

**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

Case No:

In the matter between:

**JACOB GEDLEYIHLEKISA ZUMA**

Applicant

And

**RAYMOND MNYAMEZELI ZONDO**

First Respondent

**THE COMMISSION OF INQUIRY INTO STATE CAPTURE,  
FRAUD AND CORRUPTION IN THE PUBLIC SECTOR,  
INCLUDING ORGANS OF STATE**

Second Respondent

---

**FOUNDING AFFIDAVIT**

---

I, the undersigned

**JACOB GEDLEYIHLEKISA ZUMA**

state under oath as follows:

1. I am an adult male and former President of the Republic of South Africa and reside at Nkandla, KwaDakwadunuse Homestead, KwaNxamalala, Kwa Zulu-Natal.

2. Save where the contrary appears from the context, the facts set out in this affidavit are within my own personal knowledge and are true and correct. Where I make submissions of a legal nature, I do so on the advice of my legal representatives, which advice I believe to be correct.

## **THE PARTIES**

3. I am the former President of the Republic of South Africa and served as such between the period of 9 May 2009 to 14 February 2018.
4. The first respondent is the Chairperson of the Commission of Inquiry, **DEPUTY CHIEF JUSTICE ZONDO**, who was selected by the Chief Justice for appointment to chair the Commission of Inquiry.
5. The second respondent is the **COMMISSION OF INQUIRY INTO STATE CAPTURE, CORRUPTION AND FRAUD IN PUBLIC ENTITIES AND OTHER ORGANS OF STATE**, appointed in January 2018 by the President on the dictation and direction of the remedial action of the Public Protector which was endorsed by order of the High Court in the case **President of the Republic of South Africa v Public Protector**.

## **PURPOSE OF THIS AFFIDAVIT**

6. On 4 November 2020, I filed an application seeking the recusal of the Chairperson of the Commission. A copy of the recusal application is attached hereto as annexure “**JZ 1**”. To

avoid repetition, I incorporate herein the contents of my founding affidavit in that application.

7. The purpose of this affidavit is to set out the basis on which I seek an order reviewing and setting aside the ruling (“the ruling”) of Chairperson of the Commission of Inquiry into State Capture, Fraud and Corruption in the Public Sector, including Organs of State (“the Commission or Commission of Inquiry”), dated 23 November 2020, refusing my application for his recusal to preside over those issues that pertain to me and my family. A copy of the ruling is attached hereto as annexure “**JZ 2**”.
8. This review is brought on the basis that the ruling was in violation of the principle of legality and should therefore be set aside;
9. I have in the past raised the issue of the constitutionality of the Commission and persist that it was appointed unconstitutionally. For present purposes, however, I confine the contents of this affidavit to the facts relevant to the recusal application. The constitutionality of the Commission, as well as the summons may be a subject of a separate application in the future.
10. I submitted that the Chairperson has lacked the detachment necessary to preside independently and impartially over the issues that concern my role in state affairs as former President of South Africa. As I showed in several examples ignored by the Chairperson, he has conducted the Commission investigations on the presumption that there was a capture of the state under my presidency, and every transaction that occurred under my administration is evidence of state capture.

11. When I brought the application for the recusal of the Chairperson, it was after an anxious consideration of how, despite my reservations of the Commission's unconstitutionality, I could nonetheless participate in the process, if only give it facts that could enable it to report on what happened under my presidency. However, soon after my appearance at the Commission of Inquiry in July 2019, I realized that the attitude of the Chairperson was such that it was neither impartial nor independent. His mind, in my view, was made up that my presidency was characterized by state capture, corruption and fraud. His interjections during several witness testimony, demonstrated that he was inclined to implicate me. Furthermore, his explanations during the recusal application revealed his justification for his bias.
12. The ruling should be reviewed and set aside because on the elementary principles of recusal, he should have done so. As I demonstrate below, the Chairperson failed to apply the recusal test on the common cause facts regarding his conduct. However, when the Chairperson descended to the arena by seeking to actively place facts into dispute in order to pre-empt my application, he transmogrified himself into a witness in my dispute, from being an impartial and fair adjudicator, rendering himself disqualified to preside over the dispute involving me.
13. In this affidavit, apart from the factual matters on the basis of which I seek the recusal of the Chairperson, I also set out the legal principles that govern applications for recusal. I do this merely to demonstrate the Chairperson's failure to take into account these relevant factors.
14. As I stated in the recusal application, I do not file this application lightly. I fully appreciate its gravity and seriousness. I equally understand the importance of the work with which the

Commission is tasked. However, scrupulous compliance with the rules of fairness and natural justice, is as important as the work of the Commission. Many a Commission have been a waste of tax-payers' money because of non-compliance with the prescripts of administrative justice and legality.

15. The orders that I therefore seek is an order in the following terms:

15.1 Declaring that in refusing the recusal application the Chairperson's disregarded clear evidence exhibiting his bias in the manner in which he conducted the proceedings in respect of those aspects that related to me;

15.2 Declaring that the Chairperson's decision violated the principle of legality and is accordingly reviewed and set aside;

15.3 Declaring that the failure of the Chairperson to recuse himself after becoming a judge in his own matter is unlawful and irrational;

15.4 Reviewing and setting aside the ruling of the Chairperson;

16. It is clear that the examples and evidence presented to the Chairperson demonstrate his biased disposition towards me. However, the Chairperson ignored the entire evidence and/or came to an irrational conclusion that such evidence did not show bias on his part. As I demonstrate by reference to the recusal application a plethora of examples were cited to demonstrate the Chairperson's conduct that prejudiced me and led to my reasonable

apprehension that he would not bring an independent and open mind when dealing with me or evidence in which I am mentioned or implicated.

17. I am advised that the Chairperson should have recused himself on the basis set out in my application and that his decision to enter into evidence his own statement and version regarding our relationship made him incapable of becoming the adjudicator of the disputes that arose therein. On that ground alone, and the fact that even on his own version, his statement that he had not met with me during my tenure was untrue, he should have recused himself. Accordingly, at the time he placed on oath that assertion, he knew that it was incorrect.

18. As a result, the ruling was mired in a controversy caused by his incorrect statement. Clearly, the Chairperson became a judge in his own matter and the determination of disputes arising from his own averments during the proceedings. On these grounds alone, the Chairperson ought to have recused himself, even if he had thought the original grounds of recusal were unsustainable.

19. I reject as irrational and irrelevant the explanation that had the Chairperson recused himself, the Commission would have collapsed. He would have been free to continue investigating other implicated persons and issues not directly relevant to me and my family. That would not have collapsed the Commission of Inquiry at all. I deal with this issue in some greater detail below.

20. Accordingly, the Chairpersons decision was:

- 20.1 Irrational and in conflict with the principle of legality;
- 20.2 He failed to take into account issues that were relevant and, instead, took into account irrelevant issues and considerations;
- 20.3 The reasons given in his ruling for his refusal to grant the application are inadequate and fail to deal with each ground that was raised in the application;
- 20.4 He failed to apply the known legal principles that are relevant for the determination of a recusal application;
- 20.5 The Chairperson's statements on oath in a matter involving him disqualified him from determining it. On this ground alone, he should have recused himself.

## **STRUCTURE OF THE AFFIDAVIT**

21. This affidavit is therefore structured to reflect the above issues as follows:
  - 21.1 First, I summarize the grounds upon which this application is brought;
  - 21.2 Second, I set out the relevant background to the recusal application;
  - 21.3 Third, I set out the specific parts of the ruling that disregarded the evidence I placed before the Chairperson. In this regard I refer to the ruling of 19 November

2020 as the transcript of the recusal proceedings;

21.4 Fourth, I set out in greater detail the grounds upon which I sought the recusal of the Chairperson of the Commission, which in my respectful submission were ignored or not properly considered.

21.5 Fifth, I set out a brief account of the legal principles regarding recusal applications in order to dispel the notion that impartiality of the Chairperson is not required in a Commission of Inquiry;

#### **SYNOPSIS OF THE GROUNDS OF RECUSAL THAT WERE NOT PROPERLY CONSIDERED**

22. The ruling must be reviewed and set aside on the following grounds that may be summarized as follows:

22.1 He became a witness in the proceedings when he purported to deal with the recusal application by placing facts that were false and inaccurate. He therefore should not have been a judge of a dispute involving his disputed evidence. By so doing, he became a judge in his own dispute;

22.2 On his own version, the Chairperson's statement was inaccurate in respect of our personal relationship and how often we met while I was President;

22.3 The Chairperson failed to properly consider his prejudicial comments to which I

referred in the recusal application. Many of his comments carried with them a miscellany on insinuations about my involvement in the unlawful capture of our State while I was President;

22.4 The Chairperson also failed to consider that he had singled me out for adverse public announcements, by addressing issues relating to me through the media; and

22.5 The Chairperson's past and present conduct in the Commission indicates that he, without any basis, put into question my *bona fides*. On two occasions, he questioned or doubted my statement that I could not appear before the Commission on his scheduled times because I had travelled to seek medical attention;

22.6 The Chairperson failed to apply the trite principles governing recusal applications when determining the application I brought before him.

## **ESSENTIAL BACKGROUND**

### **The genesis of the recusal application**

23. The following facts, are common cause and thus germane to this application:

23.1 Prior to the summons issues on 22 October 2020, I had indicated on several

occasions that I was prepared to cooperate with the Commission;

23.2 The application to issue summons had been necessitated by the Commission's reluctance to accept that I had travelled overseas to seek medical attention;

23.3 The period to which such application had long passed, and the application had become moot. However, the Commission amended its notice of motion and proceeded to argue as if the application related to the new dates of 16-20 November 2020;

23.4 Previously, the Chairperson had indicated in his own ruling that he would meet my doctor to confirm that indeed I had been ill. However, to date, the Chairperson has never met my doctor despite his undertaking to do so.

23.5 Instead, the Commission proceeded to seek a new summons on the basis of an old application, whose time had passed. During this period, my attorney had addressed a letter to the Commission dated 28 September 2020, alerting it of my intention to file a recusal application. I attach hereto as annexure "**JZ 3**" a copy of the letter in this regard.

23.6 This letter was preceded by another letter dated 01 September 2020 from my new attorneys indicating to the Commission that they sought to familiarize themselves with the documentation. They indicated expressly my intention to co-operate but indicated that they were also in the middle of preparations for my criminal trial. I

attach hereto as annexure “**JZ 4**” a copy of this letter.

23.7 To my surprise, the Commission processed to apply for summons. This was to give the impression that I had refused to co-operate with the Commission. It is now common cause that even though it was for the recusal application. I appeared on 16 November 2020 and there had been no need for the summons. I did so in order to comply with the summons, which had directed me to present myself to the Commission.

23.8 Having advised the Commission that I would lodge a recusal application, I considered it inappropriate to participate in the application for the summons. I assumed that it was obvious that the application for summons would be premature. However, the Commission’s evidence leaders proceeded with the application and, obviously, it was granted.

23.9 On 11 November 2020. I lodged my recusal application, a copy of which I attach to this application. The secretary of the Commission filed an answering affidavit, a copy of which is attached hereto as annexure “**JZ 5**”. Apart from legal issues raised herein, the secretary, Dr Mosala, deposed to matters that only the Chairperson could know. Although he sought to deny matters relating to the relationship between myself and the Chairperson, no confirmatory affidavit of the Chairperson was attached.

23.10 On 15 November 2020, I filed a replying affidavit, in which I disputed that the

secretary had personal knowledge of the issues relating to my relationship with the Chairperson. I attach hereto as annexure “**JZ 6**” a copy of my replying affidavit, the contents of which I request be regarded as herein incorporated.

23.11 On 16 November 2020, at the commencement of the hearing/oral argument of the recusal application, the Chairperson read into the record his own statement, which sought in the main, to dispute that we had been friends and that we met during my tenure as President of South Africa. I attach hereto as annexure “**JZ 7**” a copy of the Statement. Prior to the hearing on 16 November 2020, the Commission has issued a media statement, in which it declared that the Chairperson had fathered a child with my wife’s sister. It is not clear to me what actually necessitated this declaration. However, it is noteworthy that this declaration is omitted in the Chairperson’s statement read into the record.

23.12 During the hearing, my counsel indicated that I would consider the Chairperson’s statement and if necessary file a response thereto. Indeed having considered the statement, I filed my response in which I contested the accuracy of his statement of facts. I attach hereto as annexure “**JZ 8**” a copy of my affidavit in that regard. Apart from disputing the accuracy of the Chairperson’s statement I indicated that by reading or making a statement, the Chairperson had become a judge in his own matter and that on that ground alone, he ought to have recused himself. It is this affidavit that occasioned that postponement of the ruling several times.

23.13 The perception of impartiality was so crucial that even the Court deemed it

appropriate to give to the judiciary a function that is constitutionally assigned to the executive, an issue I believe renders the Commission unconstitutional. However, I make reference to the High court only to highlight its comment on the need for impartiality and independence. I also do so to indicate that the Chairperson failed to consider the relevant legal principles when making his ruling dismissing my application for his recusal.

23.14 In its judgement of 13 December 2017, the Court stated as follows in regard to the need for impartiality:

**“[141] The rationale that underpins the Public Protector’s direction that the judge who is to head the commission be appointed by the Chief Justice is clear. The Public Protector foresaw that the credibility of the process may be compromised were the President to select the judge who is to lead the commission. She would undoubtedly have been aware that public perception is important too and is linked to encouraging public faith in the process.”**

**[142] The President has a clear personal interest in the outcome of the commission. The President is implicated in the “State Capture” Report and is at the centre of the allegations regarding the Gupta family’s involvement in the appointment of Cabinet Ministers. Moreover, his son’s business interests are heavily implicated by the allegations regarding the award of contracts by SOEs to Gupta-owned businesses.**

**[143] Any person chosen by the President to head the commission would therefore not be perceived as independent. There is much force in the argument that the President should recuse himself from appointing a Judge in order to exclude any perception of bias and to protect the integrity of the commission in the eyes of the public. [emphasis added]**

**[144] The President’s insistence that he alone select a Judge to head the commission of inquiry is at odds with the legal principle of recusal. The principle of recusal is primarily**

applicable to Judges who have a conflict of interest in matters over which they preside. Judges recuse themselves from matters which they are personally conflicted in order to exclude the possibility or the perception of bias affecting the outcome and in order to protect the integrity of the legal process in the eyes of the public. [emphasis added]

[145] The principle of recusal is not only concerned with actual bias, but with the existence of a reasonable apprehension of bias. The apprehension of bias principle reflects the fundamental principle of our Constitution that Courts must be independent and impartial. In *President of the Republic of South Africa and Others v South African Rugby Football Union & Others*, it was emphasized that a judicial officer who sits on a case in which he or she should not be sitting, because seen objectivity, the judicial officer is either actually biased or there exists a reasonable apprehension that the judicial officer might be biased, acts in a manner that is inconsistent with the Constitution. [emphasis added]

[146] There is no reason why the recusal principle should not apply to the President. The principle of recusal applies here because the President has an official duty to select a Judge to lead the commission, but he is conflicted, as he himself has been personally implicated, whether directly or indirectly, through his family and associates in allegations of “State Capture”.

[147] In these exceptional circumstances it was not only appropriate, but necessary for the Public Protector to ensure that someone other than the President select the head of the commission. The Chief Justice was a perfectly sensible and rational choice.

[148] What remains to be considered is the President's contention that it is unlawful for the Chief Justice to appoint the Judge to head the commission of inquiry as the Constitution does not assign this power to Chief Justice.

[149] There is no constitutional prohibition on the President seeking and adopting the advice of the Chief Justice. The President could of his own accord ask the Chief Justice to select the Judge to head a commission, whether for reasons of availability or, as here, the clear apprehension of bias.

[150] In the circumstances of the case, the Public Protector's direction that the Chief Justice select the Judge who is to

**preside over the commission of inquiry is both necessary and appropriate in order to render the remedial action taken suitable and effective. The President's contrary argument must be rejected."**  
[Own emphasis]

23.15 The above excerpts reveal that both the Public Protector and the North Gauteng High Court recognised the need for impartiality in the manner in which the Commission of Inquiry would conduct its proceedings. There can be no doubt that a judicial officer appointed to head a judicial commission of inquiry must be independent, impartial and must act without fear, favour or prejudice. This was the principle that made the question the conduct of the Chairperson.

23.16 The North Gauteng High Court also confirmed that recusal does not only apply to judges performing their judicial functions in a court of law, but also in every forum where impartiality and fairness are required. The principle of impartiality and independence are central to judicial functions. A judge presiding over a commission of inquiry remains bound by the oath of office which requires that he or she defends the Constitution, acts independently and impartially, without fear, favour or prejudice. A judge in a commission of inquiry has a dual role. It is both adjudicative and investigative, thus imposing a greater need for impartiality on his/her part.

23.17 It, therefore, cannot be overemphasised that Deputy Chief Justice Zondo is constitutionally obligated, even when performing the functions of the Commission

of Inquiry, to act independently and impartially to all those appearing before him. This is the reason a judge was required to head the Commission of Inquiry in the first place.

23.18 As I demonstrate below, his ruling disregards the practical examples I gave that in my view, led to my apprehension that he could no longer bring an open and impartial mind. However, I commence with the Chairperson's long background, which appears to influence his decision about the recusal application.

## **GROUNDS OF REVIEW**

### **Reliance of my failure to appear or make submissions is irrelevant**

24. The ruling devotes a number of pages to some history about my interactions with the Commission. In my view, this devotion is designed to give the impression that I have refused to co-operate with the Commission. First, I submit that it is incorrect to suggest that I have refused to co-operate. Second, I submit that even if that were the case, it would be irrelevant to consider such alleged non-co-operation to determine whether or not my apprehension of bias was reasonable.

25. In so far as the ruling seems to rely on the engagement between the Commission and my legal representatives to justify its hostility towards me, the events I set out below are relevant to explain what the Chairperson may wish to describe as my failure to co-operate.

### **My first appearance**

26. Having been invited as a "guest" by the Commission, arrangements were made as to how I

would be given time and areas of interest to which I would be required to respond. My legal team agreed to this and further arrangements were made. However, two unexpected events occurred which presented difficulties for the arrangement. First, as it is now common course that on two separate occasions I fell ill and had to travel abroad to seek medical help. Second, early this year and in the middle of the Covid pandemic I changed attorneys. These two events, together with the impact of Corona Virus made consultations difficult. In the meantime, the Commission's legal team steamed ahead with a summons application that had been made in respect of dates that had coincided with my travels abroad.

27. As I stated above, at the end of my first appearance, the Chairperson directed that my next appearance at the Commission would be per arrangement between myself and the Commission. I was surprised when the Chairperson sought to reinterpret his directive to mean that he would unilaterally set the dates for my next appearance. It is on this basis that the summons application was unjustified in the first place.

28. When the Chairperson of the Commission adjourned the proceedings during the last day of my appearance, he directed that:

**“We’ll adjourn for the day and the Former President will come back at another time that will be arranged.”**

29. The Commission decided to disregard the directive of its Chairperson by trying to unilaterally impose dates for my next appearance. The Commission's unilateral decision to impose dates and terms of appearance made it difficult for me to attend. Nevertheless, on each and every occasion where dates were unilaterally imposed by the Commission, I timeously advised it of

my position as the correspondence referred to below demonstrates.

### **Dates 14 to 18 October 2019**

30. This was week during which I was attending my criminal case in the Pietermaritzburg High Court. My legal team had informed the Commission that I would not be available on the determined dates. It is therefore incorrect to suggest that my non-attendance may have been due to non-co-operation on my part.
31. The Commission was duly advised by my then attorneys by letter dated 17 September 2019 that; **“Our client is scheduled to appear in the criminal court in the Pietermaritzburg High Court during the week of 14 October 2019, and therefore the proposed dates of 14 to 25 October 2019 are not suitable to him.”**<sup>1</sup>
32. My legal team could not confirm those dates since I was waiting for the outcome of my application for the stay of my prosecution. That judgment was handed down on 13 October 2019. After the unfavourable outcome of my permanent stay application, I instructed my legal team to prepare an application for leave to appeal. This required me and my legal team to urgently work on the application for leave to appeal which was to be filed by 01 November 2019. I am aware that the Chairperson regards his Commission as crucial but I had to juggle my time and availability of the same legal team and this is not easy.

---

<sup>1</sup> Letter dated 17 September 2019, from L M Attorneys.

### **Dates 21 to 25 October 2019**

33. The Commission was duly informed by the letter of 15 October 2019 that:

**“... our client and his legal team are not available to attend the proposed sitting of the Commission in October.”**

### **Dates from 11 to 14 November 2019**

34. The reason for my unavailability during this period was that I fell ill and was hospitalised in a Durban hospital during the proposed period. My then attorneys duly informed the Commission through a letter dated 01 November 2019, which states the following:

**“We refer to the above matter and advise that former President was admitted in Hospital over the past weekend and was released late afternoon yesterday for him to continue treatment at his home. The former President asked us to convey to you that due to the above he will not be able to attend the scheduled sitting of the Commission commencing on 11 November 2019 to 15 November 2019, he will however keep you updated on his recovery progress.”**

### **Proposed dates 27 to 30 January 2020**

35. I am due to return to continue medical treatment as from 23 January 2020 for a much longer period. Soon thereafter, I also underwent another unscheduled medical procedure and therefore will not be able to attend the Commission on the said dates. I am aware that the Commission may doubt my bona fides in this regard. I am in my late seventies and my health is not what it used to be. My attorneys advised the Chairperson to consult with my medical

team in order to satisfy himself that my health was failing me.

36. To date, the Chairperson has refused and/or failed to honour his undertaking to meet my medical team, yet the Commission continues to give the impression that I refused to co-operate. Their entire application for the summons was based on this false belief that I refused to co-operate. I have never refused to co-operate because, contrary to the Commission's narrative, I have nothing to fear. Nor is there any real evidence implicating me in fraud or corruption.
37. It is therefore irrelevant to rely on the matters surrounding my non-attendance at the previous appearance dates. First, it is untrue that I refused to co-operate. Second, such matters are irrelevant to the determination of whether or not my apprehension of bias is reasonable. Even if it could be argued that the Chairperson's impression that I refused to co-operate was legitimate, it could explain his justification for the summons, but constitutes no legitimate justification for his prejudicial statements during the testimony of other witnesses. I refer to these statements in the recusal application and make some brief reference to them below. I submit that it was irrational of the Chairperson to disregard such statements or to downplay their impact on me.
38. I therefore persist that the application for summons was intended to portray me in a negative light and to continue to provide ammunition to those engaged in the character assassination plan that I detailed before the Commission. I was therefore anxious that the Commission seems determined to treat me differently and in a biased manner.

## **The denial by the Chairperson that we were friends is incorrect**

39. I set out in both the founding affidavit and my response to the Chairperson's statement that the Chairperson and I had had a personal relationship. In his ruling, the Chairperson selectively refers to a letter of 28 September 2020 addressed to the Commission by my attorneys. In this regard, the ruling reflects as follows:

**"25. In Paragraph 9 of the letter, the applicant's attorneys wrote:  
"[The applicant believes that the source of the Chairperson's bias against him stems from the fact that [the applicant] and the Chairperson have historical personal, family and professional relations that ought to have been publicly disclosed by the Chairperson before accepting his appointment."**

**26. This sentence in the applicant's attorneys' letter of 28 September 2020 makes it clear that, at least as at the time, the applicant believed that the source of my alleged bias against him stemmed from " the fact that [the applicant] and the Chairperson have historical personal, family and professional relations that ought to have been disclosed by the Chairperson before accepting his appointment."<sup>2</sup>**

40. I submit that this reference ignores the other issues raised in the letter as the source of the reasonable apprehension of bias. On his own version, the Chairperson, in the paragraphs that follow, acknowledges that more issues than just the personal or family or professional relationships formed the grounds on the basis of which I sought his recusal. To suggest that at the time of the letter, the alleged bias stemmed solely from the issue of our relationship is simply incorrect. It reveals that the Chairperson failed to deal with this matter in that he disregarded the precise nature of the grounds as he focused on the issue of our relationship.

41. Furthermore, it is noteworthy that the Chairperson had earlier, on 29 October 2020, elected to

---

<sup>2</sup> Ruling, paragraphs 25 - 26

disclose that he had fathered a child with my wife's sister. This disclosure made much earlier than the hearing and is not found in my affidavit, seems to have been made in anticipation that I would raise the issue and the Commission sought to apply some ill-conceived pre-emptive strike. However, when the Chairperson read his statement of facts into the record, he made no reference to this aspect. Accordingly, I submit that his statement was less than candid.

42. While the Chairperson stated into the record that he had never met with me during my tenure as President of the Republic of South Africa, he acknowledged during his ruling that such a statement was incorrect. He only acknowledged this after I had filed my affidavit in response to his statement of facts. Therein, I indicated that he had misled the public as we had indeed met at least once when he had just been selected by the Chief Justice to head the Commission. The Chairperson's attempt to justify his false statement is, with respect, regrettable from a person of his seniority in the judiciary.
43. This further demonstrates that the Chairperson failed to apply his mind rationally to the issues raised in the recusal application.

#### **The Chairperson became a judge in his own matter**

44. Relying on some precedent during the SARFU case, the Deputy Chief Justice commenced the recusal proceedings with a statement of his own. Therein, he sought to deny that we had a close relationship. He expressly stated that he was copying what the then Chief Justice, Chaskalson had done before the hearing of the SARFU matter. As it later emerged, his own

statement was inaccurate and had to admit this when filed an affidavit refuting his version.

45. The Deputy Chief Justice has denied that I had a close personal relation, in an elaborate statement read prior to the hearing of the recusal application. I have attach a copy of his statement of facts as “**JZ 7**” as indicated above.
46. Although the Deputy Chief Justice denies being my friend and citing numerous instances to demonstrate his denial, I state that I considered DCJ Zondo to be my friend and family member. I attach my affidavit setting out the basis on which I believed that we were friends and family as “**JZ 8**” as indicated above. I request that the contents of my affidavit should be regarded as herein incorporated.
47. I am advised and submit that this dispute over the nature of our relationship should not have been judged by DCJ Zondo, who had transmogrified himself into a witness. This much I stated in my affidavit responding to his statement of facts.
48. Clearly, the Chairperson disregarded all the issues I raised therein and limited his reply to admitting that I had been correct that it was false that we had never met during my tenure as President<sup>3</sup>. On his own version, the Chairperson had not only stated an incorrect fact, but had become a judge in his own matter. In a rather regrettable attempt to justify stating an incorrect fact, the Chairperson states as follows:

**“...The applicant is correct that such a meeting took place but he errs in so far as he suggests that such a meeting should have been**

---

<sup>3</sup> Ruling; paragraph 40

**mentioned in paragraph 7 (e). Paragraph 7 (e) appears under the heading “Personal relationship between myself and Mr Zuma.” That topic excludes official meetings. The meeting I had with the applicant after the Chief Justice had given him my name was an official meeting. I was not paying him a personal visit...”**

49. With respect, this is below the standard one expects from a judge. It is self-evident that he never volunteered this information and sought to give the impression that we had never met during my tenure as President. Had he been candid, he ought to have indicated that we did meet during my tenure as President, regardless of the status of the meeting. Interestingly, he never volunteered this information even where he dealt with our official relationship.
50. Clearly, his statement had been inaccurate. He ought not to have made himself the arbiter of this dispute as soon as it arose. Accordingly, and on this ground alone, he ought to have recused himself. It was irrational for the Chairperson to ignore such a major violation of the elementary rules governing his duties as a judge and presiding officer.
51. The truth is that my personal relationship with the Deputy Chief Justice dates back to the early 1990's, when he was an attorney and partner at the firm then known as Mathe-Zondo Attorneys in Durban. He does not deny this.
52. I sketched in my application for the Chairperson's recusal the nature of my professional and personal relationship with the Deputy Chief Justice to provide a context within which I now believe that his hostility towards me, characterised by his unkind public comments relating to my alleged role in “State capture” renders him incapable of maintaining an impartial mind. For whatever reason, his comments about me betray a mind that is biased or at least

enthused to publicly demonstrate that he holds no brief for me. He has failed to deal with this in his ruling.

53. I dispute to the extent set out in my answering affidavit attached above, the factual allegations relied on by the DCJ Zondo disputing my version. The fact of the matter is that to the extent that he believes that there is evidence that we are not friends, I point out that it was part of our agreement not to flaunt it but to keep it discrete so as to avoid the appearance of impropriety. A flat denial of our relationship is inconsistent with admitted facts in his statement where he avoided giving details regarding the context and content of our meeting.

54. I am advised that one DCJ Zondo placed an inaccurate version of facts, he should have recused himself – for he could not be a judge of the dispute between him and I on the nature of the friendship, even if the nature was not sufficiently weight to justify his recusal. The fact that he was now a witness in the bias complaint against him and application for recusal, it became inappropriate for him to adjudicate the matter. He should have recused himself on that basis alone.

### **Biased Identification of Commission Witnesses**

55. In his ruling, the Chairperson has not given sufficient consideration to my complaint relating to how the Commission identified and chose its witnesses. Instead, he merely states that **“...There is no merit on this point. The Commission was free to use whatever witnesses were available as long as in the end the applicant was himself afforded a**

**fair opportunity to come before the Commission and deal with whatever evidence such witnesses may have given against him.”**

56. The Chairperson ignores the essence of this ground. He does not explain why it is not unfair to call a string of witnesses who seek to support a particular narrative when the Commission could have had a mix of witnesses, including Cabinet members that did not have grievances against me. To simply dismiss this ground as unmeritorious reveal that the Chairperson failed to consider it rationally. Accordingly, his conduct in this regard is irrational and fails to meet the test of legality.

57. I specifically alleged that the witnesses chosen by the Commission appear to have been intended to set the tone of the Commission’s narrative in particular to ensure that I was called to answer ‘charges’ by former ministers, Director-Generals and failed Members of Parliament on state capture, corruption and fraud. In his ruling, the Chairperson does not deny that the Commission’s approach was to obtain evidence against me and then to call me for a rebuttal of that evidence. I was not called as other ministers in my government to give facts on how my administration was structured, operated and took decisions. I was simply called to answer to allegation under the narrative that presumed the actual existence of a captured state.

58. The ruling does not in any way deal with my contention that it appears to me that what the Commission did was to identify, fetch and interview persons who could implicate me in some wrongdoing to support the political narrative of a state that was captured by illegitimate interests. I also stated that it is also apparent that the people who were called were politically

hostile to me, and/or had some other grievance or complaint against me.

59. Clearly, the Chairperson failed to deal with my contention that the Commission seemed to have identified persons known to have been opponents of my leadership role in government who were vocal about the perception of State Capture. It is also people, who, for reasons unbeknown to me, were disgruntled about decisions either taken by me or other Cabinet ministers with or without my knowledge. It was people, who, for their political ambitions and interests, bad-mouthed the activities of government to advance their political narratives that would delegitimize the leadership of government at the time. Having identified and selected these as Commission witnesses, it gave further credence to the political narratives of my political opponents both in my party, the ANC and in government, that I had essentially run a corrupt government.
60. I stated and the ruling fails to deal with it, that what the Commission seems to have done is to conduct an investigation powered by the popular political narratives that assumes the correctness of the views of those opposed to my leadership of government and the ANC as the basis on which I should be called to give answers.

### **Commission ignored my testimony**

61. The Chairperson's ruling confirms rather than dispel the reasonable apprehension of bias that I have based on the objective fact that the Commission simply ignored the extraordinary allegations that I made regarding the manipulation of our democratic system by foreign agencies working with internal ones. Nowhere in his ruling does the Chairperson dispute the

objective failure by the Commission to investigate the existence of two intelligence report to which I made reference.

62. Instead, the Chairperson justifies ignoring my testimony by again accusing me falsely of non-co-operation. In his ruling, he states in this regard that, **“The fact of the matter is that the applicant had not completed his evidence when he left the Commission in July 2019 and it was agreed that he would come back to continue his evidence. Since then, it is now more than a year and the Commission has been trying to get the applicant to come back to the Commission to continue his evidence but the applicant has had to be compelled by way of summons to appear before the Commission...”**

63. This is no justification for ignoring the evidence already given. In fact, the Commission continues to investigate matters raised by even witnesses who have not completed their testimony. This conduct of the Chairperson is irrational and ought to be reviewed and set aside.

64. Apart from its carefully selected witnesses to tarnish my name, the Commission has completely disregarded my testimony to it during 15 – 19 July 2019. In my appearance at the Commission, I specifically set out the political context within which I believe the Commission was established which mired the Chairperson in political controversy and therefore a position that is inconsistent with the central mission of the judiciary. I pointed out to the existence of two intelligence reports in which it was made clear that my political influence in the country should be eliminated. I indicated with reference to those intelligence reports, that I was a target for elimination from a long time ago. I told the Commission that I believed, based on

my work as an experience and trained intelligence officer, that the Commission was in essence the perfection of a political project that began a long time ago which was targeted at eliminating my influence on the politics of South Africa.

65. During argument, the evidence leader tendered evidence from the bar to suggest that my testimony was being investigated by making vague references to the nature of the investigation. It was incoherent and devoid of any meaning to give me comfort that I was being taken seriously.

66. If the Commission was acting fairly and impartially, it would not ignore serious allegations going to the core of its constitutional and political legitimacy. If the Chairperson had bothered to investigate my claims, he would have found that he had been selected and appointed by the Chief Justice to preside over a political project. Had he investigated my claims, he would have done what the Constitutional Court has held is the duty of a judge faced with an appointment that is inimical to the central mission of the judiciary.

67. Nowhere does not Chairperson address my concerns that he has ignored critical testimony that could determine the constitutional legitimacy of the Commission. In essence in his ruling the Chairperson failed to reflect on this ground of recusal. I apprehend that the political project of targeting me is being executed through the Commission and if the Chairperson had a basis to suggest that this is not a ground on which to apprehend bias, he would have dealt with this in his ruling.

68. His ruling on this matter is on paragraph 44 where he dismisses this ground on the basis that

I had not completed my evidence. First it is clear that summons have not been issued for me to complete my incomplete evidence. Second, nowhere does the Chairperson confirm the suggestions made by the evidence leader that some investigation of my allegations was taking place. The Chairperson failed to appreciate the significance of my testimony.

69. I am a former President of the Republic and former Head of Intelligence who is well trained in the craft of intelligence. I hold a considerable rank in intelligence and it is simply irresponsible for anyone to disregard the information that I gave to the Commission regarding its undisclosed objectives. If the Chairperson was open to being persuaded differently, he would have on his own given my testimony sufficient priority as such testimony went to the constitutional legitimacy of the Commission. If I was right, DCJ Zondo would have had to resign as the Chairperson as he would accept that his selection and appointment to chair the Commission was inconsistent with his judicial position.

70. If I was right on the involvement of intelligence agencies in the manipulation of our democratic processes to side-line my involvement, the Chairperson would have been fully informed on the true purpose of the narrative of state capture. Both the issues that I raised were sufficiently grave to simply be ignored by the Commission. This conduct can only be explained on the basis that the Commission was unprepared to hear a testimony that would deviate from the political narrative of those asking him to join invisible dots to find state capture, corruption and fraud. The Chairperson regards me as an accused and this is irrational in the extreme.

## **Chairperson's prejudicial comments**

71. In my recusal application I raised a series of examples of comments that were made by the Chairperson during testimony of witnesses like Ms Barbara Hogan, Mr Zola Tsotsi and Minister Pravin Gordhan. I made specific references to his own words and how his utterances created a reasonable apprehension of bias. The Chairperson simply failed to deal with each of the references I made in the application. Instead, he made a general statement that he is satisfied that my contention has no merit. He does not specify in what way each of the examples I cited do not reveal a biased mind.
72. The Chairperson simply dismissed this ground on the basis that on his reading of the transcript he was satisfied that there is no objective basis to apprehend bias. He further justified his conduct on the basis that the nature of the proceedings justified it. He readily accepted the submission of evidence leaders that a Chairperson was entitled to conduct himself as I alleged. The Chairperson did not deny the allegations relating to the quoted statements. He did not even assure me that he was open to being persuaded on the issue of whether his conduct could justifiably give a reasonable apprehension of bias. He was dismissive and believed that he had struck the right balance to hold fairness and the questioning required to extract the true facts.
73. I have set out the basis on which I believe that his comments, objectively viewed, demonstrate a mind that has accepted the political narrative of state capture – the notion of implicated persons and those implicating them as representing angels and devils. Those witnesses identified as responsible for state capture, corruption and fraud were listed in the

submissions of the evidence leaders. What the Chairperson failed to do was to appreciate that objectively, he has conducted himself in a manner that gives rise to a reasonable apprehension that he is convinced that state capture was a reality under my presidency, that transactions concluded during my tenure were evidence of such state capture. There is no attempt to explore the issues outside the accepted narrative of state capture.

74. I raised the apprehension of bias in the affidavit that was filed in respect of the application for summons. I attach a copy of that affidavit as “**JZ 9**”. Even then, I pertinently tried unsuccessfully to deter the Commission's secretariat attempt to perpetrate a narrative that I was an uncooperative witness. This narrative was finally accepted by the Chairperson when he granted the summons against me. The allegation that I was not cooperative is simply incorrect but has received traction through a robust media campaign which significantly misrepresented the true facts. I am aware that I did not submit an affidavit after my appearance but the truth is that I became ill and it became difficult to complete what my lawyers had prepared. I realized the insensitivity of the Commission on my medical condition coupled with its manufactured outrage at my alleged failure to cooperate with it and as I cogitated on this, came to the conclusion that I was only needed by the Commission to give credence to the political narrative that I presided over a captured state that was corrupt and characterised by fraudulent transaction.

75. Despite my deeply held reservations regarding the constitutionality of the Commission and the lawfulness of the appointment of the Chairperson, I nonetheless sought to offer my cooperation to the Commission and to exercise my rights under its rules. However, it appears that the Chairperson and the Commission do not accept that where I have not given

a response to the notices, I have done so exercising my rights to ignore testimonies that I do not believe implicate me in any criminal offense and I am satisfied that the Commission can make any inference it deems appropriate. The entire strategy of the subpoena seems to be premised on a belief that I fear being arrested and therefore threatening me will force me to forgo my constitutional rights to fairness and dignity, as well as my privilege not to incriminate myself.

76. It is utterly incorrect of the Commission's legal team and the Chairperson to insinuate that, when I exercise my right not to respond to a notice, I am refusing to cooperate. The rules themselves envisage that I should do so in the event that I wish to give evidence. If I elect not to respond, the Commission is at liberty to make the inferences it deems appropriate in its judgment.

77. It is self-evident that the Chairperson and the Commission view me as an accused with a case to answer based on the evidence of its chosen witnesses, which the chairperson appeared to readily accept. The comments and insinuations that have been made by the Chairperson attest to this. Even when witnesses make no reference to me, the Chairperson always attempts to link or implicate me in some wrongdoing or impropriety. The Chairperson makes propositions to witness in a leading manner to place me in circumstance where I do not feature.

**The Chairperson failed to deal sufficiently or at all with examples of his prejudicial statements**

78. In my recusal application, the contents of which must be regarded as herein incorporated, I

made specific references to some of the prejudicial comments made by the Chairperson during testimonies of the Commission's witnesses.

79. I stated that there was a general acceptance of the testimony of witnesses that are willing to implicate me. I contended that I perceived this to represent a biased disposition towards me and fear that all I am being called upon to do is confirm a pre-determined position about my alleged role as President of the Republic.

80. In paragraph 45 of his ruling, the Chairperson only states as follows to deal with a series of examples I cited to show his biased disposition:

**“...I have read all the comments quoted in the founding affidavit. I do not propose to refer to any one of them. I am satisfied that the applicant's contention has no merit. As Mr Pretorius SC submitted, I am entitled, and sometimes, actually obliged, to ask witnesses questions and to seek clarification on their evidence because the Commission seeks to establish the truth on the matters that it is investigating.”**

81. With respect, the above statement reveals that the Chairperson failed to deal with the contentions I made. It was never my submission that the Chairperson does not have to ask questions. It is the nature of propositions and questions that I specifically referred to that should have been explained. His reliance on Mr Pretorius is indeed telling on this issue. It means he completely misconceived the nature of this ground and thought that I had questioned or disputed his obligation to ask questions.

82. Clearly, he failed to deal with the precise issue raised and accordingly his conduct in this regard stands to be reviewed as irrational. Had he considered the precise nature of the

comments to which I referred, he would have concluded that such comments were indeed prejudicial and demonstrated that he could no longer bring an open mind.

83. This statement in his ruling reveals that he failed to consider the grounds stated in my application and assumed that I was questioning his obligation to even ask questions. This is clearly a serious misconception on the Chairperson's part and demonstrates his failure to consider the relevant issues raised in the application.

84. The Chairperson sets out in his ruling the legal principles that ought to be applied in determining whether or not a recusal is justified. However, the Chairperson fails to apply these to the facts of this case. The reasons he cites in his ruling demonstrate that he misconceived the applicable principles. In any event, as soon as the Chairperson became a judge in disputes involving his statement, he ought to have recused himself. Accordingly, the Chairperson failed to apply the relevant legal principles to the facts of the recusal application.

## **CONCLUSION**

85. In the light of the above, I ask that this Honourable Court should review and set aside the ruling of the Chairperson on the basis that it fails to comply with the principle of legality. It should be found that the Chairperson ought to have recused himself and/or considered the relevant matters brought before him and disregard the irrelevant issues he seems to have taken into account.

86.

---

**JACOB GEDLEYIHLEKISA ZUMA**

I certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, that he has no objection to taking the prescribed oath and that he considers it to be binding on his conscience. I further confirm that this affidavit was duly sworn to before me and the deponent signed it in my presence at \_\_\_\_\_ on the \_\_\_\_\_ of \_\_\_\_\_ 2020.

SIGNATURE:

FULL NAMES: \_\_\_\_\_

COMMISSIONER OF OATHS, REPUBLIC OF SOUTH AFRICA

STAMP