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14 April 2021

RE: DIRECTIONS DATED 9 APRIL 2021: CASE NO. CCT 52/21

Dear Chief Justice

1. I received your directions dated 9 April 2021 in which you direct me to “file an affidavit of no longer than 15 pages on or before Wednesday, 14 April 2021” to address two theoretical questions relating to sanction.
2. The questions are framed on the presumption that the Court that heard the application of the Chairperson of the Commission of Inquiry into State Capture, Fraud and Corruption in Public Entities (“Zondo Commission”) has not determined the merits of whether I am guilty of contempt of court.
3. I have thought long and hard about the request in your directives. I have also been advised that addressing a letter of this nature to the court is unprecedented as a response to a directive to file an affidavit. However, given the unprecedented nature of my impending imprisonment by the Constitutional Court, we are indeed in unprecedented terrain.

4. The purpose of this letter is two-fold. First, although I am directed to address in 15 pages and within three court days my submissions on sanction in the event, I am found guilty of contempt of court and *“in the event that this court deems committal to be appropriate, the nature and magnitude of the sentence supported by reasons.”*, I wish to advise you that I will not depose to an affidavit as presently directed. Second, I wish to advise that my stance in this regard is not out of any disrespect for you or the Court, but stems from my conscientious objection to the manner in which I have been treated. Accordingly, I set out in this letter my reasons for not participating and deem it prudent, for the record, to appraise you of my objections.

5. At the outset, I must state that I did not participate in the proceedings before the Constitutional Court and view the directives as nothing but a stratagem to clothe its decision with some legitimacy. Further, in directing me to depose to an affidavit, the Chairperson of the Commission, as the applicant, and some politically interested groups styled as *amicus curie* are given the right of rebuttal. That is in my view not a fair procedure in circumstances where my rights under sections 10, 11 and 12 of the Constitution are implicated. I am resigned to being a prisoner of the Constitutional Court because it is clear to me that the Constitutional Court considers the Zondo Commission to be central to our national life and the search for the national truth on the state of governance during my presidency. It has also become clear to me that even though the Constitutional Court has no jurisdiction Deputy Chief Justice Zondo was determined to place the matter before judges who serve as his subordinates in order to obtain the order he wants.

6. This is despite the fact that by doing so, he ignores the review I have launched regarding his refusal to recuse himself.
7. The directions took me by surprise in their breadth and scope. I understand them to be your attempt at giving me a right to hearing only on the question of sanction in the alleged theoretical or hypothetical basis that I am found guilty of contempt of court. That is of significant concern to me firstly because the Court would have known that I had decided not to participate in the proceedings of the Court. I did not ask for this right to hearing and since it is an invention of the Chief Justice I would have expected the Chief Justice to have been concerned about the motive of seeking my participation in mitigating by speculating about a decision concealed from me.
8. As currently framed the directions – to the extent they purport to give me a right to a hearing on the question of sanction – it is a sham and an attempt to sanitise the gravity of the repressive manner in which the Court has dealt with my issues. It is disappointing and fortifies my concerns, when our apex court engages in what clearly is political or public management of a decision they have already taken.
9. In my view, these political gimmicks do not belong in the bench. It is apparent that the Constitutional Court is attempting to correct its rather incorrect decision in hearing a matter relating to a summons or the non-compliance thereto when the Commissions Act contains an internal provision as to how a commission should deal with such an eventuality.

10. It is a matter of record that I filed no notice to oppose. Nor did I file an answering affidavit or written submissions. I also did not request or brief Counsel to appear on my behalf to address the Court on the issues raised by Chairperson Zondo on matters arising from the Commission of Inquiry. I was content to leave the determination of the issues in the mighty hands of the Court. If the Court is of the view, as it does, that it can impose a sanction of incarceration without hearing the “accused” I still leave the matter squarely in its capable hands.
11. My position in respect of the contempt of court proceedings is a conscientious objection to what I consider to be an extraordinary abuse of judicial authority to advance politically charged narratives of a politically but very powerful commercial and political interests through the Zondo Commission. My objection is legitimate, as it is sourced directly from the Constitution itself and what it promises. The Constitution is the pillar of our celebrated constitutional order.
12. South Africa’s nascent democratic order is built against the background of a painful past, a blatant disregard for human rights by the apartheid political order. The new South Africa was built on an anti-thesis of an unjust system, a system that had no regard for human rights and justice. Our Constitution cured this apartheid injustice and engraved, as foundational principles, “human dignity, the achievement of equality and the advancement of human rights and freedoms.” To ensure the inviolability of these principles, our Constitution made it a mandatory constitutional requirement on every state institution (the courts included) to “respect, protect, promote and fulfil the rights in the Bill of Rights.” The Bill of Rights was given the supreme status as the cornerstone of democracy

in South Africa, enshrining the rights of all people in our country and affirming the democratic values of human dignity, equality, and freedom. In s 8 of the Constitution, the Bill of Rights applies to all and binds the legislature, the executive, the judiciary, and all organs of state.

13. This means that both the Zondo Commission (acting as the executive arm of government) and the Constitutional Court are bound by the “democratic values of human dignity, equality and freedom.
14. The Constitutional Court was to be the enduring monument of our constitutional order, representing our victory over the apartheid system. It is the only innovation by the founders of our constitutional order in the structure of our judiciary that was established to champion a judicial system that would be the bulwark against injustice and oppression.
15. It was established to represent an irrevocable covenant between the people and their government of human dignity, the achievement of equality and the advancement of human rights and freedoms.
16. In order to ensure that our new system of constitutional democracy would have an enduring constitutional legacy, we decided that we would only appoint worthy arbitrators, whose historical experience and sense of humanity would connect with the spirit and ethos of our constitutional system. This is because our Constitutional Court would not have to be prompted to perform its central constitutional mission.

17. The Constitutional Court would represent freedom for everyone, and with it, I believed that we would be safe from the unjust and oppressive political narratives that had routinely found credibility in the courts of oppression. It is no secret that dominant narratives come from the dominant and moneyed classes in our society.
18. Ideally, such narratives should not sway our apex court on how to deal with a particular litigant.
19. The men and women who were to serve on it would not conduct the affairs of the Court with arrogance and oppressive tendencies. In the words of our national hero Nelson Mandela on 14 February 1995 at the inauguration of the Constitutional Court, on behalf of the people of South Africa he said to the then Chief Justice Arthur Chaskalson:
- “yours is the most noble task that could fall to any legal person. In the last resort, the guarantee of the fundamental rights and freedoms for which we fought so hard, lies in your hands. We look to you to honor the Constitution and the people it represents. We expect from you, no, we demand of you, the greatest use of your wisdom, honesty, and good sense – no short cuts, no easy solutions. Your work is not only lofty, but also a lonely one.”
20. At the signing of the Constitution on 10 December 1996, President Mandela characterized the Constitutional Court as the *“true and fearless custodian of our constitutional agreements.”* Why we needed an independent judiciary is to ensure that the courts are transformed into unwavering and uncompromising custodians of our constitutional democracy and the freedoms through an

adjudicative system that is based on the recognition of the inherent dignity of each individual.

21. I was particularly disappointed that our apex court even considered it prudent that it had jurisdiction to consider a custodial sanction as a court of first instance when no trial has been conducted to determine whether or not there has been contempt of court. Although I am not a lawyer, I have read the Constitutional Court ruling and its attempt to fudge the issue of jurisdiction and I was left none the wiser as to its reasoning about jurisdiction.
22. I also watched the proceedings of the Court on 28 December 2020 – in which I was addressed in very unkind words, labelled “accused number 1” at the Commission by the Commission lawyers, a defiant against the authority of the Commission. These unkind comments were not met with judicial disapproval and in fact found validation in the ruling of the Constitutional Court delivered by Justice Jafta on February 2021.
23. I was sad to see the Constitutional Court fail to uphold elementary constitutional standards of human dignity, advancement of rights and freedom. I was particularly shocked to learn that the Constitutional Court found it consistent with its constitutional mission to – in support of the Zondo Commission – to strip me of constitutional rights guaranteed in our Constitution. It was not only the right to be presumed innocent, to remain silent and not to testify during proceedings – guaranteed in section 35(3)(h) of the Constitution. My right to equality before the law and to the equal protection of the law was taken away from me. Many

witnesses at the Zondo Commission, where it was deemed appropriate, could assert their rights in section 35(3)(h) of the Constitution, with approval by the Chairperson, while he sought to limit mine. The Constitutional Court ordered that I should not assert a valid defense based on the right to be presumed innocent, to remain silent and not to testify in proceedings. Why is it consistent with the central constitutional mission of the Court to deprive me of the rights afforded to other witnesses in similar proceedings?

24. I reflected on the condemnatory tone adopted by the Constitutional Court in relation to my non-participation including its decision to impose a punitive cost order and could only conclude that the Court had decided to come to the assistance of the Zondo Commission – not based on constitutionally justifiable grounds but to support the rampant political narrative of the Zondo Commission that if I am forced to testify – it would assist in assessing the state of democratic governance under my Presidency.
25. Finally, without any reflection on its constitutional status as a court of first and final instance in constitutional matters, the Constitutional Court made rulings that deprived me of my right to have my justifiable dispute with Justice Zondo over his suitability to receive and determine evidence given by or against me in the Zondo Commission. I carefully examined the implications of a judgment that was essentially forcing me to appear before a biased and prejudiced presiding officer and realized that the Court had entrenched a growing judicial trend in which my cases are not determined in accordance with the Constitution and the constitutional values of our Constitution. Broadly speaking, I believe, having

examined how the courts have dealt with cases involving my constitutional rights, I came to the conclusion that there is inexplicable judicial antipathy towards me. I can give numerous examples of how courts have joined the political narrative in which I am routinely a subject of political ridicule and commentary.

25.1. The condemnatory political comments by Acting Justice Pillay in her judgment about me are but one example.

26. My decision not to participate in the contempt of court proceedings was based on my belief that my participation would not change the atmosphere of judicial hostility and humiliation reflected in its judgment against me. It is my view or my feeling that the judges of the Constitutional Court do not intend to ensure that they address disputes involving me in a manner that accords with the independence, impartiality, dignity, accessibility, and effectiveness of the Court.
27. One of the astonishing facts is indeed the presence of Acting Justice D Pillay as a member of the panel of the Constitutional Court considering my dispute, a judicial officer whose judicial antipathy towards me is well recorded in a court judgment and an order for my arrest while I was in hospital, sitting comfortably as a panelist pretending to exercise impartial judicial authority in a case that would determine whether I should be arrested and imprisoned for not complying with a court order. I found the participation of Acting Justice Pillay particularly disturbing and a clear indication of her unmitigated lack of discretion and a deeply irresponsible exercise of judicial power. Her gratuitous comments in a judgment against me in a dispute involving my comments on Derek Hanekom and her

subsequent refusal to accept a medical note from a qualified doctor justifying my absence from a court in which my criminal trial was not scheduled to begin are a matter of public record.

28. Your directive, Chief Justice provides that I must answer the questions in a 15-page affidavit within 3 days. Regrettably, if I accede to your request, I purge my conscientious objection for having not participated in the proceedings of the Constitutional Court. So, please accept this letter as the only manner in terms of which I am able to convey my conscientious objection to the manner in which your Constitutional Court Justices have abused their power to take away rights accorded to me by the Constitution. I invite you to share this letter with them as it is relevant to the directions that you have issued. I make this request having been advised that this letter is not a pleading.
29. After agonising over how to respond to your direction, Chief Justice, I came to the conclusion that the directions are an attempt to get me to make submissions that would assist those judging me on the question of sanction.
30. Chief Justice, while giving me a right to a hearing is something I could commend, there are intractable problems with the nature and scope of the right that you have afforded me. The right to hearing in respect of sanction reduced to 15 pages which must be provided to the Court within 3 days does not appear to be made as a good faith attempt to give me a right to hearing but to sanitise the procedural infirmities of the procedures of the Constitutional Court. More importantly, the conditions for my right to a hearing do not appear to fully engage

with my rights to express a view on the merits - given that the issue of sanction would ordinarily also include the question of why I should not be sanctioned for my non-compliance with the Court order. I have therefore decided to address that antecedent question before I address the theoretical question of what the sanction should be given in the event of my conviction.

31. As stated above, my decision not to participate in the hearing of the Constitutional Court was a conscientious objection.
32. Rather than being regarded as acts of defiance, my actions are aimed at bringing to the attention of the Court the injustice of their actions and judgment. I cannot appeal a judgment of the Constitutional Court even where it perpetrates a grave constitutional injustice. I therefore cannot in good conscience enable the Constitutional Court to violate my constitutional rights contrary to its supreme constitutional mandate by filing an affidavit on sanction simply to cure the procedural infirmities adopted by it.
33. When the Constitutional Court accepted the submissions of the Zondo Commission on the question of extreme urgency and direct access, I was convinced that it had done so because of the political nature of the work of the Zondo Commission – which is established to destroy the work that I did when I served my country as President. I am also concerned that in this context, the Constitutional Court as well as the Zondo Commission misapprehended the powers and legal status of the Commission.

34. I have no doubt that the Zondo Commission has become a complex project controlled by my political foes. Even though I established the Commission, I was aware that it had been proposed as part of the campaigns to force me out of government.
35. The Zondo Commission has an insurmountable problem which the Court failed to even reflect on: whether it was competent for the judges of the Constitutional Court to adjudicate a matter involving their own colleague and a Deputy Chief Justice for that matter? The Constitutional Court failed to reflect its reasons for adjudicating a dispute involving their colleague.
36. The contempt proceedings were not brought to vindicate the integrity of the Zondo Commission rulings or directives – for as I listened to the arguments made before the Court by the Commission – it expressly does not seek to enforce my further participation in the Commission. In fact, it was stated vociferously on behalf of the Commission that all it wants is my incarceration and not my appearance before it.
37. What the Zondo Commission did was to avoid utilising the statutorily prescribed procedures for enforcing its directives, it created conditions for holding me in contempt of court rather than in contempt of the Zondo Commission. Had the Zondo Commission utilised the procedure prescribed in the Commissions Act to enforce its rulings, I would have been entitled to raise many defences. Approaching the Constitutional Court as a court of first and final instance violated my constitutional rights.

38. As I understand it, the Zondo Commission publicly declared its decision to file a charge of contempt with the NPA in compliance with the Commissions Act. That statutorily prescribed approach was abandoned for the inexplicable convenience of the Zondo Commission and with no regard to the effects that such a position would have on my constitutional rights. This clearly demonstrated that the Court had abandoned its constitutional mission for the sake of promoting the entrenchment of political narratives of alleged acts of state capture, fraud and corruption by me.
39. I therefore believed that the Constitutional Court would not succumb to the temptation of promoting political narratives. The Court simply ignored that the Chairperson of the Zondo Commission had publicly announced that he would have me prosecuted on a criminal charge of contempt. To date I have not received summons to appear in a criminal court to answer any question in terms of the Commissions Act alleging that I should be found guilty of defying the Zondo Commission.
40. The fact that the Constitutional Court failed to detect the abuse of the procedure adopted by the Zondo Commission demonstrates that they too have adopted the political view that there is something that I did for which it is justified to strip me of my constitutional rights.
41. I was further advised that the Constitutional Court, as the supreme custodian of guaranteed constitutional rights would not countenance a situation in which an executive arm of government would request it to strip me of my constitutional

right to be presumed innocent, to remain silence and not to testify during proceedings guaranteed in section 35(3)(h) of the Constitution. I had seen the Commission Chairperson accepting the right of at least two individuals appearing before him to rely on these rights as a legitimate response to the questions by the Commission. I was treated in a discriminatory manner by the Constitutional Court in violation of my right to s 9 when it agreed that I was not entitled to assert my constitutional right in section 35(3)(h) where other similarly placed witnesses had been allowed to exercise the right.

42. I was convinced that the Constitutional Court, acting as the ultimate custodian of our constitutional rights, would not deprive me of my right to appear before a tribunal or Commission of Inquiry that is fair and impartial. This to me was akin to forcing me to appear before someone who had tortured me to give a statement about my alleged criminal conduct involving my political activism. It is for that reason that the Commission has been trying very hard to pretend that my review application does not exist. I have reviewed the decision of Deputy Chief Justice Zondo refusing to recuse himself.
43. In that review I also demonstrate that not only has he told falsehoods on oath, but became a judge in his own matter.
44. I believed that Constitutional Court would respect the authority and obligation of the High Court to determine the merits of my review application and therefore, do nothing that would undermine the fair and impartial adjudication of that matter.

45. The intervention of the Constitutional Court based on political conveniences in the work of the Zondo Commission to me was not only bizarre and premature but demonstrated further that I could not place my trust in the independence, impartiality, dignity, accessibility, and effectiveness of the Court. It was clear to me that the decision to approach the Constitutional Court was an abuse of our judiciary.
46. As a starting point, I do not believe that the Zondo Commission was established in a manner that is consistent with the Constitution. Deputy Justice Zondo's own appointment was unconstitutional as it was done by the Chief Justice – who too was complying with an illegal directive of the Public Protector and an unlawful order of the Gauteng High Court.
47. Chief Justice, you know that you do not have the power, either in terms of the Constitution or by any known convention in political or constitutional governance to participate in the appointment of a Commission of Inquiry established in terms of section 84(2)(f) of the Constitution.
48. You essentially appointed the Deputy Chief Justice Zondo to be Chairperson of the Commission and you did so in the face of a glaring breach of the separation of powers doctrine. The appointment of the Commission failed to uphold the Constitution by accepting the re-allocation of constitutional powers exclusively assigned to the President in terms of the Constitution for the political convenience of the time. In fact, you will recall that you first gave me the name of Justice Desai and thereafter the name of Deputy Chief Justice Zondo. What

is of concern to me other than that you did not have the constitutional power to exercise this function, it is who you consulted with for your change in directing me to appoint Deputy Chief Justice rather than your initial choice of Justice Desai. To date, I do not know what actually changed in this regard.

49. DCJ Zondo is simply disqualified to preside over my evidence by virtue of his prejudice towards me for reasons set out in my review application. Approaching this Court was a clear stratagem to sidestep the review. That the Commission even published that I had to demonstrate my seriousness about the review for it to file the necessary record and answer is simply disingenuous, to say the least.
50. The Zondo Commission, as the Court, knows or should know that there is no case of criminal contempt against me.
51. What the Constitutional Court judgment did was to take away my right to have my review application heard and determined. I could not continue to subject myself to a hearing before the very Commissioner who was biased. This was brought to the attention of the Court in a submission in which my review application was described by the Commission's Counsel as "hopeless".
52. It is not a criminal offence to have a dispute with an administrative agency over its eligibility to adjudicate my dispute. I have a legitimate dispute with the Chairperson, Mr Zondo and I am taking steps to have that ventilated in the courts through a judicial review, which has been ignored by the Commission and the Constitutional Court in its determination of this matter in its previous order.

53. It is clear that DCJ Zondo has created an unconstitutional potential for bias. He serves as both the accuser and the adjudicator in his own case and his own version of facts. He is already a complainant in a criminal case against me. Here the risk of retaliation by Mr Zondo is just too palpable to ignore and to insist that I appear by judicial fiat to a prejudiced presiding officer of a Commission is not only wrong, but it also lacks human dignity and the advancement of freedom and justice.

CONCLUSION

54. My letter to you Chief Justice is long, but it was necessary as I do believe that you need to know why I believe that your decision to afford me a right to be heard falls woefully below that which is expected under the circumstances. I do not accept that I committed contempt of court when I decided not to participate in the Commission proceedings in circumstances where my rights would be violated. It is clear for all to see that nothing can persuade the Constitutional Court not to incarcerate me.

55. I have addressed this letter to you because I deemed it disrespectful to merely ignore directives from our Chief Justice without explaining myself. I have every faith in you as a jurist and a person of absolute integrity. I raise the issues I raise as matters of principle and not as an attack on you. I am fully aware that you were also not part of the panel that complied with DCJ Zondo's strange applications to the Constitutional Court.

56. I also have a duty to protect my constitutional rights even at the risk of being imprisoned. I have just turned 79 years as I write this letter. I have not known the peace and the freedom that I committed the most active years of my life to. However, I watch the Constitutional Court which is charged with ensuring the safety of my constitutional rights, violate them with judicial impunity. What the Zondo Commission has done is inexcusable and I will live to see my vindication when – after squandering billions of much needed public revenue, an independent court reviews and set aside the findings of the Commission on the basis that it was not established in accordance with our Constitution.
57. A lawfully established Commission would be an asset in making recommendations to the executive that could be accepted, considered, and possibly implemented. How an unlawfully established Commission of Inquiry is capable of assisting the executive to govern correctly eludes me.
58. Just so you do not believe that I have avoided answering your direction, here is my answer. There is no precedence for what the Constitutional Court has allowed to take place in its sacred forum. As stated above, I am ready to become a prisoner of the Constitutional Court and since I cannot appeal or review what I see as a gross irregularity, my imprisonment would become the soil on which future struggles for a judiciary that sees itself as a servant of the Constitution and the people rather than an instrument for advancing dominant political narratives. My impending imprisonment by the Constitutional Court will be a constitutional experiment because it does not appear that it was created as a court of first and final instance to hold the powers of imprisonment and incarceration.

59. The Constitutional Court accepted its platform to be used to dehumanise and humiliate me by the Zondo Commission. I listened to the submissions made by Counsel and what stood out for me was his determination to convey to the Courts the unwavering belief that the Zondo Commission – an executive arm – was entitled to an urgent hearing to enforce its rulings by the order of the Constitutional Court. The Constitutional Court endorsed the abusive submissions that I am a risk to the integrity of our democratic system because I assert its laws in the correct forums to vindicate my rights. Chief Justice I have publicly expressed the view that the Courts have become political players in the affairs of our country as opposed to neutral arbiters with supreme constitutional duty to act independently, impartially, with dignity, accessibility, and effectiveness.
60. I am disappointed to witness the degradation of our collective commitment to remain vigilant against any form of dictatorship, including judicial dictatorship. I am however determined to stand on my conscience and beliefs in the sacredness of my constitutional rights. For the cause of constitutional rights, I will walk in jail as the first prisoner of the Constitutional Court.
61. Although this letter is an unprecedented step, I hope that I have answered your questions. However, I cannot assist the Courts to violate my constitutional rights by telling them what kind of punishment they must impose which accords with the foundational principles of human dignity, the achievement of equality and the advancement of human rights and freedom.
62. The Constitutional Court must know that it will imprison me for exercising my

constitutional rights and for that I leave it to you and your court. Clearly, the Constitutional Court deems it appropriate and lawful to impose a criminal sanction of incarceration of a person without hearing oral evidence from such an accused person. Contrary to popular sentiment, peddled by sponsored legal analysts and editors, I do not seek to undermine our Constitution or to create any constitutional crises. In fact, I have accepted that my stance has consequences and I am of the view that the Constitutional Court already knows what ruling it will make.

63. I stress however, that judges of the Constitutional Court must know too that they are constitutional beings and are subject to the Constitution. The power that they have will not always ride on the wave of the political support of ANC political veterans and interests groups whose agenda in our nation is not particularly clear – but appears to mount campaigns to discredit what we and many freedom fighters were determined to achieve even at the cost of life itself. When I am imprisoned, as it is clearly the Court's intention, it is my body that you imprison and my political foes, who are now friends of the Court will flood the streets with celebration – for in my imprisonment – they would have achieved – using the legitimacy of institutions that we fought for.

64. Chief Justice, I would urge you and your colleagues to remain faithful servants and custodians of our Constitution. Be vigilant on what you do with the power vested on you which represents an inviolable national covenant. That my political foes have turned themselves into friends of the Court with such a powerful voice is unfortunate, but is the fate I have resigned myself to. I am ready

for the finding the Constitutional Court is already contemplating, but will not clothe it with the legitimacy of my participation at this late stage and for a purpose that is so obvious.

65. I shall await the decision of your esteemed Court and am preparing myself for its obvious although unjustified severity.

ISSUED BY:

JACOB GEDLEYIHLEKISA ZUMA