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:
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> > '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.

For the Applicant:	T Ngcukaitobi SC and J Bleazard instructed by the State Attorney, Johannesburg
For the Amicus Curiae:	M du Plessis SC, J Thobela-Mkhulisi and C Kruyer instructed by Webber Wentzel