

**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

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**SUPPLEMENTARY FOUNDING AFFIDAVIT**

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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.
3. I have considered the Rule 53 record filed by the Commission and considered its contents for the purpose of determining whether I should supplement my grounds of review or file an amended notice of motion. I am aware that I am out of time in filing these supplementary documents and will file a condonation application in respect of that. It is in the interest of justice that condonation for the late filing of the supplementary affidavit be granted for reasons that are set out further in this affidavit.
4. For the present purposes, I wish to supplement the relief that I seek in the application to include those set out in the notice of motion. It would have been clear that my interest was to secure for myself an independent and impartial hearing of my evidence and therefore sought to confine the relief merely to the recusal of the Chairperson. Given my subsequent experience with this Commission of Inquiry, I am forced to seek direct orders relating to whether the Chairperson was lawfully appointed in accordance with the Constitution. I raised this issue in my recusal application but because I also believe that there should be an impartial and independent investigation into allegations of State Capture, fraud and corruption in government, for prudence, I thought I should leave that question for the moment.

5. I have carefully considered the serious events that followed my recusal application in the Commission, including the Chairpersons' decisions to apply on direct access to the Constitutional Court for orders seeking to enforce his directives and summons against me in an attempt to compel me to appear before it. I have also considered the direct access application by the Chairperson to have me held in contempt of the orders of the Constitutional Court and to be directly imprisoned for a period of two years. The Constitutional Court, on the Chairperson's application, granted both orders but imposed a fifteen-month direct imprisonment sentence on me. I have served almost two months of the fifteen months. I continue to serve my sentence although now on medical parole. The two applications of the Commission are not included in the Rule 53 record lodged by the Commission in response to my Notice of Motion in this application. I have attached these application as I consider them to be directly relevant to the matters under consideration. Consequently, I seek to also amend the relief in the Notice of Motion. I attach both applications as "JZ1" and "JZ2" respectively. I will refer to both judgements of the Constitutional Court as cited in the footnote below.<sup>1</sup>
6. The direct access and contempt of court applications to the Constitutional Court were direct products of the dispute over whether I was entitled to refuse to appear before the Chairperson of the Commission on the basis set out in my founding affidavit. The applications were launched in the Constitutional Court by the Chairperson who at the time had received this application. They were launched in direct violation of my right to section 34 of the Constitution to have a dispute regarding the lawfulness of his position as Chairperson in matters relating to me determined by the High Court. The Chairperson also launched the applications to the Constitutional Court in direct violation of the Commissions Act which is binding on his

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proceedings. He further launched the applications to the Constitutional Court in direct violations of his directives and rulings regarding my alleged refusal or failure to appear before him. He was bound by his directives and rulings, and was not entitled to approach the Constitutional Court to have them enforced by its orders when the Commissions Act prescribes the manner in which a Chairperson may enforce Commissions rulings and directives.

7. The period following my application to have the Chairperson of the Commission, Acting Chief Justice Zondo recuse himself stands as the clearest example of what is clearly wrong and unlawful about his position and how he sees it. I have thought carefully why it is now the time to place before the Courts a frontal challenge to the constitutionality of his position as Chairperson of the Commission. In my affidavit before the Commission where I first sought to have the Chairperson recuse himself, I indicated that I had “reservations about the lawfulness and appropriateness of the appointment of the current Deputy Chief Justice Zondo...”.<sup>2</sup> In doing so, it may be suggested that I am relitigating the issues that full bench of the North Gauteng High Court,<sup>3</sup> Mlambo JP presiding, which upheld the Public Protector’s remedial action relating to the establishment of the Commission of Inquiry. I am advised that the judgment of Mlambo JP does not bring finality to the questions that I raised in that application. I say so because the issues dealt by the High Court are matters falling within the exclusive jurisdiction of the Constitutional Court and to the extent that the judgment has not been dealt with by the Constitutional Court, it is open for me to raise the same issues in my personal capacity. In any event, the question that I seek answered by this Honourable Court within the context of my recusal application is

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<sup>2</sup> Record, page 007, paras 3 page 009 para 13; see also pages 013 to 017 para 18; see also my replying affidavit on page 718, paras 96 to 107 of the Record

<sup>3</sup> President of the Republic of South Africa and Others v Office of the Public Protector and Others 2018 (2) SA 100 (GP) (13 December 2017)

whether the Chairperson was in fact lawfully appointed to chair the Commission of Inquiry in terms of section 84(1)(f) of the Constitution. If his appointment was unlawful, I believe I would have established that he should have recused himself on that basis and furthermore that his directives, rulings and decisions compelling me to appear before him were a nullity, including that his decision to approach the Constitutional Court to enforce his directives, rulings and decisions against me and to have me imprisoned for contempt of court was also unlawful. I am therefore entitled, within the context of my recusal application to challenge the lawfulness of his appointment. I do so in this application.

8. The gravity of the Chairperson's unlawful conduct towards me is serious and goes to the heart of judicial independence and the integrity of the judicial office. In response to my complaint involving the lawfulness of his appointment to chair the Commission, he said two things – the first is in paragraph 23 of Motala's affidavit<sup>4</sup> filed on his behalf in which he relied on the judgement of the High Court to dismiss my reservations about the lawfulness of the Commission, and the second one, is what the lawfulness of the decisions of the chairperson publicly announced on 3 November 2020 and 11 November 2020<sup>5</sup> both of which relate to the steps that he intended to take in order to compel me to appear before him. Simply put, having decided to invoke the provisions of the Commissions Act to deal with my failure to appear before him as a criminal offence, he violated the law when he approached the Constitutional Court to seek enforcement orders without a criminal trial that he had triggered with his decision to invoke the Commissions Act. In essence, having publicly announced that I had committed a criminal offence, he was not entitled to approach the Constitutional Court to enforce compliance

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<sup>4</sup> Record, page 654;

<sup>5</sup> Record, page 732;

with his directives and rulings as the Constitutional Court is a court of final appeal on all constitutional matters and not a criminal court which he was obliged to approach to enforce his directives against me.

9. In his recusal ruling, the chairperson dismissed my concerns relating to the lawfulness of his appointment as follows;

*“ In any event I am of the opinion that, if the applicant was of the view that I should not chair this Commission when the Chief Justice gave him my name, he should have raised the matter with the Chief Justice....”<sup>6</sup>*

10. Of-course the chairperson knows that the constitutional power to appoint a commission of inquiry in accordance with the law had been taken away from the President by the Public Protector. That unlawful remedial action received judicial endorsement in a judgment of the High Court of Mlambo JP. In this regard, I have been shown an interview conducted with Mlambo JP in which the lawfulness of the judgment was specifically asked and answered. It is clear that he considered the judgment as tailored for the times. I will seek to transcribe his remarks to the interviewer merely to avoid the allegation that I have targeted him unfairly.
11. The gravity of the Chairperson’s unlawful conduct in relation to my appearance calls for a frontal challenge to the lawfulness of his appointment and consequently the lawfulness of his directives, rulings and decisions relating to me. I do not wish to be understood to be against any investigation of corruption including that which implicates me. I am against that being done for

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<sup>6</sup> Record, page 989 at para 42

political reasons by one of the highest judicial officers on the terms of an unlawful appointment. I believe that my grounds for the recusal of the Chairperson on the basis of bias include that he (the Chairperson) appeared to have accepted the political narrative powered by a faction in my political party, the ANC, that he endorsed readily as legitimate evidence that I promoted state capture and corruption. I believe that the Chairperson targeted me and it came to me as no surprise that he was bold enough to disregard the fundamentals of his judicial office and to violate his own oath of office to perpetrate a grave injustice on me. What he did after I failed to appear before his Commission amounts to an abuse of judicial power which could only happen because he misunderstands the lawfulness of his appointment.

12. I therefore intend to supplement the grounds for seeking to review and set aside the Chairperson's refusal to recuse himself from taking and assessing any evidence from me on the basis that his appointment to Chair the Commission of Inquiry was unlawful and so where his directives, rulings and decisions in relation to me. Consequently, I now seek to amend the relief that I seek in this application in the following terms:

- 12.1 Declaring that the appointment of Acting Chief Justice Zondo to preside over the **COMMISSION OF INQUIRY INTO STATE CAPTURE CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE** ("Commission of Inquiry") to be contrary to section 84(1)(e) and therefore unconstitutional, accordingly to be set aside;

- 12.2 Declaring that, as a consequence of the order in paragraph 1 above, the rulings, directives, and decisions of the Chairperson of the **COMMISSION OF INQUIRY INTO**

**STATE CAPTURE CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE** as they pertain to the Applicant to be unconstitutional and therefore a nullity;

12.3 Declaring that the decision of the Chairperson of the **COMMISSION OF INQUIRY INTO STATE CAPTURE CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE**, to enforce his directives, rulings and summons in relation to the Applicant, by order of the Constitutional Court to be in breach of the Commission Act, XXX and accordingly unlawful;

12.4 Directing that the President of the Republic of South Africa to appoint a new Chairperson to preside over the **COMMISSION OF INQUIRY INTO STATE CAPTURE CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE**, in terms of section 84(1)(f) of the Constitution as he considers it necessary;

13. The amended notice of motion places squarely the constitutional question regarding whether the Chairperson was appointed in terms of the Constitution by the President of the Republic of South Africa exercising the constitutional powers in section 84(1)(f) of the Constitution. If the Chairperson was appointed in an unconstitutional manner as I know he was, then he was not lawfully entitled to issue any directives, rulings or decisions directing my appearance at the Commission of Inquiry. His directives, rulings or decisions against me are unconstitutional and void ab initio. In my first appearance at the Commission of Inquiry, as part of my submissions to the Chairperson, I raised the issue of whether the Chairperson's appointment had complied with

the Constitution.<sup>7</sup> I raised this question again in my affidavit filed in response to the summons issued by the Chairperson. In my affidavit opposing the issuing of summons, I pertinently raised as part of my submissions and for consideration by the Chairperson, whether his appointment to chair the Commission of Inquiry complied with the Constitution.

14. Even if the Chairperson were considered to have been lawfully appointed to chair the Commission, I submit that his conduct violated the binding provisions of the Commissions Act with the consequence that he grossly undermined my constitutional rights in section 34, 35(3), 9(1), 10 and 12 of the Constitution.
15. The purpose of this supplementary affidavit therefore is to set out a further basis on which I seek an order reviewing and setting aside the decision 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.
16. I do so because, as it will become clear further in this affidavit the legality of the appointment of Acting Chief Justice Zondo or (“the Chairperson”) as Chairperson of the Commission, has now become an unavoidable central constitutional issue in this application. I say so because of the unprecedented constitutional questions relevant to the protection of my rights and personal safety has been challenged by Chairperson Zondo. After the Constitutional Court – which he now heads – granted him the orders that he wanted of my direct imprisonment, he appeared on TV gloating that he would did not regret having exposed me to such grave constitutional

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<sup>7</sup> Record, page 119

violations. The public statement on its own demonstrates that he was always prejudiced against and set out to abuse his membership of the judiciary and particularly the Constitutional Court to violate my constitutional rights. Deliberately taking steps that violated my constitutional rights is itself evidence that he was biased against me. I am therefore entitled to challenge the legal basis of his chairpersonship of the Commission and if I am correct that he was unlawfully appointed, this means that his conduct towards me is consequently equally unlawful.

17. The steps taken by the Chairperson against me to enforce his directives, decisions or rulings presume the constitutionality of his appointment to chair the Commission. If, as I am advised, the manner in which the Commission of Inquiry was unconstitutional, then my failure to appear before the Commission was not unlawful and consequently the Chairperson's conduct in seeking to enforce his orders and summons unlawful.

18. As, in the recusal application before the Commission, I do not file this review application lightly because I am acutely aware of its impact on the general political landscape of South Africa. I fully appreciate the immense public and national interest and concerns regarding the state of our constitutional governance and system, the decaying state of our national institutions which are characterized by rampant and debilitating levels of corruption and fraudulent transactions. I also believe that some of these issues may be addressed through a judicial commission of inquiry. However, such a chairperson appointed to chair that judicial commission of inquiry must be lawfully appointed in accordance with our Constitution. Our Constitution does not permit reliance on unconstitutional means to achieve national goals in combating corruption and malfeasance in public administration and affairs. I therefore seek to correct a grave constitutional and national error in terms of which the Chairperson was appointed. The

usefulness to our national goals of this Commission depends on whether the Chairperson was lawfully appointed to be perform the functions he has been performing for over three years - and as such could take the steps that he took against me – including having me imprisoned by order of the Constitutional Court for a period of fifteen years.

19. Where I believe the Chairperson to be appointed in a manner that is inconsistent with the Constitution, I am entitled to raise that concern before him – which I did – and the Chairperson is enjoined to take such a view very seriously. The Chairperson failed to take into account that I had reservations about the lawfulness of his appointment to chair the Commission which reservations are based on my first-hand knowledge as former President who was compelled to appoint him as directed by a court order and the Public Protector’s remedial action. Both the court order and the remedial action of the Public Protector in my view do not reflect the correct constitutional position on the appointment of a commission of inquiry.
  
20. The Chairperson is the Deputy Chief Justice of South Africa with an indispensable constitutional duty to conduct both his private and public affairs in a manner that upholds judicial independence and the integrity of the judicial office. Often, when the executive seeks the assistance of members of the judiciary, it is on the presumption that these members have integrity, uncommon wisdom and a sufficient detachment from the subjective political morass that often bedevils the work of the executive. My experience with the Chairperson is that he lacks the detachment necessary to preside independently and impartially over the issues that concern my role in state affairs as former President of South Africa. I believe that he has accepted and conducted himself in a manner that promotes a biased political narrative that I am an accused who should appear and be cross-examined by the Commission on the work and

decisions that I did as head of the executive. It appears to me that the Chairperson has conducted the Commission investigations on the presumption that the state under my presidency was captured for nefarious purposes, and that every transaction that occurred under my administration had to be treated as evidence of that state capture, corruption and fraud.

21. I am however entitled to appear before a chairperson who is appointed to chair a Commission of Inquiry in accordance with the Constitution. I am also entitled to appear before a chairperson who is fair, independent and impartial. I apprehend that this unlawful conduct by a senior member of the judiciary has been justified by an inflated reference and outraged at the perceived gravity of the allegations on state capture, corruption and fraud during my presidency.
  
22. 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 to 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 he was neither impartial nor independent to accept a narrative that my presidency was not characterized by state capture, corruption and fraud. The narrative that I tolerated the decay in state institutions and encouraged corruption and fraudulent transactions to benefit a particular family was deeply ingrained in the body politic of South Africa to be assessed through an unlawfully appointed chairperson of the Commission of Inquiry. I was particularly concerned that this constitutional question involving the manner in which the Chief Justice and the Deputy Chief Justice of South Africa were prepared to abandon their constitutional consciences by participating in unconstitutional acts appeared to have been done to please the political interests of a particular

political faction of the ANC rather than to pursue legitimate constitutional interests. As a fact which is conceded by the Chairperson, he was selected solely by the Chief Justice on the orders of the Public Protector. The Public Protector has no power to direct a Chief Justice to do what is unlawful. In this case she did. The Chief Justice has no constitutional power to select for the President a judge in the exercise of section 84(1)(e) of the Constitution. The Chief Justice knew or ought to have known that, but chose to comply with the orders of the Public Protector. The Deputy Chief Justice accepted an appointment to chair a Commission of Inquiry knowing very well that the appointment was not the President's decision as required in section 84(1)(e) of the Constitution. As President I was forced to rubber stamped the appointment of a chair in terms of section 84(1)(e) by the Chief Justice.

23. After months of mulling over how my participation in the Commission of Inquiry was being managed – I decided, reluctantly, to request the recusal of the Chairperson. My aim was to seek the recusal of the Chairperson from presiding only over my matters, which would have left the Chairperson free to deal with other issues and witnesses who were not concerned about the lawfulness of the Chairperson's appointment and the appearance of bias in relation to me. As I dug more into the issues, I was persuaded that it was necessary to bring the recusal application and in doing so, to raise the constitutionality of the Commission of Inquiry – not as a basis for the recusal but to bring to the conscience of the Chairperson a significant constitutional matter requiring that he avoids taking actions that could bring to the fore a frontal challenge to the work that he is engaged in. I now seek the recusal of Acting Chief Justice Zondo on the basis his appointment was unconstitutional.

24. The stated reason for this extraordinary constitutional ruling was that I was allegedly conflicted to exercise the full extent of the constitutional power to establish a judicial commission of inquiry. It is obvious that this was based on the suspicion that a judge selected by me would be incapable of being impartial and independent. Clearly, independence and impartiality are at the heart of this decision. This point is important in the context of this application because I rely on the principle of independence and impartiality to demand the recusal of the Chairperson over matters involving me before him.
25. His ruling on my application should be reviewed and set aside because on the additional basis that he was unlawfully appointed to exercise the powers of a Commission of Inquiry. In the event that it is held that he was lawfully appointed to exercise the powers of a Commission of Inquiry, his conduct in relation to me demonstrate beyond a reasonable doubt that he was biased against me.

#### **DIRECT ACCESS TO THE CONSTITUTIONAL COURT TO ENFORCE HIS ORDERS AGAINST ME**

26. In seeking to enforce his ruling through an order of the Constitutional Court without complying with the Commissions Act, the chairperson acted in breach of the law with the consequence that he violated my constitutional rights.
27. Having issued a decision to enforce his summons through the provisions of the Commissions Act, the chairperson was not entitled to abandon that ruling for an order of the Constitutional Court. In doing so he violated my right guaranteed in the Commissions Act to a fair trial in section 35 of the Constitution.

28. Having made a decision to invoke the provisions of the Commissions Act, he was not entitled to approach the Constitutional Court in breach of his own orders.
29. Completely ignoring my application to review his decision to refuse my recusal application in the High Court and in breach of the procedure established in the Commissions Act, he acted unlawfully in a manner demonstrative of his bias against me.
30. The Chairperson's application to the Constitutional Court to hold me in contempt of the court orders and for my direct imprisonment was also demonstrative of his actual bias towards me. When the orders were granted by the Constitutional Court, the chairperson convened a press conference in which he said that he did not regret taking these dramatic and unprecedented steps, none of whom complied with the Commissions Act.
31. Finally, and also in breach of his ruling on 14 January 2020, the chairperson failed to meet with my medical team to ascertain from them my medical condition which he had accepted justified my failure to appear on that particular day. He took no steps to meet with my doctors as he had publicly ruled and thereafter took steps that violated the Commissions Act to ensure that I was hurt by his bias.
32. In summary the chairperson's decisions involving my appearance before the Commission, including approaching the Constitutional Court, were indications that he was biased against me and on that basis was prepared to violate the following of my constitutional right;

- 32.1 Section 9 of the Constitution in that no Commission of Inquiry in South Africa – past or present - has ever approached the highest appeal court without complying with the provisions of the Commissions Act to enforce the directives or summons issued by the chairperson of a Commission of Inquiry. The consequence of the chairperson's conduct was that I was deprived of equality before the law and the right to equal protection and benefit of the law. This conduct in itself was demonstrative of actual bias which the chairperson harboured against me in that it is clear that he was prepared to violate the law governing Commissions of Inquiry to ensure that I was paraded before his biased commission of inquiry.
- 32.2 Section 10 of the Constitution which guarantees my right to inherent dignity in that due to the chairperson's actual bias, he took steps that resulted in my imprisonment without the benefit of the procedure prescribed in the Commissions Act – a fair trial.
- 32.3 Section 12 of the Constitution in that my right to freedom and security was taken away without any due process involving a fair trial.
- 32.4 Section 34 of the Constitution which guarantees the right to a fair and impartial court and
- 32.5 Section 35(3) of the Constitution which guarantees the right to a fair trial.

**CONCLUSION**

33. In the light of the above, I supplement my grounds on which the ruling of the chairperson refusing to recuse himself from receiving and assess my evidence as chairperson of the Commission of Inquiry. Furthermore, I amend my notice of motion to support the basis of the orders that I seek against the chairperson.

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**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