he stridently elects to remain in defiance of it. Most importantly, Mr Zuma has not presented any evidence before this Court to establish a reasonable doubt as to whether his disobedience of this Court's order was wilful and mala fide.

[41] As held in *Pheko II*—

> "the presumption rightly exists that when the first three elements of the test for contempt have been established, mala fides and wilfulness are presumed unless the

[36] See regulation 10(6) of the Regulations, which provides:

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

[37] See above n 5.

> contemnor is able to lead evidence sufficient to create a reasonable doubt as to their existence. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established."[38]

[42] As demonstrated, the three elements have been established. Notwithstanding that Mr Zuma has been afforded the opportunity to advance evidence before this Court to contest his wilfulness or mala fides, he has outright refused to do so. This Court cannot but find for the applicant on this because Mr Zuma bore an evidentiary burden to refute the allegation of contempt, which he elected not to discharge. Accordingly, contempt of court has been established beyond any doubt. In fact, Mr Zuma's contempt of this Court's order is both extraordinary and unprecedented in respect of just how blatant it is.

[43] Before proceeding, I must firmly allay any doubts as to the judicial value of the purported defences raised by Mr Zuma in his public statements. Mr Zuma's extra-curial statements are of no relevance to the question whether he is guilty of contempt. So, his endeavour in those statements to provide reasons for his defiance of this Court's order is of no moment. The fact is, he has defied this Court's order. And the statements are a far cry from what is required of him as a respondent in contempt proceedings, as outlined above. As I read *Wickee*, proof of bona fides raised in justification of the contempt by the respondent will serve as a defence to an application for committal in the case of direct contempt.[39] However, the evidentiary burden to prove bona fides rests solely at the feet of the respondent.[40] The point is that even if there were bona fide reasons for Mr Zuma's non-compliance, it would be wholly inappropriate for this Court to search for them. Nor would it be appropriate for this Court to treat Mr Zuma's statements as any kind of attempt to participate in these proceedings or discharge the evidentiary burden he bore, given that these submissions were not properly placed

[38] *Pheko II* above n 6 at para 36.

[39] *Wickee v Wickee* 1929 WLD 145 at 148, cited in *Consolidated Fish* above n 4 at 524A-E.

[40] *Fakie* above n 8 at para 22.

before it. In sum, these "defences", so to speak, are not formally pleaded and fall to be disregarded.

[44] The scurrilous and defamatory aspects of these statements, on the other hand, are bound to inform my reasoning on the appropriate sanction[41] as they are inextricably linked to the public nature of the defiance of this Court's order. However, the remaining aspects of these statements, namely the extent to which the statements attempt to justify his contempt, are utterly irrelevant for our purposes.

[45] It being perspicuous that Mr Zuma is in contempt of this Court's order in *CCT 295/20*, the crisp question with which I am seized is the appropriate sanction. It is to this that I now turn.

What is the appropriate sanction?

[46] For I am not in the habit of playing my cards close to my chest, let me, at this earliest opportunity, state that Mr Zuma has earned himself a punitive sanction of direct and unsuspended committal.

The purposes of contempt orders

[47] I should start by explaining how the purposes of contempt of court proceedings should be understood. As helpfully set out by the minority in *Fakie*, there is a distinction between coercive and punitive orders, which differences are "marked and important".[42] A coercive order gives the respondent the opportunity to avoid imprisonment by complying with the original order and desisting from the offensive conduct. Such an order is made primarily to ensure the effectiveness of the original order by bringing about compliance. A final characteristic is that it only incidentally vindicates the authority of the court that has been disobeyed.[43] Conversely, the following are the

[41] See [19].

[42] *Fakie* above n 8 at para 76.

[43] Id at para 74.

characteristics of a punitive order: a sentence of imprisonment cannot be avoided by any action on the part of the respondent to comply with the original order; the sentence is unsuspended; it is related both to the seriousness of the default and the contumacy of the respondent; and the order is influenced by the need to assert the authority and dignity of the court, to set an example for others.[44]

The inappropriateness of a coercive order

[48] A coercive order would be both futile and inappropriate in these circumstances. Coercive committal, through a suspended sentence, uses the threat of imprisonment to compel compliance.[45] Yet, it is incontrovertible that Mr Zuma has no intention of attending the Commission, having repeatedly reiterated that he would rather be committed to imprisonment than co-operate with the Commission or comply with the order of this Court. Accordingly, a suspended sentence, being a coercive order, would yield nothing. In *CCT 295/20*, this Court was at pains to point out how Mr Zuma had been afforded, perhaps too generously at times, ample opportunities to submit to the authority of the Commission. Notwithstanding that I recognise the importance of the work of the Commission, being guided by what this Court said in *CCT 295/20*, I do not think this Court should be so naïve as to hope for his compliance with that order. Indeed, it defies logic to believe that a suspended sentence, which affords Mr Zuma the option to attend, would have any effect other than to prolong his defiance and to signal dangerously that impunity is to be enjoyed by those who defy court orders.

[49] Corruption, as is under investigation by the Commission, is a cancer that threatens our constitutional order and the human rights to which it seeks to give meaning.[46] I am not abandoning what this Court said in *CCT 295/20* when it held that the allegations investigated by the Commission are extremely serious.[47] And I am not

[44] Id at para 75.

[45] Id at para 30.

[46] *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at para 166.

[47] *CCT 295/20* above n 3 at para 70.

departing from the view that Mr Zuma's testifying before the Commission is imperative, given that it was under his Presidency that the alleged corruption and malfeasance uncovered by the Public Protector, and now under investigation by the Commission, took place. Nor am I disputing that society holds a vested interest in the truth concerning serious allegations of State Capture, corruption and fraud being uncovered, because, if found to be veracious, these allegations would indeed implicate the constitutional order of the Republic itself.[48] According to Theron J, all of this culminates in the need to prioritise compelling Mr Zuma's compliance.[49] Notwithstanding all of what I have said above, I consider a purely punitive order to be the appropriate sanction because I am alive to the reality that there is simply no hope remaining that Mr Zuma will attend the Commission. At this stage, ordering and then expecting Mr Zuma's compliance with this Court's order is akin to flogging a dead horse. To the extent that the second judgment would have us persist in the flogging exercise, I cannot support such an approach, which I fear would render this judgment a *brutum fulmen* (an ineffectual legal judgment).

[50] Mr Zuma has demonstrated a marked disregard for the authority of this Court and is resolute in his refusal to participate in the Commission's proceedings. Thus, it is impossible to see that a coercive order would achieve any of the purposes of contempt proceedings: neither this Court's honour, nor the public's interest in Mr Zuma's testifying before the Commission, would be vindicated by the making of a coercive order. If anything, I am alert to the fact that the public has an equally important, if not more acute, interest in a functioning Judiciary than in Mr Zuma's testifying before the Commission. Given that any hope of Mr Zuma's attendance was long ago dashed on the rocks, I would rather ensure that this society is one in which deference is shown to the rule of law, than continue to try, with what I know will be to no avail, to compel this most recalcitrant of individuals. Compulsion will inevitably result in further acts of defiance and contempt.

[48] Id at paras 69-70.

[49] Second judgment at [191] and [260].

[51] For all of the reasons set out above, I am likewise not convinced by HSF's proposal of a partially-suspended sentence. HSF argues that the public interest dictates an order in favour of compelling compliance with the order in *CCT 295/20*, and that a purely punitive order would compromise the public's interest as it would afford no opportunity for Mr Zuma to cure his contempt. I reiterate that, with or without a coercive order, Mr Zuma has made it clear that he will not purge his contempt. He has offered neither contrition nor apology, let alone any suggestion that he intends to obey an existing or future order of this Court. A partially suspended sentence equally muddies the waters in a matter where the appropriate sanction is glaringly obvious.

[52] I am further troubled by the fact that an order of committal that is conditional upon further non-compliance by Mr Zuma fails to address his already contemptuous conduct and wields no punitive power in respect of his conduct that is already, without more, worthy of rebuke. Were a coercive order to be made, the punitive effect of it would only operate upon future non-compliance, which is essentially to say that it would be that act of further non-compliance, as opposed to the already existing non-compliance, that would become punishable. Mr Zuma has done more than enough already to deserve a punitive sanction. A coercive order that employs the threat of imprisonment in the event of further non-compliance would be incapable of vindicating the extent to which this Court's authority has already been violated. As expounded in *Fakie*, a coercive order only incidentally vindicates a court's honour: mere incidental vindication is far from what is warranted in these circumstances, which demand direct and incisive vindication.

[53] Although I prefer the delineation by the minority in *Fakie* as to the purposes of coercive and punitive orders, I am alive to the fact that the majority rejected the idea that there is a bright line between the two, maintaining that the binary between seeking enforcement through a contempt order and vindicating the authority of the court may be a false one. It held that the enforcement of an order in contempt proceedings has a public dimension, and that it is almost impossible to disentangle the punitive from the

coercive purposes of contempt orders.[50] The second judgment relies heavily on this point. It is pertinent then, that I express that I am not suggesting that a coercive order is always or inherently incapable of vindicating a court's authority. There may very well be circumstances in which a coercive order is capable, at the same time as ensuring compliance, of vindicating a court's honour and the integrity of the judicial process. However, this is not one of those cases. In these truly peculiar circumstances, it is impossible to see how either the public's interest in Mr Zuma's testifying before the Commission, or this Court's own interest in vindicating its integrity, would be satisfied by making a coercive order. If anything, a coercive order, likely only to be further defied, would plunge the integrity of this Court into even deeper waters.

[54] Whilst it is trite that this Court enjoys wide remedial discretion to determine appropriate relief, it is also trite that, in determining appropriate relief in contempt proceedings, this Court should be guided by the approach adopted by other courts. On numerous occasions, it has been confirmed that "the principal purpose of contempt of court proceedings when an order has been disobeyed has been the imposition of a penalty in order to vindicate the Court's honour consequent upon the disregard of its order . . . and to compel the performance thereof".[51] It is indeed the accepted practice in contempt matters to seek compliance, using punishment as a means of coercing same.[52] In other words, committal is ordered for coercive purposes and made conditional upon non-compliance with a mandamus or interdict.

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[50] Similarly, in *Witham v Holloway* [1995] HCA 3 at para 15, the Australian High Court held that—

> "there is not a true dichotomy between proceedings in the public interest and proceedings in the interest of the individual. Even when proceedings are taken by the individual to secure the benefit of an order or undertaking that has not been complied with, there is also a public interest aspect in the sense that the proceedings also vindicate the court's authority. Moreover, the public interest in the administration of justice requires compliance with all orders and undertakings, whether or not compliance also serves individual or private interests."

[51] *Victoria Park Ratepayers' Association* above n 25 at para 19; *Protea Holdings* above n 28 at 868A-B; *Ferreira v Bezuidenhout* 1970 (1) SA 551 (O) at 552G. See also *Pheko II* above n 6 at para 28 and *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* [2014] ZASCA 209; 2015 (2) SA 413 (SCA) (*Meadow Glen*) at para 16 where the Supreme Court of Appeal held that "[a]lthough some punitive element is involved, the main objectives of contempt proceedings are to vindicate the authority of court and coerce litigants into complying with court orders".

[52] *Cape Times Ltd v Union Trades Directories (Pty) Ltd* 1956 (1) SA 105 (N) (*Cape Times*).

[55] In *Protea Holdings*, the Court held that, despite giving anxious consideration as to whether or not to order direct imprisonment—

> "I must, however, bear in mind that a Court is loath to restrict the personal liberty of the individual in matters of this kind . . . and that, if a period of imprisonment in this type of case is imposed, it is usually or often suspended."[53]

To the extent that the second judgment stresses this,[54] it is not wrong. Moreover, I cannot ignore the fact that I have yet to come across a case in which a solely punitive order of immediate committal has been made, or where punishment is not calculated to coerce the recalcitrant to comply with the initial order.[55]

[56] However, I am alive to the fact that the case before us is so markedly distinct from any matter that has preceded it, that it exceeds the expectations of legal precedent. The result is that, despite my efforts, I have found very little solace in our jurisprudence. The extent and gravity of the contempt in this matter is singularly unprecedented and absolutely inimitable. All of the cases to which I have had regard are woefully inadequate in the face of these circumstances. For instance, coercive orders tend to be accompanied by a reasonable hope that the contemnor will desist from their contempt.[56] The factual matrix of this matter has served to undermine the usefulness of precedent at almost every turn. Whereas in other cases there was reason to hope for compliance, as I have already said, there is no hope to be had that Mr Zuma will desist from his contempt. So, I cannot think of anything more inappropriate than ordering a fine or a suspended period of imprisonment.

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[53] *Protea Holdings* above n 28 at 872B-C.

[54] Second judgment at [151]-[152].

[55] For example, *Cape Times* above n 52 at 120D-G.

[56] *Protea Holdings* above n 28 at 872C-D where a fine with a period of imprisonment was ordered and "suspended on certain conditions [because] one hopes that this will have a salutary effect on the respondents and ensure that they desist from and do not repeat their conduct".

[57] I acknowledge that the decision at which I arrive, namely an order of direct committal, may constitute an unprecedented step forward on the trajectory of contempt litigation. That being said, I am wholeheartedly of the view that this flows from legal precedent, as I will demonstrate. After all, it is not this judgment that is coming up for the first time with the idea that a purely punitive order is possible under our law. This judgment may be unprecedented, then, only to the extent that it does actually impose a punitive sanction. In that regard, let me say that there can be no better time, and no case more unprecedented, than this with which I am seized. To the extent that the second judgment insinuates that I am creating precedent to punish Mr Zuma alone,[57] my Sister is mistaken. I do no more than apply the law, cautiously, to these new and unusual circumstances.

[58] Although I acknowledge that, for the most part, our jurisprudence has left me up the creek without a paddle, I must say that it is perilous to rely on irrelevant precedent, and I find the second judgment's reliance on *Botha*[58] to be misplaced. The second judgment suggests that *Botha* is analogous with the matter we are seized with.[59] It suggests that, because in that case, Mr Botha, upon refusing to give evidence before the Truth and Reconciliation Commission (TRC) in breach of the Commissions Act, was subsequently referred to the prosecuting authority, we should do the same here. Let me emphasise that this matter is unequivocally distinguishable: that was not a case of contempt of court. Thus, a cause of action in contempt of court proceedings was never available to the TRC. The present matter differs drastically in this regard, because the Commission obtained an order of this Court declaring that Mr Zuma must comply with its directives and summonses. It is this order of court that Mr Zuma is in breach of, not the Commissions Act. So, to imply that the applicant ought to have done what the TRC did is an illogical and indefensible proposition. It would be nonsensical for this Court to tell a litigant that she or he is not entitled to exercise a rightful cause of action on the

[57] Second judgment at [191].

[58] *S v Botha* 1999 (2) SACR 261 (C) (*Botha*).

[59] Second judgment at [251]-[255].

basis that another litigant, who never bore that same right, took a different course of action.

The importance of ensuring that court orders are obeyed

[59] It cannot be gainsaid that orders of court bind all to whom they apply.[60] In fact, all orders of court, whether correctly or incorrectly granted, have to be obeyed unless they are properly set aside.[61] This, in addition to typifying common sense, the Constitution itself enjoins. Section 165(5) of the Constitution itself provides that an order or decision binds all persons to whom it applies. The reason being that ensuring the effectiveness of the Judiciary is an imperative. This has been confirmed in multiple cases, including *Mjeni*, in which the Court stated that "there is no doubt, I venture to say, that [complying with court orders] constitutes the most important and fundamental duty imposed upon the State by the Constitution".[62] On this, the then Chief Justice Mahomed, writing extra-curially in 1998, said:

> "The exact boundaries of judicial power have varied from time to time and from country to country, but the principle of an independent Judiciary goes to the very heart of sustainable democracy based on the rule of law. Subvert it and you subvert the very foundations of the civilisation which it protects . . . . What judicial independence means in principle is simply the right and the duty of Judges to perform the function of judicial adjudication through an application of their own integrity and the law, without any actual or perceived, direct or indirect interference from or dependence on any person or institution."[63]

[60] As this Court held in *Tasima I*, "the obligation to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system . . . and is the stanchion

[60] *Pheko II* above n 6 at para 1 and *Victoria Park Ratepayers' Association* above n 25 at para 22.

[61] *Culverwell v Beira* 1992 (4) SA 490 (W) at 494A.

[62] *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk) at 452C-E, which was cited by Kirk-Cohen J in *Federation of Governing Bodies of South African Schools v MEC for Education, Gauteng* [2016] ZACC 14; 2016 (4) SA 546 (CC); 2016 (8) BCLR 1050 (CC) at 678G-679A.

[63] Mahomed CJ in a speech published in (1998) 115 *SALJ* 111 at 112, as quoted in *Federation of Governing Bodies of South African Schools* id at 679C-E.

around which a State founded on the supremacy of the Constitution and the rule of law is built".[64] It is perspicuous that the constitutional right of access to courts will be rendered an illusion unless orders made by courts are capable of being enforced by those in whose favour the orders were made.[65] In *SALC*, it was said that "if the State, an organ of State or State official does not abide by court orders, the democratic edifice will crumble stone by stone until it collapses and chaos ensues".[66] A complete denial of judicial mechanisms "would render meaningless the whole process of taking disputes to courts for adjudication and that is a recipe for chaos and disorder".[67] Accordingly, it is necessary for this Court to send, by virtue of a punitive sanction, an unequivocal message that its orders must be obeyed.

[61] Finally, I hasten to point out that "contempt of court is not an issue *inter-partes* [(between the parties)]; it is an issue between the court and the party who has not complied with a mandatory order of court".[68] Notwithstanding that this order derives its life force from *CCT 295/20*, these proceedings are a different creature altogether. We are not required to pursue the same purpose as we did in *CCT 295/20*: to order Mr Zuma to attend the Commission. Indeed, in *Pheko II*, this Court noted that "[a]t its origin the crime being denounced is the crime of disrespecting the courts, and ultimately the rule of law".[69] Although the harm caused to successful litigants, like the applicant, through contempt of court is by no means unimportant, the overall damage caused to society by conduct that poses the risk of rendering the Judiciary ineffective and eventually powerless is at the very heart of why our law forbids such conduct. Therefore, as I have already said, the mischief I am called upon to address is not that

[64] *Department of Transport v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) (*Tasima I*) at para 183.

[65] *Federation of Governing Bodies of South African Schools* above n 62 at 679E-G.

[66] *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* 2015 (5) SA 1 (GP) (*SALC*) at para 37.2.

[67] *Federation of Governing Bodies of South African Schools* above n 62 at 678F-G.

[68] Id at 673C-D, which was reiterated by Cameron JA in *Fakie* above n 8 at para 38.

[69] *Pheko II* above n 6 at para 31

Mr Zuma failed to comply with the summons, but rather, that he failed to comply with the order of this Court.

[62] Notwithstanding this, I might have been persuaded to compel compliance had I been given a single reason to believe doing so would be a fruitful exercise. As it will not be fruitful, I defer to what was said in *Victoria Park Ratepayers' Association*:

> "Contempt of court is not merely a means by which a frustrated successful litigant is able to force his or her opponent to obey a court order. Whenever a litigant fails or refuses to obey a court order, he or she thereby undermines the Constitution. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest."[70]

Indeed, at the core of these contempt proceedings lies not only the integrity of this Court and the Judiciary, but the vindication of the Constitution itself.[71]

Mr Zuma's constitutional rights in respect of sanction

[63] Since all of this led this Court in the direction of an unsuspended order of committal, this Court was alive to the need to consider, and indeed safeguard, Mr Zuma's constitutional right to freedom. Accordingly, we issued directions on 9 April 2021, in which we invited Mr Zuma to file an affidavit on an appropriate sanction and sentence in the event that he is found to be in contempt of this Court's order.[72] The reason behind this was that this Court is acutely aware that contempt

[70] *Victoria Park Ratepayers' Association* above n 25 at para 23.

[71] Id where it was stated:

> "[I]t is clear that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. In this sense, contempt of court must be viewed in a particularly serious light in a constitutional State such as ours that is based on the democratic values listed in section 1 of the Constitution, particularly those of constitutional supremacy and the rule of law."

[72] The directions issued by this Court on 9 April 2021 directed Mr Zuma to file written submissions in the following terms:

proceedings are hybrid in nature as, although brought by civil process, they have a criminal component.[73] We issued the directions mindful of that criminal component.

[64] After conviction in a conventional criminal trial, it is a violation of an accused person's right to a fair trial under section 35 of the Constitution to proceed to impose a sentence without affording her or him an opportunity to say something in mitigation of sentence. The right to be afforded an opportunity to say something in mitigation of sentence flows from the residual fair trial right contained in section 35(3) of the Constitution. The right is residual because section 35(3) stipulates that it "includes" a number of itemised fair trial rights. And our jurisprudence has repeatedly affirmed that ordinarily the words "includes" or "including" mean that what is being itemised does not constitute an exhaustive list.[74] So, the right to a fair trial entails more than the rights that are specifically itemised. Under the Constitution, being afforded an opportunity to say something on an appropriate sentence or in mitigation of sentence is a right, and not merely a privilege extended to an accused person upon request.

[65] However, this is not a conventional criminal trial. And, I emphasise that I am alive and deferential to the jurisprudence of this Court that affirms that "a respondent in contempt proceedings . . . is not an 'accused person' as envisioned by section 35 of the Constitution".[75]

> "The first respondent is directed to file an affidavit of no longer than 15 pages on or before Wednesday, 14 April 2021 on the following issues:
>
> a) In the event that the first respondent is found to be guilty of the alleged contempt of court, what constitutes the appropriate sanction; and
>
> b) In the event that this Court deems committal to be appropriate, the nature and magnitude of sentence that should be imposed, supported by reasons."

[73] See *S v Beyers* 1968 (3) SA 70 (A) at 80C-E (*Beyers*) where it was held that although the proceedings are or may be civil in nature, the contempt constitutes a criminal offence.

[74] See *New Nation Movement NPC v President of the Republic of South Africa* [2020] ZACC 11; 2020 (6) SA 257 (CC); 2020 (8) BCLR 950 (CC) at para 17 and *Minister of Health v New Clicks South Africa (Pty) Limited* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 455.

[75] *Pheko II* above n 6 at para 36 where this Court affirmed the Supreme Court of Appeal's reasoning in *Fakie* above n 8 which held, at para 42:

> "To sum up:

[66] Notwithstanding this distinction, Mr Zuma does indeed face the prospect of imprisonment for unlawful conduct that our law defines as an offence. It is useful and instructive to consider the Supreme Court of Appeal's characterisation of a contempt application, which it describes as "a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat".[76] In dealing with this sui generis process, it further held:

> "[I]n interpreting the ambit of the right's procedural aspect, it seems to me entirely appropriate to regard the position of a respondent in punitive committal proceedings as closely analogous to that of an accused person; and therefore, in determining whether the relief can be granted without violating section 12 [of the Bill of Rights], to afford the respondent such substantially similar protections as are appropriate to motion proceedings . . . .
>
> I follow this path because the civil process for a contempt committal is an oddity that is distinctive in its combination of civil and criminal elements, and it seems undesirable to straitjacket it into the protections expressly designed for a criminal accused under section 35. Certainly, not all of the rights under that provision will be appropriate to or could easily be grafted onto the hybrid process."[77]

[67] What is undoubtedly apparent from this is that, although a contemnor in contempt proceedings does not elegantly fit into the category of an accused person for the purposes of the protections afforded by section 35, he or she remains entitled to his or her rights in terms of section 12.[78] And, to the extent that I acknowledge the

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> (a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.
>
> (b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings."

[76] *Fakie* id at para 8.

[77] Id at paras 25-6.

[78] Section 12(1) of the Constitution states:

> "Everyone has the right to freedom and security of the person, which includes the right—
>
> (a) not to be deprived of freedom arbitrarily or without just cause;

importance of section 12, this judgment does not differ from that of my Sister, Theron J.[79] Importantly, section 12 includes the right not to be deprived of freedom arbitrarily or without just cause. This Court has, on numerous occasions, confirmed that this right entails both substantive and procedural protections.[80] On the procedural front, the right requires that no one be deprived of physical freedom unless a fair procedure has been followed. In *De Lange*, O'Regan J went as far as interpreting the procedural protection afforded by the right not to be deprived of freedom arbitrarily as demanding "a high standard of procedural fairness".[81] This principle was echoed in *Fakie*, where the Court held that—

> "[t]here can be no reason why these protections should not apply also where a civil applicant seeks an alleged contemnor's committal to prison as punishment for non-compliance. This is not because the respondent in such an application must inevitably be regarded as an 'accused person' for the purposes of section 35 of the Bill of Rights. On the contrary . . . it does not seem correct to me to insist that such a respondent falls or fits within section 35. Section 12 of the Bill of Rights grants those who are not accused of any offence the right to freedom and security of the person, which includes the right not only 'not to be detained without trial', but 'not to be deprived of freedom arbitrarily or without just cause'. This provision affords both substantive and procedural protection, and an application for committal for contempt must avoid infringing it."[82]

[68] Therefore, although a contemnor is not an accused person as envisaged by section 35, the fair procedure required by section 12 may, depending on the

(b) not to be detained without trial;

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way."

[79] Second judgment at [197]-[198].

[80] See *Smit v Minister of Justice and Correctional Services* [2020] ZACC 29; 2021 (3) BCLR 219 (CC) at paras 101-2; *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 37; *De Lange v Smuts N.O.* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at paras 22-3; and *Bernstein v Bester N.N.O.* [1996] ZACC 2; 1996 (2) SA 751; 1996 (4) BCLR 449 at para 145.

[81] *De Lange* id at para 147.

[82] *Fakie* above n 8 at para 24.

circumstances, necessitate a process that is akin to that afforded by section 35. I have already noted that section 35(3) affords an accused person a residual fair trial right to say something in mitigation of sentence.[83] Taking away the liberty of an individual is a drastic step. Affording her or him an opportunity to say something in mitigation of sentence, as is the case under the residual fair trial right, is the least that a court can do before taking that drastic step. Especially since the principle that a person ought to be afforded an opportunity to be heard in matters where their rights or interests are affected permeates our law regarding fair procedure. Indeed, it is even considered unfair to take administrative action against an individual without affording her or him an opportunity to make representations.[84] It must then follow that it is untenable to impose a criminal sentence on a person without affording her or him an opportunity to say something on an appropriate sanction. After all, a criminal sanction has the potential of so serious a consequence as depriving an individual of their constitutional right to freedom.

[69] It is unsurprising then that, in the context of conventional criminal proceedings, after pronouncing a conviction, courts always, and indeed must, invite an accused person to say something in mitigation of sentence. Even in pre-constitutional times, a practice existed in terms of which courts afforded accused persons an opportunity to address them before sentence. This was captured thus by Williamson JA in *Bresler*:

> "[I]f a request is properly made by the defence to lead evidence or to address in mitigation a court should accede thereto. In order to avoid possible misunderstanding between the bench and the accused or his representative, the most desirable practice would be for a criminal court always to ask the defence after verdict whether it is desired to say anything in regard to sentence, even if there be no actual obligation on the court to make such an enquiry."[85]

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[83] See my explanation of this residual fair trial right in [64] above.

[84] See *Walele v City of Cape Town* [2008] ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC) at paras 27-8.

[85] *S v Bresler* 1967 (2) SA 451 (A) (*Bresler*) at 456D-F. See also *S v Leso* 1975 (3) SA 694 (A) (*Leso*) at 695H, where Van Blerk JA, held that "[a]lthough a convicted person does not have a statutory right to address the Court on sentence, through usage such a right has been afforded to [her or] him in practice". As was the case in *Bresler*, in *Leso* the Court proceeded from the premise that it was incumbent upon an accused person to make a request to say something on sentence. Two things are worth mentioning. First, the Court in *Bresler* held that a desirable

This is a time-honoured and commonplace fair trial right practice. Time-honoured because, even before the dawn of our constitutional democracy and the constitutionalisation of the fair trial right, our courts have followed the practice for many decades. I would add that the practice is salutary. This is because it recognises the truism that, on a matter like sentence that so intimately and adversely affects an accused person, a court cannot rightly think that nothing coming from the accused person can ever bear relevance to, and possibly influence, the determination of an appropriate sentence.

[70] By issuing the directions, this Court afforded Mr Zuma this unexceptional, commonplace entitlement to a fair process dictated by section 12 of the Constitution in a manner comparable to the section 35 residual fair trial right. This, because of the looming drastic step of depriving him of his freedom.

[71] The applicant notified Mr Zuma of its intention to seek a term of imprisonment of two years. Mr Zuma made it abundantly clear that he was not going to co-operate in the conduct of these proceedings. Does that automatically mean that we should not have afforded him this constitutionally guaranteed opportunity? The answer is a resounding no. A court is duty bound magnanimously to afford a litigant all the rights to which all litigants are entitled. That is so regardless of the attitude that a particular litigant may have displayed towards the court. It was only fair, therefore, to extend to Mr Zuma the same procedural protection that is enjoyed by all people whose section 12 right stands to be severely curtailed. For pragmatic reasons, the main difference between the procedure followed in this matter and that which is ordinarily followed in a criminal trial is that, since contempt proceedings deal with guilt and sentence in one process, the invitation was sent out before we reached a decision on the question of guilt.

practice was that an accused must always be invited to say something on sentence, if she or he so wished. Second, courts adopted this practice even before there was any constitutional obligation on them so to do.

[72] In response to the directions, Mr Zuma addressed a 21-page, unsigned letter to this Court. He did not depose to and file an affidavit of no more than 15 pages, as he was directed to do. Accordingly, it can only be said that this response was patently, and defiantly, non-compliant with the directions. Unfortunately, but not entirely unexpectedly, Mr Zuma once again squandered an opportunity to follow and respect this country's legal processes which guarantee all citizens fairness and equality before the law. His conduct demonstrates a deliberate choice to, instead of furnishing this Court with mitigating factors, once again air his views through inflammatory statements intended to undermine this Court's authority and portray himself as a victim of the law. All of this, besides being scandalous, is totally irrelevant to the question of sanction upon which he was directed to make submissions.

[73] It is unbecoming and irresponsible of a person in Mr Zuma's position to wilfully undermine the law in this way. Mr Zuma had every right and opportunity to defend his rights, but he chose, time and time again, to publicly reject and vilify the Judiciary entirely. I have already detailed the lengths to which this Court has gone in this matter to safeguard Mr Zuma's rights despite his insolence towards this Court. Consequently, there is no sound or logical basis on which Mr Zuma can claim to have been treated unfairly or victimised by this Court. His attempts to evoke public sympathy through such allegations fly in the face of reason. They are an insult to the constitutional dispensation for which so many women and men fought and lost their lives.

[74] It is on this basis that I must address a fundamental point on which this judgment and the second judgment diverge. The second judgment concludes that the process followed in these proceedings constitutes a violation of Mr Zuma's section 35 rights,[86] and then proceeds to engage in a section 36 limitations analysis.[87] My Sister suggests that Mr Zuma is entitled to each of the fair trial rights included in section 35,[88] which leads her to state that I fixate on only one of these rights and conclude, illogically, she

[86] Second judgment at [205].

[87] Id from [217].

[88] Id at [200]-[201].

suggests, that because one procedural right has been afforded there is no need to consider the others.[89] In short, my Sister concludes that I have "trammelled" over the constitutional rights of Mr Zuma as an alleged contemnor.[90]

[75] Firstly, I am compelled to point out that I see no reasonable way of reconciling the second judgment's reasoning on this particular point with the jurisprudence of this Court and the Supreme Court of Appeal which concludes, in no uncertain terms, that a contemnor in civil contempt proceedings does not fit the description of an accused person for the purposes of section 35.[91] I have already dealt with this extensively. It is uncontroversial that he was not afforded each and every single one of the protections of section 35, because he was not an accused person, and was never entitled to all of them.

[76] It can be inferred that my Sister is of the view that the sanction sought by the applicant in these proceedings has the consequence of transforming Mr Zuma into an accused person. But I cannot agree. Ordinary criminal proceedings differ vastly from civil contempt proceedings, and it cannot be that something as simple as a party's, in this case, the applicant's, pleadings can have the effect of marrying these two markedly distinct concepts. Secondly, and in any event, I am satisfied that this Court has taken cautious steps to ensure that Mr Zuma's rights, enshrined in section 12 and buttressed by section 35, as canvassed above, have been protected during the course of these proceedings. Indeed, I am satisfied that this Court took appropriate steps, mindful of what has been said by this Court in the past of the seriousness of implicating a person's personal liberty, "to afford [Mr Zuma] such substantially similar protections as are appropriate to motion proceedings".[92]

[77] I shall not belabour this point any further, other than to emphasise that it is perspicuous that contempt of court may be brought through civil proceedings, and that

[89] Id at [216].

[90] Id at [143].

[91] See [65].

[92] See *Fakie* above n 8 at para 25.

many of the specific rights listed in section 35(3) cannot fit comfortably, or at all, within these motion proceedings. I agree with Cameron JA that "not all of the rights under that provision will be appropriate to or could easily be grafted onto the hybrid process".[93] This is because the section 35 rights were crafted with the specific criminal process in mind. Moreover, if one is prepared to accept that contempt of court may be litigated through civil proceedings, as our jurisprudence unequivocally does, it is simply unavoidable that a contemnor in civil proceedings will not be categorised as an accused person and enjoy each of the rights enshrined in section 35. Thus, since the constitutional rights to which Mr Zuma was entitled have in no way been limited or disregarded by this Court in determining this matter, a justification analysis under section 36(1) simply does not arise.

[78] Because the constitutionality of my judgment is impugned so forcefully by the second judgment, it is necessary for me to address a specific point raised by my Sister. Theron J expresses great discomfort with the fact that this matter was brought directly and on urgent basis to this Court, effectively compromising Mr Zuma's right of appeal to, or review by, a higher court in terms of section 35(3)(o).[94]

[79] Firstly, it is because of the efforts to which this Court has gone to encourage Mr Zuma's participation and protect his constitutional rights, that I find it troubling that the second judgment remains adamant that this Court is causing prejudice to a contemnor, like Mr Zuma, where it sits as a court of first and final instance. Whilst this judgment indeed cannot be appealed, this Court afforded Mr Zuma multiple opportunities to place relevant material before it. He has dismissed those opportunities with disdain.

[80] Secondly, as I have already explained, Mr Zuma simply does not enjoy an accused person's right of appeal. Further, the Constitution categorically allows the

[93] Id at para 26.

[94] Second judgment at [209].

denial of the right of appeal by empowering this Court to entertain matters by way of direct access. So, the Constitution itself has, in its wisdom (or rather that of its framers), seen fit to take away the right of appeal in those instances where direct access is warranted. It is extraordinarily unlikely that direct access would be granted in the case of an ordinary criminal trial concerning an accused person. Indeed, if this were to happen, I would share my Sister's concern that it would constitute an infringement on the accused person's right of appeal in terms of section 35. But that is not the kind of matter that is before this Court in these proceedings. The true debate on appealability in this matter, then, turns on whether direct access is warranted. If it is, *cadit quaestio* (that is the end of the matter). The right of appeal simply does not arise. To suggest otherwise would contradict the very provision in the Constitution that permits direct access. I have already demonstrated that direct access is warranted.

[81] The administration of justice justifies my disposing of this matter on this urgent and direct basis. Theron J has, herself, referred to an important passage from *Mamabolo*,[95] that bears repetition here. In that case Kriegler J notably held:

> "It should also be noted that we are not concerned here with the kind of case where the orderly progress of judicial proceedings is disrupted, possibly requiring quick and effective judicial intervention in order to permit the administration of justice to continue unhindered. Here we are not looking at measures to nip disruptive conduct in the bud, but at occurrences that by definition occur only after the conclusion of a particular case or possibly unrelated to any particular case. Swift intervention is not necessary.
>
> . . .
>
> In such cases there is no pressing need for firm or swift measures to preserve the integrity of the judicial process. If punitive steps are indeed warranted by criticism so egregious as to demand them, there is no reason why the ordinary mechanisms of the criminal justice system cannot be employed."[96]

[95] Second judgment at [161].

[96] *Mamabolo* above n 2 at paras 52 and 57.

[82] I must acknowledge that, although the Court in that case was dealing with an entirely different form of contempt, the circumstances were sufficiently analogous for Kriegler J's statement of the law to find application here. Of course, my Sister and I rely on this passage for different reasons, but I hasten to point out that the matter we are currently seized with is precisely the kind of case that Kriegler J imagined would trigger a "pressing need for firm or swift measures". At its core, this matter is about an egregious threat posed to the authority of the Constitution, the integrity of the judicial process, and the dignity of this Court. If these circumstances do not warrant "swift and effective judicial intervention", then I do not know what will. And I am not disturbed by the fact that this intervention may not be appealable for it is the administration of justice that requires this intervention.

[83] I also hasten to highlight a contradiction in the second judgment's conclusion on constitutionality. The second judgment ultimately finds that this judgment, and the process followed by the applicant, is unconstitutional because it permits a punitive order of committal to be made without a justificatory coercive sanction. It makes this finding alongside two significant acknowledgements. Firstly, it acknowledges that our jurisprudence has affirmatively held that contempt of court proceedings are consistent with the Constitution. Secondly, it acknowledges that the ordinary sanction in contempt proceedings is a suspended order of committal, contingent on an order compelling compliance with the impugned court order. My difficulty then, with the second judgment's pronouncement on the constitutionality of these proceedings, is that I do not see how the act of suspending an order of committal can cure the constitutional defects so forcefully alleged by the second judgment.

[84] It has always been open to this Court to grant a suspended order of committal and direct Mr Zuma's compliance with the order in *CCT 295/20*. Even the second judgment concludes that this would have been the correct and constitutionally compliant approach.[97] Herein lies the problem with the reasoning of the second

[97] Second judgment at [267].

judgment. Were we to do so, and were Mr Zuma to defy this Court once again by electing not to purge his contempt, the result would be the same: Mr Zuma would be imprisoned without having gone through an ordinary criminal trial, and without being afforded the opportunity to exercise the rights of an accused person in terms of section 35. This suggests that the constitutional concerns raised in the second judgment pertain to committal through civil contempt proceedings whether the order is suspended or unsuspended. Not only does this contradict the order the second judgement would arrive at, but it is at odds with our jurisprudence on contempt proceedings – both that which establishes suspended committal paired with a coercive order as the commonplace sanction, and this Court's findings on the constitutionality of contempt proceedings.

[85] I must address one final concern raised by the second judgment, wherein it reminds us that the "rule of law is multi-dimensional" and that a court's attempt at vindicating the authority of its orders in contempt proceedings is but "one piece of the puzzle".[98] It suggests that, although I purport to be upholding the rule of law, I am at the same time compromising it by virtue of the implications that my judgment will have on Mr Zuma's constitutional rights. It suggests that I am not exercising my powers in upholding the rule of law "judiciously" or "even-handedly".[99] I, of course, agree that constitutional rights are to be respected at all costs, and that any attempt to uphold the administration of justice that throws caution to the wind in respect of fundamental human rights, like that of liberty, is patently at odds with the rule of law and thus, cannot be said to uphold it. However, I am boldly convinced that this Court has done all it can to protect Mr Zuma's constitutional rights. Accordingly, I am unperturbed by the suggestion that I have not given appropriate deference to Mr Zuma's constitutional rights. It is on that basis that I march firmly on to justify an unsuspended order of committal.

[98] Id at [234].

[99] Id.

The appropriateness of a punitive order

[86] By this point, it needs no repeating that the only rationale provided to this Court for the granting of a punitive sanction was that put forward by the applicant.[100] However, it is trite that this Court enjoys wide discretionary powers, and that we are enjoined by the Constitution to grant appropriate remedies that are just and equitable.[101] In these circumstances, and for the reasons that follow, I am satisfied that an order of unsuspended committal is just and equitable.

[87] I have already set out the shortcomings and inadequacies of any sanction other than unsuspended committal. It would be nonsensical and counterproductive of this Court to grant an order with no teeth. Here, I repeat myself: court orders must be obeyed. If the impression were to be created that court orders are not binding, or can be flouted with impunity, the future of the Judiciary, and the rule of law, would indeed be bleak. I am simply unable to compel Mr Zuma's compliance with this Court's order in *CCT 295/20*, and am thus faced with little choice but to send a resounding message that such recalcitrance is unlawful and will be punished. I am mindful that, "[h]aving no constituency, no purse and no sword, the Judiciary must rely on moral authority" to fulfil its functions.[102] On this basis, an unsuspended order of committal is strongly supported by the need to affirm the binding nature of court orders. Mindful of the novelty of this conclusion, I repeat that this case is exceptional. It is exceptional, not in the sense that Mr Zuma is being treated exceptionally, but because there are certain exceptional features of this factual matrix that justify the imposition of an exceptional sanction. I shall now address these.

[100] See [10]-[11].

[101] Section 172(1)(b) of the Constitution empowers this Court to "make any order that is just and equitable".

[102] *Mamabolo* above n 2 at para 16.

Exceptional features of this matter

The intensity of Mr Zuma's attacks on the Judiciary

[88] The applicant fervently argued that the intensity of Mr Zuma's attacks on the Judiciary further justifies a punitive sanction in this matter. I agree. The importance of public confidence in the Judiciary cannot be overstated. In *Mamabolo*, Kriegler J said:

> "[I]t is the people who have to believe in the integrity of their Judges. Without such trust, the Judiciary cannot function properly; and where the Judiciary cannot function properly the rule of law must die. Because of the importance of preserving public trust in the Judiciary and because of the reticence required for it to perform its arbitral role, special safeguards have been in existence for many centuries to protect the Judiciary against vilification. One of the protective devices is to deter disparaging remarks calculated to bring the judicial process into disrepute."[103]

This is not to say that the Judiciary is a unique branch of State that must be sheltered from the public and all criticism. This Court has acknowledged and accepted the benefit of robust and informed public debate about judicial affairs and I am by no means implying that the Judiciary is exempt from the accountability it owes to the society that it serves.[104] However, critically, this does not mean that scurrilous, unfounded attacks on the Judiciary and its members can be tolerated or met with impunity.[105]

[89] I note that it may be difficult to distinguish between genuine and acceptable criticism of the Judiciary, and harmful attacks that undermine its legitimacy, but this Court has held that the guiding objective is as follows:

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[103] Id at para 19.

[104] Id at para 27.

[105] Id at para 32 and *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) at paras 68-9, where this Court held that—

> "[d]ecisions of our courts are not immune from criticism. But political discontent or dissatisfaction with the outcome of a case is no justification for recklessly attacking the integrity of judicial officers.
>
> . . .
>
> [U]njustified and unreasonable attacks on individual members of the Judiciary, whatever their background or history, are especially to be deplored."

> "[C]ourts must be able to attend to the proper administration of justice and – in South Africa possibly more importantly – they must be seen and accepted by the public to be doing so. Without the confidence of the people, courts cannot perform their adjudicative role, nor fulfil their therapeutic and prophylactic purpose."[106]

It follows that the legal imperative to protect courts from slanderous public statements has little to do with protecting the feelings and reputations of Judges, and everything to do with preserving their ability and power to perform their constitutional duties.[107]

[90] When one considers Mr Zuma's public statements against this backdrop, his conduct appears all the more egregious. It is unnecessary and inappropriate to entertain the specific details of these statements, save to note that they disclose no cogent, genuine, or factually supported critiques of this Court or any of the other institutions and individuals whose integrity and motives he so casually and emphatically denounces. These statements do not fall into the category of tolerable criticism alluded to by this Court in *Mamabolo*.

[91] Not only are the statements intolerable, but I have been enjoined to consider them. Indeed, it would be with naivety and a great deal of dissonance to view the material act of non-compliance with this Court's order in isolation of the statements, which themselves confirm and compound the contempt. The outlandish statements are part and parcel of the contemptuous conduct because they are the calico that clothe it. On this, I am guided by what this Court said in *Pheko II*:

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[106] *Mamabolo* id.

[107] Id at para 33 where this Court held:

> "An important distinction has in the past been drawn between reflecting on the integrity of courts, as opposed to mere reflections on their competence or the correctness of their decisions. Because of the grave implications of a loss of public confidence in the integrity of its Judges, public comment calculated to bring that about has always been regarded with considerable disfavour. No one expects the courts to be infallible. They are after all human institutions. But what is expected is honesty. Therefore the crime of scandalising is particularly concerned with the publication of comments reflecting adversely on the integrity of the judicial process or its officers."

> "[I]t needs to be stressed that contempt of court does not consist of mere disobedience of a court order, but of the contumacious disrespect for judicial authority."[108]

[92] Indeed, contempt is not the act of non-compliance with a court order alone, but encompasses the nature of that contempt, the extent of it and the surrounding circumstances. I must therefore take cognisance of the unique and scandalous features of this particular contempt. If I were to ignore those aspects, I believe I would be adjudicating the matter with one eye closed, and declining to decide it without fear, as I am constitutionally mandated to do.

[93] At this stage, I must dispel the concern my Sister raises in which she alleges that I, in taking stock of Mr Zuma's scandalous remarks, am eliding the crime of civil contempt with that of scandalising the court, which are in fact, two separate offences.[109] I am not doing so and am alive to the difference between these forms of contempt. To the extent that Theron J suggests that I am conflating the two, she mischaracterises this judgment. I take umbrage with the fact that she would have us disregard the egregiousness of the statements and adjudicate the matter in a vacuum.

[94] Without derogating from the stance that I do not propose to deal with the specifics of Mr Zuma's unfounded accusations and insults, I want to touch on only one, which appears to be a leitmotif in his complaints against this Court. He repeatedly says that, by hearing this application in the face of his High Court application for the review of the decision by the Chairperson of the Commission not to recuse himself, this Court has acted unconstitutionally and in violation of his rights. Of course, this view is totally misconceived and calculated to confuse the public. If Mr Zuma did not want to participate in the Commission's hearings whilst his review application was pending, it was open to him to seek an interim stay of proceedings insofar as they related to him. Without that, he could not reasonably expect, nor could he genuinely believe, that the

[108] *Pheko II* above n 6 at para 42.

[109] Second judgment at [232]-[233].

Commission would not summon him to appear before it. Absent that interim relief, nothing stands in the way of this Court's power to entertain this matter.

[95] Strangely, this misconceived view repeatedly stated by Mr Zuma is shared by his attorneys who articulated it in the letter that they sent to the Commission when Mr Zuma did not attend the Commission's proceedings during the week of 15 to 19 February 2021. It purported to explain his failure to attend the proceedings. I say that this was strange because, generally, seeking interim interdicts or a stay of proceedings is elementary practice when a litigant wishes to prevent adverse decisions being taken pending the outcome of litigation. Surely Mr Zuma's attorneys knew better.

[96] In sum, the position in which Mr Zuma finds himself is of his own making and has nothing to do with the violation of any of his rights. And his attempt to equate legitimate legal processes with a witch-hunt is dangerous, unfounded and intolerable.

The relevance of Mr Zuma's position as former President

[97] The cause for concern regarding Mr Zuma's statements does not stop there. Mr Zuma is no ordinary litigant. He is the former President of the Republic, who remains a public figure and continues to wield significant political influence, while acting as an example to his supporters. This leads me to the final point and exceptional feature of this matter that justifies the punitive sanction that I impose: the unique and special political position that Mr Zuma enjoys as the former President. He has a great deal of power to incite others to similarly defy court orders because his actions and any consequences, or lack thereof, are being closely observed by the public. If his conduct is met with impunity, he will do significant damage to the rule of law.[110] As this Court

[110] See *Executive Council, Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC), where this Court was confronted with a contemptuous statement made by the then Minister of Local Government, Western Cape, and at para 122 said:

> "It undermines not only this Court, but constitutionalism itself, of which this Court is a guardian. Having regard to the high political office held by the [Minister], the consequences of a statement impugning the integrity of this Court might have been particularly harmful."

noted in *Mamabolo*, "[n]o one familiar with our history can be unaware of the very special need to preserve the integrity of the rule of law".[111]

[98] Mr Zuma is subject to the laws of the Republic. No person enjoys exclusion or exemption from the sovereignty of our laws. To borrow from this Court's judgment in *CCT 295/20*:

> "[i]n our system, no one is above the law. Even those who had the privilege of making laws are bound to respect and comply with those laws. For as long as they are in force, laws must be obeyed."[112]

It would be antithetical to the value of accountability if those who once held high office are not bound by the law.

[99] In fact, this Court has espoused the existence of a heightened obligation on the President, by virtue of her or his position, to conduct her or himself in a manner that accords with the Constitution because there are few office-bearers of greater constitutional importance than that of the President.[113] As held in *Nkandla*—

> "an obligation is expressly imposed on the President to uphold, defend and respect the Constitution as the law that is above all other laws in the Republic. . . . This requires the President to do all he can to ensure that our constitutional democracy thrives. He must provide support to all institutions or measures designed to strengthen our constitutional democracy."[114]

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[111] *Mamabolo* above n 2 at para 17.

[112] *CCT 295/20* above n 3 at para 87.

[113] *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51; 2019 (3) SA 30 (CC); 2019 (3) BCLR 329 (CC) at para 30, where this Court said that—

> "[t]he President of South Africa is not just any of the many other constitutional office-bearers in the Republic. She is indeed an embodiment of supreme power. When all others fail, it is to that repository of raw power that we all ought to turn. It is in the President that citizens justifiably pin their hopes by reason of the vast and unrivalled capacities she has as a singular centre of extensive constitutional powers."

[114] *Economic Freedom Fighters v Speaker, National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) (*Nkandla*) at para 26.

[100] Mr Zuma's conduct that led to and has persisted throughout these proceedings is all the more outrageous when regard is had to the position that he once occupied. Although Mr Zuma is no longer President, his conduct flies in the face of the obligation that he bore as President. It is disturbing that he, who twice swore allegiance to the Republic, its laws and the Constitution, has sought to ignore, undermine and, in many ways, destroy the rule of law altogether.

[101] Finally, it is not insignificant that Mr Zuma's contemptuous conduct relates to his duty to account for the time that he was in Office and is accordingly inextricably linked to his constitutional obligations as a public office-bearer. For these reasons, Mr Zuma's flagrant and disdainful breach of this Court's order is intertwined with the oath that he took to uphold the Constitution. In *Pheko II*, this Court maintained that cases of contempt of court are particularly troubling where constitutional rights and obligations are at issue.[115] This applies equally to the breach of constitutional obligations. This factor is pertinent to the determination of the appropriate sanction in this matter.

Concluding remarks on sanction

[102] The cumulative effect of these factors is that Mr Zuma has left this Court with no real choice. The only appropriate sanction is a direct, unsuspended order of imprisonment. The alternative is to effectively sentence the legitimacy of the Judiciary to inevitable decay.

[103] In taking stock of these exceptional circumstances, it is clear that this Court must grant an order that will vindicate its honour, and protect and maintain public confidence in the legitimacy of the Judiciary. This Court cannot be seen to condone and indulge a litigant's flagrant defiance of an order, paired with unmeritorious and scandalous public statements that are clearly aimed at undermining this Court's authority and legitimacy. In fact, this Court is constitutionally mandated by section 165 to ensure that the

[115] *Pheko II* above n 6 at para 27.

processes and functions of the courts are not undermined or interfered with by anyone,[116] including Mr Zuma.

Concluding remarks on the approach adopted in the second judgment

The applicant's instituting of civil contempt proceedings in this Court

[104] Having arrived at the unprecedented, yet soundly justified conclusion that Mr Zuma is to be subjected to a punitive order of committal, I pause to briefly return to the second judgment's assertion that the process instituted by the applicant in this matter is unconstitutional.[117] The thrust of the dissent voiced by the second judgment is that, what is essentially a purely criminal matter, is being brought in a civil court through motion proceedings.[118] Thus, the second judgment seems to be of the view that the fact that our law classifies civil contempt as a crime does not mean that it loses its civil character altogether, which speaks to the public interest in seeking and securing compliance with the initial civil order. Accordingly, continues the second judgment, absent the civil component (the seeking of compliance), the contempt ought to be treated as any other crime that falls to be dealt with in criminal proceedings.

[105] Theron J takes issue with a litigant approaching a court for a purely criminal sanction in civil proceedings without seeking any civil relief, and stresses that the applicant should only have approached this Court on the basis of civil contempt proceedings where it intended to seek civil relief, namely an order that Mr Zuma comply with this Court's order in *CCT 295/20*. My Sister relies on *Mamabolo*, in which this Court found that it is unconstitutional for a civil court to summarily deal with the crime of scandalising the court because there is no urgency or pressing need to intervene in the administration of justice. She interprets this case to mean that under no

[116] Id at para 26.

[117] Second judgment at [191].

[118] Id at [143].

circumstances can it be appropriate to prosecute someone for a crime and punish them through civil proceedings.[119]

[106] I must firmly state that I disagree with the second judgment's characterisation of these proceedings, and the assertion that the process instituted by the applicant is unconstitutional. This assertion relies, in part, on earlier decisions of courts that have held that a litigant has standing in contempt proceedings only if it seeks the court's assistance in vindicating or enforcing its rights pursuant to the impugned order, and that the pursuit of punishment alone is an insufficient basis on which a litigant may institute civil contempt proceedings.[120]

[107] Firstly, our jurisprudence signals that purely punitive orders of committal in contempt proceedings are possible. In *Victoria Park Ratepayers' Association*, the Court, upon establishing that the respondent was in contempt, notably said the following:

> "I view the respondents' contempt in a very serious light. It is brazen and disdainful of the rights of others. It seeks to bring the administration of justice into disrepute by undermining one of the most important foundations of an ordered and civilised society, respect for, and obedience to, the law. I would have considered sentencing Mr Melville to a term of imprisonment, without the option of a fine and without suspending it, but for the fact that the applicant did not seek such a sentence in their notice of motion."[121]

[108] This was in respect of a contemptuous respondent who ran a bar that caused a nuisance to the neighbouring residents, which nuisance persisted unabated contrary to an order requiring his desistance, resulting in contempt proceedings. I find myself confronted with a far more egregious factual matrix, coupled with the fact that Mr Zuma has failed to either contest his contempt or seek an opportunity to purge the contempt.

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[119] Id at [163] and [241].

[120] Id at [181], where it cites *Cape Times* above n 52 at 120F, 121B-C and 129F-G and *Naidu v Naidoo* 1967 (2) SA 223 (N) at 545I.

[121] *Victoria Park Ratepayers' Association* above n 25 at para 61.

This case cries out far louder for an unsuspended sentence than did *Victoria Park Ratepayers' Association*, where the Court was on the verge of granting one. Accordingly, I can see no reason why I should sit on any verge.

[109] In addition, it was said by Cameron JA in *Fakie*, that—

> "[civil contempt proceedings] permit a private litigant who has obtained a court order requiring an opponent to do or not do something (*ad factum praestandum*), to approach the court again, in the event of non-compliance, for a further order declaring the non-compliant party in contempt of court, and imposing a sanction. The sanction usually, though not invariably, has the object of inducing the non-complier to fulfil the terms of the previous order."[122]

It follows that a litigant is obviously entitled, in law, to approach a court seeking committal, even if committal is not the ordinary sanction.

[110] In any event, whether or not a litigant is entitled to approach a court seeking punitive relief has absolutely nothing to do with a court's competence to grant it.[123] Indeed, *Pheko II* unequivocally held that a court can raise contempt *mero motu* (of its own accord).[124] In this context then, the process followed by the applicant says nothing about this Court's competence to make a purely punitive order of committal. In other words, nothing, including the process instituted by the applicant, could prevent this Court from determining the matter by exercising our right to raise the proceedings of our own volition.

[111] It is further trite that courts must make orders that are just and equitable in the circumstances. This means that even if it is not appropriate for an applicant to seek

[122] *Fakie* above n 8 at para 7.

[123] Section 173 of the Constitution provides this Court with wide, inherent powers to protect and regulate its own process, taking into account the interests of justice.

[124] *Pheko II* above n 6 at para 2, where this Court said that "courts may, as is the position in this case, raise the issue of civil contempt of their own accord".

certain relief, this Court cannot be bound by what is sought by the applicant if granting an order beyond those limitations is what justice demands.

[112] The second judgment avers that the proper approach to be taken, because the applicant seeks a purely punitive order, is to refer this matter to the Director of Public Prosecutions (DPP) so that Mr Zuma can be tried according to criminal standards and protections.[125] The difficulty with this assertion is that it develops the law of contempt proceedings by imposing a rule that litigants must choose between either pursuing only coercive relief in the court that granted the breached order or, if seeking punitive relief, refer the matter to the DPP. This is a novel idea in the context of civil contempt and one that is markedly out of step with the jurisprudence outlined in this judgment, which firmly states that it is for courts to enforce their orders, maintain the rule of law, and defend their authority. It is also flagrantly antithetical to section 165 of the Constitution, which vests the judicial authority of the Republic in the courts themselves, and section 173, which empowers the courts to regulate their own processes. I have grave jurisprudential difficulty with the suggestion that the inherent and extensive powers of this Court to uphold its own orders are to be divested and reassigned to the DPP.

[113] The path that I have taken builds on our existing jurisprudence on civil contempt, and ultimately answers a question that our courts, thus far, have only had to contemplate, but not determine. I therefore do not support the suggestion made by my Sister that in the event that a private litigant approaches a civil court for a punitive order that is not allied with the remedial purpose of coercing compliance with the original court order, the proper approach is to refer the matter to the DPP.

[114] All of this is not to say that disgruntled litigants can simply run to court seeking to punish a contemnor. In fact, I have gone to great lengths to demonstrate just how rare and exceptional it is that a court might find it appropriate to grant a purely punitive order in civil contempt. The fact remains, however, that contempt is between the court

[125] Second judgment at [146].

and the contemnor, and it is for the court to decide, taking all circumstances into account, how to deal with an alleged contempt.

[115] Even the jurisprudence that is cited by the second judgment as being authority for the impropriety of the process followed in this matter acknowledges that, in instances where contempt is paired with conduct that is disrespectful to a court and of such a nature that the administration of justice is threatened, a litigant may approach a court for a punitive sanction.[126] This speaks to the important public dimension of all cases of contempt – a view that has been affirmed and strengthened by courts, and indeed this Court, since the advent of our constitutional dispensation. It is perspicuous that—

> "[although] the successful litigant's interest is in compelling compliance, the courts are able to grant the sanction of committal because there is a public interest being protected – that is, the obedience to court orders and the maintenance of the rule of law."[127]

It accordingly seems to me that a court in contempt proceedings is charged with the critical constitutional obligation of defending the rule of law, and that this imperative permeates contempt proceedings as a whole. On this basis, the second judgment's approach to the process instituted by the applicant in this matter is overly formalistic, and fails to take cognisance of these important constitutional considerations.

[116] In any event, I cannot support the second judgment's suggestions that the applicant has no interest in Mr Zuma's punishment through committal; that it is before us merely seeking the satisfaction of punishing him; and that this Court, in granting a punitive order, is succumbing to entertaining a bitter and personal vendetta held by the Commission against Mr Zuma. That is simply not why we are here. The applicant took extensive measures to secure Mr Zuma's co-operation with the Commission's work,

[126] See *Cape Times* above n 52 at 121D-125H.

[127] *Pheko II* above n 6 at para 34, where this Court cited *Fakie* above n 8.

both before approaching this Court in *CCT 295/20* and after the order was handed down, to no avail. Of concern to the applicant is that Mr Zuma's contempt has undermined the Commission's authority and legitimacy severely, and is detrimental and destructive to its ability to carry out its mandate. For these reasons, paired with the overall damage that his conduct has done to the integrity of this Court and the Judiciary, it seeks his committal. In other words, the applicant seeks to vindicate the Commission's, and indeed the public's, interest in preserving public faith in the work of the Commission, this Court and the Judiciary.

[117] To my mind, it would be nothing short of naïve to view the order in *CCT 295/20* as a simple command to any ordinary witness. It was a confirmation by this Court that all South Africans are constitutionally obliged to co-operate with the important work of the Commission. It logically follows from this that the applicant is entitled to guard and vindicate this confirmation, especially in the case of an influential contemnor who so brazenly seeks to make a mockery of it. To imply that the applicant seeks to merely punish Mr Zuma and, in the process, use this Court to leapfrog the criminal justice system,[128] overlooks what is at stake here for the applicant.

[118] In sum, it is trite that our law permits an aggrieved litigant to approach a court for an order of contempt pursuant to an earlier court order being defied. Although, in our law, direct committal has yet to be ordered in proceedings of this kind, this Court's own words in *Pheko II* signal to a litigant that he or she is entitled to approach a court for an order of contempt where a previous order has been breached, and that there will be times when a punitive order will be apposite. These conclusions are supported further by the finding in *Pheko II*, that "courts shall not hesitate to enforce their orders",[129] and the fundamental principle that contempt proceedings exist as the only mechanism by which courts can assert their authority and preserve integrity in the judicial process and administration of justice.[130] I accordingly see no reason that the

[128] Second judgment at [265].

[129] *Pheko II* above n 6 at para 65.

[130] Id at para 2 where this Court held:

applicant can be said to have followed an improper, let alone an unconstitutional process, in this matter.

[119] A final word on the divergence between my approach and the one adopted in the second judgment. I am compelled to clarify that my analysis and conclusions on the procedure adopted by the applicant and this Court in this matter do not seek to undermine any of the principles espoused in *Mamabolo*. In that matter, this Court concluded in the affirmative that "the option allowed to a judge to summon a suspected scandaliser to appear before her or him to answer to a summary charge of contempt of court, constitutes a limitation of . . . the fundamental rights protected by the Bill of Rights".[131] Those proceedings were fundamentally different to the matter at hand, because they dealt with the crime of scandalising the court – a category of contempt that affects only the public and not the opposing litigant.[132] Indeed, in that matter the Court was at pains to illustrate the complexities of the considerations facing a court determining whether a litigant can be found guilty of scandalising the court.[133]

[120] The summary process under scrutiny in *Mamabolo* cannot be characterised as being akin to ordinary civil contempt proceedings, like those *in casu* (in this case), for defiance of a court order.[134] In that matter, this Court even described the alleged scandaliser as "an accused person as contemplated by section 35(3) of the

> "Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of State. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest. It is thus unsurprising that courts may, as is the position in this case, raise the issue of civil contempt of their own accord."

[131] *Mamabolo* above n 2 at para 51.

[132] Id at para 24.

[133] Id at para 26.

[134] The summary procedure that was held to be unacceptable in *Mamabolo* was one where a Judge, upon learning about conduct that appears to scandalise the court, calls the alleged scandaliser to appear before her or him and summarily asks the person to answer to what the Judge has learned and, there and then, convicts or acquits. As Kriegler J held at para 55, "this procedure . . . rolls into one the complainant, prosecutor, witness and Judge". It was this that the Court held to be irreconcilable with the principle of fairness. It was for that reason that the Court held that the proper procedure to follow there was to refer the matter to the prosecution service for a full blown criminal trial. That situation is a far cry from the instant matter.

Constitution",[135] because of the summary process involved on those specific facts. Thus, to imply that these proceedings are akin to the summary process held to be unconstitutional in *Mamabolo*[136] constitutes a mischaracterisation of these proceedings. That the applicant seeks a sanction, which this Court has said may be apposite under certain circumstances for defiance of court orders, that happens to be committal, does not have the effect of transforming Mr Zuma into an accused person in terms of section 35 of the Constitution. As I have already stated, to say that it does would contradict the clear findings in *Fakie* that have been affirmed by this Court in *Pheko II*.[137]

[121] This Court is at large to impose a sanction that is appropriate upon a consideration of all of the relevant facts and law. I am by no means beholden to the applicant's desires and, as I have demonstrated, the sanction that this Court has chosen to impose on Mr Zuma has been informed and supported by numerous important legal, and indeed constitutional, considerations. Moreover, without in any way implying that accused persons may be tried for criminal charges summarily, I am confident that unsuspended committal may be ordered by a court in contempt proceedings in these extraordinary circumstances.

What is the appropriate sentence?

[122] I now turn to grapple with the vexed question of determining the length of committal in these contempt proceedings. Before I settle on the length of the sentence, I first address the aggravating and mitigating factors that have informed this determination.

[135] Id at para 53.

[136] Second judgment at [163].

[137] See [65].

Aggravating and mitigating factors

[123] I have dealt extensively with the aspects of this matter that render it exceptional, and justify taking our law on civil contempt further than it has gone in the past. These same factors, being the intensity of Mr Zuma's attacks on the Judiciary as well as his former position as President, certainly constitute aggravating factors for the purpose of sentencing. I have dealt with these factors in detail above, albeit in the context of sanction. It is unnecessary to repeat this analysis here, save to note that it is self-evident that these factors justify the imposition of a sentence that reflects the seriousness of the damage that Mr Zuma's conduct has inflicted, and will continue to inflict, on the rule of law if not admonished in harsh terms.

[124] Since it is necessary and relevant to take account of these aggravating factors, I must acknowledge that a court's consideration of aggravating factors is ordinarily paired with due regard to mitigating factors. It needs no repeating that Mr Zuma has left this Court in the lurch in this regard. However, I am guided by the ordinary criminal justice process.[138] Adopting this approach, I have carefully considered, for example, the fact that Mr Zuma is of an advanced age which is usually accompanied by the onset of frailties. However, I am ultimately unpersuaded that the cumulative effect of these factors does anything to counterbalance the profound and significant impact of the aggravating factors.

Length of sentence

[125] The applicant proposes that the sentence be two years of direct committal, the rationale for which is firmly rooted in the logic behind sentences prescribed for offences under the Commissions Act and its Regulations. Whilst the applicant's approach

[138] Our criminal law jurisprudence indicates that, ordinarily, when a criminal court determines an appropriate sentence it is enjoined to consider mitigating factors which include, inter alia, the age of the accused; whether the accused is a first-time offender, demonstrates remorse, was provoked or compelled into committing the offence, was under the influence of alcohol or drugs when committing the offence; and the nature and extent of the accused's role in the commission of the offence.

See, for example, *S v De Sousa* [2008] ZASCA 93; 2009 (1) All SA 26 (SCA) at paras 12-4; *S v Malgas* [2001] ZASCA 30; 2001 (2) SA 1222 (SCA) at paras 9-10 and 34; *S v Nkwanyana* [1990] ZASCA 95; 1990 (4) SA 735 (A) at 745G-749C.

certainly has an intuitive appeal, the crime for which punishment is being meted out is not a contravention of the Commissions Act, but rather, a contravention of this Court's order and, in turn, the crime of contempt of court. As I have said, this matter is emphatically not about the enforcement of summonses, nor about the dispute between the parties. So, to have recourse to the Commissions Act as the guiding light on sentence is far from appropriate. Accordingly, the applicant's approach which relies on the Commissions Act is misguided, and the metric offered cannot be of use to this Court.

[126] Having rejected this reasoning, however, I must admit that I am in unchartered waters. And unfortunately, or perhaps fortunately, there is little of precedential value to be found in our jurisprudence. In fact, looking to our jurisprudence for guidance has proven to be a tremendously unhelpful exercise. My difficulty is that the instances of contempt that I have come across come nowhere close to the contempt in this matter. I have already established above that, although the courts in these cases opted for coercive orders, a punitive order is warranted in the present matter.

[127] In determining a quantifiable length of sentence, I am enjoined to consider the circumstances; the nature of the breach; and the extent to which the breach is ongoing.[139] The Court in *Protea Holdings* went so far as to state that because contempt cannot be tolerated, "I would be failing in my duty if I did not impose a punishment which takes into account the serious nature of this type of offence".[140] Not only has Mr Zuma failed to dispute the contempt of court, but he has failed to contest the degree of the contempt.[141] Instead, he has aggravated it. Furthermore, as outlined above, I cannot ignore the materiality of the particular position that Mr Zuma holds. Furnished with only the applicant's submissions and Mr Zuma's public statements duly incorporated in

[139] *Protea Holdings* above n 28 at 869H, where it was held that—

> "[i]n order to assess what penalty should be imposed, it becomes necessary to . . . assess the nature of the admitted contempt of court . . . . The manner in which the Court order . . . was breached, and therefore the nature of the admitted contempt, is obviously an important factor which must be taken into account in assessing sentence."

[140] Id at 871H.

[141] Id at 870E-F.

the record, I am left with no choice but to exercise my discretion and issue a sentence that I deem to be just and equitable in the circumstances.

[128] Quantifying Mr Zuma's egregious conduct is an impossible task. So, I am compelled to ask the question: what will it take for the punishment imposed on Mr Zuma to vindicate this Court's authority and the rule of law? In other words, the focus must be on what kind of sentence will demonstrate that orders made by a court must be obeyed and, to Mr Zuma, that his contempt and contumacy is rebukeable in the strongest sense. With this in mind then, I order an unsuspended sentence of imprisonment of 15 months. I do so in the knowledge that this cannot properly capture the damage that Mr Zuma has done to the dignity and integrity of the judicial system of a democratic and constitutional nation. He owes this sentence in respect of violating not only this Court, nor even just the sanctity of the Judiciary, but to the nation he once promised to lead and to the Constitution he once vowed to uphold.

Costs

[129] The applicant seeks costs on an attorney and own client scale. I do not consider it necessary, in this matter, to enter the debate as to the distinctions between costs on an attorney and client scale as opposed to costs on an attorney and own client scale. If punitive costs are warranted, there is no reason why they should not be on an attorney and client scale.

[130] In *CCT 295/20*, this Court considered whether Mr Zuma ought to be mulcted with costs for an application that he did not oppose, and held that the principles laid down in *Biowatch*[142] do not protect respondents "who raise frivolous defences or whose unlawful conduct has forced the State to litigate".[143] Ultimately, the prejudice and harm

[142] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

[143] *CCT 295/20* above n 3 at para 114.

caused to the applicant by Mr Zuma's conduct outweighed his decision not to oppose the relief sought in that matter.[144]

[131] The same principles traversed in *CCT 295/20* in relation to costs are relevant in this matter as well, albeit that the applicant is now seeking punitive costs. In several instances, this Court has affirmed the principle that punitive costs are exceptional and are reserved for instances where a litigant has conducted themselves in a "clear and indubitably vexatious and reprehensible" manner.[145] Punitive costs orders are accordingly indicative of "extreme opprobrium",[146] and the question is whether Mr Zuma's conduct is so extraordinary that it is worthy of rebuke.[147]

[132] The applicant submits that punitive costs are warranted in this matter because, firstly, Mr Zuma's conduct smacks of malice and, secondly, his public utterances and accusations are utterly bereft of supporting facts. The combined effect of these factors renders an ordinary costs order insufficient in the circumstances. The applicant also submitted that Mr Zuma's failure to oppose these proceedings and explain his conduct to this Court further justifies punitive costs, because it exhibits his total lack of respect for this Court and the judicial process. In support of this, the applicant referred us to the Supreme Court of Appeal's decision in *Compensation Solutions,*[148] where the respondent's failure to oppose the proceedings and justify his conduct was considered to be "deserving of the strictest censure possible".[149]

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[144] Id.

[145] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC) (*SARB*) at para 225, where this Court affirmed principles laid down in *Plastics Convertors Association of SA on behalf of Members v National Union of Metalworkers of SA* [2016] ZALAC 39; 2016 (37) ILJ 2815 (LAC) at para 46.

[146] *SARB* id.

[147] Id at para 226.

[148] *Compensation Solutions (Pty) Ltd v Compensation Commissioner* [2016] ZASCA 59; 2016 (37) ILJ 1625 (SCA) (*Compensation Solutions*).

[149] Id at para 20.

[133] The applicant's submissions in this regard are persuasive. This case does not merely concern an apathetic respondent. It concerns a respondent who breached this Court's order, chose not to explain why, and then, in defiance of unambiguous directions issued by this Court, elected to file yet another provocative, unmeritorious and vituperative statement in the form of a letter. Evidently, Mr Zuma had something to say, but he deliberately chose to say it unofficially and mostly on a public platform, thereby denying this Court and the applicant an opportunity to legitimately and officially engage with it and effectively escaping any accountability he might be brought to bear in respect of the statements. There is no explanation whatsoever for why Mr Zuma could not participate in these proceedings, and I wholeheartedly agree with the applicant's submission that this tactic was part of a deliberate and calculated strategy to undermine this Court's authority.

[134] While there is no doubt that punitive costs orders are exceptional, certain aspects of this case are reminiscent of *Tjiroze*.[150] In that case, the applicant, who was a legal professional and was thus expected to have been aware of the import and consequences of impugning the integrity of the Judiciary, abused court processes and made defamatory remarks which targeted and were directed at a sitting Judge.[151] In that matter, this Court held that such conduct was particularly reprehensible and deserving of a punitive costs order.[152] Although Mr Zuma is not a legal professional, as the former President bearing the heightened obligation discussed above, it is more than reasonable to expect that he must appreciate the gravity of his conduct and its impact on the integrity of the Judiciary. He has repeatedly defamed and vilified members of this Court, and although he has not actively abused court processes, he has passively done so by ventilating his "case" through a public smear campaign, instead of through legitimate legal processes. Similar to the way in which this Court inverted the *Biowatch* principle in *CCT 295/20* by imposing costs on the basis that Mr Zuma had forced the

[150] *Tjiroze v Appeal Board of the Financial Services Board* [2020] ZACC 18; 2020 JDR 1413 (CC); 2021 (1) BCLR 59 (CC).

[151] Id at para 28.

[152] Id at para 29.

State to litigate, it is fitting that this Court should express its dissatisfaction and punish a respondent who, in the circumstances, ought to have, but failed to participate in proceedings.

[135] It follows that the issue of costs in this matter is relatively simple. This application should never have been before this Court because Mr Zuma had no justifiable basis to abandon his regard for the law and pursue the route that he did. The fact that Mr Zuma committed contempt of court is, on its own, worthy of this Court's rebuke. But when this contempt is considered alongside the derisive statements and disdainful attitude that Mr Zuma has adopted towards this Court and the Judiciary in general, it is without question that the extraordinary award of punitive costs is warranted.

[136] Before I go on, I must acknowledge and lament the evident rise in a casual and reckless attitude being adopted by many litigants who see it fit to level unsubstantiated accusations against the Judiciary, both in the public domain and in their pleadings before the courts. This inexcusable state of affairs cannot be tolerated or encouraged. Let me be perfectly clear: it is not permissible for a disgruntled litigant to besmirch the reputation of the Judiciary or its members without fear of consequence. This is not the status quo in our constitutional democracy, and it is patently undesirable that an influential figure, like Mr Zuma, should be allowed to exhibit such behaviour. This is not the first time that Mr Zuma's malevolent attitude towards the Judiciary has attracted punitive costs,[153] but I sincerely hope that it will be the last. Mr Zuma's conduct has undoubtedly set an example to the public, so let this costs order follow suit. Let it be known that she or he who abandons all ethical standards in pursuit of a cause must prepare to meet this Court's reproach, and the award of punitive costs that naturally follows.[154]

[153] See *Zuma v Democratic Alliance* [2021] ZASCA 39; 2021 JDR 0702 (SCA) at paras 47-51, where the Supreme Court of Appeal concluded that Mr Zuma's baseless and untruthful submissions regarding the partiality and fairness of the Judiciary in that matter were worthy of censure by way of a punitive costs order.

[154] *Limpopo Legal Solutions v Eskom Holdings Soc Limited* [2017] ZACC 34; 2017 (12) BCLR 1497 (CC) at para 36.

Conclusion

[137] The right, and privilege, of access to court, and to an effective judicial process, is foundational to the stability of an orderly society. Indeed, respect for the Judiciary and its processes alone ensures that peaceful, regulated and institutionalised mechanisms to resolve disputes prevail as the bulwark against vigilantism, chaos and anarchy.[155] If, with impunity, litigants are allowed to decide which orders they wish to obey and those they wish to ignore, our Constitution is not worth the paper upon which it is written.

[138] So let me repeat what I have said before, for it is deserving of ingemination. Never before has the legitimacy of this Court, nor the authority vested in the rule of law, been subjected to the kind of sacrilegious attacks that Mr Zuma, no less in stature than a former President of this Republic, has elected to launch. Never before has the judicial process, nor the administration of justice, been so threatened. It is my earnest hope that they never again will.

[139] I, too, cherish the ideal of a democratic and free society in which all persons are both as equal in opportunity, as they are in accountability, before the law. As eloquently stated by Mogoeng CJ in *Nkandla*:

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

[155] *Victoria Park Ratepayers' Association* above n 25 at para 21.

> 'Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy.'"[156]

[140] Within their purview of functions, courts are pillars of democracy and the keepers of our Constitution. As Dicey once wrote, "no [person] is above the law" and "every [person], whatever be [her or] his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals".[157] An act of defiance in respect of a direct judicial order has the potential to precipitate a constitutional crisis: when a public office-bearer or government official, or indeed any citizen of this Republic, announces that he or she will not play by the rules of the Constitution, then surely our Constitution, and the infrastructure built around it, has failed us all.

[141] My duty, as I pen this judgment, is cloaked in the duty and loyalty that I owe to our Constitution and the rule of law that undergirds it. I find myself left with no option but to commit Mr Zuma to imprisonment in the hope that doing so sends an unequivocal message: in this, our constitutional dispensation, the rule of law and the administration of justice prevails.

Order

[142] The following order is made:

1. The application for direct access is granted.
2. The Helen Suzman Foundation is admitted as amicus curiae.

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[156] *Nkandla* above n 114 at para 1, citing *Nyathi v MEC for Department of Health, Gauteng* [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) at para 80, per Madala J.

[157] As quoted in *Victoria Park Ratepayers' Association* above n 25 at para 19.

3. It is declared that Mr Jacob Gedleyihlekisa Zuma is guilty of the crime of contempt of court for failure to comply with the order made by this Court in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma* [2021] ZACC 2.
4. Mr Jacob Gedleyihlekisa Zuma is sentenced to undergo 15 months' imprisonment.
5. Mr Jacob Gedleyihlekisa Zuma is ordered to submit himself to the South African Police Service, at Nkandla Police Station or Johannesburg Central Police Station, within five calendar days from the date of this order, for the Station Commander or other officer in charge of that police station to ensure that he is immediately delivered to a correctional centre to commence serving the sentence imposed in paragraph 4.
6. In the event that Mr Jacob Gedleyihlekisa Zuma does not submit himself to the South African Police Service as required by paragraph 5, the Minister of Police and the National Commissioner of the South African Police Service must, within three calendar days of the expiry of the period stipulated in paragraph 5, take all steps that are necessary and permissible in law to ensure that Mr Jacob Gedleyihlekisa Zuma is delivered to a correctional centre in order to commence serving the sentence imposed in paragraph 4.
7. Mr Jacob Gedleyihlekisa Zuma is ordered to pay the costs of the Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, including the costs of two counsel, on an attorney and client scale.

THERON J (Jafta J concurring):

> "Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their importance . . . but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."[158]

Introduction

[143] I have read the judgment of my Sister Khampepe ADCJ and commend her on an elegantly crafted judgment that deftly navigates the complex issues in this matter (main judgment). I agree that Mr Zuma is in contempt of this Court's order and that direct access ought to be granted on an urgent basis. Regretfully, I do not agree that it is constitutionally acceptable for this Court to grant an order of unsuspended committal which is not linked to coercing compliance with this Court's order in *CCT 295/20*. With the greatest respect, I am concerned that the main judgment's focus on the "unprecedented" facts of this case distracts from a very troubling feature; namely, that this Court, in motion proceedings and sitting as a court of first and last instance, is being asked to mete out an unsuspended term of imprisonment which is singularly punitive in purpose and effect. Whereas civil contempt proceedings have dual remedial and punitive purposes, the proceedings before us are wholly punitive. In my view, it is unconstitutional, to the extent that it violates sections 12 and 35(3) of the Constitution, to order punitive committal for civil contempt in motion proceedings, where no remedial or coercive relief is granted. The main judgment, again and again, answers this concern with recourse to the exceptional facts of this case and the conduct of Mr Zuma. In doing so, it fails, or refuses, to see the woods for the trees, with the result that, in seeking to justify a punitive order which satisfies an understandable desire to address Mr Zuma's scandalous disrespect for this Court, it trammels over the constitutional rights of alleged contemnors (including Mr Zuma).

[158] *Northern Securities Company v United States* 193 US 197 (1904) at 400. By great cases, Holmes J referred to those cases that come before the United States Supreme Court from time to time and capture the attention of the public, placing the Court in the vortex of a current public controversy.

[144] The ordinary remedy in civil contempt cases – which has been granted in every single case in which a litigant has been found guilty of civil contempt that I have come across[159] – is a period of suspended committal, which allows the contemnor one final opportunity to comply with the court order and avoid imprisonment. That is the order I would have considered making in the event that the Commission's lifespan had not expired by the time this judgment is handed down.

[145] Mindful of the intense public interest in this case, let me be absolutely clear: *both this judgment and the main judgment would impose a period of imprisonment on Mr Zuma because he is in contempt of this Court's order*. The point of divergence between the two judgments is whether it is constitutionally permissible to impose punishment (in this instance unsuspended committal) in the context of civil proceedings, *where the initiating party disavows its interest in obtaining compliance with the original court order* (remedial objective).

[146] In the present circumstances, however, and given that the Commission's mandate is about to expire, a coercive order would likely be a *brutum fulmen* (an empty threat) and, for that reason, inappropriate. The main judgment reaches the same conclusion for a different reason, namely, that a coercive order would be "pointless" because Mr Zuma's statements demonstrate that he would not comply with a further order of this Court, even in the face of imprisonment. The main judgment solves this problem by meting out a purely punitive order of unsuspended committal. This solution will no doubt resonate with those who, understandably, wish to see Mr Zuma face punishment for his contempt of this Court, but it is a solution I cannot support. In my view, if a coercive order of committal will likely be inappropriate, the proper order would be an order referring the matter to the DPP so that Mr Zuma's case can be tried according to criminal standards and subject to the necessary protections.

[159] *Compensation Solutions* above n 148 at para 21; *Burchell v Burchell* [2005] ZAECHC 35 at para 35(2); *Naude N.O. v Matebesi Construction (Pty) Limited t/a CG Civils* [2015] JOL 34878 (FB); *Christian Catholic Apostolic Church in Zion v Hlamandlana* 2015 JDR 0789 (ECM); *Law Society, Free State v Macheka*; 2011 (5) SA 591 (FB); *Victoria Park Ratepayers' Association* above n 25 at para 64(c); *Uncedo Taxi Service Association v Mtwa* 1999 (2) SA 495 (E) (*Mtwa*); *Singer's Estate v Kotze* 1960 (2) SA 304 (C) at 308I-H; and *Martin v French Hairdressing Saloons, Ltd* 1950 (4) SA 325 (W) at 330G.

The dual purpose of civil contempt

[147] Contempt of court can take many forms, but the essence of the crime lies in the violation of the dignity, repute and authority of the court.[160] In *Matjhabeng Local Municipality*,[161] this Court explicated the overall scheme of contempt of court in our law:

> "Traditionally, contempt of court has been divided into two categories according to whether the contempt is criminal or civil in nature. These types of contempt are distinguished on the basis of the conduct of the contemnor. Criminal contempt brings the moral authority of the judicial process into disrepute and as such covers a multiplicity of conduct interfering in matters of justice pending before a court. It thereby creates serious risk of prejudice to the fair trial of particular proceedings. . . Civil contempt, in contrast, involves the disobedience of court orders. The continued relevance of the distinction between civil and criminal contempt also seems to lie, on occasion, in the ability to settle the dispute and to waive contempt."[162]

[148] Civil contempt, which is one strain of the broader offence of contempt, consists in the wilful and mala fide disobedience of a civil court order. It appears to have been received into South African law from English law,[163] which characterises civil contempt in the following terms:

> "[C]ivil contempt bears a twofold character, implying as between the parties to the proceedings merely a right to exercise and a liability to submit to a form of civil execution, but as between the party in default and the State, a penal or disciplinary jurisdiction to be exercised by the court in the public interest."[164]

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[160] *Mamabolo* above n 2 at para 13 and Snyman *Criminal Law* 6 ed (LexisNexis Butterworths, Durban 2014) at 315.

[161] *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2018 (1) SA 1 (CC); 2017 (11) BCLR 1408 (CC) (*Matjhabeng Local Municipality*). In this matter, two applications – the *Matjhabeng* matter (under case number CCT 217/15) and the *Mkhonto* matter (under case number CCT 99/16) – were consolidated and heard at the same time.

[162] Id at paras 52-3.

[163] *Fakie* above n 8 at para 7, citing *Attorney-General v Crockett* 1911 TPD 893 at 922.

[164] *Halsbury's Laws of England* 5 ed (LexisNexis Butterworths, Durban 2008) vol 22 at 57 at para 67.

[149] In *Pheko II*, this Court explained that although civil contempt is a crime, it "can be prosecuted in criminal proceedings, which characteristically lead to committal" or dealt with in civil proceedings.[165] This is an important nuance: where the cases and this judgment refer to "civil contempt proceedings", what is being referred to are civil proceedings in which a private party alleges that a party against whom they have obtained a court order is in contempt of the order and therefore guilty of the crime of civil contempt. The reference to civil contempt proceedings is, however, slightly misleading, since civil contempt can be pursued in proceedings that are not civil but criminal, to the extent that a punitive sanction against the alleged contemnor is sought. This distinction is important and it is at the heart of the divergence between this judgment and the main judgment. The main judgment concludes that a litigant who is guilty of the crime of civil contempt can be sentenced to a punitive order of unsuspended committal which is not aimed at coercing the contemnor to comply with a court order (which I will refer to as a punitive committal order, in contradistinction to a coercive committal order). I agree, but there is a further question which must be asked. Is it constitutionally permissible for this order to be made in the context of civil rather than criminal proceedings?

[150] Civil contempt proceedings have been described as "a most valuable mechanism" which permits a private litigant who has obtained a court order that has been breached to approach a civil court to obtain relief ordinarily associated with criminal proceedings (such as an order of committal or a fine).[166] It is for this reason that such proceedings are said to have a dual character to the extent that they have both civil and criminal elements.[167]

[151] Where contempt of court consists of the failure to comply with a court order, the party in whose favour the order was granted may initiate civil proceedings against the

[165] *Pheko II* above n 6 at para 30.

[166] *Fakie* above n 8 at para 7.

[167] *Burchell* above n 159 at para 27.

alleged contemnor in order to enforce the rights flowing from the order in question.[168] A coercive order seeks to enforce compliance with the original order and is made for the benefit of the successful party.[169] In order for the coercion to be effective, a punitive sanction is suspended on condition that the contemnor complies with the original court order. Civil contempt proceedings also have a punitive purpose in that they seek to vindicate judicial authority. They might therefore result in a punitive sanction in the form of a fine or committal. As noted, the sanction is generally imposed in order to coerce the contemnor to comply with the original court order.[170]

[152] As the main judgment acknowledges, in *Pheko II* this Court said that "the 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*".[171] The Supreme Court of Appeal likewise acknowledged in *Meadow Glen* that "[a]lthough some punitive element is involved, the main objectives of contempt proceedings are to vindicate the authority of court and coerce litigants into complying with court orders".[172] The Commission itself also accepts that the main purpose of a civil contempt application is to coerce compliance with a previous court order.

The Commission's punitive approach

[153] In a strange twist, the Commission does not, in these proceedings, ask for a coercive order to compel Mr Zuma into complying with this Court's order in *CCT 295/20*. Instead, it asks for an unsuspended order of imprisonment, in the context of civil contempt proceedings, which is not designed to induce compliance. This is an

[168] *Pheko II* above n 6 at para 30.

[169] *Fakie* above n 8 at para 74.

[170] In *Cape Times* above n 52 at 120D-E it was stated:

> "Generally speaking, punishment by way of fine or imprisonment for the civil contempt of an order made in civil proceedings is only imposed where it is inherent in the order made that compliance with it can be enforced only by means of such punishment."

[171] *Pheko II* above n 6 at para 28. See also *Protea Holdings* above n 28 at 868.

[172] *Meadow Glen* above n 51 at para 16.

order which, as far as I am aware, has not been made in the history of our jurisprudence on civil contempt. The Commission has insisted, in the strongest possible terms, that the order that has been granted in every other civil contempt case to date – namely, a coercive order aimed at inducing the contemnor to comply with the order – would be "pointless" because Mr Zuma's statements evince an intractable defiance of this Court that is immune to coercion. This argument has found favour in the main judgment, which declares that a coercive order would be "futile" and would "yield nothing".[173]

[154] The question which this raises is whether a punitive committal order can and ought to be made against a contemnor in the context of civil contempt proceedings, notwithstanding their dual character. Put differently, can the civil, remedial element of civil contempt proceedings be abandoned in favour of a wholly punitive approach? The main judgment says that this is not only possible, it is also necessary in this case. It offers two reasons in support of its approach, namely: (a) that a punitive order of unsuspended committal with no remedial dimension is consonant with our law[174] and (b) the punitive approach advocated by the Commission is constitutionally permissible, in the main because of the "unprecedented" nature of Mr Zuma's contempt. I evaluate each of these arguments in turn.

[155] As I demonstrate, the proper approach to committal in the context of civil contempt proceedings must be informed by the dual remedial and punitive purpose of civil contempt proceedings, as well as the Constitution. While our courts, in very general and loose terms, may have considered the theoretical possibility of punitive committal orders, I have not come across a single case in which such an order has been granted. But, even if there were a common law rule which allows a civil court in motion proceedings to grant such an order, that rule would not be compatible with the Constitution because it would unjustifiably limit the fundamental rights of contemnors in Mr Zuma's position, as provided for in sections 12 and 35(3) of the Constitution.

[173] Main judgment at [48].

[174] Id at [57].

[156] The exceptionality and gravity of Mr Zuma's contempt and his refusal of every procedural olive branch offered by this Court does not cure the unconstitutionality of these proceedings. In the first place, as a general principle, constitutionality is determined objectively and not with reference to a particular factual scenario or the conduct of a particular rights bearer (such as Mr Zuma). It is no answer to say that the punitive approach advocated by the Commission does not limit the constitutional rights of the alleged contemnor because Mr Zuma did not mitigate the limitation by participating fully in these proceedings. Furthermore, the procedural rights of an accused who has allegedly committed a heinous and serious crimes are no less important or violable than those of an accused who has committed a less serious crime. In other words, the seriousness of Mr Zuma's contempt does not diminish the constitutional protections to which he is entitled.

The common law position regarding purely punitive committal orders made in the context of civil contempt proceedings

[157] Does the common law of civil contempt, as it stands, contemplate a civil court granting a punitive committal order which does not vindicate the initiating party's private interest in compelling compliance and, instead, is aimed solely at punishing the contemnor for her transgression of the rule of law?

[158] There are two judgments of this Court which deal with civil contempt. The first was *Pheko II* and the second *Matjhabeng Local Municipality*. These were preceded by this Court's decision in *Mamabolo*, which concerned criminal contempt in the form of scandalising the court. Notwithstanding that *Mamabolo* concerned a different species of contempt, the Court's analysis of the relationship between the nature of the contempt procedure followed and the purposes of the contempt in question forms part of the jurisprudential context in which the matter before us must be adjudicated. It is instructive, then, to begin with this Court's decision in *Mamabolo* before turning to *Pheko II* and *Matjhabeng Local Municipality*.

[159] The applicant in *Mamabolo* had published a statement in the media to the effect that the High Court had made a mistake by granting bail pending an appeal.[175] This prompted the presiding officer in that matter to issue an order calling upon the applicant to explain the basis on which the statement was made.[176] The applicant was subsequently convicted of the offence of scandalising the court and sentenced to a fine or six months' imprisonment, with a further six months' imprisonment conditionally suspended.[177]

[160] There were two issues for determination in *Mamabolo*. The first was whether the crime of scandalising the court was constitutional (this Court held that it was). The second was the constitutionality of the summary procedure initiated by a judicial officer that calls upon a suspected scandaliser to appear before her to answer to a summary charge of contempt of court in circumstances where the contemptuous conduct occurred outside of court and after the event.[178] This Court identified a host of procedural deficiencies in the summary procedure employed by the High Court:

> "Manifestly the summary procedure is unsatisfactory in a number of material respects. There is no [adversarial] process with a formal charge-sheet formulated and issued by the prosecutorial authority in the exercise of its judgment as to the justice of the prosecution; there is no right to particulars of the charge and no formal plea procedure with the right to remain silent, thereby putting the prosecution to the proof of its case. Witnesses are not called to lay the factual basis for a conviction, nor is there a right to challenge or controvert their evidence. Here the presiding Judge takes the initiative to commence proceedings by means of a summons which he or she formulates and issues; at the hearing there need be no prosecutor, the issue being between the Judge and the accused. There is no formal plea procedure, no right to remain silent and no

[175] *Mamabolo* above n 2 at para 5.

[176] Id at para 6. See also para 8, where this Court noted that the order issued by the High Court "neither expressly nor by necessary implication conveyed that the object of the exercise was to pursue the question of contempt of court", although it appears that the applicant "addressed that question and disavowed any intention on [his] part to have acted contemptuously".

[177] Id at fn 9.

[178] Id at para 51.

> opportunity to challenge evidence. Moreover, the very purpose of the procedure is for the accused to be questioned as to the alleged contempt of court."[179]

[161] The Court considered whether these deficiencies were justified in light of the nature and purpose of the crime of scandalising the court. Kriegler J, writing for this Court, noted that scandalising the court is "a public injury" and is criminalised in order to "protect the integrity of the administration of justice" and the public at large.[180] There is typically no private litigant seeking to advance its private interests and no need for the Court to wield a coercive power over a contemnor. The Court then drew a distinction between proceedings that concern scandalising the court (in which there is no need for remedial relief) and proceedings involving forms of contempt that disrupt the administration of justice where swift intervention is necessary:

> "It should also be noted that we are not concerned here with the kind of case where the orderly progress of judicial proceedings is disrupted, possibly requiring quick and effective judicial intervention in order to permit the administration of justice to continue unhindered. Here we are not looking at measures to nip disruptive conduct in the bud, but at occurrences that by definition occur only after the conclusion of a particular case – or possibly unrelated to any particular case. *Swift intervention is not necessary*.[181]
>
> . . .
>
> In such cases there is no pressing need for firm or swift measures to preserve the integrity of the judicial process. If punitive steps are indeed warranted by criticism so egregious as to demand them, *there is no reason why the ordinary mechanisms of the criminal justice system cannot be employed*."[182]

[162] This led this Court to conclude that the summary procedure invoked by the High Court constituted a radical departure from the ordinary mechanisms of the criminal justice system that was unjustified because there was no interference in a

[179] Id at para 54.

[180] Id at paras 24-5.

[181] Id at para 52.

[182] Id at para 57.

judicial process or the administration of justice which called for swift remedial action. Regardless of how scandalous the conduct might have been, where swift intervention is not necessary, this Court held that the proper course is to employ the ordinary mechanisms of the criminal justice system.

[163] Although *Mamabolo* concerned a particularly robust and invasive summary procedure, a plausible interpretation of this Court's reasoning is that it endorsed the general principle that a summary contempt procedure intended purely for penal purposes is inconsistent with the fundamental right to a fair trial as protected by sections 12 and 35(3) of the Constitution. Where a summary procedure is employed for purely punitive purposes, with no countervailing need to enforce compliance with a court order, these limitations cannot be justified.

[164] In *Pheko II*, which was a sequel to supervisory relief granted by this Court in *Pheko I*, this Court *mero motu* (of its own accord) raised possible contempt by issuing directions calling upon a municipality to show cause as to why it was not in contempt of its order in *Pheko I*.[183] Several dicta from *Pheko II* appear to suggest that it is permissible for a court to grant a purely punitive order of committal in the context of civil proceedings. The Court noted that "[c]ommittal for civil contempt can . . . be ordered in civil proceedings for punitive or coercive reasons"[184] and that the application for committal in civil proceedings "has in its arsenal the threat or consequence of criminal sanction".[185] The Court also accepted the distinction drawn by the minority in *Fakie* between "[c]oercive contempt orders [which] call for compliance with the original order that has been breached as well as the terms of the subsequent contempt

[183] *Pheko II* above n 6 at para 2. *Pheko v Ekurhuleni Metropolitan Municipality* [2011] ZACC 34; 2012 (2) SA 598 (CC); 2012 (4) BCLR 388 (CC) (*Pheko I*).

[184] *Pheko II* id at para 34.

[185] Id at para 30. In support of this statement, the Court cited *Fakie* above n 8 at para 8, where the majority explained that that an application for committal "invokes a criminal sanction or its threat". It also cited the majority's observation, at para 7, that sanction for civil contempt is usually "though not invariably" aimed at inducing the contemnor to comply.

order" and "punitive orders aim[ed] to punish the contemnor by imposing a sentence which is unavoidable".[186]

[165] Do these statements give this Court's stamp of approval to punitive committal orders in the context of civil contempt proceedings? I do not think they do, for two reasons. The first is that this Court's exposition of the law regarding civil contempt was merely a recitation of the common law position as it stood at that point in time and it was clear that the Court did not consider the constitutionality of punitive committal orders.[187] Had the Court done so, it would have had to consider the implications of *Mamabolo* and the argument made by the minority in *Fakie* that the common law should be developed so that punitive committal orders can be granted in criminal proceedings following a referral by the DPP. In *Pheko II*, this Court did not follow the summary contempt procedure dealt with in *Mamabolo* but it did initiate contempt proceedings *mero motu*. As in *Mamabolo*, there was no formal plea procedure or right to remain silent, and no adversarial process with a formal charge sheet issued by the prosecutorial authority. It follows that, had this Court in *Pheko II* considered the appropriateness of granting a purely punitive order, it would have had to engage fully with its reasoning in *Mamabolo*.

[166] Secondly, the comments relating to punitive committal orders in *Pheko II* were made in passing and are therefore *obiter*. The primary issue before this Court in *Pheko II* was whether the respondents were in contempt of court.[188] The Court was not called upon to consider whether a purely punitive committal order should have been made or whether it would pass constitutional muster. Because this Court ultimately found that the respondents were not guilty of contempt, it did not need to consider whether a coercive or punitive order of committal would be a constitutionally permissible sanction. Indeed, the only common law rules which were necessarily

[186] *Pheko II* id at para 31.

[187] Id at fn 33. This much is clear from the fact that this Court endorsed the distinction drawn between coercive committal orders and punitive committal orders drawn by the minority in *Fakie* above n 8 on the basis that it "appears to accurately capture the common law position in this regard".

[188] *Pheko II* above n 6 at para 39.

endorsed by this Court in *Pheko II* related to the elements of the crime of civil contempt and the Supreme Court of Appeal's holding in *Fakie* that, where committal is a possibility, the appropriate standard of proof is proof beyond reasonable doubt.

[167] The second judgment of this Court dealing specifically with civil contempt was that of *Matjhabeng Local Municipality*, in which two separate contempt applications (*Matjhabeng* and *Mkhonto*) were consolidated and heard at the same time. Before dealing with the merits of each matter, the Court provided an exposition of the law on contempt of court. In doing so, it cited with approval the statement in *Burchell* that "civil contempt proceedings have always had a dual nature".[189] In this Court's exposition of the common law position on civil contempt, there are no statements which endorse the proposition that committal can or should be ordered in civil contempt proceedings for the sole purpose of punishing the alleged contemnors. Indeed, there is a suggestion that committal is a civil contempt remedy aimed at coercing compliance. In this regard, it cited the following passage from *Pheko II*:

> "[W]here a court finds a recalcitrant litigant to be possessed of malice on balance, *civil contempt remedies other than committal* may still be employed. These include any remedy that would ensure compliance such as declaratory relief, a mandamus demanding the contemnor to behave in a particular manner, a fine and any further order that would have the effect of coercing compliance."[190]

Having regard to the Court's findings on the merits in both the *Matjhabeng* and *Mkhonto* matters, it is clear that, as in *Pheko II*, this Court neither granted a punitive committal order nor did it conclude that such an order would be constitutional.

[168] The *Matjhabeng* matter concerned a Municipal Manager who had been held in contempt of a consent order issued by the High Court and sentenced to six months' imprisonment, wholly suspended in terms of a summary procedure initiated by the

[189] *Matjhabeng Local Municipality* above n 161 at para 51, citing *Burchell* above n 159 at para 27.

[190] *Matjhabeng Local Municipality* id at para 65, citing *Pheko II* above n 6 at para 37.

High Court *mero motu*.[191] The summary procedure by which he was held in contempt was described by this Court:

> "On 6 November 2014, Mr Lepheana was present at Court. The Court outlined facts to illustrate that the order was not obeyed. Counsel for Eskom was asked to confirm the correctness of those facts. The invitation was not extended to counsel for the Municipality or to Mr Lepheana himself. Whilst counsel for the Municipality was addressing the Court, the Court ordered Mr Lepheana to enter the witness box. He was sworn in. It is evident from the transcript of the proceedings that Mr Lepheana was subjected to lengthy questioning by the Judge and counsel for Eskom."[192]

[169] On appeal, this Court considered whether the requisites of contempt of court had been established as well as the appropriateness of the summary contempt procedure.[193] It concluded that the summary procedure followed by the High Court "clearly deprived Mr Lepheana of the hallmarks of procedural fairness in terms of section 35(3) of the Constitution".[194] This Court did not say anything about whether a punitive committal order could have been granted.

[170] *Mkhonto* involved a dispute as to whether the Compensation Commissioner[195] was in contempt of a settlement agreement that was made an order of court.[196] The High Court found that the Commissioner's failure to comply with the consent order was not wilful and mala fide.[197] On appeal, the Supreme Court of Appeal convicted the Compensation Commissioner of contempt of court and sentenced him to three months' imprisonment on condition that he was not convicted of contempt during the period of

[191] *Matjhabeng Local Municipality* id at paras 5, 7 and 12.

[192] Id at para 10.

[193] Id at para 18.

[194] Id at para 81.

[195] The Commissioner of the Compensation Fund was established under the Compensation for Occupational Injuries and Diseases Act 130 of 1998 (Compensation Commissioner).

[196] *Matjhabeng Local Municipality* above n 161 at paras 21-2.

[197] Id at para 33.

suspension.[198] That finding was overturned by this Court on the basis that there was a reasonable doubt as to the Compensation Commissioner's wilfulness and mala fides. The question of punitive committal, again, did not arise.

[171] In sum, this Court's reasoning in *Matjhabeng Local Municipality*, like in *Pheko II* before it, is hardly an endorsement of granting punitive committal orders in the context of civil contempt proceedings. The position is therefore that this Court has neither awarded a punitive committal order like the one sought by the Commission, nor has it said that such an order, in the context of civil proceedings, would pass constitutional muster.[199]

[172] It is also appropriate to consider the jurisprudence of the Supreme Court of Appeal. The first touchstone is *Beyers*,[200] a pre-constitutional case decided by the Appellate Division. In *Beyers*, the alleged contemnor and the successful party had reached a settlement in which the latter abandoned the interdict which the contemnor had allegedly violated, with retrospective effect "as if it had never been granted".[201] Dealing with the criminal dimension of civil contempt, the Court said:

> "Even though enforcement of a civil obligation is the primary purpose of the punishment, it is nevertheless not imposed merely because the obligation has not been observed, but on the basis of the criminal contempt of court that is associated with it. The fact that the punishment is generally suspended on condition of compliance with the order in issue, and that the punishment is thus not enforced if the applicant should abandon his rights under the order, does not detract from this at all. Depending on the nature and seriousness of the contempt, *the court would accordingly be able to suspend only a portion of the punishment, and then the abandonment of rights by the applicant would not affect the unsuspended portion*."[202]

[198] *Compensation Solutions* above n 148 at para 21.

[199] *Pheko II* above n 6 at para 68 and *Mathjabeng Local Municipality* above n 161 at paras 107-8.

[200] *Beyers* above n 73.

[201] See id at 75D-E and *Fakie* above n 8 at para 11.

[202] *Beyers* id at 80C-H per the majority's translation in *Fakie* id at para 11.

[173] This suggests that even if the initiating party abandons her rights as far as compliance with the original court order is concerned, the court can nevertheless grant an order of unsuspended punishment. However, it is important to note that because the successful party in *Beyers* had abandoned its interest in coercing the contemnor comply with the interdict, "the state decided nevertheless to press ahead", which demonstrated that "the private abandonment did not preclude the public prosecution".[203] The *Fakie* majority noted that in *Beyers* the successful litigant's interest was to "seek punishment of an opponent for contempt of court to enforce compliance with a court order".[204] This seems to me to be an indication that both the *Beyers* court and *Fakie* majority had in mind that when a successful party seeks the punishment of the alleged contemnor, that punishment is linked to the enforcement of a court order. Where this link is broken, it is for the State to take up the prosecution of the alleged contemnor.

[174] The central issue before the Supreme Court of Appeal in *Fakie* was whether the criminal standard of proof beyond reasonable doubt should apply in civil contempt proceedings whenever an order of committal is sought. Put differently, when the successful party only seeks committal that is linked to enforcement (and thus has a coercive purpose), should the civil or criminal standard of proof apply?

[175] There were two judgments in *Fakie*. The majority judgment concluded that, even if the initiating party seeks a coercive committal order in civil contempt proceedings, the criminal standard of proof ought to apply. In reaching this conclusion, the majority acknowledged that it was developing the common law in light of constitutional dictates.

[176] The majority's holding flowed from two considerations. The first was that it is constitutionally impermissible to find an accused guilty of a criminal offence in the absence of conclusive proof of its essential elements.[205] The second consideration was

[203] *Fakie* id.

[204] Id.

[205] Id at paras 21-2.

that "it is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted".[206] The fact that the initiating party's motive is to obtain a committal order to coerce compliance does not alter the fact that, in the end, committal is ordered in part because the public's interest in the maintenance of judicial authority. The initiating party's reason for seeking a committal order is not determinative of the standard of proof. There is thus "no true dichotomy between proceedings in the public interest and proceedings in the interest of the individual, because even where the individual acts merely to secure compliance, the proceedings have an inevitable public dimension – to vindicate judicial authority".[207] When a party approaches a court and proves that the crime of civil contempt has been committed, the matter raises not only the violation of a private interest in compliance with a court order, but also the public's interest in the maintenance of the rule of law. If the court determines that there has been contempt of court, the coercive order employs punishment to induce compliance and punishment to vindicate the rule of law. Although the main judgment initially states that coercive orders only incidentally vindicate the rule of law (and thus, surprisingly, endorses the minority view in *Fakie*),[208] in the end it accepts, as it must, that a coercive order is indeed capable of vindicating judicial authority and that there is no bright line between the coercive and punitive purpose of civil contempt.[209]

[177] The scheme of committal orders sketched by both the majority and minority in *Fakie* suggest the possibility of a punitive committal order in civil proceedings. For example, the majority considers the position of a respondent "in punitive committal proceedings brought by a successful party".[210] Reference is also made to "punitive committal" in contradistinction to "coercive committal".[211] However, sight must not be

[206] Id at para 20.

[207] Id at para 38.

[208] Main judgment at [47].

[209] Id at [53].

[210] *Fakie* above n 8 at para 25.

[211] Id at para 30.

lost of the *ratio decidendi* of *Fakie,* which answers the issue the Supreme Court of Appeal had to decide: namely, whether the criminal standard of proof applies when a coercive order of committal is sought in the context of civil contempt proceedings. What the majority in *Fakie* sought to do was to shine a light on coercive committal to reveal its punitive dimension in order to explain why, notwithstanding its coercive (and notionally "civil" objective), the criminal standard of proof (beyond reasonable doubt) ought to apply.

[178] Notably, the minority judgment in *Fakie*, on which the main judgment places reliance,[212] expressed the view that where a contemnor has been found to be in contempt in civil proceedings, and the judicial officer is of the view that a punitive sentence may be warranted (regardless of whether or not she chooses to impose a coercive sentence), the matter should be referred to the DPP with a view to prosecution in a criminal court. It said:

> "[T]he law does require development: a judicial officer who has found a litigant in civil proceedings to be in contempt and who forms the opinion that a punitive sentence may be warranted, should (whether or not he imposes a coercive sentence) refer the matter to the Director of Public Prosecutions with a view to prosecution in a criminal court. This would in my view be a desirable and justified development of the common law to ensure that those forms of the remedy of contempt of court (and the concomitant procedures) which are criminal in substance are tried in accordance with criminal standards, while leaving those that are truly civil in history, objectives and effects to be treated, as they always have been, according to civil standards."[213]

[179] A run of decisions in the High Court also suggests that other courts have shared the *Fakie* minority's discomfort with granting a purely punitive and unsuspended committal order in civil contempt proceedings. The most ancient of these cases is *Kaplan*,[214] in which De Villiers CJ had occasion to express the follow cautionary words:

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[212] Main judgment at [47].

[213] *Fakie* above n 8 at para 82.

[214] *R v Kaplan* (1893) 10 SC 259 (*Kaplan*).

> "My own personal view has always been that, except where immediate punishment is necessary for the maintenance of the authority of the Court, it is a wiser course for the Court not to take into its own hands the summary punishment of offenders whose contempt is of such a nature as to render them liable to an indictment. The defeating of the due course of justice appears to me to be a contempt of that nature. There may be cases in which such contempt must be summarily dealt with, but, except in such cases, the practice to submit the question whether the offence has been committed to the decision of a jury, appears to me to be a wholesome one."[215]

[180] These misgivings are unsurprising. After all, there is no denying that civil contempt is a remedy "that allows the committal of a person to gaol on less stringent requirements than those required following upon conviction for a criminal offence".[216]

[181] The approach taken by the High Court to punitive civil contempt proceedings has evolved over time. The earlier approach, evidenced in *Cape Times* and later in *Naidu*, was to refuse to hear these matters on the basis that the initiating party lacked locus standi (legal standing) to claim purely punitive relief.[217] The reasoning underpinning this approach is apparent from the following passage from *Cape Times*:

> "It falls to be considered whether a litigant who, as such, approaches the court for the punishment of his opponent for an alleged breach of an order which he has obtained against such opponent in a civil proceeding, has any locus standi to do so where the punishment is not calculated to coerce the opponent to comply with the order. . . . If the person who has obtained the order has suffered some actual loss as a result of its not being timeously complied with, he may have an action for damages occasioned by the breach of the condition as to time, but it seems to me obvious that as the coercive element is, *ex hypothesi*, entirely absent, he would have no locus standi to ask the court to punish his opponent as for a civil contempt, such punishment being always coercive in character. . . . A party cannot come to court as a litigant, except in aid of some right which he possesses or claims to possess . . . [U]nless the appellant showed that the

[215] Id at 263.

[216] *Burchell* above n 159 at para 11.

[217] *Naidu* above n 120 at 545I and *Cape Times* above n 52.

> punishment of those respondents would assist it to enforce its rights [in terms of] the order, it cannot demand such punishment by way of proceedings for contempt."[218]

[182] This reasoning is echoed in *Fakie*, where the majority noted that "the litigant seeking enforcement has a manifest private interest in securing compliance"[219] and in *Pheko II*, where this Court accepted that "civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour".[220]

[183] In both *Cape Times* and *Naidu*, the court labelled the problem with punitive committal as one of standing and, while I disagree with that diagnosis, it is telling that both judgments concluded that an essential component of civil contempt proceedings was absent where there was no interest in obtaining compliance with a court order.

[184] In later decisions, our courts have taken a more permissive approach to private parties who act as so-called "informers" by bringing contempt of court to the attention of a court without seeking coercive or remedial relief.[221] In cases where a contempt application is brought for the sole purpose of punishing the respondent, the applicant is "no more than an informer who brings the contempt to the attention of the court".[222] Though the informer may not seek compliance with the original order, that does not change the nature and character of the application,[223] which is "directed towards the protection of the courts, respect towards the courts and court orders, and the protection of the integrity of the court system".[224] In *Lan*, the Court explained that where contempt

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[218] *Cape Times* id at 120F, 121B-C and 129F-G.

[219] *Fakie* above n 8 at para 8.

[220] *Pheko II* above n 6 at para 30.

[221] *Senatla Trading Enterprises 26 CC v Bloem Water* 2012 JDR 2550 (FB) (*Senatla Trading*) at para 5; *Lan v OR Tambo International Airport Department of Home Affairs Immigration Admissions* 2011 (3) SA 641 (GP) at paras 74-5; *Mashiya v Matshikawe* [2005] JOL 14725 (E) at 4; *Hardy Ventures CC v Tshwane Metropolitan Municipality* 2004 (1) SA 199 (T) (*Hardy Ventures*); *Du Plessis v Du Plessis* 1972 (4) SA 216 (O) at 216F-H; and *Martin* above n 159 at 330E-H.

[222] *Senatla Trading* id.

[223] *Du Plessis* above n 221 at 216G.

[224] *Lan* above n 221 at para 72.

is followed by late compliance with the original court order, the commission of the offence of contempt cannot be ignored and that, "[o]nce the requirements of the offence have been established to have existed at a certain period in time, and once it is found that no valid defence has been raised in that regard, a positive finding should follow".[225] This notwithstanding, I have not found a single case in which a court has granted punitive relief at the request of an informer. It is only in *Lan* that the court granted a warning as a sanction and noted in passing that even if there has been compliance with the original court order, the court is not precluded from granting a sanction not aimed at enforcement.[226]

[185] *Mashiya* deals with civil contempt proceedings at the instance of an informer, post the advent of the Constitution and in accordance with constitutional dictates. The applicant sought an order holding a Magistrate in contempt for breaching an order directing him to hear argument and deliver judgment on the applicant's bail application. The applicant was subsequently released on bail after bringing an urgent application in the High Court. Writing for the Full Court, Froneman J noted that while civil contempt is primarily a means of ensuring compliance with court orders, it "comprises both a private aspect (as a form of execution for certain civil judgments), as well as a public one (that of protecting the authority of the courts)".[227] Froneman J held that the order releasing the applicant on bail satisfied the private interest of the applicant in the contempt proceedings, though "as a citizen", he retained an interest in the public aspect of the proceedings.[228] In effect, the applicant was treated as an informer who was entitled to bring the respondent's contempt to the court's attention.

[186] The question then became whether this remaining public aspect ought to be determined by the Court in those proceedings. Relying on the dicta from this Court's decision in *Mamabolo*, the Court reasoned that, since the proceedings were not aimed

[225] Id at para 71.

[226] Id at paras 76-7.

[227] *Mashiya* above n 221 at 4.

[228] Id.

at enforcing execution of a court order, there was no "pressing need to preserve the integrity of the judicial process which cannot be met by using the ordinary mechanisms of the criminal justice system".[229] In those circumstances it was not appropriate to pursue a punitive sanction against the respondent in "application proceedings [that] do not comfortably fit the requirements of a fair criminal trial, even though they may well be adapted to conform with those requirements where expeditious action is necessary".[230] The Court concluded that the matter should be referred to the DPP for a decision whether to prosecute the respondent for contempt of court.

[187] To sum up, the common law position is that civil proceedings for contempt of court can serve the object of compelling compliance with a court order and the object of punishing the respondent. They can be both coercive and punitive in nature. Under the common law, where an applicant claimed punitive relief not linked to compelling compliance with a court order, the applicant had no locus standi to claim that relief.[231] In later judgments, our courts allowed an applicant with no intention of enforcing a right or a claim to act as an informer to bring to the attention of the court an alleged violation of a court order granted in its favour. Notably, however, a purely punitive committal order *has never been granted in the context of civil contempt proceedings.* On the contrary, the Full Court in *Mashiya* accepted that the initiating party had standing to act as an informer but specifically refused to grant the purely punitive relief sought by him.[232] Underpinning this conclusion is the premise that where only punitive relief is sought for contempt of court, recourse to a summary procedure is unjustifiable because, by definition, compliance with a court order is not capable of being achieved in those proceedings. This absence of a civil rationale for the summary procedure undercuts the justification for adopting a procedure which falls short of the protections that would be afforded an accused person.

[229] Id at 5.

[230] Id at 5-6.

[231] *Naidu* above n 120 at 544-5 and *Cape Times* above n 52 at 120F-121B and 129G-H.

[232] *Mashiya* above n 221.

[188] This approach has found favour with the Ghanaian High Court in *Domelevo*[233] where it was emphasised that courts should be wary of granting personal satisfaction to private litigants:

> "The duty to protect the dignity of the court is not vested in Judges alone. Where contempt is *ex facie curia*, i.e. contempt committed outside the court, it is the duty of litigants and in some cases the Attorney General to bring proceedings to commit the contemnor for contempt. However, litigants in such cases should be mindful not to assume that the essence of the contempt proceedings is to protect their dignity or for their personal satisfaction. The appellant in accordance with his public duty started the contempt proceedings in the High Court. His role to protect the dignity of the court ceased once the Court of Appeal found the respondents guilty and convicted them for contempt. The appellant by appealing to this Court for an enhanced punishment seems to have personalised the contempt application. This Court cannot grant the personal satisfaction the appellant is seeking in this case."[234]

[189] The import of these cases is that the Commission may, in the public interest and as an informer, bring Mr Zuma's contempt to the attention of this Court. The question whether this Court should grant a punitive committal order in cases like these – where the informer seeks punitive relief not coupled with enforcement – is a separate question altogether.

[190] The main judgment acknowledges that "it is indeed the accepted practice in contempt matters to seek compliance, using punishment as a means of coercing same"[235] and my Sister Khampepe ADCJ admits that she has "yet to come across a case in which a solely punitive order of immediate committal has been made, or where punishment is not calculated to coerce the recalcitrant to comply with the initial order".[236] The main judgment's answer to this is that "the extent and gravity of the

[233] *Danie Yaw Domelevo v Yaw Osafo-Maafo* (CR/0407/2020) [2020] High Court of Justice, Accra (12 May 2020) (*Domelevo*).

[234] Id at para 40.

[235] Main judgment at [54].

[236] Id at [55].

contempt in this matter is singularly unprecedented" and warrants a different and novel approach.[237] It appears to accept that it "may be unprecedented" to the extent that it imposes a wholly punitive sanction.[238]

[191] The extraordinary features of this matter are undeniable: a former President has very publicly refused to comply with an order of our country's apex court, which was granted in order to secure his attendance at a commission of inquiry. The establishment of the Commission flows from remedial action by the Public Protector, a Chapter 9 institution which this Court has described as "one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs".[239] The main judgment, by its own admission, has pushed the bounds of our law of contempt in order to meet these exceptional circumstances. The danger of this approach is foreshadowed in the well-known aphorism quoted at the outset of this judgment. It has led to the creation of bad law. As I demonstrate, the law is not just bad; it is unconstitutional.

Civil contempt under the Constitution

[192] It is not enough to say, as the main judgment does, that the common law allows punitive committal to be ordered in civil contempt proceedings. The Constitution is the supreme law of this country and the common law is only instructive to the extent that it is constitutional.[240]

[193] As this Court did in *Mamabolo*, I accept that a common law rule allowing a civil court to order a punitive sanction of committal with no paired remedial purpose qualifies

[237] Id at [56].

[238] Id at [57].

[239] *Nkandla* above n 114 at para 52.

[240] Section 2 of the Constitution provides:

> Supremacy of Constitution
>
> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

as a law of general application for the purposes of section 36 of the Constitution. This begs the question: is such a rule, and the approach taken in the main judgment, constitutional?

[194] In *Fakie*, the Supreme Court of Appeal concluded that civil contempt proceedings, as a general proposition, are constitutional.[241] Although in this case the focus is ultimately on the constitutionality of civil contempt proceedings when certain relief (namely, punitive committal) is sought, it is necessary to consider the respects in which civil contempt proceedings in general limit a contemnor's constitutional rights. This leg of the analysis will be the same regardless of whether the order sought is coercive or punitive. In that regard, it is apparent that the contemnor's constitutional rights are limited whenever committal is sought in the context of civil proceedings. It is only at the second stage of the limitations analysis, which looks at reasonableness, proportionality and justification, that the difference between the two scenarios emerges. Whereas the limitation can be justified when coercive committal is granted, it becomes unjustifiable when the committal is entirely punitive and not linked to a remedial objective.

[195] In my view, civil contempt proceedings potentially limit two constitutional rights, namely, the right to freedom and security of the person (section 12) and an accused's right to a fair trial (section 35(3)).

[196] Before considering this limitation, I pause to comment on the approach taken by the main judgment in this regard. The main judgment's point of departure seems to be that the conduct of an accused person, if egregious enough, is justification to divest them of constitutional rights. Indeed, it seems that the main judgment is nonplussed by the possible limitation of Mr Zuma's procedural rights because, instead of "defend[ing] his rights . . . [Mr Zuma] chose, time and time again, to publicly reject and vilify the

[241] *Fakie* above n 8 at para 42(1).

Judiciary entirely".[242] It is "unperturbed by the suggestion that [it has] not given appropriate deference to Mr Zuma's constitutional rights"[243] because he has not taken up "multiple opportunities to place relevant material" before this Court.[244] There are two serious problems with this approach – one in principle and another in logic. The first is that it seems to assume constitutional rights can be waived, which has no jurisprudential foundation as far as I can see.[245] The second is that it is illogical to reason that a party's entitlement to a specific procedural protection depends on whether she has taken advantage of another, separate procedural protection.

Section 12

[197] Section 12(1) of the Constitution provides in relevant part:

> "Everyone has the right to freedom and security of the person, which includes the right —
>
> (a) not to be deprived of freedom arbitrarily or without just cause;
>
> (b) not to be detained without trial."

[198] This Court in *Nel*,[246] explained that "[t]he mischief at which this particular right is aimed is the deprivation of a person's physical liberty without appropriate procedural safeguards".[247] In *Coetzee*,[248] this Court expressed strong views about a person being deprived of their liberty without a criminal trial. It put the matter thus:

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[242] Main judgment at [73].

[243] Id at [85].

[244] Id at [79].

[245] See for example *S v Schoombee* [2016] ZACC 50; 2017 (2) SACR 1 (CC); 2017 (5) BCLR 572 (CC) at paras 25-6. I am mindful that the very notion of a "waiver" of constitutional rights has been criticised, see Woolman "Category Mistakes and the Waiver of Constitutional Rights: A Response to Deeksha Bhana on Barkhuizen" (2008) 125 *SALJ* 10 at 13.

[246] *Nel v Le Roux N.O.* [1996] ZACC 6; 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC).

[247] Id at para 14.

[248] *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC).

> "Certainly to put someone in prison is a limitation of that person's right to freedom. To do so without any criminal charge being levelled or any trial being held is manifestly a radical encroachment upon such right."[249]

[199] I agree with this assessment and accordingly find that these proceedings limit Mr Zuma's right not to be deprived of his liberty without a criminal trial.

Section 35(3)

[200] Section 35(3) provides that every accused person has a right to a fair trial, which includes the right:

(a) to be informed of the charge with sufficient detail to answer it;
(b) to have adequate time and facilities to prepare a defence;
(c) to a public trial before an ordinary court;
(d) to have their trial begin and conclude without unreasonable delay;
(e) to be present when being tried;
(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
(i) to adduce and challenge evidence;
(j) not to be compelled to give self-incriminating evidence;
(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

[249] Id at para 10. *Coetzee* dealt with the constitutionality of provisions relating to a wilful refusal to comply with a court order which required payment of a civil debt sounding in money as well as those who were unable to make payment due to a lack of means. The question before this Court was whether procedures for the committal to prison of non-paying judgment debtors for up to 90 days in terms of sections 65A-M of the Magistrates' Courts Act 32 of 1994 were constitutionally permissible.

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(o) of appeal to, or review by, a higher court."

[201] The main judgment says that it is "uncontroversial that [Mr Zuma] was not afforded each and every single one of the protections of section 35" but reasons that there is no limitation of section 35(3) because contemnors in Mr Zuma's position are not "accused persons".[250] This leads the main judgment to focus primarily on section 12, which it admits finds application in this matter and may "necessitate a process that is akin to that afforded by section 35".[251] But section 35(3) cannot be sidestepped. I accept that the status quo is that a respondent in civil contempt proceedings is not an accused person for the purposes of section 35(3), which means that she is not guaranteed all the protections of the section in the context of civil contempt proceedings.[252] But if the question we are answering in this case is whether the prosecution of a punitive committal order with no paired remedial object in motion proceedings is constitutional, section 35(3) in its entirety is unavoidable. This is because the alternative procedure is for the punitive committal order to be pursued in criminal proceedings, in which the alleged contemnor would be accorded the status of an "accused person" for the purposes of section 35(3). So, to that extent, if civil contempt proceedings fall short of the fair trial requirements in section 35(3), there will have been a limitation on the section 35(3) rights the alleged contemnor *would have enjoyed had the order of punitive committal been pursued in criminal proceedings*. This does not "transform" Mr Zuma into an accused person (as the main judgment suggests).[253] The main judgment misses the point. In fact, the exact opposite has occurred: despite the fact that he is being prosecuted for committing a crime, civil contempt proceedings transform Mr Zuma into a civil litigant. The question this judgment asks is whether this "transformation" is

[250] Main judgment at [75].

[251] Id at [68] – [71] and [76].

[252] *Pheko II* above n 6 at para 36, which upheld the Supreme Court of Appeal's finding in *Fakie* above n 8 at para 42(1).

[253] Main judgment at [76].

constitutional where a purely punitive sanction is sought and the proceedings are in substance wholly criminal.

[202] In *Matjhabeng Local Municipality*, this Court clarified that while it is indeed "undesirable to strait-jacket [civil contempt proceedings] into the protections expressly designed for a criminal accused under section 35(3)", it did not understand this to suggest that the rights of a respondent where civil contempt resulting in committal is sought cannot be "grounded in section 35(3)".[254] Though the requirements of ordinary criminal proceedings might be relaxed in the context of civil contempt, "these adaptations of form do not, however, alter the constitutional imperative that a person's freedom and security must be protected".[255] However, as I will demonstrate, even with "adaptations", the rights of a contemnor are not adequately grounded in section 35(3) as required by *Pheko II*.

[203] In *Dzukuda*,[256] this Court provided the following overview of the "comprehensive and integrated" right to a fair trial under section 35(3):

> "[A]n accused's right to a fair trial under section 35(3) of the Constitution is a comprehensive right and 'embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force'. Elements of this comprehensive right are specified in paragraphs (a) to (o) of subsection (3). The words 'which include the right' preceding this listing indicate that such specification is not exhaustive of what the right to a fair trial comprises. It also does not warrant the conclusion that the right to a fair trial consists merely of a number of discrete sub-rights, some of which have been specified

[254] *Matjhabeng Local Municipality* above n 161 at para 58. In *Fakie* above n 8, the Supreme Court of Appeal cautioned that an application for committal for civil contempt should not infringe the procedural protection afforded by section 12 of the Constitution. It went on to elaborate at para 25 that:

> "[I]n interpreting the ambit of the right's procedural aspect, it seems to me entirely appropriate to regard the position of a respondent in punitive committal proceedings as closely analogous to that of an accused person; and therefore, in determining whether the relief can be granted without violating section 12, to afford the respondent such substantially similar protections as are appropriate to motion proceedings."

[255] *Matjhabeng Local Municipality* id at para 59.

[256] *S v Dzukuda; S v Tshilo* [2000] ZACC 16; 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC) (*Dzukuda*).

> in the sub-section and others not. The right to a fair trial is a comprehensive and integrated right, the content of which will be established, on a case by case basis, as our constitutional jurisprudence on section 35(3) develops. It is preferable, in my view, in order to give proper recognition to the comprehensive and integrated nature of the right to a fair trial, to refer to specified and unspecified elements of the right to a fair trial, the specified elements being those detailed in sub-section (3)."[257]

[204] Ackermann J, writing for this Court, went on to hold that it is not so that the requirements of section 35(3) can only be achieved by way of one specific system of criminal procedure and that—

> "there may be more than one way of securing the various elements necessary for a fair trial and provided the legislature devises a system which effectively secures such right, it cannot be faulted merely because it settles for a system which departs from past procedure".[258]

This implies that civil contempt proceedings would not violate section 35(3) merely because they are not conducted exactly as a conventional criminal trial would be. Whether the procedure meets the requirements of section 35(3) will have to be determined according to the substance of the protections it offers and not merely according to the "civil" label attached to it.

[205] In this matter, the form of summary procedure followed is the ordinary notice of motion procedure. There are a number of respects in which this procedure falls short of the protections in section 35(3). Some of these deficiencies were also identified in the summary procedure followed in *Mamabolo*, which this Court said was unconstitutional. As in *Mamabolo*, the summary procedure – even when initiated by way of notice of motion – does not entail a formal plea procedure or safeguard the right to remain silent and, in addition, there is no adversarial process with a formal charge

[257] Id at para 9.

[258] Id at para 10.

sheet issued by the prosecutorial authority exercising its discretion as to the justice of the prosecution.

[206] Another glaring deficiency is that it is the prerogative of the civil court hearing a contempt matter to adapt the proceedings in a manner which safeguards the alleged contemnor's section 12 right and which "grounds" the proceedings in section 35(3). Unlike in other jurisdictions, our procedural law of civil contempt is uncodified,[259] which means that courts must look for guidance in rather general and open-ended pronouncement by earlier courts. In this regard, *Fakie* tells us that the respondent in civil contempt proceedings must be afforded "substantially similar protections as are appropriate to motion proceedings"[260] and that an application for contempt must "avoid infringing" the procedural and substantive protections in section 12.[261] This Court's remarks on this point are just as open-ended. *Matjhabeng Local Municipality* then tells us that courts may "relax . . . the requirements ordinarily expected of criminal proceedings" in order to accommodate civil contempt's "hybrid status"[262] but that "the procedure and processes for contempt proceedings seeking committal should deviate from criminal prosecutions only to the extent necessary to make allowance for its unique status".[263] Notably, there is no guidance as to which protections should be imported into the civil contempt procedure.

[207] This degree of judicial discretion and flexibility might be appropriate where the alleged contemnor faces coercive relief allowing her an opportunity to avoid committal and I do not wish to suggest that the general approach outlined in these cases is flawed. The point is simply that this flexibility leaves the protection of constitutional rights up to a judicial officer's assessment of what seems fair in the circumstances. This is a far

[259] For example, civil contempt proceedings in England are governed by RSC Order 52 and the Practice Direction issued in respect of committal applications, which sets out procedures regarding the proper commencement of committal proceedings, the leading of written evidence, case management and other aspects of the civil contempt procedure.

[260] *Fakie* above n 8 at para 25.

[261] Id at para 24.

[262] *Matjhabeng Local Municipality* above n 161 at para 59.

[263] Id at para 58.

cry from the approach in criminal trials, in which the protections in section 12 and 35(3) are peremptory.

[208] Section 35(3)(b) guarantees the accused's right to have adequate time and facilities to prepare a defence. A key feature of these particular proceedings is that they have been brought and heard on an urgent basis. Criminal trials, by contrast, are generally not conducted on an urgent basis. Mr Zuma has been afforded an opportunity to oppose the application and to participate in the hearing of the matter but every aspect of this matter has followed a substantially truncated timeline. Written submissions had to be filed within shorter time frames than would ordinarily be the case, the matter was set down for hearing during this Court's recess and when this Court called for submissions regarding sanction, Mr Zuma was afforded three court days to respond. While all of this was done to ensure a fair procedure was followed, we must nevertheless ask: would Mr Zuma have been pressed to similar timelines if this matter had proceeded by way of criminal proceedings? The answer is, of course, that he would not have. Would Mr Zuma's defence have benefitted from being conducted over a longer period of time, with more procedural safeguards? I will not speculate on this point but it seems to me to be uncontroversial to say that having more time to formulate a defence would only benefit an alleged contemnor. Of course, it might not be that all civil contempt proceedings will be heard on an urgent basis, but I note that in *Victoria Park Ratepayers' Association*, which the main judgment cites with approval,[264] the High Court went so far as to say that in every case of contempt there is "an element of urgency". To the extent that it is open and, indeed, likely that courts will hear civil contempt proceedings on an urgent basis, this could potentially limit the guarantee in section 35(3)(b) that accused persons are to be afforded adequate time to prepare their defence.

[209] Another consequence of this Court granting direct access, or raising a contempt matter *mero motu* (as it did in *Pheko II*), is that the main judgment's committal order is

[264] Main judgment at [32].

unappealable. This limits section 35(3)(o). The main judgment seems unperturbed by the fact that its order is immune from appeal, citing the fact that Mr Zuma did not take advantage of multiple opportunities to represent himself before this Court.[265] But this does not address the position of a more co-operative contemnor who participates fully in the proceedings. It is untenable for this Court to note procedural deficiencies in the civil procedure and nevertheless find that a particular contemnor, because of her egregious conduct, is somehow undeserving of procedural protections. Here again the main judgment seeks to answer genuine and real constitutional concerns with a recitation of the scandalous facts of this case.

[210] The main judgment also suggests that, in any event, this Court's decision to grant direct access puts paid to any concern for Mr Zuma's right of appeal.[266] In my view, it does not.

[211] Section 167(6)(a) of the Constitution provides for direct access to this Court:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
> (a) To bring a matter directly to the Constitutional Court . . ."

Undeniably, a case for urgent direct access has been made out. First, it is this Court's order that is at stake and it would be inappropriate for the matter to be brought in the High Court. Secondly, in its founding affidavit the Commission mooted the possibility of a suspended term of committal and it was incumbent upon this Court to adjudicate that relief as a matter of urgency. It should also be recalled that this Court has a residual discretion to grant the relief sought by HSF in this matter, notwithstanding the fact that the Commission did not seek that relief.

[265] Id at [79].

[266] Id at [80].

[212] Yet granting direct access, though necessary, nevertheless places this Court in a quandary because doing so effectively denies Mr Zuma his right of appeal. Should we accept this as the inevitable consequence of granting direct access and ignore the implications this has for Mr Zuma's right of appeal? Our jurisprudence tells us that we cannot. First, to accept this consequence would nullify the finding in *Fakie* that the position of a contemnor in punitive committal proceedings is "closely analogous" to that of an accused.[267] It would also be contrary to the instruction in *Matjhabeng Local Municipality* that "contempt proceedings seeking committal should deviate from criminal prosecutions *only to the extent necessary*".[268] This Court was emphatic in confirming that the rights of a contemnor in civil contempt proceedings resulting in committal are, and should be, grounded in section 35(3).[269] Secondly, section 167(6)(a) is a procedural rule which allows a matter to be brought directly to the Constitutional Court. It does not divest litigants of their constitutional rights. To the extent that the main judgment suggests that the granting of direct access to this Court has the result of divesting litigants of their constitutional right of appeal, it fails to grasp this point. Having granted direct access, it would be artificial to ignore the fact that the Commission's purely punitive relief implicates this facet of section 35(3). In adjudicating this matter, this Court *must* consider the implications of granting direct access – the most important being that a constitutional right of appeal is implicated. This should inform this Court's assessment of which remedies would pass constitutional muster in the circumstances. The primary duty of this Court is to uphold and protect the Constitution and the fundamental rights it enshrines. This Court would be failing in this duty were it to turn a blind eye to the consequence of granting direct access in this matter, which is that Mr Zuma is stripped of his constitutional right of appeal.

[213] The motion procedure in this context also limits the alleged contemnor's fundamental right to remain silent and to be presumed innocent to the extent that it requires the alleged contemnor to present his or her defence before it is clear that the

[267] *Fakie* above n 8 at para 25.

[268] *Matjhabeng Local Municipality* above n 161 at para 58.

[269] Id.

initiating party has made out a prima facie case against him or her.[270] Section 35(3) does not specifically impose a duty on the State to prove its case by the leading of evidence in accordance with our law of evidence but as Ackermann J was at pains to emphasise in *Dzukuda*, the specific elements listed in section 35(3) do not exhaustively describe all the necessary features of a fair trial.[271] The necessity for the State to be put to the proof of its case by the leading of evidence forms part of the right to a fair trial. In this matter, the Commission has made out a case on affidavit and has not been put to the proof of the authenticity of any of the documents annexed to its affidavit. Of course, Mr Zuma could have filed opposing papers in which he might have challenged the Commission's version, but his version would only supplant that of the Commission if he was able to raise a bona fide and genuine dispute of fact.[272] That might be a low bar to meet, but in the context of criminal proceedings, the State would have had to prove its case by leading evidence rather than simply making bald averments in an affidavit. Indeed, if this matter were adjudicated in a criminal trial, the Commission would need to demonstrate the authenticity of the transcripts that were annexed to its founding affidavit and it would have had to show that the letters purportedly authored by Mr Zuma can in fact be attributed to him. But again, because we are determining the objective constitutional validity of proceedings like these, it would be a mistake to get caught up in what Mr Zuma did or did not do and whether the Commission's case against him is unassailable. The point is that in criminal proceedings, it is only once the prosecution has established a prima facie case, proven by the leading of evidence, that an accused is called upon to challenge that case.[273]

[214] Notably, this is a concern which has been voiced by the Canadian Federal Court in *Selection Testing Consultations*[274] where it stated that even if the motion procedure

[270] *S v Lubaxa* [2001] ZASCA 100; 2001 (4) SA 1251 (SCA) at paras 18-9.

[271] *Dzukuda* above n 256 at para 9.

[272] *Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 638D.

[273] Section 174 of the Criminal Procedure Act 51 of 1977.

[274] *Selection Testing Consultations International Ltd v Humanex International Inc* [1987] 2 FC 405 (*Selection Testing Consultations*).

makes the alleged contemnor aware of the facts on which the initiating party's cause of action is based—

> "the person charged would be obligated to disclose by way of affidavit his evidence and ultimate defence before the onus on the accuser has been discharged. Were the matter prosecuted criminally the 'alleged contemnor [would be] under no obligation to respond; he may remain absolutely silent until such time as the onus of proving beyond a reasonable doubt has been met'."[275]

[215] In sum, to the extent that the common law allows motion proceedings to be invoked to obtain a purely punitive committal, it constitutes a limitation of the fundamental rights in sections 12 and 35(3) of the Constitution.

[216] The main judgment accepts that contemnors in Mr Zuma's position are entitled to their rights in terms of section 12[276] and that section 12 "necessitate[s] a process that is akin to that afforded by section 35".[277] It also accepts that "taking away the liberty of an individual is a drastic step".[278] This notwithstanding, the main judgment concludes that because this Court afforded Mr Zuma an opportunity to make submissions in mitigation of his sentence, it follows that there has been no violation of his section 12 rights.[279] This is surprising, given that this right is but one residual fair trial right. What about the numerous other procedural rights not enjoyed by Mr Zuma? The main judgment, inexplicably, fixates on only one of these rights and reaches the illogical conclusion that because one procedural right has been afforded, there is no need to consider the many others which have not.

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[275] Id at para 69. See also *Apple Computer Inc v Mackintosh Computers Ltd* [1988] 3 FC 277 (CA) at 283, where the Canadian Federal Court of Appeal also voiced its concern that the alleged contemnor was obliged "to disclose by way of affidavit his defense before the onus which the accuser carries had been discharged".

[276] Main judgment at [67].

[277] Id at [68].

[278] Id.

[279] Id at [76] and [77].

Are these limitations reasonable and justifiable?

[217] Section 36(1) of the Constitution provides:

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

[218] Section 36 requires the weighing up of competing values[280] and the balancing of different interests.[281] In *De Lange*, this Court gave guidance on how this exercise is to be conducted:

> "On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose."[282]

[219] Before the Supreme Court of Appeal settled the question in *Fakie* (and was endorsed by this Court in *Pheko II*), there was a lively debate about whether civil contempt proceedings pass constitutional muster.[283] In *Maninjwa*, the High Court

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[280] *Economic Freedom Fighters v Minister of Justice and Correctional Services* [2020] ZACC 25; 2021 (2) SA 1 (CC); 2021 (2) BCLR 118 (CC) at paras 36 and 91 and *Prince v President of the Law Society of the Cape of Good Hope* [2002] ZACC 1; 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC) at para 45.

[281] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR (CC) at para 104 and *De Lange* above n 80 at para 86.

[282] *De Lange* id at para 88.

[283] *Victoria Park Ratepayers' Association* above n 25 at paras 17 and 58; *Laubscher v Laubscher* 2004 (4) SA 350 (T) at paras 19 and 21; *Mtwa* above n 159; *Maninjwa* above n 35; and *Burchell* above n 159 at para 13.

concluded that civil contempt proceedings as a general proposition are constitutional even when brought summarily by notice of motion.[284] A key part of that decision's ratio decidendi was its finding that civil contempt proceedings are constitutionally justifiable because their object "is to compel performance of the court's order as expeditiously as possible".[285]

[220] In *Mamabolo* this Court concluded that, where swift intervention is not necessary to preserve a judicial process or halt an interference with the administration of justice, the proper course is to employ the ordinary mechanisms of the criminal justice system. In those circumstances, adjudicating punitive relief in the context of summary contempt proceedings would unreasonably and unjustifiably limit sections 12 and 35(3) of the Constitution. As I explain, the line of reasoning which led to this conclusion is especially relevant to the question whether the limitations I have identified are necessary to achieve the purpose of civil contempt proceedings and whether there are less restrictive means of achieving that purpose.

The factors in section 36

[221] With this background in mind, I now consider the factors which determine whether the limitation in this case is reasonable and justifiable. For the avoidance of doubt, I must reiterate that what is at issue is neither whether civil contempt proceedings in general are constitutional, nor is it about the constitutionality of sentencing a contemnor to a period of unsuspended committal for committing the crime of civil contempt. I accept that civil contempt proceedings are constitutional, and that this Court has said as much.[286] What we are concerned with in this case is whether it is constitutionally permissible, in the context of civil contempt proceedings, to make a

[284] However, the Court did hold that, to the extent that committal can be ordered in such proceedings, they would only be constitutional if guilt is established beyond reasonable doubt. This finding was later endorsed by the same division of the High Court in *Mtwa* above n 159 and in *Victoria Park Ratepayers' Association* above n 25.

[285] *Maninjwa* above n 35 at 429G-H.

[286] *Pheko II* above n 6.

purely punitive order of committal with no concomitant objective of securing compliance with a court order.

Nature of the right

[222] The starting point is the nature of the rights which have been limited because "the more profound the interest being protected . . . the more stringent the scrutiny".[287] All rights in the Bill of Rights are important and essential in our constitutional democracy. There is no hierarchy of rights, but some rights establish the basic prerequisites for participation in our society.[288] The right not to be deprived of liberty without just cause and the right to a fair trial form part of the bedrock of our constitutional order. Indeed, there can be no doubt that personal freedom is of paramount importance and a high standard of procedural fairness is required whenever it is threatened.[289]

Nature and extent of the limitation

[223] As O'Regan J wrote in *Manamela*:[290]

> "The level of justification required to warrant a limitation upon a right depends on the extent of the limitation. The more invasive the infringement, the more powerful the justification must be."[291]

[224] It is instructive to consider the procedural deficiencies identified in *Mamabolo* that this Court regarded as serious and unjustifiable intrusions on sections 12 and 35(3):

> "There is no [adversarial] process with a formal charge-sheet formulated and issued by the prosecutorial authority in the exercise of its judgment as to the justice of the

[287] *Coetzee* above n 248 at para 45.

[288] *South African Broadcasting Corporation Limited v National Director of Public Prosecutions* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at paras 55 and 91.

[289] *De Lange* above n 80 at paras 128-9.

[290] *S v Manamela (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) (*Manamela*).

[291] Id at para 69.

> prosecution; there is no right to particulars of the charge and no formal plea procedure with the right to remain silent, thereby putting the prosecution to the proof of its case. Witnesses are not called to lay the factual basis for a conviction, nor is there a right to challenge or controvert their evidence. Here the presiding judge takes the initiative to commence proceedings by means of a summons which he or she formulates and issues; at the hearing there need be no prosecutor, the issue being between the judge and the accused. There is no formal plea procedure, no right to remain silent and no opportunity to challenge evidence. Moreover, the very purpose of the procedure is for the accused to be questioned as to the alleged contempt of court.
>
> The composite effect of these departures from the normal procedure where an accused person is called upon to face a charge of criminal conduct, is fundamental. Indeed, there is no adversarial process where an impartial judicial officer presides over and keeps the scales even in a contest between prosecution and defence. The process is inquisitorial and inherently punitive and unfair. Moreover, this procedure which rolls into one the complainant, prosecutor, witness and judge – or appears to do so – is irreconcilable with the standards of fairness called for by section 35(3).
>
> There can be no doubt that a procedure by which an individual can be hauled before a judge for the sole purpose of enquiring into the possible commission of a crime, there to be questioned and, depending on the judge's view of the responses to the questioning, possibly to be punished by a fine or imprisonment, constitutes a major inroad into his fair trial rights. Nor can it be denied that such an individual enjoys little protection or benefit of the law and its processes."[292]

[225] While it is true that the summary procedure followed in *Mamabolo* differs from motion proceedings, the distinction is in form and not substance. It is so that the summary proceedings in *Mamabolo* were initiated by the court itself without any notice of motion and supporting affidavits, whereas motion proceedings are initiated by the party in whose favour an order had been granted. But while the contempt proceedings in *Mamabolo* were initiated mero motu, affidavits were nevertheless filed on behalf of those who were accused of scandalising the Court.[293] There are also a host of

[292] *Mamabolo* above n 2 at paras 54-6.

[293] Id at para 7.

similarities between the procedure followed in *Mamabolo* and these proceedings. As in *Mamabolo*, there was no formal plea procedure or right to remain silent and no adversarial process with a formal charge sheet issued by the prosecutorial authority exercising its discretion as to the justice of the prosecution.

[226] In the view of this Court, these deficiencies amounted to an egregious limitation of rights. While not identical to the procedure followed in *Mamabolo*, these proceedings likewise entail serious inroads into an accused's right to a fair trial and the right to freedom and security of the person.

Legitimate government purpose

[227] There is no denying that civil contempt proceedings serve an important constitutional function. This much is apparent from the opening lines of this Court's judgment in *Pheko II*, where it pronounced that the rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld and that the disobedience of court orders risks undermining judicial authority. It observed that "the effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced" and explained that when courts use their power to defend their orders, they "are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest".[294]

[228] In *Coetzee*, this Court also said:

> "The institution of contempt of court has an ancient and honourable, if at times abused, history . . . . the need to keep the committal proceedings alive would be strong, because the rule of law requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained."[295]

[294] *Pheko II* above n 6 at paras 1-2.

[295] *Coetzee* above n 248 at para 61.

Civil contempt proceedings thus serve the important purpose of upholding the rule of law and vindicating judicial authority in the public interest. The balancing exercise which section 36 requires must therefore reconcile the competing imperatives of protecting individual liberty and upholding the rule of law.

[229] As a general proposition, civil contempt proceedings, which are a curious and sui generis hybrid between criminal and civil proceedings, are also intended to provide private parties with an opportunity to vindicate their rights and obtain speedy relief.[296] This is necessary because the institution of criminal proceedings with its "attendant delays would in many cases hamper the achievement of this object".[297] In *Mamabolo*, this Court appreciated that inroads into a contemnor's procedural rights might be justified if there were a countervailing need for swift judicial intervention to preserve the integrity of the judicial process. Likewise, in this case the purpose of allowing the Commission to proceed by way of motion proceedings is to afford it speedy and effective relief so that the judicial process that began with this Court's decision in *CCT 295/20* can run its course.

Relationship between the limitation and its purpose

[230] By definition, in cases of punitive civil contempt compliance with the particular court order allegedly breached is not capable of being achieved by the contempt proceedings. Thus, the "civil" rationale for the summary procedure is not present. When a successful party seeks a punitive committal order with no remedial purpose, there is no relationship between the form of the proceedings and the legitimate aim of affording successful litigants speedy and effective relief in motion proceedings. As was the case in *Mamabolo*, it cannot be said that the limitations inherent in the summary procedure employed in this matter, when compared to criminal proceedings, are rationally connected to their ostensible purpose, which is to allow swift intervention to ensure the integrity of a judicial process.

[296] See *Maninjwa* above n 35 at 429G-H.

[297] Id.

[231] To be sure, if this Court grants a punitive order of unsuspended committal against Mr Zuma, it will demonstrate and exercise its authority. In that regard, the proceedings will serve the legitimate and important purpose of upholding the rule of law. However, when assessing whether the limitations I have identified are justified to the extent that they serve to uphold the rule of law, two considerations are relevant. The first is the extent of the threat to the rule of law and judicial authority posed by civil contempt. The second is the extent to which meting out punitive committal in the context of civil contempt proceedings buttresses and vindicates the rule of law. Both factors will reveal how much weight to accord the purpose of the limitations when conducting the balancing exercise called for by section 36(1). In other words, when conducting this balancing exercise, the weight accorded to the countervailing interest in upholding the rule of law that is served by civil contempt proceedings will depend on (a) the threat which civil contempt poses to the rule of law and (b) the extent to which summarily punishing civil contempt with unsuspended committal vindicates the rule of law.

[232] In this matter, the first consideration depends on the threat posed by Mr Zuma's civil contempt – and not the inflammatory statements made by Mr Zuma, which may amount to scandalising the court and thus constitute a separate crime altogether. Both the Commission and HSF seem to accept that Mr Zuma's statements may make him guilty of the crime of scandalising the court. The Commission, for its part, does not ask this Court to decide whether Mr Zuma committed the offence of scandalising the court, presumably because it appreciates that *Mamabolo* would likely preclude this Court dealing with this form of contempt by way of a summary procedure. Instead, it submits that Mr Zuma's statements are an aggravating factor in his offence of contempt of court. The main judgment takes up this invitation. It is clear that the statements play another role in the context of the main judgment. Despite accepting that "the mischief [it] is called upon to address is . . . [Mr Zuma's failure] to comply with the order of this Court",[298] the main judgment seems to justify the punitive approach it has taken by

[298] Main judgment at [61].

decrying Mr Zuma's statements, which it describes as "scurrilous and defamatory"[299] and "scandalous".[300]

[233] The main judgment's appraisal of the gravity and seriousness of Mr Zuma's contempt, and its threat to the rule of law, thus flows in part from the derisive nature of his public statements.[301] This may explain the heavy handed sentence it has meted out and why it is so comfortable overlooking serious inroads into Mr Zuma's fundamental rights. In doing so, the main judgment considers it necessary to clamp down on the totality of Mr Zuma's contempt, and not only that part which constitutes the crime of civil contempt. In other words, the main judgment frames the threat to the rule of law posed by Mr Zuma's contempt as his disobedience of this Court's order *and* the statements made by Mr Zuma even though the latter constitute a separate crime (namely, that of scandalising the court). This is impermissible because it runs counter to the principle that punishment should fit the crime actually committed. It also seeks to justify a limitation of constitutional rights by pointing to benefits which flow from punishing an entirely separate crime, which has not been proven. While there is no doubt that Mr Zuma's civil contempt poses a threat to the rule of law, and that punishing him for that contempt would vindicate the rule of law, this punishment cannot be justified by the fact that Mr Zuma may, in addition, be guilty of the crime of scandalising the court.

[234] The second consideration when determining what weight should be accorded to the limitations' rule of law enhancing function, is whether making a punitive order of committal does in fact advance and preserve the rule of law. In this regard, it is important to acknowledge that the rule of law is multi-dimensional. Undeniably, a court's ability to vindicate the authority of its orders in contempt proceedings is one piece of the puzzle. But, equally and importantly, this power must be wielded judiciously and even-handedly. Judicial authority should not be protected at the

[299] Id at [44].

[300] Id at [72].

[301] See for example main judgment at [72] and [92].

expense of fundamental rights. Allowing a punitive order of committal to be meted out in civil contempt proceedings will vindicate the rule of law only if the exercise of judicial authority is not at an unacceptable cost to the procedural protections and norms which undergird a penal system under the Constitution.

Less restrictive means to achieve the purpose

[235] Subject to the caveat above, I accept that the limitations identified are rationally connected to the important purpose of vindicating judicial authority and the rule of law. There are, however, less restrictive means of achieving that purpose.

[236] The most obvious alternative is for civil courts to impose committal only where it is married to a remedial purpose. This affords the contemnor a final opportunity to cure her contempt and avoid imprisonment. A coercive order can also include a further condition that the contemnor will face committal if she is found guilty of contempt again within a certain period. As the Supreme Court of Appeal concluded in *Fakie*, this coercive approach achieves the purpose of providing speedy relief to successful litigants and vindicating judicial authority in the public interest.[302] Unfortunately, due to circumstances outside this Court's control, a coercive order in this matter will likely be inappropriate, but this does not detract from the fact that it would have been as effective as a punitive order and less intrusive on fundamental rights.

[237] I accept that it may be difficult to grasp why a coercive order would be constitutionally permissible in the context of civil contempt proceedings whereas a punitive, unsuspended committal order would not. As this matter has demonstrated, our law of civil contempt is not straightforward. The main judgment reasons that, had this Court granted a coercive order, and had Mr Zuma defied that order, "the result would be the same: Mr Zuma would have been imprisoned without having gone through an ordinary criminal trial".[303] It then concludes, inexplicably, that the finding in this

[302] *Fakie* above n 8 at para 38.

[303] Main judgment at [84].

judgment is that both an unsuspended and suspended committal order is unconstitutional.

[238] I have taken great pains to explain that what is at issue is the constitutionality of punitive committal orders – that is, unsuspended imprisonment – granted in civil contempt proceedings. It is unsound to assume, as the main judgment does, that because both a coercive committal order and a punitive, unsuspended committal order would limit Mr Zuma's constitutional rights, it is impossible for this judgment to draw a distinction between these two scenarios without contradicting itself. Not so. Plainly, both orders limit constitutional rights but the question is whether the limitations in each instance are reasonable and justifiable. Where a coercive order is granted, the limitation of rights is balanced by a countervailing interest in securing swift compliance with a court order for the benefit of the successful litigant. Moreover, the fact that a contemnor faced with a coercive order can comply with the original court order to avoid committal considerably tempers the limitation of rights because the contemnor can avoid committal simply by complying with a lawful court order. It is common sense that the position of a contemnor faced with a coercive order has an added protection against imprisonment that the contemnor faced with a punitive order does not enjoy.

[239] A second less restrictive means, where coercion is inappropriate or not sought by the successful party, is a referral to the DPP. Again, because there is no pressing need to ensure the enforcement of a court order, the rule of law can be vindicated in criminal proceedings. Punitive contempt proceedings, like all proceedings invoking the penal jurisdiction of the courts, can be resolved by means of ordinary prosecution at the instance of the prosecuting authority, or if that authority declines to prosecute, by means of a private prosecution brought by the civil complainant. The main judgment says a referral to the DPP would be inappropriate because the prosecution of Mr Zuma would be left to the discretion of another branch of government. But again, the Commission is free to prosecute Mr Zuma privately in accordance with section 8 of the Criminal Procedure Act.

[240] The answer to this might be that the contemnor's flouting of judicial authority makes every case of contempt urgent and that Mr Zuma's egregious conduct in this matter renders the matter especially urgent. Even still, I do not accept that judicial authority is so fragile that it must be vindicated urgently and at any cost. If this matter had been referred to the DPP, and criminal charges were pressed against Mr Zuma, that in and of itself will demonstrate that compliance with a court order is necessary and that judicial authority cannot be flouted.

[241] In sum, applying the reasoning of this Court in *Mamabolo*, it seems to me to follow that, in a matter where there is no pressing interest in securing compliance with a court order, the ordinary mechanisms of the criminal justice system can safely be employed. As this Court explained in *Matjhabeng Local Municipality*, a summary procedure in this context should be "invoked in exceptional circumstances, where there is a 'pressing need for firm or swift measures to preserve the integrity of the judicial process'".[304]

Conclusion on the reasonableness and justifiability of the limitation

[242] Although section 36(1) lists the various factors that need to be considered when determining whether a limitation is reasonable and justifiable, this Court's approach has been to engage in a balancing exercise. The balancing metaphor, while helpful, belies the complexity of this determination, which is made at the nexus of competing – and sometimes incommensurable – values and social goods. In this matter, the vindication of particular facets of the rule of law seemingly runs up against the procedural rights of alleged contemnors whose conduct has threatened them.

[243] We are concerned with a limitation of fundamental constitutional rights, being the right not to be deprived of freedom without just cause and to be detained without trial, and the right to receive a fair trial. As I have demonstrated, there are significant inroads into these rights which, when assessed in light of their fundamental importance,

[304] *Matjhabeng Local Municipality* above n 161 at para 81.

result in a significant violation. When a contemnor is faced with a coercive committal order, the limitation of rights is significantly tempered because the contemnor is given a final opportunity to avoid imprisonment by complying with a lawful court order. This is a further distinction between civil proceedings, in which coercive relief is sought, and civil contempt proceedings in pursuit of punitive relief which renders the former reasonable and proportional.

[244] Civil contempt proceedings generally serve two important purposes, namely, the enforcement of rights flowing from a court order and the vindication of judicial authority and the rule of law. When a punitive order of committal is sought, they do not serve the first purpose because there is no pressing need to coerce compliance. This means that the limitation of rights inherent in the civil contempt procedure is not balanced by a countervailing interest and need to enforce a court order and, in doing so, facilitate the administration of justice.

[245] Civil contempt proceedings in which punitive committal is sought do, however, serve the second purpose to the extent that an order of punitive committal would be a demonstration and recovery of this Court's authority, but the question is whether, on balance, the rule of law is enhanced or devalued by the manner in which this matter has been conducted. When determining the weight to be accorded to this rule of law enhancing function, regard must be had to the extent of the threat posed by civil contempt to the rule of law as well as the extent to which the rule of law is enhanced or devalued by the swift imposition of punitive committal. As I have explained, the flouting of judicial authority and non-compliance with court orders undermines the rule of law. That said, we must be careful not to assess the threat posed by civil contempt with reference to the threat posed by Mr Zuma's scandalous remarks. I accept that these remarks are aggravating factors relevant to the length of committal, but the limitation of Mr Zuma's constitutional rights is in service of punishing civil contempt and it is impermissible to justify the limitation by reasoning that the limitation also serves the purpose of punishing a separate crime committed by Mr Zuma which has not been proven and which the Commission does not ask us to punish.

[246] In an open and democratic society based on human dignity, equality and freedom, litigants are not prosecuted criminally in civil court in circumstances where they are afforded no opportunity to purge their contempt in order to avoid being deprived of their liberty. In these cases, the choice between upholding the rule of law and protecting the constitutional rights of the alleged contemnor is a false one. While the swift imposition of unsuspended committal in motion proceedings may very well vindicate judicial authority, the trade-off between upholding judicial authority and protecting the rights of contemnors is not zero-sum. As I have shown, alternative means – such as the imposition of coercive orders or a referral to the DPP – also vindicate judicial authority. Moreover, the rule of law is about more than obedience with court orders and its robustness does not depend solely or even primarily on whether litigants who flout court orders are punished swiftly and unconstitutionally. The rule of law, as a fundamental norm, must be understood within the context of an open and democratic society premised on human dignity. In such a society, every possible deprivation of liberty must be adjudicated with as many procedural protections as is reasonable, taking into account countervailing public goods. In this case, the countervailing public good which sanctions the prosecution of civil contempt in motion proceedings is the need to provide the successful litigant with swift and effective redress. When a purely punitive order of committal is sought, this countervailing interest falls away and, with it, the justification for awarding such relief in the context of civil contempt proceedings.

[247] The main judgment suggests that this judgment concludes that "committal through civil contempt proceedings is unconstitutional whether the order is suspended or unsuspended" and that, in this regard, this judgment contradicts jurisprudence from this Court and the Supreme Court of Appeal which accepts that committal in civil contempt proceedings, as a general proposition, is constitutional.[305] Not so. The conclusion reached in this judgment is that when an unsuspended, wholly punitive

[305] Main judgment at [84].

committal order is granted, the limitation of constitutional rights flowing from the civil contempt procedure becomes unjustifiable and unreasonable. The position is different where the committal order is coercive, for two reasons: first, there is a countervailing interest in securing swift compliance with a court order and, secondly, the contemnor is allowed a final opportunity to comply with the original order and avoid imprisonment. I accept, of course, that in both instances constitutional rights are limited. What I do not accept is that the limitation is reasonable and justifiable when punitive committal is sought.

[248] In these proceedings, the Commission – which says it holds out no hope of Mr Zuma agreeing to testify – does not ask for an order requiring Mr Zuma to comply with this Court's order by testifying before the Commission's tenure ends. Absent this interest, which would have given these proceedings a civil character, there is simply no pressing need for Mr Zuma to be prosecuted for a crime in motion proceedings. I am therefore not persuaded that the procedure followed here meets the standard laid down in section 36(1) of the Constitution.

Alternative remedies available to the Commission

[249] The question must be asked: why has the Commission instituted civil contempt proceedings when it does not seek to protect its rights or interests under the order granted by this Court and it appears to gain no benefit from these proceedings? Tellingly, it has offered no explanation for why it has chosen this course and why this Court should adjudicate a substantively criminal matter in civil proceedings.

[250] Notably, the Commission had at its disposal two alternative mechanisms it could have invoked in order to punish Mr Zuma. Both options involve a referral to the DPP. First, the Commission could have referred Mr Zuma's failure to comply with this Court's order. Secondly, it could have referred Mr Zuma's non-compliance with the Commission's directives and summonses in terms of the Commissions Act. Non-compliance with summonses and directives issued by the Commission is an

offence under the Commissions Act[306] and the Commission could have sought to hold Mr Zuma in contempt of the Act. Recently, it threatened to employ this mechanism after Ms Dudu Myeni failed to comply with subpoenas issued by the Commission. In both instances, the DPP would be required to make a decision whether to institute criminal proceedings against Mr Zuma.

[251] The fact that the Commission's recourse to this Court is unnecessary is brought into sharp focus when one considers another case in our jurisprudence that is closely aligned to this matter. Like this matter, the key role players were a former President and a commission of inquiry.

[252] In 1995, the Truth and Reconciliation Commission (TRC)[307] was established by the Government of National Unity to help heal the country and bring about a reconciliation of its people by uncovering the truth about human rights violations that had occurred during apartheid.[308] In 1998, the TRC determined that it was necessary for former President P.W. Botha to provide testimony about his role in atrocities committed under his rule during the apartheid era.[309] Mr Botha was President from

[306] Section 6 of the Commissions Act, above n 10, provides:

> "(1) Any person summoned to attend and give evidence or to produce any book, document or object before a commission who, without sufficient cause (the onus of proof whereof shall rest upon him) fails to attend at the time and place specified in the summons, or to remain in attendance until the conclusion of the enquiry or until he is excused by the chairman of the commission from further attendance, or having attended, refuses to be sworn or to make affirmation as a witness after he has been required by the chairman of the commission to do so or, having been sworn or having made affirmation, fails to answer fully and satisfactorily any question lawfully put to him, or fails to produce any book, document or object in his possession or custody or under his control, which he has been summoned to produce, shall be guilty of an offence and liable on conviction to a fine not exceeding fifty pounds or to imprisonment for a period not exceeding six months, or to both such fine and imprisonment.
>
> (2) Any person who after having been sworn or having made affirmation, gives false evidence before a commission on any matter, knowing such evidence to be false or not knowing or believing it to be true, shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred pounds or to imprisonment for a period not exceeding twelve months, or to both such fine and imprisonment."

[307] The Promotion of National Unity and Reconciliation Act 34 of 1995 (TRC Act) established the TRC.

[308] Desmond Tutu "Truth and Reconciliation Commission, South Africa (TRC)" *Britannica* (6 April 2020), available at https://www.britannica.com/topic/Truth-and-Reconciliation-Commission-South-Africa.

[309] In a statement emphasising the importance of Mr Botha's appearance before the TRC, the Deputy Chairperson of the Commission, Mr Alex Boraine, said the following:

1979 to 1988 and it has been reported that he presided over the country's most brutally oppressive era.[310] While he was in office 30 000 people were detained without trial and thousands were tortured or killed at the hands of the police.[311]

[253] Mr Botha was repeatedly subpoenaed by the TRC but he refused to comply and he refused to give evidence before the TRC. In terms of the TRC Act, refusal to comply with a subpoena issued by the Commission amounted to a criminal offence punishable by a fine, imprisonment not exceeding a period of two years, or both.[312] In the face of these subpoenas, Mr Botha adopted a defiant stance and attacked the legitimacy of the TRC in the strongest terms. He publicly referred to it as a "circus" and told a newspaper that he would rather be charged criminally than make an appearance at the Commission.[313] Mr Zuma has expressed somewhat similar sentiments in this matter.

[254] Mr Botha's persistent non-compliance with the subpoenas led the TRC to refer the matter to the Prosecuting Authority, which charged Mr Botha with contempt of the Commission in terms of the TRC Act. Mr Botha was convicted of contempt by the

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> "[B]ear in mind the long years when he was in charge of apartheid . . . . He has information. He has to answer like anyone else . . . I mean Mr Mbeki came before us, Mr de Klerk came before us, next week Mrs Mdikizela-Mandela comes before us. [We are calling Botha] not out of revenge but as an attempt to do our job."

[310] Suzanne Daley "Ex-South Africa Leader Guilty of Contempt for Refusing to Testify Before Truth Panel" *New York Times* (22 August 1999), available https://www.nytimes.com/1998/08/22/world/ex-south-africa-leader-guilty-contempt-for-refusing-testify-before-truth-panel.html.

[311] Id.

[312] Section 39(e) of the TRC Act provides that any person who:

> (i) having been subpoenaed in terms of this Act, without sufficient cause fails to attend at the time and place specified in the subpoena, or fails to remain in attendance until the conclusion of the meeting in question or until excused from further attendance by the person presiding at the meeting, or fails to produce any article in his or her possession or custody or under his or her control;
>
> (ii) having been subpoenaed in terms of this Act, without sufficient cause refuses to be sworn or to make affirmation as a witness or fails or refuses to answer fully and satisfactorily to the best of his or her knowledge and belief any question lawfully put to him or her;
>
> . . . shall be guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

[313] Lansing and King Perry "Should Former Government Leaders Be Subject to Prosecution after Their Term in Office - The Case of South African President P.W. Botha." (1999) 30 *California Western International Law Journal* 91 at 100-1.

Regional Magistrate[314] and sentenced to pay a fine of R20 000 (or one year imprisonment) as well as a sentence of one years' imprisonment suspended for five years, on condition that Mr Botha complied with any further subpoenas issued by the TRC.[315]

[255] The main judgment has, with respect, misconstrued the point I make by referencing *Botha*. I accept that *Botha* is not on all fours with the case before us. Mr Botha was charged with contempt in terms of the TRC Act while the Commission's cause of action is contempt of this Court's order and not contempt of the Commissions Act. What *Botha* demonstrates, however, is that there was an alternative path which the Commission could have pursued instead of waiting until the eleventh hour, obtaining a court order from this Court on an urgent basis and then pursuing a punitive remedy in further urgent proceedings before this Court. The Commission's cause of action in this Court is not contempt of the Commissions Act, but the legal substratum of the stand off between Mr Zuma and the Commission is Mr Zuma's non-compliance with the Commissions Act. Had the Commission followed the course

[314] Mr Botha's appeal against the order was upheld by the High Court on technical grounds. In *Botha* above n 58 at 271, Selikowitz J stated:

> "I should like to record that this Court is mindful of the fact that there will be many who may consider that it is unjust that the appellant should succeed in his appeal upon the basis that the section 29(1)(c) notice issued by the TRC and served on him on 5 December 1997, was unauthorised because it was prematurely issued. Indeed, Mr Morrison submitted that this Court should not permit the appellant to take what he called 'technical points' because of the intransigent and obdurate attitude which the appellant had demonstrated towards the TRC. The TRC was established to perform a noble and invaluable task for our country. It remains, however, a statutory body clothed only with the powers that the Legislature has given it. This Court is duty-bound to uphold and protect the Constitution and to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. Suffice it to say that the same law, the same Constitution which obliges the appellant to obey the law of the land like every other citizen, also affords him the same protections that it affords every other citizen."

[315] Lansing and King Perry above n 313 at 114-5 noted at the time:

> "The sentence handed down to P.W. Botha will no doubt appear too lenient to some and too harsh to others. The sentence does little to punish him, although the trial and the ruling were personal humiliations for him. In addition, the resulting fine was not large and he will serve no time in jail. Rather than punishing P.W. Botha, the main importance of the sentence seems to be that it sends a clear message: all South Africans must cooperate with the TRC, just as all South Africans must participate in the reconciliation process for that process to be effective in healing the country."

adopted in *Botha*, it could have achieved the same result it desires in these proceedings without trampling upon Mr Zuma's constitutional rights.

[256] The Chairperson of the Commission publicly stated, a month before the Commission made its application to this Court in *CCT 295/20*, that it would lay criminal charges against Mr Zuma.[316] To date, the Commission has not laid charges against Mr Zuma for his failure to comply with the Commission's summonses and directives. It begs the question: why has it not done so? Mr Zuma's non-compliance with summonses and directives issued by the Commission began approximately two years ago. It also bears reminding that this Court in *CCT 295/20* was also perturbed by the Commission's failure to invoke its coercive powers timeously. In this regard, my Brother Jafta J said:

> "Despite the constitutional injunction of equal protection and benefit of the law, of which the Commission was aware, for reasons that have not been explained the Commission treated the respondent differently and with what I could call a measure of deference. He was only subjected to compulsion by summons when it was too late in the day. On the occasion of the respondent's withdrawal without permission from the Commission in November 2020, the Chairperson stated:
>
> > 'Given the seriousness of Mr Zuma's conduct and the impact that his conduct may have on the work of the Commission and the need to ensure that we give effect to the Constitutional provisions that everyone is equal before the law, I have decided to request the Secretary of the Commission to lay a criminal complaint with the South African Police against Mr Zuma, so that the police can investigate his conduct and in this regard the Secretary would make available to the police all information relevant as well as make information available to the National Prosecuting Authority.'

[316] *CCT 295/20* above n 3 at para 58.

> This is a classic example of the Commission invoking its coercive powers. The question that arises is whether the current situation in which the Commission finds itself would have arisen if it had timeously invoked its powers of compulsion."[317]

[257] The Commission elected to bypass the criminal proceedings it threatened to lay against Mr Zuma in favour of an urgent application to this Court that was heard as a court of first and last instance. Armed with an order of this Court compelling Mr Zuma to comply with summonses and directives issued by it, the Commission elected to launch urgent contempt of court proceeding in this Court by way of notice of motion. In its founding affidavit in this Court, it indicated that it would be amenable to an order of suspended committal aimed at coercing Mr Zuma to comply with this Court's order but at the hearing of this matter, the Commission argued that only a punitive order of unsuspended committal would be appropriate. This is in the face of a long line of precedent confirming that civil contempt proceedings have a dual remedial and punitive purpose and that in no other case has a court granted such an order. On the Commission's own account, these proceedings have been denuded of their civil and remedial purpose. Instead of calling it a day, the Commission forged ahead in proceedings that are civil in nature seeking a remedy that is entirely criminal in substance.

[258] I accept that the Commission was entitled, in its capacity as an informer, to bring this egregious case of contempt to the attention of this Court. However, it is not entitled, in these proceedings, to a punitive order which is not linked to the enforcement of this Court's order in *CCT 295/20*. There were several other viable avenues the Commission could have pursued in an attempt to hold Mr Zuma accountable. This Court should not shy away from saying so. Clearly, as *Botha* illustrates, the Commission has remedies under the Commissions Act. It elected not to pursue these remedies despite publicly saying it would. In any event, it is still open to the Commission, despite it being near the end of its lifespan, to refer a case of contempt of this Court's order to the DPP. It

[317] Id at paras 58-9.

follows that a finding that these proceedings are unconstitutional is not a death knell to holding Mr Zuma accountable.

The appropriateness of a coercive order

[259] For the reasons set out in this judgment, the procedure chosen by the Commission does not pass constitutional muster. The unfortunate consequence is that Mr Zuma's contempt cannot, in these proceedings, be punished in the manner proposed by the Commission. And, if this judgment is handed down on the eve of the Commission's expiry, the ordinary coercive remedy of suspended committal will have no practical effect unless the Commission's term is extended. If, however, this Court were to have handed down its judgment at a point in time when the Commission's term was not on the brink of expiry, a coercive order marrying remedial and punitive objectives would have been appropriate. In line with the well-established approach to sanction in civil contempt cases, an appropriate sanction would be a period of committal, suspended on condition that Mr Zuma comply with this Court's order and that Mr Zuma is not convicted of contempt within a specific period of time.

[260] The advantages of such an order are numerous. First, a sanction that seeks to ensure Mr Zuma's compliance with this Court's original order will better promote the Commission's important truth-seeking work. The purpose of the Commission's subpoenas directing Mr Zuma to appear and give evidence before it – and this Court's order seeking to enforce those subpoenas – was to arrive at the truth concerning serious allegations of state capture, corruption and fraud. This truth-seeking purpose has not disappeared and is heightened now as the Commission's lifespan nears its end. Secondly, coercive sanctions are commonly used in contempt proceedings in respect of recalcitrant witnesses to coerce the recalcitrant witness into complying with the subpoena.[318] The primary purpose of a sanction imposed upon a recalcitrant witness, as described by this Court in *De Lange*, is to acquire the information that may be

[318] *Nel* above n 246 at para 22.

required from the witness.[319] Thirdly, a sanction that seeks to compel Mr Zuma to comply with this Court's order, and to appear and give evidence before the Commission, is in the public's interest and not only that of the Commission as the successful litigant in the earlier proceedings. This Court has affirmed the interest that the public has in the Commission's investigations into the allegations of state capture and corruption.[320]

[261] In *Fakie*, the minority observed that where a coercive order of imprisonment is issued and a contemnor does not comply, she will be deprived of her liberty "because [she] has, with knowledge of the order and the consequences of disobedience, elected to flout the order".[321] In this case, were a coercive order to be made, the proverbial sword of Damocles would then hang over Mr Zuma's head and if Mr Zuma again refused to comply with a court order, he would "carr[y] the keys of his prison in his own pockets".[322]

Conclusion

[262] The main judgment, in my view, allows our law of contempt to be hijacked by the peculiar, and indeed, frustrating, facts of this case. One has to wonder: what would the main judgment have done if Mr Zuma had refused to comply with this Court's order but not issued public statements attacking this Court? Absent these scandalous remarks, this Court would be left with civil contempt *simpliciter*. How then could it justify a purely punitive order in civil contempt proceedings that has never been made by our courts and that is at odds with the dual purpose of civil contempt proceedings, which marry the coercive with the punitive? The simple answer is that it could not. Mr Zuma's scandalous remarks might constitute the crime of scandalising the Court but their relevance, as far as the appropriate sanction *for civil contempt* (disobedience of a court order) is concerned, is, at most, that they constitute aggravating circumstances

[319] *De Lange* above n 80 at para 33.

[320] *CCT 295/20* above n 3 at para 69.

[321] *Fakie* above n 8 at para 76.

[322] *De Lange* above n 80 at para 36 and *Nel* above n 246 at para 11. See also the American jurisprudence cited by this Court in *Nel*: *In re Nevitt* 117 F 448, 461 (CA 8th Cir 1902) and *Shillitani v United States* [1966] USSC 110; 384 US 364 (1966) at 368.

which have a bearing on the length of committal. What this counter-factual reveals is that the main judgment develops the law to meet the peculiarly frustrating circumstances of this case. It leaves in its wake law that is not only bad; but also unconstitutional.

[263] It is for that reason that I am not willing to entertain the Commission's purely punitive approach. The main judgment's answer is that the matter before us is "unprecedented" and that jurisprudence emerging from decided cases and settled legal principles does not provide any meaningful guidance. It undoubtedly is an unprecedented case, but the law we apply – whether it reflects the status quo common law position or is an attempt at developing the common law in light of unprecedented facts – must be compliant with the Constitution. The main judgment does not recognise the danger of these proceedings and the threat it poses to litigants who are prosecuted in civil court by their adversaries intent on seeing them punished, with no opportunity to purge their contempt and avoid punishment. By depriving contemnors of their liberty without a criminal trial, summary contempt proceedings, even when brought on notice of motion, limit the fundamental right to freedom of the person protected by section 12 and the right to a fair trial protected by section 35(3) of the Constitution. Where this procedure is exercised for purely punitive purposes, the limitation of fundamental rights cannot be justified. Rights should not be limited without a criminal trial in the interests of "nakedly punitive retribution".[323]

[264] It is also no answer to say that the facts of this case are so exceptional that the main judgment's approach does not pose a threat to contemnors generally. As this Court lamented in *Pheko II*, our courts have increasingly come up against "a troubling disregard for judicial orders" displayed by state organs and functionaries whose failure to comply with court orders "have real and serious consequences for those whose interests they are there to serve".[324] As frustrations mount, there may well be an

[323] *Coetzee* above n 248 at para 14(iv).

[324] *Pheko II* above n 6 at para 27.

increase in contempt litigation which seeks to bring to heel recalcitrant politicians and public functionaries. It is essential, in my view, to develop a balanced and constitutionally compliant law of contempt so that courts are not in future called upon by private litigants to impose purely punitive sanctions designed to jail politicians and functionaries without criminal trials. Playing this role, untethered from the strictures of criminal law and procedure, would ultimately be damaging to the Judiciary.

[265] In my view, this Court has been placed in an invidious position by the Commission. Although the Commission sought Mr Zuma's attendance in 2018 already,[325] it only very recently drew this Court into the arena by launching an urgent application six months ago.[326] Instead of pressing criminal charges against Mr Zuma for contempt of the Commissions Act – which it threatened to do[327] – it compelled this Court to solve a problem born of the Commission's overly deferent approach to Mr Zuma. When Mr Zuma failed to comply with this Court's order, the Commission again approached to this Court on an urgent basis, this time seeking a sentence of punitive committal. Though the substratum of its dispute with Mr Zuma was non-compliance with the Commissions Act, the Commission effectively sought to transform that dispute into one between Mr Zuma and this Court. This Court must of course defend its orders but it can only do so within the bounds of the Constitution.

[266] In my view, the Constitution does not allow private parties to obtain a punitive order of unsuspended committal in civil contempt proceedings, even when they are acting in the public interest. Acting in the public interest is, in any event, the domain of the prosecuting authority, the body ordinarily tasked with the responsibility of prosecuting in the public interest and seeking punitive sanction for the violation of that interest. If a contempt matter is wholly criminal in substance, it should be tried in accordance with criminal standards. The award of a punitive committal order in the

[325] *CCT 295/20* above n 3 at para 57.

[326] *CCT 295/20* id was heard by this Court on 29 December 2020. At paras 58-9 and 65, this Court admonished the Commission for its delay in acting against Mr Zuma.

[327] Id at para 51.

context of motion proceedings subverts the dual purpose of civil contempt proceedings. It is for these reasons that the most appropriate order in the circumstances is a referral to the DPP so that Mr Zuma's case can be tried according to criminal standards and subject to the necessary protections.

[267] To sum up:

(a) Generally, an applicant's interest in civil contempt proceedings is the enforcement of an order granted in their favour.

(b) It is not reasonable and justifiable under the Constitution for a court to make an order of unsuspended committal in civil contempt proceedings, where the successful litigant has no interest in compelling compliance with a court order or where compliance is no longer possible. Such an order, when granted in civil proceedings, is unconstitutional to the extent that it limits sections 12 and 35(3) of the Constitution.

(c) Where relief is sought in civil contempt proceedings which is not aimed at enforcing compliance with a court order, the ordinary mechanisms of the criminal justice system should be employed to protect the dignity of the Court.

(d) In the event that a private litigant approaches a civil court for a punitive order which is not allied with the remedial purpose of coercing compliance with the original court order, the proper approach is to refer the matter to the DPP. Should the same litigant pray for coercive relief, it is within the power of the Court to adjudicate that claim and, in doing so, make an order of committal which vindicates the public interest and creates an incentive for the contemnor to comply with the original order.

Order

[268] Had I commanded the majority, I would have made a coercive order of suspended committal, conditional upon Mr Zuma complying with this Court's order. But because the Commission's lifespan is at its end, I would order that the matter be

referred to the DPP for a decision on whether to prosecute Mr Zuma for contempt of court. Should the DPP refuse to prosecute, it would be open to the Commission to prosecute Mr Zuma privately in accordance with section 8 of the Criminal Procedure Act.

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