CONSTITUTIONAL COURT OF SOUTH AFRICA

Jacob Gedleyihlekisa Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State and Others

CCT 52/21

Date of judgment: 17 September 2021

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Friday, 17 September 2021 at 10h00, the Constitutional Court handed down judgment in an urgent application for direct access in which former President Jacob Gedleyihlekisa Zuma sought the rescission and setting aside of the order granted by the Constitutional Court on Tuesday, 29 June 2021, which found him guilty of contempt of court and sentenced him to imprisonment for a period of 15 months.

In December 2020, in the matter of *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, the Secretary of the Commission, approached the Constitutional Court on an urgent basis for an order that would compel Mr Zuma's co-operation with the Commission's investigations and objectives. On Thursday, 28 January 2021, the Constitutional Court, in a unanimous judgment, ordered Mr Zuma to file affidavits and attend the Commission to give evidence before it. Mr Zuma did not comply with that order. Instead, he issued a series of public statements in which he impugned the integrity of the Constitutional Court, the Commission and the Judiciary, and expressed an intention neither to co-operate with the work of the Commission, nor comply with the Court order. Accordingly, the Commission approached the Constitutional Court on an urgent basis and launched contempt of court proceedings, seeking a punitive sanction and Mr Zuma's imprisonment.

In that matter, *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 18, the Constitutional Court unanimously found Mr Zuma guilty of the crime of contempt of court. However, two judgments were penned that reached different conclusions on the appropriate sanction. The majority, penned by Khampepe ADCJ (Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Tlaletsi AJ and Tshiqi J concurring), found that in the unprecedented circumstances that Mr Zuma's contumacy had created, the only appropriate sanction capable of vindicating the dignity of the Constitutional Court and

safeguarding the rule of law was a punitive sanction in the form of direct and unsuspended committal. The minority judgment, penned by Theron J (Jafta J concurring), took a different view, concluding that it would be unconstitutional to grant an order of unsuspended committal in the context of motion proceedings for civil contempt of court, where committal is not aimed at coercing compliance with the initial court order. Mr Zuma did not oppose the contempt case launched against him, nor did he cooperate when he was invited by the Constitutional Court to make submissions on the appropriate sanction. The majority ordered that he be sentenced to imprisonment for a period of 15 months.

In anticipation of his impending incarceration, Mr Zuma filed an application for direct access at the Constitutional Court on Friday, 2 July 2021, seeking the rescission and reconsideration of the judgment and order that found him guilty and ordered his imprisonment. Although an order of the Constitutional Court cannot be appealed, there are certain narrow grounds upon which an order of court, including an order of the Constitutional Court can be rescinded. The thrust of Mr Zuma's case was that the Constitutional Court erroneously granted the judgment and order in his absence. Thus, it stood to be set aside in terms of rule 42(1)(a) of the Uniform Rules of Court, and, in addition, in terms of the common law, on the basis that he had established "good cause" for rescission.

Mr Zuma was incarcerated on Wednesday, 7 July 2021 in terms of the contempt order. The rescission application was heard by the Constitutional Court on an urgent basis, on Monday, 12 July 2021.

The matter was opposed by the Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, its Chairperson and the Helen Suzman Foundation, the first, second and fifth respondents respectively. Council for the Advancement of the South African Constitution (CASAC) and Democracy in Action (DIA) applied to be admitted as amici curiae. Satisfied that CASAC and DIA met the requirements for admission and advanced useful submissions that differed from those advanced by the parties cited, the Constitutional Court admitted CASAC and DIA.

Three judgments were penned in this matter. The majority judgment was penned by Khampepe J (Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Tlaletsi AJ and Tshiqi J concurring) (first judgment). A dissent was penned by Jafta J (second judgment). And a third judgment was penned by Theron J, concurring in part with the dissent.

All three of the judgments held that this matter engaged the Constitutional Court's jurisdiction and that the circumstances warranted granting direct access on an urgent basis.

Beginning with rule 42(1)(a), the first judgment found that Mr Zuma did not meet the statutory requirements for rescission. Noting that an applicant who invokes this rule must show that both grounds exist, the first judgment was not persuaded by Mr Zuma's submissions. It found that although Mr Zuma's physical absence was beyond dispute, the words "granted in the absence of any party affected", exist to protect litigants whose presence was precluded, not those whose absence was elected. Mr Zuma had been given notice of the contempt of court proceedings launched against him and knew of the relief the Commission sought. Thus, it was to his peril that he elected not to participate in the contempt proceedings. His elected absence could not have the effect of turning a competently granted order into one erroneously granted.

The first judgment found that Mr Zuma also failed to demonstrate why the order was erroneously granted. The second prong of rule 42(1)(a) requires an applicant to show that the judgment against which the rescission is sought was erroneously granted because there existed a fact of which the court was unaware at the time, which, had it been aware of, would have precluded the granting of the judgment. The absence of submissions from Mr Zuma, which may have been relevant at the time the Court was seized with the contempt proceedings, cannot render erroneous the order granted simply because it was granted in the absence of those submissions. This is because the existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous one. Mr Zuma had multiple opportunities to bring his arguments to the attention of the Court. That he opted not to cannot mean that the Court committed an error in granting the order. In any event, the first judgment held that Mr Zuma's alleged errors were all issues that had been substantively dealt with by the Constitutional Court in the contempt judgment, and did not constitute errors that would have precluded the Court from making the impugned order, had it been aware of them at the time.

Mr Zuma also pleaded that he had established "sufficient" or "good cause" for rescission in terms of the common law. However, the first judgment concluded that Mr Zuma failed to meet both of the necessary requirements for rescission in terms of the common law. Not only did his application lack prospects of success, all of his submissions having already been addressed by the Constitutional Court when it disposed of the contempt proceedings, he failed to provide a plausible or acceptable explanation for his default. This, the first judgment found, was fatal.

The first judgment also concluded that it would be contrary to the interests of justice to expand the grounds of rescission, as advocated for by Mr Zuma, who argued that the Court should reconsider its order on the basis that the meaning of a rescindable "error" should be expanded to permit for rescission where the constitutionality of an order is impugned. Far from inviting courts to expand the scope of rescission, it is well-established that courts should do the exact opposite. The Legislature has deliberately carved out exceptionally narrow grounds for rescission because the notion of rescinding court orders constitutes an affront to the general rule that orders, especially those of the apex Court, are final. This, it was emphasised, is important because if orders of court are too readily set aside, the administration of justice would be compromised by chaos. Specifically, the majority of the Constitutional Court found that the qualification in rule 29 of the Rules of the Constitutional Court, which incorporates rule 42 with "such modifications as are necessary", provides no panacea to Mr Zuma's ill-fated application for rescission.

Notwithstanding that the first judgment accepted that it might be open to the Court to reconsider an order previously granted if it would be in the interests of justice to do so, circumstances must be wholly exceptional to justify a departure from the doctrines of *res judicata* and *functus officio*. It was found that Mr Zuma's case did not meet the threshold of "exceptional circumstances" such that the Court should depart from these cardinal tenets of the rule of law. The first judgment emphasised that the interests of justice required the Constitutional Court to protect the principles of finality in litigation. It also decried the degree of damage that has already been done to the rule of law, and the principles that underlie it, as a result of the legal uncertainty that has both shrouded this application and been ushered in thanks to it. Finally, the first judgment found that Mr Zuma's conduct throughout the litigation history of this matter prejudiced his case for it would fly in the face of the interests of justice for a litigant to be allowed to wilfully refuse to participate in litigation and then expect the opportunity to re-open

the case when it suits them. The first judgment found that it was not in the interests of justice that Mr Zuma's tactics of litigious vacillation be tolerated.

The majority of the Constitutional Court was also not persuaded by the reasoning of the dissent, which concluded that the impugned order authorised Mr Zuma's detention without a trial, in contravention of section 12(1)(b) of the Constitution, and that the procedure leading up to his conviction and sentencing breached his rights guaranteed by sections 34 and 35(3) of the Constitution. Aside from finding that the impugned order is unconstitutional, and therefore, falls to be set aside, the second judgment found that the order is incompatible with international law, specific reliance placed on Articles 9 and 14(5) of the International Covenant on Civil and Political Rights (ICCPR), which also renders it rescindable. The first judgment accepted that it is incontrovertible that the Constitutional Court is enjoined, by section 39(1)(b) of the Constitution, to consider international law when interpreting rights in the Bill of Rights. However, it stressed that this is an interpretative injunction and does not oblige South African courts to prefer a position taken in international law, as the second judgment suggested. The relevance of the ICCPR to a rescission application, the first judgment found, is misleading given that in a dualist legal system like South Africa's, international treaties do not create rights and obligations capable of being enforced domestically unless they are incorporated by an Act of Parliament. The first judgment stressed that because the ICCPR has not been incorporated, it only binds South Africa at the international level. And, because its provisions cannot be invoked by litigants in domestic courts, it is a mischaracterisation of international law to say that an alleged incompatibility of an order of a South African court with provisions of the ICCPR, constitutes a ground for rescission or reconsideration in a domestic court, including the Constitutional Court.

In conclusion, the majority of the Constitutional Court found that Mr Zuma has not met the requirements of rescission in terms of rule 42(1)(a) or the common law. Instead, in launching an application for rescission, Mr Zuma opportunistically sought to re-open the merits of the contempt proceedings. The majority held that it would be contrary to the interests of justice to expand the legal grounds of rescission or reconsider the judgment and order the Constitutional Court handed down on 29 June 2021. Accordingly, the majority dismissed the application with costs.

In the final analysis, the majority took the opportunity to pronounce that of course, rescission as an avenue of legal recourse remains open, but to litigants who advance meritorious and bona fide applications, and who have not, at every turn of the page, sought to abuse judicial process.

The second judgment identified the issue for determination was whether the motion procedure followed when Mr Zuma was convicted and sentenced complied with section 12(1)(b) of the Constitution, which guarantees the right not to be detained without a trial. The second judgment interpreted this section and concluded that it requires a trial to be held before an individual may be detained.

Since here there was no trial, the second judgment concluded that the detention was invalid as it was inconsistent with section 12(1)(b) unless it constituted a reasonable and justifiable limitation. Having undertaken the justification analysis, the second judgment concluded that the limitation was not justifiable. Accordingly, the second judgment held that the detention was unconstitutional and invalid.

The second judgment, with reference to section 172(1) of the Constitution, pointed out that the Constitutional Court is obliged to declare the detention invalid and set it aside. It pointed out that the invalidity of the order flowed from its being inconsistent with the Constitution.

Theron J concurred in Jafta J's judgment, subject to the qualification that there is no need to craft a "separate ground for intervention". The third judgment held, instead, that on the basis of *Molaudzi v S,* an order of the Constitutional Court can be reconsidered in exceptional circumstances, and where the interests of justice "cry out" for intervention. Theron J agreed with Jafta J that the order made by the majority in the contempt proceedings was made pursuant to an unconstitutional procedure. Theron J held that Mr Zuma was incarcerated without a right of appeal, his case is exceptional, and cries out for intervention, failing which substantial hardship and injustice would be visited upon Mr Zuma.