



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 295/20

In the matter between:

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

Applicant

and

JACOB GEDLEYIHLEKISA ZUMA

Respondent

and

**COUNCIL FOR THE ADVANCEMENT OF THE
SOUTH AFRICAN CONSTITUTION**

First Amicus Curiae

VUYANI NGALWANA SC

Second Amicus Curiae

THE HELEN SUZMAN FOUNDATION

Third Amicus Curiae

Neutral citation: *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma* [2021] ZACC 2

Coram: Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ

Judgments: Jafta J (unanimous)

Heard on: 29 December 2020

Decided on: 28 January 2021

Summary: Section 3 of the Commissions Act 8 of 1947 — the power of a commission to compel a witness to appear before it — urgent application — direct access — privileges of a witness before a commission

ORDER

On application for direct access to the Constitutional Court on an urgent basis:

1. The application for direct access is granted.
2. Advocate Vuyani Ngalwana SC is not admitted as *amicus curiae*.
3. The Council for the Advancement of the South African Constitution and the Helen Suzman Foundation are admitted as *amici curiae*.
4. Mr Jacob Gedleyihlekisa Zuma is ordered to obey all summonses and directives lawfully issued by the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (Commission).
5. Mr Jacob Gedleyihlekisa Zuma is directed to appear and give evidence before the Commission on dates determined by it.
6. It is declared that Mr Jacob Gedleyihlekisa Zuma does not have a right to remain silent in proceedings before the Commission.
7. It is declared that Mr Jacob Gedleyihlekisa Zuma is entitled to all privileges under section 3(4) of the Commissions Act, including the privilege against self-incrimination.
8. Mr Jacob Gedleyihlekisa Zuma must pay the Commission's costs in this Court, including costs of two counsel.

JUDGMENT

JAFTA J (Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring):

Introduction

[1] This matter concerns the interpretation and application of the provisions of the Commissions Act¹ and regulations made under that Act.² The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (Commission) instituted this application as a matter of urgency. The application was launched in December when this Court was on recess. The Commission sought to approach this Court directly on alternative bases. In the main, it contended that the matter falls within the exclusive jurisdiction of this Court. Alternatively, the Commission sought direct access to this Court for purposes of determining its application.

[2] Commissions of inquiry are investigative tools which the President may invoke for purposes of investigating matters of public concern or for gathering information considered necessary for formulating policy. The power to establish these commissions vests in the President and may be exercised by him or her in his or her capacity as the Head of State. It is a power expressly conferred by the Constitution.³

¹ 8 of 1947.

² Regulations of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State published in the Government Gazette number 41436 of 9 February 2018.

³ Section 84 of the Constitution provides:

- “(1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.
- (2) The President is responsible for—

[3] In *SARFU III*⁴ this Court construed section 84(2)(f) of the Constitution in terms of which the President is empowered to appoint commissions of inquiry. This Court observed that it was an executive power that was subject only to constraints of legality and those specifically mentioned in the Constitution.⁵

[4] Notably in *SARFU III* it was emphasised that the findings and recommendations made by a commission established in terms of section 84(2)(f) do not bind the President. The President is free to reject them in their entirety or select recommendations he wishes to implement. In this regard the Court said:

“In the case of the appointment of commissions of inquiry, it is well-established that the functions of a commission of inquiry are to determine facts and to advise the President through the making of recommendations. The President is bound neither to accept the commission’s factual findings nor is he or she bound to follow its recommendations.”⁶

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- (a) assenting to and signing Bills;
 - (b) referring a Bill back to the National Assembly for reconsideration of the Bill’s constitutionality;
 - (c) referring a Bill to the Constitutional Court for a decision on the Bill’s constitutionality;
 - (d) summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business;
 - (e) making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive;
 - (f) appointing commissions of inquiry;
 - (g) calling a national referendum in terms of an Act of Parliament;
 - (h) receiving and recognising foreign diplomatic and consular representatives;
 - (i) appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives;
 - (j) pardoning or relieving offenders and remitting any fines, penalties or forfeitures; and
 - (k) conferring honours.”

⁴ *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) (*SARFU III*).

⁵ *Id* at para 148.

⁶ *Id* at para 146.

[5] In addition to the function of advising the President, a commission of inquiry may also serve the purpose of holding a public inquiry in respect of a matter of public concern. The purpose of a public hearing under those circumstances is to restore public confidence in the institution in which the matter that caused concern arose. Here the focus is not what the President decides to do with the findings and recommendations of a particular commission. Instead, the objective is to reveal the truth to the public pertaining to the matter that gave rise to public concern. Affirming this purpose in *Minister of Police*, this Court stated:

“In addition to advising the executive, a commission of inquiry serves a deeper public purpose, particularly at times of widespread disquiet and discontent.”⁷

[6] However, it is not every commission of inquiry that serves “a deeper public purpose”. As mentioned, the President is free to appoint a commission of inquiry, even for purposes of gathering information he or she may use to formulate policy. Ordinarily a commission that was established to gather information does not need coercive powers to force individuals to furnish it with information. But if it is a fact-finding commission, it may be necessary for it to compel witnesses to testify or produce documentary evidence.

[7] Section 84(2)(f) of the Constitution does not, however, authorise the President to confer upon the commission he or she establishes in terms of that section, the power to compel witnesses to appear before the commission. The President derives the power to do so from the Commissions Act.

The Commissions Act

[8] This is a pre-Constitution piece of legislation that came into force in April 1947. It is a short Act comprising seven sections. Section 1 deals with the application of the Act to a commission. It does not automatically apply to a

⁷ *Minister of Police v Premier, Western Cape* [2013] ZACC 33; 2014 (1) SA 1 (CC); 2013 (12) BCLR 1365 (CC) at para 45.

commission upon its establishment by the President. The section requires the President to declare that the Act will apply to the commission subject to conditions he or she may specify.⁸ The declaration must be made in the form of a proclamation in the Gazette.

[9] The section also empowers the President to make regulations that govern the effective operation of the commission in question. These regulations may confer additional powers upon the commission and spell out the procedure to be followed by the commission in conducting an investigation. The regulations may also protect the integrity of the commission and insulate it against external influences. All this may be achieved by criminalising conduct which may prevent a proper investigation.⁹ Section 1(2) prescribes amounts of fines and periods of imprisonment which may be

⁸ Section 1(1) of the Commissions Act provides:

“Whenever the Governor-General has, before or after the commencement of this Act, appointed a commission (hereinafter referred to as a ‘commission’) for the purpose of investigating a matter of public concern, he may by proclamation in the Gazette—

- (a) declare the provisions of this Act or any other law to be applicable with reference to such commission, subject to such modifications and exceptions as he may specify in such proclamation; and
- (b) make regulations with reference to such commission-
 - (i) conferring additional powers on the commission;
 - (ii) providing for the manner of holding or the procedure to be followed at the investigation or for the preservation of secrecy;
 - (iii) which he may deem necessary or expedient to prevent the commission or a member of the commission from being insulted, disparaged or belittled or to prevent the proceedings or findings of the commission from being prejudiced, influenced or anticipated;
 - (iv) providing generally for all matters which he considers it necessary or expedient to prescribe for the purposes of the investigation.”

⁹ Section 1(2) of the Commissions Act provides:

“Any regulation made under paragraph (b) of subsection (1) may provide for penalties for any contravention thereof or failure to comply therewith, by way of—

- (a) in the case of a regulation referred to in subparagraph (i), (ii) or (iv) of the said paragraph, a fine not exceeding two hundred rand or imprisonment for a period not exceeding six months;
- (b) in the case of a regulation referred to in subparagraph (iii) of the said paragraph, a fine not exceeding one thousand rand or imprisonment for a period not exceeding one year.”

imposed as penalties for breach of the regulations. The offences created by the regulations may be tried in the magistrate's court.¹⁰

[10] Of importance for present purposes are sections 3 and 6, in addition to section 1. Section 3 provides:

“(1) For the purpose of ascertaining any matter relating to the subject of its investigations, a commission shall in the Union have the powers which a Provincial Division of the Supreme Court of South Africa has within its province to summon witnesses, to cause an oath or affirmation to be administered to them, to examine them, and to call for the production of books, documents and objects.

(2) A summons for the attendance of a witness or for the production of any book, document or object before a commission shall be signed and issued by the secretary of the commission in a form prescribed by the chairman of the commission and shall be served in the same manner as a summons for the attendance of a witness at a criminal trial in a superior court at the place where the attendance or production is to take place.

(3) If required to do so by the chairman of a commission a witness shall, before giving evidence, take an oath or make an affirmation which oath or affirmation shall be administered by the chairman of the commission or such official of the commission as the chairman may designate.

(4) Any person who has been summoned to attend any sitting of a commission as a witness or who has given evidence before a commission shall be entitled to the same witness fees from public funds, as if he had been summoned to attend or had given evidence at a criminal trial in a superior court held at the place of such sitting, and in connection with the giving of any evidence or the production of any book or document before a commission, the law relating to privilege as applicable to a witness giving evidence or summoned to produce a book or document in such a court, shall apply.”

¹⁰ Section 1(3) reads:

“Notwithstanding anything to the contrary in any other law contained, a magistrate's court shall have jurisdiction to impose any penalty prescribed by any such regulation.”

[11] This provision vests commissions with powers equal to those enjoyed by the High Court with regard to summoning witnesses; taking their evidence under oath or affirmation and demanding the production of documents and other objects which constitute evidentiary material. Section 3(2) authorises the secretary of a commission to issue a summons which must be in the form prescribed by the commission's Chairperson.

[12] What is apparent from the text of section 3(2) is that if the attendance of a witness is sought, a summons should be issued, directing the witness to appear before the commission on a specified date. Under the section the authority to issue the summons vests in the commission's secretary who should sign the summons presented to him or her if it is in the prescribed form. No substantive application on affidavit is required for that purpose. Nor is the witness to be summoned entitled to a hearing or an opportunity to make representations before the summons is issued.

[13] Once a summons is duly signed by the secretary, it should be served upon the witness in the manner similar to the process followed when summonses are served for the attendance of witnesses at a criminal trial before the High Court. The person on whom the summons is served is obliged to appear at a sitting of the commission on the designated date. Subject to the law relating to privilege applicable to a witness giving evidence in a criminal trial in the High Court, the witness summoned to the commission is obliged to give evidence and answer all questions put to him or her.

[14] Should the witness fail to attend the inquiry on the date and place specified in the summons or to remain in attendance until the conclusion of the inquiry or until he or she is excused by the Chairperson of the commission from further attendance, he or she would be guilty of an offence. Upon conviction he or she would be liable to a fine or a period of imprisonment not exceeding six months or to both such fine and imprisonment.¹¹

¹¹ Section 6 of the Commissions Act provides:

[15] It cannot be gainsaid that the Commissions Act authorises serious limitations of fundamental freedoms and rights guaranteed by the Bill of Rights. To mitigate the intrusion upon individual rights, the Act restricts its application to a commission established “for the purpose of investigating a matter of public concern”. In view of this impact of the Act on fundamental rights, the duty imposed by section 39(2) of the Constitution when legislation is interpreted, is activated during the construction of the provisions of the Commissions Act. This duty requires this Court to interpret the Act in a manner that promotes the rights and freedoms safeguarded by the Bill of Rights.¹²

[16] The phrase “a matter of public concern” is subject to an objectively ascertainable standard. It does not mean what the President in his or her mind views as public interest. Instead, it refers to the concern that the general public had in respect of the matter to be investigated by the Commission vested with coercive powers in the Commissions Act.

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- “(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.”

¹² *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at paras 49-50. See also *Van Vuren v Minister of Correctional Services* [2010] ZACC 17; 2012 (1) SACR 103 (CC); 2010 (12) BCLR 1233 (CC) at para 47; *Chagi v Special Investigating Unit* [2008] ZACC 22; 2009 (2) SA 1 (CC); 2009 (3) BCLR 227 (CC) at para 14; *Daniels v Campbell N.O.* [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at paras 43-5 of Ngcobo J’s concurring judgment and paras 81-3 of Moseneke J’s dissenting judgment; and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 72.

[17] With regard to the objective test and the proper approach to the interpretation of the phrase, this Court said in *SARFU III*:

“In determining whether the subject-matter of the commission’s investigation is indeed a ‘matter of public concern’, the test to be applied is an objective one. The legally relevant question is not whether the President thought that the subject-matter of the inquiry was a matter of public concern, but whether it was objectively so at the time the decision was taken. Whether or not the matter is one of public concern is a question for the courts to determine and not a matter to be decided by the President within his own discretion. In this context, the Constitution requires that the notion of ‘public concern’ be interpreted so as to promote the spirit, purport and objects of the Bill of Rights and to underscore the democratic values of human dignity, equality and freedom. The purpose of the requirement that a matter be one of public concern is, on the one hand, to protect the interests of individuals by limiting the range of matters in respect of which the President may confer powers of compulsion upon a commission and, on the other, to protect the interests of the public by enabling effective investigation of matters that are of public concern.”¹³

[18] In the context of the Commissions Act, a matter is of public concern if it evokes public anxiety or worry and interest. The presence of one or the other of these features does not constitute public concern. With the help of a dictionary meaning, this Court in *SARFU III* stated:

“The Oxford English Dictionary defines the term ‘concern’ as ‘anxiety or worry; or matter of interest or importance to one’. The first meaning given is the meaning of ‘worry or anxiety’. The second meaning is a matter of interest or importance. In our view, ‘public concern’, as it is used in the Commissions Act, should be interpreted in a way which involves both the notion of ‘anxiety’ and ‘interest’. A matter of public concern is, therefore, not a matter in which the public merely has an interest, it is a matter about which the public is also concerned. ‘Public concern’ in this context is therefore a more restricted notion than that of public interest.”¹⁴

¹³ *SARFU III* above n 4 at para 171.

¹⁴ *Id* at para 174.

[19] In view of the nature of the allegations which are being investigated by the present Commission, there can be no doubt that they constitute matters of public concern envisaged in the relevant Act. As it appears in the Proclamation¹⁵ under which the Commission was appointed, its purpose is “to investigate allegations of state capture, corruption and fraud in organs of state”. In part, the Commission’s terms of reference read:

“A Judicial Commission of Inquiry (‘the Commission’) is hereby appointed in terms of section 84(2)(f) of the Constitution of the Republic of South Africa, 1996. The Commission is appointed to investigate matters of public and national interest concerning allegations of state capture, corruption and fraud.”¹⁶

¹⁵ Proc R3 GG 41403 of 25 January 2018.

¹⁶ The Terms of Reference read:

“1. The Commission shall inquire into, make findings, report on and make recommendations concerning the following, guided by the Public Protector’s state of capture report, the Constitution, relevant legislation, policies, and guidelines, as well as the order of the North Gauteng High Court of 14 December 2017 under case number 91139/2016:

- 1.1 whether, and to what extent and by whom attempts were made through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including Deputy Ministers), office bearers and /or functionaries employed by or office bearers of any state institution or organ of state or directors of the boards of SOEs. In particular, the commission must investigate the veracity of allegations that former Deputy Minister of Finance, Mr Mcebisi Jonas and Ms Mentor were offered Cabinet positions by the Gupta family;
- 1.2 whether the President had any role in the alleged offers of Cabinet positions to Mr Mcebisi Jonas and Ms Mentor by the Gupta family as alleged;
- 1.3 whether the appointment of any member of the National Executive, functionary and /or office bearer was disclosed to the Gupta family or any other unauthorised person before such appointments were formally made and /or announced, and if so, whether the President or any member of the National Executive is responsible for such conduct;
- 1.4 whether the President or any member of the present or previous members of his National Executive (including Deputy Ministers) or public official or employee of any state-owned entities (SOEs) breached or violated the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders by SOEs or any organ of state to benefit the Gupta family or any other family, individual or corporate entity doing business with government or any organ of state;
- 1.5 the nature and extent of corruption, if any, in the awarding of contracts, tenders to companies, business entities or organizations by public entities listed under Schedule 2 of the Public Finance Management Act No. 1 of 1999 as amended;
- 1.6 whether there were any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts, mining licenses, government advertising in the New Age Newspaper and any other governmental services

[20] The terms of reference proceed to explicitly tabulate matters to be investigated. These include allegations that “Mr Mcebisi Jonas and Ms Mentor were offered Cabinet positions by the Gupta family”. And in particular whether the then President had any role in those offers or in informing that family about appointments to Cabinet, before those appointments were formally made. Another issue for investigation was whether the former President had unlawfully facilitated the awarding of tenders by state-owned entities to the Gupta family or any other person or company.

[21] These terms of reference place the former President at the centre of the investigation. They seek to establish whether he abdicated his constitutional power to appoint Cabinet members to a private family and whether he had acted unlawfully. These are all matters of public concern as defined above and some of them fall particularly within the personal knowledge of the ex-President.

[22] Sight must not be lost of the fact that it was he who was the subject of the investigation and who drew up the terms of reference that placed him at the heart of the investigation. Some of those matters may not be properly investigated without his participation. Indeed, the terms of reference require all organs of state to cooperate fully with the Commission and extend the application of the Commissions Act to it, including the power to secure and compel witnesses to appear before the Commission

in the business dealings of the Gupta family with government departments and SOEs;

- 1.7 whether any member of the National Executive and including Deputy Ministers, unlawfully or corruptly or improperly intervened in the matter of the closing of banking facilities for Gupta owned companies;
- 1.8 whether any advisers in the Ministry of Finance were appointed without proper procedures. In particular, and as alleged in the complaint to the Public Protector, whether two senior advisers who were appointed by Minister Des Van Rooyen to the National Treasury were so appointed without following proper procedures;
- 1.9 the nature and extent of corruption, if any, in the awarding of contracts and tenders to companies, business entities or organizations by Government Departments, agencies and entities. In particular, whether any member of the National Executive (including the President), public official, functionary of any organ of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest.”

for purposes of giving evidence. The terms of reference also mention that regulations would be made in terms of the Commissions Act to enable the Commission “to conduct its work meaningfully and effectively and to facilitate the gathering of evidence by conferring on the Commission powers as necessary”.

Regulations

[23] On 9 February 2018, the former President signed the regulations in question. These regulations permit legal representation for any person appearing before the Commission. Regulation 8 obliges witnesses to answer all questions put to them except only those which fall within the scope of section 3(4) of the Commissions Act.¹⁷ It will be recalled that this section affords witnesses before the Commission protections enjoyed by witnesses in a criminal trial. The regulation permits cross-examination of witnesses subject to authorisation by the Chairperson.

[24] In exchange for compelling witnesses to testify before the Commission, regulation 8(2) prohibits the use in any criminal proceedings of evidence adduced at the Commission. This prohibition does not apply to a trial relating to an offence under section 6 of the Commissions Act or regulation 12. The prohibition extends to derivative evidence that may come to light as a result of the witness’s testimony before the Commission. That evidence is inadmissible in criminal proceedings.¹⁸

[25] Regulation 10 empowers officials of the Commission to enter any premises and seize evidentiary material relevant to the Commission’s investigation.¹⁹ But this entry

¹⁷ Regulation 8(1) provides:

“No person appearing before the Commission may refuse to answer any question on any grounds other than those contemplated in section 3(4) of the Commissions Act, 1947 (Act No. 8 of 1947).”

¹⁸ Regulation 8(2) provides:

“No evidence regarding questions and answers contemplated in sub-regulation (1), and no evidence regarding any fact or information that comes to light in consequence of any such questions or answers, shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned is charged with an offence in terms of section 6 of the Commissions Act, 1947 (Act No. 8 of 1947), or regulation 12.”

¹⁹ Regulation 10(1) reads:

must be authorised by a search warrant issued by a Judge of the High Court within whose jurisdiction the premises concerned are located.²⁰ But where it is justified, a Judge may issue a warrant for the search of premises situated outside his or her area of jurisdiction.²¹

[26] While section 3 of the Commissions Act empowers the Commission's secretary to issue a summons for attendance at a hearing by witnesses, regulation 10(6) bestows the power upon the Chairperson to secure the same attendance by means of a direction. This regulation provides:

“For the purposes of conducting an investigation the Chairperson may direct any person to submit an affidavit or affirmed declaration or to appear before the Commission to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on the matter being investigated, and may examine such person.”

[27] The regulation enables the Chairperson, acting on his or her own accord, to call any witnesses he considers necessary to give evidence or call upon such witness to submit a sworn statement or produce any document that has a bearing on a matter under investigation by the Commission. It bears emphasis that the process regulated by regulation 10(6) differs from that which is governed by section 3 of the Commissions Act. The regulation 10(6) process does not require a summons to be

“The Chairperson or any officer may, with a warrant, for the purposes of the inquiry, at all reasonable times and without prior notice or with such notice as he or she may deem appropriate enter and inspect any premises and demand and seize any document or article which is on such premises.”

²⁰ Regulation 10(3) provides:

“Subject to sub-regulation (4), the premises referred to in sub-regulation (1) may be entered only by virtue of a warrant issued in chambers by a judge of the area of jurisdiction within which the premises are situated.”

²¹ Regulation 10(4) reads:

“A warrant referred to in sub-regulation (1) may be issued by a judge in respect of premises situated in another area of jurisdiction, if he or she deems it justified.”

issued but a direction only. Failure to comply with that direction may, in appropriate circumstances, constitute an offence.²²

[28] It is against this legislative backdrop that the present claim by the Commission must be adjudicated. This is so because the Proclamation under which the Commission was established explicitly states that the Commission was established in terms of section 84(2)(f) of the Constitution.²³ And in the Government Gazette of 9 February 2018, the provisions of the Commissions Act were extended to apply to the Commission.²⁴

Factual background

[29] It must be mentioned at the outset that the facts placed before this Court were furnished only by the Commission. Former President Jacob Gedleyihlekisa Zuma (respondent) has decided not to participate in these proceedings. This means that the matter will be determined on the basis of the version provided by the Commission, which is the applicant here. The facts as set out in the Commission's papers are not disputed and as a result they will be taken as correct.

²² Regulation 12(2) provides:

“Any person who wilfully hinders, resists or obstructs the Chairperson or any officer in the exercise of any power contemplated in regulation 10 is guilty of an offence.”

²³ The Proclamation states:

“In terms of section 84(2)(f) of the Constitution of the Republic of South Africa of 1996, I hereby appoint a Commission of Inquiry to investigate allegations of state capture, corruption and fraud in the Public Sector including organs of state with the terms of reference in the Schedule attached hereto and appoint Honourable Mr Justice Raymond Mnyamezeli Mlungisi Zondo, Deputy Chief Justice of the Republic of South Africa, as its Chairperson.”

²⁴ Government Notice No 105 of 9 February 2018 reads:

“Under the powers vested in me by section 1 of the Commissions Act, 1947 (Act No. 8 of 1947) (the Act), I hereby—

- (a) declare that the provisions of the said Act shall be applicable to the Judicial Commission of Inquiry into allegations of state capture, corruption and fraud in the Public Sector including Organs of State established in terms of Proclamation No.3 of 2018 published in Gazette No. 41403 dated 25 January 2018; and
- (b) make the regulations in the Schedule with reference to the said Commission.”

[30] Following remedial action issued by the Public Protector to the effect that a commission of inquiry be appointed to investigate certain allegations that were made to her during an investigation, the respondent who was then the sitting President of the Republic, established the Commission. As mentioned, he was exercising the power conferred on him by section 84(2)(f) of the Constitution. On the recommendation of the Chief Justice, the respondent appointed the Deputy Chief Justice as the Chairperson of the Commission.

[31] Among the allegations which the Public Protector ordered be investigated by a commission were matters which implicated the respondent in his capacity as President of the Republic. These included offers of appointment to Cabinet made to certain individuals by the Gupta family and whether the President and members of his Cabinet were involved in the facilitation of the awarding of tenders unlawfully by state-owned entities. Commendably the respondent, having established the Commission, drew up terms of reference which covered the allegations flagged by the Public Protector, despite the fact that he was implicated as one of the culprits. Effectively the respondent, by so doing, made himself the subject of the Commission's investigation.

[32] It must have come as no surprise to him that the Commission required his attendance in the course of its investigation. At that point the respondent, having resigned from office, was no longer President of the Republic. During September 2018 the respondent was requested to furnish the Commission with an affidavit, responding to the evidence by two witnesses, Ms Mentor and Mr Maseko, which implicated him. The respondent, through his attorneys, informed the Commission that he had sought certain records from the office of the President. The records in question had, it was stated, information relevant to matters the respondent needed to include in the requested affidavit.

[33] However, no affidavit was submitted by the respondent. More than seven months later, the Commission addressed a query to the respondent's attorneys

expressing concern that no affidavit had been submitted. The respondent's attorneys responded immediately and took issue with the assertion that he had "failed to deliver an affidavit as requested". They pointed out that the Presidency had furnished them with incomplete information on 24 April 2019. They recorded their rejection of a suggestion that the respondent did not cooperate with the Commission, even though the Commission's letter under reply made no suggestion of that sort. That letter merely recorded the Commission's concern over the delay. The respondent's attorneys proceeded to lump the Commission and the Presidency together and accused them of lack of cooperation with the respondent by their failure to furnish him with information. They concluded by insisting that their client needed the full information in order to submit an affidavit and mentioned that their client's rights on the issue were reserved.

[34] On 30 April 2019, and by means of a letter, the Commission invited the respondent to appear before it from 15 to 19 July 2019. The letter stated that the purpose of the appearance was to afford the respondent an opportunity "to give his side of the story" in relation to evidence of witnesses who implicated him and also to answer questions from the Commission. The letter asked for a written confirmation that the respondent would appear before it.

[35] Following an exchange of correspondence between the Commission and the respondent, the former President appeared before the Commission on 15 July 2019. He testified for two and half days before declining to answer questions and objecting to being questioned in a manner that he said amounted to cross-examination. The respondent took the decision that he would no longer participate in the proceedings of the Commission. He did not complain only about the questioning, but also expressed misgivings about how the Commission had secured his attendance.

[36] The Commission's lawyers refuted the respondent's complaints. They pointed out that the Chairperson had authority to call witnesses to testify before the Commission and that the respondent was "invited" in the exercise of that power.

They drew the respondent's attention to the provisions of regulation 8(1) and pointed out that he was obliged to answer questions, except those in respect of which he was exempted from answering by section 3(4) of the Commissions Act. The lawyers for the Commission also refuted that the respondent was subjected to cross-examination. They concluded by asserting that the respondent's procedural objections, complaints and misgivings were not valid.

[37] This impasse prompted the Chairperson to invite the lawyers on both sides to a discussion in chambers. On 19 July 2019, an agreement was reached on the respondent's continued participation in the Commission's hearings. He withdrew the decision not to participate and promised to cooperate with the Commission.

[38] The agreement included the Commission's lawyers providing the respondent with a list of issues in respect of which he was required to testify, within two weeks from 19 July 2019. Thereafter, the respondent would furnish the Commission with an affidavit, setting out his version on those issues. The parties had contemplated that once these steps had occurred, the respondent would testify before the Commission.

[39] On 30 July 2019, the Commission's lawyers emailed a list of issues to the respondent's attorneys and concluded their message by recording that the Chairperson had directed that the respondent should return to the hearing from 14 to 25 October 2019 and from 11 to 15 November 2019. The respondent's attorneys took umbrage at the directive fixing dates on which the respondent was required to return to the Commission. They requested the Commission's lawyers to inform the Chairperson that they regarded those dates as a proposal which may be changed at the instance of either party. Further correspondence was exchanged between the lawyers of both sides. In one of the letters, the Commission's lawyers pointed out that what informed the decision on the dates in question was the fact that the lifespan of the Commission would terminate at the end of February 2020.

[40] Notably the Commission disputed that it was a term of the agreement of 19 July 2019 that dates on which the respondent would return to the Commission, would be arranged by consensus between the parties. However, the Commission excused the respondent from appearing before it from 14 to 25 October 2019 as those dates clashed with his appearance before a criminal court in Pietermaritzburg. With regard to the dates in November, the respondent's attorneys pointed out that he and his legal team would not be available as they would be attending to another case in which he unsuccessfully sought an order for a permanent stay of prosecution. In a subsequent letter, they informed the Commission that the respondent was sick and that he was admitted in hospital. Consequently, he could not come to the Commission in November 2019.

[41] Meanwhile the respondent had also failed to meet the deadline agreed to on 19 July 2019 for submitting an affidavit, and no explanation was furnished to the Commission for his failure. This was a second occasion that he failed to do so. On the first occasion he complained that the Presidency had given him incomplete information. To date not a single affidavit has been presented by him to the Commission.

[42] In December 2019 the Commission's lawyers took a decision that the Commission's powers of compulsion should be invoked in order to force the respondent to attend and testify. Having sketched out in detail in their letter to the respondent's attorneys the chronology of the respondent's failures and their impact on the Commission's investigation, they concluded:

“The above record of events is a matter of material concern for the legal team of the Commission. First, the inability of the Commission to secure the attendance of Mr Zuma to continue evidence before the Commission is hampering the work of the Commission. Second, and in particular, the refusal or failure to submit an affidavit in response to the ‘areas of interest’ communication of 30 July 2019 is a breach of arrangement agreed and referred to above. Third, the loss of three weeks hearing time is something the Commission can ill afford both in relation to time and the costs

involved. Finally it is noted that despite the Chairperson's various directives, you have failed or refused to approach him by way of formal applications to seek rulings excusing non-compliance with his directives."

[43] But for reasons that are not apparent from the record, the Commission's lawyers, rather than following the Commissions Act and seeking that a summons be issued, chose to give notice to the respondent, advising him that they contemplate making an application for authorisation of a summons by the Chairperson. A substantive application on affidavit was filed and served on 19 December 2019. It was to be heard on 14 January 2020. The relief sought was an order authorising and directing the Commission's secretary to issue summons against the respondent. The notice of application afforded the respondent up to 6 January 2020 to give notice to oppose and deliver an affidavit setting out the grounds of opposition. On 6 January 2020, the respondent's attorneys filed a notice to oppose and promised to file the opposing affidavit on 10 January 2020.

[44] However, on that date the respondent's attorneys informed the Commission that their client had undergone a surgery on 6 and 9 January 2020 and promised to file the affidavit on or before 14 January 2020. On 13 January 2020, the respondent filed an affidavit of 105 pages, excluding annexures. As the Commission's lawyers sought to file a reply, the application was not heard on 14 January 2020. The matter was postponed indefinitely for a reply.

[45] It was only on 28 August 2020 that the Commission issued a notice setting down the application for 9 September 2020. The respondent's attorneys responded on 30 August 2020 and pointed out that due to prior commitments the respondent's counsel were not available. They asked that the hearing be rescheduled. They also objected to dates which were fixed by the Commission for the appearance of the respondent from 21 to 25 September 2020, before the application for the issuance of summons was heard. These dates were fixed by means of a letter of 10 August 2020. The respondent's attorneys demanded to be consulted before dates were fixed.

[46] On 18 September 2020 the Commission by letter informed the respondent's attorneys that the hearing of the application for summons had been rescheduled for 9 October 2020. The Commission suggested that argument on that application may even be presented "remotely". Alternatively, the application could be determined on written submissions only. In a second letter with no date, the Commission's secretary informed the respondent's attorneys that 16 to 20 November 2020 were the new dates for the respondent's appearance at the Commission. It is not clear whether the Commission excused the respondent from attending from 21 to 25 September 2020 at the behest of his attorneys.

[47] But what is evident is that the respondent's attorneys took offence at the fixing of the new dates. They responded by informing the Commission that they were instructed to bring an application for the Chairperson's recusal.

[48] Meanwhile the Chairperson had issued two directions in terms of regulation 10(6). The first was issued on 27 August 2020 and required the respondent to respond by way of an affidavit to the evidence of Messrs Tsotsi, Linnell and Matona. The second was issued on 8 September 2020 and directed him to respond to the evidence of Mr Popo Molefe by affidavit. The respondent did not comply with both directions.

[49] On 9 October 2020, the application for the issuance of the summons was heard, in the absence of the respondent. The Commission's secretary was later authorised to issue summons which was issued on 20 October 2020. The summons required the respondent to appear before the Commission from 16 to 20 November 2020. This summons was duly served on the respondent's attorneys.

[50] On 16 November 2020, the respondent appeared before the Commission but his counsel moved the application for the Chairperson's recusal. Full argument was presented by both sides. The Chairperson took time to consider the submissions and

made his ruling on 19 November 2020. In a fully reasoned ruling, the recusal application was dismissed. Following the ruling, the respondent's counsel informed the Commission that his client will leave the hearing as he intends taking the ruling on review.

[51] The Commission took a short adjournment and it was during that adjournment that the respondent and his legal team left the hearing. When the hearing resumed, the Chairperson was informed that the respondent had left without being excused from further attendance. Unimpressed by the turn of events, the Chairperson instructed the secretary to lay a criminal charge against the respondent and to launch an urgent application in this Court, hence the current one.

[52] But litigants do not approach this Court, which is the apex court, as of right. They require the Court's permission to do so, particularly if the relief sought can be obtained in the courts below. The exception to this rule applies where a matter falls within the exclusive jurisdiction of this Court. If a litigant establishes exclusive jurisdiction, it is entitled to approach this Court directly as the matters falling within this Court's exclusive jurisdiction cannot be entertained by other courts. Here, the Commission approached this Court on two grounds. First, it contended that the matter fell within the Court's exclusive jurisdiction. Second, the Commission sought to be granted direct access. Any one of these grounds, if successfully established, would entitle the Commission to a hearing by this Court. However, at the hearing of the matter, counsel for the Commission addressed the Court on direct access only. He submitted that if the Commission succeeds on it, it will not be necessary for the Court to determine whether its exclusive jurisdiction was engaged. Therefore, the point on direct access will be considered first.

Direct access

[53] In order to determine whether direct access should be granted, it is helpful first to identify the standard against which the request for direct access must be assessed. It is by now trite that when this Court grants direct access, it exercises a discretionary

power.²⁵ Like all discretions, the power must be exercised judicially. What this means is that the Court must not misdirect itself in relation to the relevant facts and the applicable law. Should an incorrect legal standard be applied, it cannot be said that the discretion was properly exercised.

[54] Section 167(6) of the Constitution empowers litigants to bring cases directly to this Court if it is in the interests of justice to do so and leave is granted.²⁶ Consistent with this provision, rule 18 of the rules of this Court prescribes the procedure to be followed when cases are brought directly to this Court.²⁷ The rule requires that these cases be brought on notice of motion, supported by an affidavit that sets out fully the facts upon which the applicant relies for relief. The rule obliges the applicant to describe grounds on which the request for direct access is based.

Grounds for direct access

[55] The Commission's mainstay for seeking direct access is urgency. It pointed out that the Commission's lifespan is to come to an end on 31 March 2021. Building

²⁵ *Tsotetsi v Mutual and Federal Insurance Co Ltd* [1996] ZACC 19; 1997 (1) SA 585 (CC); 1996 (11) BCLR 1439 (CC) at paras 11-2.

²⁶ Section 167(6) of the Constitution provides:

“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; or
- (b) to appeal directly to the Constitutional Court from any other court.”

²⁷ Rule 18 provides:

- “(1) An application for direct access as contemplated in section 167(6)(a) of the Constitution shall be brought on notice of motion, which shall be supported by an affidavit, which shall set forth the facts upon which the applicant relies for relief.
- (2) An application in terms of subrule (1) shall be lodged with the Registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out—
 - (a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted;
 - (b) the nature of the relief sought and the grounds upon which such relief is based;
 - (c) whether the matter can be dealt with by the Court without the hearing of oral evidence and, if it cannot;
 - (d) how such evidence should be adduced and conflicts of fact resolved.”

on this, the Commission argued that very little time remains for it to complete hearings and compile a report. Had it not lost three months of its time to the Covid-19 lockdown, the Commission could have concluded oral hearings at the end of December 2020. As a result, the Commission now aims at completing hearings at the end of February 2021. The Commission pointed out that it has the period of January to February 2021 to hear evidence from the respondent which is pivotal to its investigation.

[56] It concluded by submitting that in these circumstances, it is urgent that this Court makes a final determination of the issues because if it were to approach the High Court, the appeal process which may ensue would defeat the objective of compelling the respondent to testify before the Commission. The Commission argued that the normal procedures are not appropriate in view of the impending termination of its existence. As mentioned, the bedrock of the Commission's argument is that anything other than direct access to this Court would result in its tenure coming to an end without hearing the respondent's testimony.

[57] Of course, this would be a cogent reason if this situation was not caused by the Commission's own conduct.²⁸ We are told that the Commission has sought the respondent's attendance at its hearings since 2018. We are also told that to date the Commission has issued no less than 2526 summonses, but we are not informed why a summons was not issued against the respondent until October 2020.

[58] Despite the constitutional injunction of equal protection and benefit of the law,²⁹ 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

²⁸ *AParty v Minister of Home Affairs; Moloko v Minister of Home Affairs* [2009] ZACC 4; 2009 (3) SA 649 (CC); 2009 (6) BCLR 611 (CC) at paras 57-9.

²⁹ Section 9(1) of the Constitution provides: "[e]veryone is equal before the law and has the right to equal protection and benefit of the law."

too late in the day. On the occasion of the respondent's withdrawal without permission from the Commission in November 2020, the Chairperson stated:

“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.”

[59] 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. This requires us to look at steps taken by the Commission over time.

[60] When the respondent appeared before the Commission in July 2019, he refused to answer questions that made him uncomfortable and effectively withdrew his participation, raising complaints which the Commission viewed as lacking merit. This must have signaled to the Commission that the use of its coercive powers may be necessary. However, an agreement between the respondent and the Commission's lawyers was brokered. Although the Commission's lawyers kept their side of the bargain, the respondent did not. He failed to submit an affidavit he had promised to file. He took offence to the Chairperson fixing dates for his future appearance without consulting his lawyers.

[61] But of more importance is the fact that in December 2019, the Commission was convinced that a summons should be issued against the respondent. However, instead of asking that the summons be issued immediately by the Commission's secretary, the Commission's lawyers chose to give the respondent notice, informing him that they planned to make a substantive application to the Chairperson for authorisation of the summons. Shortly thereafter, they launched the application which was served upon

the respondent. All of this appears not to be required by any law. And the Commission was aware that it had limited time within which to conduct hearings. As to why it did not follow the law in relation to issuing summons, we are not told.

[62] Having opted for a formal application, the Commission did not pursue and ripen it for hearing diligently. The notice of application required the respondent to file a notice to oppose and his opposing affidavit on or before 6 January 2020. On that day notice was filed without accompanying affidavits. The respondent's attorneys promised to file affidavits on 10 January 2020. The application was set down for hearing on 14 January 2020. On the eve of the hearing, the respondent filed a long affidavit. Since the Commission's lawyers wanted to file a reply the matter was postponed without fixing a date.

[63] The respondent indicated that he would be going abroad for medical treatment and that he would be back at the end of March 2020. The Chairperson exempted him from attendance during that period. But this did not mean that the application could not be heard in his absence. The Commission failed to set the matter down from 14 January 2020 up to the end of March 2020, when the national lockdown was declared. There is no explanation as to why this did not happen. In fact, that application was only set down for 9 September 2020. Again this long delay is not explained. The Commission merely says that it lost three months of its time due to the Covid-19 lockdown. The lockdown commenced on 26 March 2020. The three months lost by the Commission must be April to June 2020. It is not clear from the Commission's papers why the application was set down for 9 September 2020. The period July to August 2020 is not accounted for by the Commission.

[64] When the respondent pointed out that 9 September 2020 did not suit his legal team, the hearing of the application was rescheduled for 9 October 2020. It was only on that day that a summons against the respondent was authorised and issued. It required the respondent to appear in November 2020. During his appearance then,

the respondent moved an application for the Chairperson's recusal. When this failed, he unilaterally withdrew from the hearing and left the Commission's venue.

[65] By then the Commission was left with almost no time to compel the respondent to appear before it by means of laws at its disposal, hence the urgent application it launched in this Court in December 2020. Had the Commission acted diligently and in accordance with the relevant law, the present situation could have been avoided.

[66] It is not true that it was only during the respondent's walk-out in November 2020 that the Commission realised that intervention by a Court was necessary. The red lights started flashing in July 2019 when the respondent unilaterally decided to withdraw from further attendance. Later in September 2020, having berated the Chairperson for not consulting his attorneys, he made it plain that he will not participate in the hearings unless the Chairperson recused himself. This was a build up to what happened in November 2020.

[67] However, the Commission's maladroit conduct described above is not decisive of the interests of justice issue. This factor must be weighed against other factors including those that are in favour of granting direct access. These include enabling the Commission to conduct a proper investigation of matters it is tasked to determine; the fact that the matter is not opposed and that it bears reasonable prospects of success.

[68] With regard to reasons for direct access, the Commission averred:

“One of the most compelling reasons for direct access lies in the pressing public importance of the matter and prejudice to the public interest if jurisdiction is not assumed. Given the importance of Mr Zuma's role as former President, I submit that it is in the public interest that urgent steps are taken to secure his appearance before the commission. It is in the public interest to require Mr Zuma to appear before the Commission to give answers to the matters under investigation as part of his duty of

accountability. I refer also to what I have stated about importance of the subject of the Commission's investigation."

[69] It is apparent from these reasons that a dismissal of the application for direct access would prejudice the public interest in the Commission's investigations. The respondent is firmly placed at the centre of those investigations which include an allegation that he had surrendered constitutional powers to unelected private individuals. If those allegations are true, his conduct would constitute a subversion of this country's constitutional order.

[70] It must be plainly stated that the allegations investigated by the Commission are extremely serious. If established, they would constitute a huge threat to our nascent and fledgling democracy. It is in the interests of all South Africans, the respondent included, that these allegations are put to rest once and for all. It is only the Commission which may determine if there is any credence in them or to clear the names of those implicated from culpability.

[71] The public, whose interest would be frustrated if direct access is refused, is not responsible for the blunders of the Commission's lawyers. As a result, the lack of diligence on the lawyers' part cannot be attributed to the public. In all these circumstances I am persuaded that direct access should be granted.

[72] This conclusion renders it unnecessary to determine whether the matter falls within the exclusive jurisdiction of this Court.

Applications for admission as amici

[73] Three parties applied to be admitted as amici curiae (friends of the Court). The first applicant was Advocate Vuyani Ngalwana SC, the second was the Council for the Advancement of the South African Constitution (CASAC) and the third was the Helen Suzman Foundation (Foundation). The Commission opposed the application by Ngalwana SC only and supported that of CASAC. This Court issued directions

requiring these applicants to file their written submissions on or before 28 December 2020 which was the eve of the hearing of the main application by the Commission.³⁰

[74] Those directions informed the relevant applicants that rulings on their respective applications would be made at the time of deciding the main application. This was necessitated by the fact that this Court was still to decide whether it would entertain the main application. If direct access were to be refused, the applications for admission as amicus would have fallen away, as there would have been no matter into which the applicants could have been admitted.

[75] It is now settled that the role of an amicus is to help the Court in its adjudication of the proceedings before it. To this end, the applicant for that position must, in its application, concisely set out submissions it wishes to advance if admitted. It must also spell out the relevance of those submissions to the proceedings in question and furnish reasons why the submissions would be helpful to the Court.³¹ For the applicant's argument to be useful, it must not repeat submissions already made by other parties.³²

³⁰ The directions of 23 December 2020 read:

- “1. Council for the Advancement of the South African Constitution, Advocate Vuyani Ngalwana SC and the Helen Suzman Foundation are directed to file written submissions not later than 13h00 on Monday, 28 December 2020.
2. The decision on whether these parties should be admitted as amici curiae will be taken and communicated in the Court's judgment.
3. The parties mentioned in paragraph 1 will not present oral argument at the hearing on 29 December 2020.
4. The Commission may file a response to submissions referred to in paragraph 1, if it so wishes, on 30 December 2020.”

³¹ Rule 10(6) of the rules of this Court provides:

- “An application to be admitted as an amicus curiae shall–
- (a) briefly describe the interest of the amicus curiae in the proceedings;
 - (b) briefly identify the position to be adopted by the amicus curiae in the proceedings; and
 - (c) set out the submissions to be advanced by the amicus curiae, their relevance to the proceedings and his or her reasons for believing that the submissions will be useful to the Court and different from those of the other parties.”

³² Rule 10(7) of the rules of this Court provides:

[76] It is not generally permissible for an amicus to plead new facts which did not form part of the record or adduce fresh evidence on which its argument is to be based. Nor can the amicus expand the relief sought or introduce new relief.³³ This is because an amicus is not a party in the main proceedings and its role is restricted to helping the Court to come to the right decision.

[77] The application by Ngalwana SC does not meet the relevant requirements. He seeks relief that differs materially from that sought by the Commission and which may not be established by the facts already on record. He claims to be acting in the public interest in terms of section 38(1)(d) of the Constitution. It will be recalled that this provision confers legal standing on a party that seeks to enforce rights in the Bill of Rights by asking for appropriate relief for the breach of those rights.

[78] Accordingly, the application by Ngalwana SC must fail. It cannot be brought under the guise of an amicus application. It is a different substantive application for different relief. It should have been instituted as a separate application, provided it met the requirements of approaching this Court directly.

[79] Although the applications by CASAC and the Foundation raise in part argument that is not relevant to the issues we are called to decide, they do contain submissions which are relevant to some of the issues. And those submissions differ from those advanced by the Commission. At face value the relevant submissions look useful. Consequently, CASAC and the Foundation should be admitted as amici curiae.

“An amicus curiae shall have the right to lodge written argument, provided that such written argument does not repeat any matter set forth in the argument of the other parties and raises new contentions which may be useful to the Court.”

³³ Rule 10(8) of the rules of this Court provides:

“Subject to the provisions of rule 31, an amicus curiae shall be limited to the record on appeal or referral and the facts found proved in other proceedings and shall not add thereto and shall not present oral argument.”

Merits

[80] The central issue that arises on the merits is whether the respondent should be compelled to appear before the Commission and testify. The subtext of this issue is whether upon appearing, he is obliged to answer all questions put to him. This requires the determination of rights held by witnesses who testify before a commission like the present one.

[81] In searching for answers to these issues, the right place at which to begin is the Commissions Act. The summonses which the Commission seeks this Court to enforce are issued in terms of the Act. Section 3(2) of the Act empowers the Commission's secretary to sign and issue summons for the attendance of witnesses at hearings by the Commission. Once a summons is issued in terms of the section and served on a prospective witness, that witness is obliged to comply. If it requires him or her to appear before the Commission on a fixed date, the witness must do so, regardless of his or her status or standing in the community.

[82] Compliance in this regard does not mean that the witness may just show his or her face at the Commission and thereafter leave at the time convenient to him or her. The obligation on the witness is to remain in attendance until the proceedings are concluded or he or she is excused by the Chairperson of the Commission from attendance. A breach of this duty constitutes an offence under section 6 of the Commissions Act.

[83] The undisputed facts here are that the respondent failed to remain in attendance after his application for recusal was dismissed on 19 November 2020. As a result, the Commission was impeded from continuing with the hearing that was scheduled for further dates in November 2020.

[84] In fact, as far back as 28 September 2020, the respondent had shown an intention not to appear before the Commission for purposes of testifying. In a letter addressed by his attorneys to the Chairperson, the respondent berated him for fixing

the dates of 16 to 20 November 2020 for the respondent's appearance at the Commission without first discussing those dates with his lawyers. In that letter the respondent continued to question the lawfulness of the Commission which he himself had established in terms of section 84(2)(f) of the Constitution.

[85] He made it quite clear that he would not comply with the process issued by the Commission and dared the Chairperson to take whatever steps he considered appropriate. In paragraph 12 of that letter, the respondent's attorneys stated:

“Until this application for your recusal is finally determined, President Zuma will take no further part in this Commission and the Chairperson is entitled to take any such steps as he deems lawful and appropriate. We reiterate that President Zuma has questioned the lawfulness of the establishment of this Commission. He persists with this issue and reserves all his rights in this regard.”

[86] The summons was not the only process from the Commission which was ignored by the respondent. In August and September 2020, the Chairperson issued two notices under regulation 10(6) of the Commission's regulations. These notices required the respondent to file affidavits with the Commission within specified periods. To date the respondent has failed to comply with those directions. It is remarkable that the respondent would flout regulations made by him whilst he was still President of the Republic.

[87] The respondent's conduct in defying the process lawfully issued under the authority of the law is antithetical to our constitutional order. We must remember that this is a Republic of laws where the Constitution is supreme. Disobeying its laws amounts to a direct breach of the rule of law, one of the values underlying the Constitution and which forms part of the supreme law. In our system, no one is above the law. Even those who had the privilege of making laws are bound to respect and comply with those laws. For as long as they are in force, laws must be obeyed.

[88] In these circumstances, I am satisfied that the claim for compelling the respondent to obey process from the Commission and testify before it, has been established.

Witnesses' rights

[89] Before leaving the Commission on 19 November 2020, counsel for the respondent cautioned that if his client were compelled to attend he would take the witness stand but would not testify. On this issue counsel said:

“If you blow us, today, you do not agree with us – as I have said, I have a mountain to climb – what happens? Do we get Mr Zuma here as a guarantee? No, no, if we are approached that way, we will just – even if we lose, we will review you, we will go as far as wherever and that is not helpful. If you force me to bring him here without the climate being created for him to believe that he is not being charged. Well, I put him there, Chair, and he will exercise his right to say nothing.”

[90] Although clumsily put, it is apparent that the respondent and his legal team believe that he has a right to remain silent during the proceedings before the Commission. However the right to remain silent that I am aware of is the one guaranteed by section 35(1)³⁴ and (3)³⁵ of the Constitution and under the common law.

³⁴ Section 35(1) of the Constitution provides:

“Everyone who is arrested for allegedly committing an offence has the right—

- (a) to remain silent;
- (b) to be informed promptly—
 - (i) of the right to remain silent; and
 - (ii) of the consequences of not remaining silent;
- (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
- (d) to be brought before a court as soon as reasonably possible, but not later than—
 - (i) 48 hours after the arrest; or
 - (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
- (e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and

But that right is evidently available to arrested and accused persons only. When he appears before the Commission, the respondent's status is that of a witness. He is not an arrested person. Nor is he an accused person. Moreover, a witness in a criminal trial has no right to remain silent.

[91] There are cogent considerations that militate against permitting witnesses to invoke the right to remain silent before the Commission. The first is that such a proposition is contrary to the plain text of the Commissions Act. It is implicit that the Act requires witnesses to answer all questions, barring the issues covered by section 3(4) which I will address in a moment. Section 6 of that Act makes it a criminal offence to refuse to answer lawfully put questions fully and satisfactorily.

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- (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.”

³⁵ Section 35(3) of the Constitution provides:

“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;
- (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.”

[92] The other consideration is that allowing witnesses before a commission to invoke the right to remain silent would seriously undermine commissions and frustrate their purpose to investigate matters. This would include, as here, matters of public concern and interest. In *Magidiwana* this Court observed:

“The power to appoint a commission of inquiry is mandated by the Constitution. It is afforded to the President as part of his executive powers. It is open to the President to search for the truth through a commission. The truth so established could inform corrective measures, if any are recommended, influence future policy, executive action or even the initiation of legislation. A commission's search for truth also serves indispensable accountability and transparency purposes. Not only do the victims of the events investigated and those closely affected need to know the truth: the country at large does, too. So ordinarily, a functionary setting up a commission has to ensure an adequate opportunity to all who should be heard by it. Absent a fair opportunity, the search for truth and the purpose of the Commission may be compromised.”³⁶

[93] I conclude that witnesses who appear and testify before the Commission have no right to remain silent. On the contrary, they are obliged to give evidence and answer all questions lawfully put to them, except only questions that address matters falling within the ambit of section 3(4) of the Commissions Act.

The exception

[94] Section 3(4) affords witnesses before a commission the protections which are enjoyed by witnesses in a criminal trial. This section extends the application of laws relating to privilege, to the hearings of commissions. Therefore, for a witness in a commission hearing to lawfully decline to answer a question, it must be shown that the refusal is based on legal privilege which would have been upheld if the proceedings amounted to a criminal trial.

³⁶ *Magidiwana v President of the Republic of South Africa (Black Lawyers Association Amicus Curiae)* [2013] ZACC 27; 2013 JDR 1788 (CC); 2013 (11) BCLR 1251 (CC) at para 15.

[95] Witnesses at a criminal trial enjoy a statutory privilege against self-incrimination.³⁷ This is a codification of the common law principle to the effect that no one may be compelled to give evidence that incriminates himself or herself. They cannot be forced to do so before or during the trial.³⁸ This principle was affirmed by this Court in *Ferreira* where it was observed that it forms part of the fair trial rights guaranteed by the predecessor to section 35 of the Constitution.³⁹

[96] In *Ferreira* this Court was concerned with the question whether a person summoned to an inquiry under section 417 of the Companies Act⁴⁰ enjoyed the privilege not to answer questions which would incriminate him or her in the commission of an offence. Ackermann J and Chaskalson P (writing for the majority) had no difficulty in locating such a right in the interim Constitution. In this regard, Ackermann J said:

“I conclude that the right of a person not to be compelled to give evidence which incriminates such person is inherent in the rights mentioned in section 25(2) and (3)(c) and (d). The fact that such rights are, in respect of an accused person, included (implicitly or otherwise) in section 25(3) of the Constitution, does not for that reason preclude the Court from giving residual content to section 11(1) and holding that section 11(1) protects rights similar to those in section 25(3)(c) and (d) in contexts and in respect of persons other than those there mentioned.”⁴¹

[97] It is evident from this statement that Ackermann J held the view that the rights in section 25(3) of the interim Constitution did not apply to persons summoned in terms of section 417 of the Companies Act to an inquiry because those persons are not accused persons. However, he held that their right to freedom guaranteed by

³⁷ Section 203 of the Criminal Procedure Act 51 of 1977 provides:

“No witness in criminal proceedings shall, except as provided by this Act or any other law, be compelled to answer any question which he would not . . . , have been compelled to answer by reason that the answer may expose him to a criminal charge.”

³⁸ *R v Camane* 1925 AD 570 at 575.

³⁹ *Ferreira v Levin N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 79 and 186.

⁴⁰ 61 of 1973.

⁴¹ *Ferreira* above n 39 at para 79.

section 11(1) of the interim Constitution, included the “right not to be compelled to give evidence against oneself in a section 417 enquiry”.⁴²

[98] On the contrary, Chaskalson P located the right against self-incrimination in section 25 of the interim Constitution. He did not see any difficulty in accepting that persons summoned under section 417 could invoke fair trial rights of accused persons in section 25 of the interim Constitution to challenge the validity of section 417. He observed:

“Ackermann J has demonstrated that the rule against being compelled to answer incriminating questions is inherent in the right to a fair trial guaranteed by s 25(3). Because he held that the applicants could not rely on s 25(3) he analysed the issues in the present case in terms of s 11(1). The reasoning that led him to conclude that s 417(2)(b) is inconsistent with s 11(1) would also have led him to conclude that it is inconsistent with s 25(3). It seems to me to be clear that this is so. To some extent his reasons are shaped by the fact that the issue is treated as one implicating freedom and not the right to a fair trial. In substance, however, they can be applied to a s 25(3) analysis and I have nothing to add to them, nor to his reasons for the conclusion that the issue of derivative evidence is one that ought properly to be decided by a trial Court.”⁴³

[99] A proper reading of *Ferreira* reveals that the majority accepted that in appropriate cases, the privilege against self-incrimination may be located in section 11(1). In making this concession, Chaskalson P said:

“Against this background I can see no objection to accepting provisionally that s 11(1) is not confined to the protection of physical integrity and that in a proper case it may be relied upon to support a fundamental freedom that is not otherwise protected adequately under chap 3.”⁴⁴

⁴² Id at para 80.

⁴³ Id at para 186.

⁴⁴ Id at para 185.

[100] Section 11 of the interim Constitution entrenched the rights in section 12 of the Constitution. Chief among them is the right to freedom and security of the person. It is this right which the minority in *Ferreira* concluded encompasses the privilege against self-incrimination.

[101] Although witnesses before the Commission may not assert the rights in section 35(1) and (3) which are reserved for arrested and accused persons, those witnesses may invoke the rights guaranteed by section 12 of the Constitution. The latter provision protects, among others, the right to freedom and security of the person which, on the authority of *Ferreira*, includes the privilege against self-incrimination.

[102] It is evident from this analysis that a statutory provision that compels witnesses to give self-incriminating evidence would be inconsistent with section 12 of the Constitution. As a result, when that statute is interpreted, the obligation imposed on courts by section 39(2) of the Constitution is triggered.⁴⁵ The Commissions Act is such a statute.

[103] Section 39(2) obliges us to interpret section 3(4) of the Commissions Act in a manner that promotes the objects of the Bill of Rights. In *Makate* this Court held:

“The objects of the Bill of Rights are promoted by, where the provision is capable of more than one meaning, adopting a meaning that does not limit a right in the Bill of Rights. If the provision is not only capable of a construction that avoids limiting rights in the Bill of Rights but also bears a meaning that promotes those rights, the court is obliged to prefer the latter meaning.”⁴⁶

[104] Here section 3(4) clearly bears a meaning that promotes the right not to be compelled to give self-incriminating evidence, guaranteed by section 12 of the Constitution.⁴⁷ According to our jurisprudence, we are bound to prefer the meaning of

⁴⁵ *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 88.

⁴⁶ *Id* at para 89.

⁴⁷ Section 12(1) of the Constitution provides:

section 3(4) which protects witnesses who testify before a commission, against self-incrimination.

[105] Contrary to all this, CASAC argued that section 3(4) must be construed as excluding the privilege against self-incrimination but retaining all other privileges. This interpretation, CASAC submitted, is consistent with section 3(4) itself and section 35 of the Constitution. The flaw in this argument lies in its foundation. There is nothing in the language of section 3(4) which suggests that the privilege against self-incrimination is excluded whilst the other privileges enjoyed by witnesses in a criminal trial are retained. There is no textual foundation for contending that the interpretation advanced by CASAC is consistent with section 3(4).

[106] In addition, it is wrong to suggest that CASAC's interpretation is consistent with section 35 of the Constitution. As mentioned, section 35 confers rights on arrested and accused persons. It does not safeguard rights of witnesses, even in criminal proceedings. Yet section 3(4) affords protection to witnesses who testify before a commission of inquiry.

[107] Reliance on the regulations to buttress CASAC's interpretation is misplaced for a number of reasons. First, in our law a regulation cannot be used to interpret a provision in the statute, let alone to give a restrictive meaning to the language bearing a wider meaning.⁴⁸ Second, the regulations themselves acknowledge that a witness before a commission may decline to answer a question on the ground of a privilege envisaged in section 3(4) of the Commissions Act. Third, the fact that regulation 8(2) refers also to a self-incriminating answer does not mean that a witness is not entitled

“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;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.”

⁴⁸ *Road Accident Fund v Masindi* [2018] ZASCA 94; 2018 (6) SA 481 (SCA) at para 9.

to the privilege against self-incrimination. Regulation 8(2) must be read together with regulation 8(1) which permits witnesses to invoke section 3(4) privileges. Read in this way, what regulation 8(2) means is that if the privilege is not claimed and a self-incriminating answer is given, that answer will not be admissible as evidence against that witness in criminal proceedings. Lastly, section 203 of the Criminal Procedure Act protects witnesses not only against the use of their own incriminating evidence at criminal trials but also from answering questions which would expose them to criminal charges. For all these reasons, the interpretation advanced by CASAC cannot be sustained.

[108] The privilege against self-incrimination is not the only privilege witnesses before a commission are entitled to. There may be others. The test is whether such a privilege would have applied to a witness in a criminal trial, for it to be covered by section 3(4) of the Commissions Act.

[109] However, it lies with a witness before a commission to claim privilege against self-incrimination. In the event of doing so, the witness must raise the question of privilege with the Chairperson of the Commission and must demonstrate how an answer to the question in issue would breach the privilege. If the Chairperson is persuaded, he or she may permit the witness not to answer the question.⁴⁹ Privilege against self-incrimination is not there for the taking by witnesses. There must be sufficient grounds that in answering a question, the witness will incriminate himself or herself in the commission of a specified crime.

Remedy

[110] Section 172(1)(b) of the Constitution vests wide remedial powers on courts when deciding constitutional matters. The flexibility of these powers enables courts to craft orders suitable to the resolution of actual disputes between parties. Sometimes

⁴⁹ *S v Carneson* 1962 (3) SA 437 (T) at 439H.

a court is required to forge an order that addresses the underlying dispute between parties.⁵⁰

[111] Here the real dispute is about the respondent's attendance at the Commission's hearing for purposes of testifying and answering questions lawfully put to him. Consequently, it is just and equitable to direct him to obey all summonses and directives lawfully issued by the Commission. For the sake of certainty, declarators defining the parties' rights during the hearing at the Commission must be added to the order to be issued.

Costs

[112] Although the respondent has not opposed the relief sought, the Commission asked for costs against him. The Commission contended that it was the unlawful conduct on the part of the respondent which forced it to approach and seek relief from this Court. If the respondent had obeyed the process lawfully issued by the Commission, continued the argument, the Commission would not have been compelled to institute and fund litigation whose purpose was to stop the respondent's unlawful conduct.

[113] The rule that a private party that loses in constitutional litigation against organs of state should be spared from liability to pay costs, does not apply here. This rule was designed to protect private parties which raised genuine constitutional issues. This is not such a case. Indeed, *Biowatch* cautioned:

“At the same time, however, the general approach of this Court to costs in litigation between private parties and the state, is not unqualified. If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not

⁵⁰ *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at para 97.

expect that the worthiness of its cause will immunise it against an adverse costs award.”⁵¹

[114] This holds true also in respect of respondents who raise frivolous defences or whose unlawful conduct has forced the state to litigate. Like the applicants described above, they do not enjoy any immunity against adverse costs orders. But here the costs order is justified by the reprehensible conduct of the respondent towards the Commission. By ignoring process from the Commission, he did not only contravene the Commissions Act but he also breached regulations made by him for the effective operation of the Commission. His conduct seriously undermined the Commission’s investigation, that included matters on which the respondent may be the only witness with personal knowledge. For example, as the President at the relevant time, the respondent was the only person who could appoint and dismiss Ministers from Cabinet. And the Commission was mandated to investigate issues relating to the appointment and dismissal of Ministers from Cabinet during the respondent’s presidency. These facts outweigh the respondent’s decision not to oppose the relief sought.

Order

[115] In the result the following order is made:

1. The application for direct access is granted.
2. Advocate Vuyani Ngalwana SC is not admitted as *amicus curiae*.
3. The Council for the Advancement of the South African Constitution and the Helen Suzman Foundation are admitted as *amici curiae*.
4. Mr Jacob Gedleyihlekisa Zuma is ordered to obey all summonses and directives lawfully issued by the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State (Commission).

⁵¹ *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 24 (*Biowatch*).

5. Mr Jacob Gedleyihlekisa Zuma is directed to appear and give evidence before the Commission on dates determined by it.
6. It is declared that Mr Jacob Gedleyihlekisa Zuma does not have a right to remain silent in proceedings before the Commission.
7. It is declared that Mr Jacob Gedleyihlekisa Zuma is entitled to all privileges under section 3(4) of the Commissions Act, including the privilege against self-incrimination.
8. Mr Jacob Gedleyihlekisa Zuma must pay the Commission's costs in this Court, including costs of two counsel.

For the Applicant:

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For the First Amicus Curiae:

MM Le Roux and O Motlhasedi
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For the Second Amicus Curiae:

V Ngalwana SC

For the Third Amicus Curiae:

M du Plessis SC, J Thobela-Mkhulisi
and C Kruyer instructed by Webber
Wentzel