



CONSTITUTIONAL COURT OF SOUTH AFRICA

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 and Others

CCT 52/21

Date of judgment: 29 June 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 Tuesday, 29 June 2021 at 10h00, the Constitutional Court handed down judgment in an urgent application for direct access seeking an order declaring former President Jacob Gedleyihlekisa Zuma to be in contempt of court, and sentencing him to a period of two years' direct imprisonment.

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 (CCT 295/20), the applicant, being the Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, 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 28 January 2021, the Constitutional Court handed down judgment in that matter, ordering Mr Zuma to file affidavits and attend the Commission to give evidence before it. Mr Zuma responded by releasing a public statement in which he alleged that the Commission and the Constitutional Court were victimising him. From 15 to 19 February 2021, Mr Zuma did not attend the Commission as ordered. Accordingly, the Chairperson of the Commission announced that it would launch contempt of court proceedings. 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 the Constitutional Court's order nor co-operate with the Commission.

The applicant proceeded to approach the Constitutional Court for direct access on an urgent basis, submitting that a court that grants an order retains jurisdiction to ensure its compliance. The applicant submitted that, considering Mr Zuma's former and current political position, his conduct constituted a particularly reprehensible attack on the rule of law and posed a serious risk that it would inspire others to similarly undermine the administration of justice. It was the applicant's case that Mr Zuma was guilty of the crime of contempt of court as he had failed to comply with the order made in *CCT 295/20*. Furthermore, that in ostensibly defending his

contempt, Mr Zuma conducted a politically-motivated smear campaign against the Constitutional Court, the Commission and the Judiciary, which constituted an aggravating factor relevant to the determination of an appropriate sanction. The applicant submitted that, in such unprecedented circumstances, it was apposite for the Constitutional Court to respond on an urgent basis and that only a punitive sanction, in the form of an unsuspended order of imprisonment for a period of two years, would be appropriate.

Mr Zuma did not oppose this application, nor did he file any submissions.

The Helen Suzman Foundation applied to be admitted as *amicus curiae*. Its main submission was that an appropriate sanction in contempt proceedings must play the dual role of vindicating the dignity of the court as well as compelling compliance with the impugned order. And, to this end, it proposed several sanctions which contained both punitive and coercive elements. Its submissions were relevant to the question of sanction and were of assistance to the Court. Since it met the requirements to be admitted as *amicus curiae* in terms of the Rules of the Constitutional Court, the Helen Suzman Foundation was admitted.

The main judgment was penned by Khampepe ADCJ (Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Tlaletsi AJ and Tshiqi J concurring). The second judgment was penned by Theron J (Jafta J concurring).

Both judgments agreed that this matter engaged the Constitutional Court's jurisdiction and that the circumstances warranted granting direct access on an urgent basis. Contempt of court proceedings exist to protect the rule of law and the authority of the Judiciary, and any disregard of an order of the Constitutional Court requires its intervention. It was held that neither the public's vested interests, nor the ends of justice, would be served if the matter had been required to traverse the ordinary, and lengthy, appeals process. It was accordingly held to be in the interests of justice to grant direct access, and to do so on an urgent basis.

The main judgment held that there could be no doubt that Mr Zuma was in contempt of court. The Constitutional Court had handed down an order in *CCT 295/20*. This had been served on Mr Zuma, who had subsequently failed to depose to affidavits or appear and give evidence before the Commission, as he had been ordered to do. And, he had failed to present evidence to establish a reasonable doubt as to whether his non-compliance was wilful and *mala fide*.

In determining the appropriate sanction, the main judgment considered the differences between coercive orders, which use suspended imprisonment as a threat to compel compliance, and punitive orders of direct committal. The main judgment held that a coercive order would be both futile and inappropriate as Mr Zuma was resolute in his refusal to comply. The main judgment held that affording Mr Zuma another opportunity to attend the Commission would have no effect other than to prolong his defiance and to signal that impunity is to be enjoyed by those who defy court orders. It was held that, notwithstanding the importance of the work of the Commission, neither the Court's honour, nor the public's interest in Mr Zuma's testifying before the Commission, would be vindicated by a coercive order. In any event, the main judgment noted 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. An additional deficiency with a coercive order, so the main judgment found, was that the punitive effect of it would only operate upon future non-compliance. In other words, it would wield no punitive power in respect of Mr Zuma's contemptuous conduct, already so worthy of rebuke.

Finding that the appropriate sanction was likely to be a punitive order of unsuspended committal, the Court was alive to the need to safeguard Mr Zuma's right not to be arbitrarily deprived of physical freedom, as enshrined in section 12 of the Constitution. The main judgment acknowledged that 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. Whereas the second judgment concluded that Mr Zuma ought to have been afforded an accused person's rights given that what the applicant sought was a punitive order, the main judgment found that this was not a conventional criminal trial and a contemnor in civil proceedings is not an accused person for the purposes of section 35. Notwithstanding this, the main judgment was acutely aware that contempt proceedings, although brought by civil process, have a criminal component. It found that section 12 imports the right to be afforded a fair procedure akin to that afforded by section 35. Thus, affording a contemnor an opportunity to say something in mitigation of sentence is important given that removing a person's freedom is a drastic step. Accordingly, directions were issued on 9 April 2021, in which Mr Zuma was invited to file an affidavit on an appropriate sanction and sentence in the event that he be found guilty of contempt. The main difference between the procedure followed in this matter and that which is ordinarily followed in a criminal trial was that, since contempt proceedings deal with guilt and sentence in one process, the invitation was sent before the Court reached a decision on guilt.

In response to the directions, Mr Zuma did not file an affidavit but addressed a 21-page letter to the Chief Justice, in which he made further inflammatory statements intended to undermine the Court, portray himself as a victim of the law and evoke public sympathy. He also attempted to justify his contempt by stating that, by hearing this application while the outcome of his application for the review of the decision by the Chairperson of the Commission not to recuse himself was outstanding, the Constitutional Court had acted unconstitutionally. The main judgment held that this defence was unfounded since, had Mr Zuma not wanted to participate in the Commission hearings whilst his review application was pending, he should have sought an interim stay of proceedings, which he did not do. The main judgment emphasised that the Constitutional Court went to great lengths to safeguard Mr Zuma's rights. Consequently, there was no sound basis on which he could claim to have been treated unfairly or victimised.

Having found that Mr Zuma could not be described as an accused person as envisaged in section 35 and that a fair procedure had been followed to safeguard his right to freedom, the main judgment held that no section 36 limitations analysis arose in the circumstances.

The main judgment held that an unsuspended order of committal was further justified by certain exceptional features of this matter. First, Mr Zuma's scurrilous and unfounded attacks on the Judiciary and its members were intolerable and could not be met with impunity. Protecting courts from slanderous public statements, it was emphasised, 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. Furthermore, the main judgment found that contempt is not the act of non-compliance with a court order alone, but encompasses the nature of the contempt, its extent and the surrounding circumstances. Thus, the Court was enjoined to take cognisance of the unique and scandalous features of the matter. It held that if these aspects were to be ignored, the Court would be adjudicating the matter with one eye closed, and declining to decide it without fear, as it is constitutionally mandated to do.

The main judgment further emphasised that Mr Zuma was no ordinary litigant, but was the former President of the Republic of South Africa, who continued to wield significant political influence and in whom lies a great deal of power to incite others to similarly defy court orders. Thus, if his conduct were to be met with impunity, he could do significant damage to the rule of law. The main judgment held that no person enjoys exclusion or exemption from the sovereignty of the laws of the Republic. And it would be antithetical to the value of accountability if those who once held high office were not bound by the law. The main judgment emphasised the existence of a heightened obligation on the President to conduct her or himself in a manner that accords with the Constitution. Although Mr Zuma was not President at the time of his contempt, his contumacy was all the more outrageous in light of the position he once occupied. The main judgment further noted that it was not insignificant that Mr Zuma's contemptuous conduct related to his duty to account for his time in Office. Accordingly, it was disturbing that he who twice swore allegiance to the Republic, its laws and the Constitution, sought to ignore and undermine the rule of law altogether.

The main judgment concluded that the cumulative effect of these factors was that the only appropriate sanction was a direct, unsuspended order of imprisonment.

In determining the length of sentence, the main judgment held that the Court was enjoined to consider the circumstances; the nature of the breach; and the extent to which the breach was ongoing. In doing so, it held that quantifying the egregiousness of Mr Zuma's conduct was an impossible task, but that the focus had to be on what kind of sentence would demonstrate, generally, that orders made by a court must be obeyed, and, to Mr Zuma specifically, that his contumacy stood to be rebuked in the strongest of terms. The main judgment concluded that if, with impunity, litigants, especially those in positions like that of Mr Zuma, are allowed to decide which orders they wish to obey and those they wish to ignore, a constitutional crisis will be precipitated. The main judgment ordered an unsuspended sentence of imprisonment for a period of 15 months.

The applicant sought costs on a punitive scale. The Constitutional Court affirmed the principle that punitive costs are exceptional and are reserved for instances where a litigant has conducted themselves in an indubitably vexatious and reprehensible manner, deserving of extreme opprobrium. The Court held that it was without question that the extraordinary award of punitive costs was warranted. Costs were awarded on an attorney and client scale.

The second judgment, penned by Theron J (Jafta J concurring), agreed that Mr Zuma was in contempt of the order in *CCT 295/20* but concluded that it would be unconstitutional to grant an order of unsuspended committal in the context of motion proceedings if the committal is not aimed at coercing compliance with a court order.

After surveying our jurisprudence on civil contempt, the second judgment concluded the following. First, that civil contempt has dual remedial and punitive purposes, with the main purpose of civil contempt proceedings being the enforcement of a court order, and that it had found no case in which a punitive committal order (unconnected to coercing compliance) had been ordered. Secondly, that the Constitutional Court had yet to consider the constitutionality of punitive committal orders in the context of civil contempt proceedings but had concluded, in respect of criminal contempt of scandalising the court, that a summary contempt procedure intended purely for penal purposes is inconsistent with the fundamental rights protected by sections 12 and 35(3) of the Constitution because there was no interference in the judicial process or the administration of justice, which called for swift remedial action.

The second judgment considered whether a common law rule allowing a civil court to order a punitive sanction of committal with no paired remedial purpose constituted a justifiable limitation of the right to freedom and security of the person (section 12) and an accused's right to a fair trial (section 35(3)). The second judgment emphasised, at the outset, that because constitutionality is determined objectively, it would be a mistake to fixate on Mr Zuma's conduct in these proceedings and that regard should instead be had to the position of contemnors in Mr Zuma's position.

The second judgment concluded that depriving a contemnor of liberty without a criminal trial limits section 12 of the Constitution and that there are a host of respects in which the civil contempt procedure falls short of the protections enshrined in section 35(3). First, although civil contempt proceedings are a hybrid of civil and criminal elements, and therefore must be conducted in a manner that is grounded in sections 12 and 35(3) of the Constitution, the adaptation of motion proceedings to reflect their hybrid status depends on a judicial officer's assessment of what seems fair in the circumstances. By contrast, the procedural rights in section 35(3) are peremptory. Secondly, civil contempt proceedings, especially when brought on an urgent basis (as they were in this case), limit the right to have adequate time to prepare a defence as enshrined in section 35(3)(b). Thirdly, the consequence of granting direct access in this matter was that the main judgment's committal order would be unappealable, which limits section 35(3)(o). Fourthly, the motion procedure 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 her or his defence before the initiating party has made out a prima facie case against her. The second judgment concluded that these deficiencies amounted to a serious violation of constitutional rights when one has regard to the fact that sections 12 and 35(3) protect a profound and essential right to freedom, which is the bedrock of our constitutional order.

The second judgment concluded that in an open and democratic society based on human dignity, equality and freedom, litigants are not prosecuted criminally in civil court by their adversaries in circumstances where they are not afforded an opportunity to cure their contempt in order to avoid being deprived of their liberty. Although a contemnor faces a deprivation of liberty without a criminal trial when the committal order sought is coercive as well as when it is punitive and unsuspended, the second judgment explained that the limitation of rights inherent in the civil contempt procedure becomes unreasonable and unjustifiable when punitive committal is ordered, for two reasons. The first is that while civil contempt proceedings serve the legitimate purpose of providing successful litigants with a speedy and effective means of enforcing court orders, when the relief sought is singularly punitive and not linked to enforcement, this justification for limiting rights falls away. The second is that the limitation of rights is substantially tempered when the contemnor can avoid imprisonment by complying with the court order.

The second judgment agreed that the Constitutional Court must defend its orders and authority, but stressed that it can only do so within the bounds of the Constitution. It agreed that Mr Zuma's contempt exposed him to an order of committal, but concluded that the constitutionally compliant approach would have been either to make an order of coercive committal aimed at inducing Mr Zuma to comply with the Court's order (if the Commission's term has not come to an end by the time judgment is handed down) or an order referring the matter to the Director of Public Prosecutions for a decision on whether to prosecute Mr Zuma for contempt of court.