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

In the matter between:

Jacob Gedleyihlekisa Zuma Applicant

In re: Application for recusal of the Chairperson of the Commission

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Ruling / Judgment: 19 November 2020

ZONDO DCJ, Chairperson

Introduction

1. This is an application brought by Mr Jacob Gedleyihlekisa Zuma for my recusal as Chairperson of this Commission or for my recusal from hearing any evidence that may be given by him or any member of his family in this Commission. Mr Zuma, to whom I shall refer in this ruling/judgment as the applicant, is a former President of the Republic of South Africa. On 22 October 2020 the applicant was served with a summons issued and signed by the Secretary of the Commission requiring or compelling him to appear before the Commission at 10h00 on 16 to

20 November 2020 for the purpose of giving evidence and being questioned by an evidence leader in the Commission. The scope of his evidence was to cover about 35 affidavits or so of certain witnesses who have already testified before the Commission.

2. On Wednesday, 11 November 2020 the applicant lodged with the Commission an application for my recusal. The application was set down for hearing before me. It was opposed by the Secretary of the Commission. He delivered an answering affidavit during the weekend of the 14 November 2020. A replying affidavit by the applicant was delivered in the evening on Sunday 15 November 2020. Under circumstances that will be apparent from this judgment or ruling later, I read a certain statement into the record at the commencement of the proceedings on Monday, 16 November 2020. A copy thereof was given to the applicant's attorneys as well as the Commission's Legal Team. Subsequently, the applicant delivered another affidavit on Wednesday 18 November 2020. I heard oral argument from counsel for the applicant, Mr Sikhakhane SC, who was assisted by Mr T Masuku SC, as well as argument from Mr PJ Pretorius SC, the Head of the Commission's Legal Team. Before I proceed, it is necessary to set out the background to this application.

Background

3. It is not necessary to set out the background to the establishment of the Commission in any great detail because that background is well-known. It suffices to point out that, in accordance with its name, the Commission was established to investigate, and, report on, allegations of State Capture, corruption and fraud in the public sector including organs of state. It was established by the applicant in January 2018 when he was still the President of the country. He did so pursuant to an order of the High Court, Pretoria, which gave effect to the then Public Protector's remedial action. In accordance with the Public Protector's remedial action and the order of the High Court, Pretoria I was selected by the Chief Justice and appointed by the applicant, as the then President of the Republic, as the Judge who would chair this Commission. My appointment was announced by the applicant in January 2018.

4. I am the sole member of the Commission. The Commission has a secretary who heads the Secretariat of the Commission. It also has its Legal Team as well as the Investigation Team. The Legal Team consists of a number of practising attorneys and advocates. The Investigation Team consists of various investigators.

5. The terms of reference of this Commission – which were approved by the applicant when he was still President - include, apart from the provision that the Commission must investigate allegations of state capture, corruption and fraud in the public sector including organs of state, that the Commission must investigate and report on:

> "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 SOE's. 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;
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> 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;
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> 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 SOE's 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 in the business dealings of the Gupta family with government departments and SOE's;

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."

6. Paragraph 3 of the terms of reference reads:

"All organs of State will be required to cooperate fully with the Commission."

7. There are two ways in which a person may be compelled to appear before the Commission for purposes of giving evidence. The one is the issuing of a summons against such a person in terms of section 3(1)[1] read with (2)[2] of the

[1] Section 3(1) reads:

"(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] Section 3(2) reads:

Commission's Act, 1947. The other is by the issuing of a directive by the Chairperson in terms of Regulation 10(6)[3] of the Regulations of the Commission. In terms of Regulation 10(6) the Chairperson also has the power to issue a directive to anybody to depose to an affidavit or affirmed declaration for the purposes of the investigations of the Commission. I have already said that the applicant was served with a summons to appear before the Commission this week. I have previously also issued two directives in terms of Regulation 10(6) against the applicant to furnish the Commission with affidavits dealing with certain matters. I will have reason to revisit this subject later in this ruling.

8. The Commission has been hearing oral evidence since August 2018 except for certain breaks it has taken. I understand that it has heard about 257 witnesses.

9. By way of an order of the High Court, Pretoria, the Commission's lifespan has been extended to the end of March 2021. Pursuant to an invitation extended to

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"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] Regulation 10(6) reads:

"(6) 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."

the applicant to appear before the Commission from 15 to 20 July 2019, the applicant appeared before the Commission for two and a half days or so. He gave evidence and was given an opportunity to present his side of the story and was questioned. However, while the applicant was being questioned, he objected to further questioning on the basis that he was being cross-examined. As a result of that objection a discussion ensued in terms of which an agreement was reached between the applicant's legal team and the Commission's Legal Team aimed at addressing the applicant's concerns regarding how he was questioned.

10. I announced the terms of the agreement at the hearing. One of the terms was that the Commission's Legal Team would, by 30 July 2019, furnish the applicant's legal team with a document that identified areas of interest in each affidavit in regard to which the applicant was required to provide his version. Another term was that the two teams would seek to agree the date by which the applicant would deliver his affidavits but that, if the two teams did not reach agreement, the matter would be brought to my attention and I would, after hearing both sides, determine the period within which the applicant would deliver his affidavits. Prior to the Commission's Legal Team reaching agreement with the applicant's legal team, the applicant informed the Commission through his legal team that the applicant had decided to terminate his participation in the Commission due to his dissatisfaction with how he had been questioned. However, the agreement that

was reached included an undertaking by the applicant that he would continue to participate in the Commission and would, therefore, return on a later date to continue with his testimony.

11. Subsequent to the applicant's appearance before the Commission in July 2019, the Commission's Legal Team furnished the applicant's legal team with a document identifying "areas of interest" in various affidavits in respect of which the applicant was required to provide affidavits containing his versions. In other words, the Commission's Legal Team complied with its obligations under the agreement of July 2019. The applicant failed to agree with the Commission's Legal Team a period within which he would furnish the affidavits he had undertaken to furnish the Commission. Ultimately, I fixed a date by which the applicant had to deliver his affidavits. Nevertheless, the applicant failed to deliver those affidavits. Between July 2019 and mid December 2019 the Commission set aside various weeks for the applicant's appearance before the Commission but the attempts were unsuccessful.

12. Towards the end of 2019 the dates of 26 – 31 January 2020 were set aside for the applicant's appearance before the Commission and the applicant was notified. In December 2019 the Commission's Legal Team served the applicant with an

application for an order to be made by me authorising the issuing of a summons to compel the applicant to appear before the Commission on the specified dates in January 2020. The applicant delivered opposing affidavits. The application was set down for hearing. On the date when the application was to be heard, it was adjourned on the basis that another date would be allocated for argument. The application was adjourned because it appeared that, owing to medical reasons, the applicant was not going to be available to appear before the Commission until after March 2020. Also, the Commission's Legal Team needed time to prepare a replying affidavit to the applicant's answering affidavit in that application. The replying affidavit was delivered by the Commission's Legal Team in due course. Before the application could be set down for hearing, the state of national disaster was declared and the national lockdown was instituted with effect from 26 March 2020 to deal with Covid-19. From that time to 28 June 2020 the Commission did not have hearings. It resumed its hearings during the week of 29 June 2020.

13. By the beginning of the national lockdown, there was a great number of witnesses who had testified before the Commission in respect of whose evidence the applicant had been served with Rule 3(3) notices in terms of the Rules of the Commission. These are notices which are served on a person who is either implicated or who may be said to be implicated in a witness' statement.

14. During August 2020 the applicant was notified that 21 – 25 September 2020 had been set down as the dates for the applicant to appear before the Commission. By the last week of August 2020 the applicant had not furnished the Commission with the affidavits he had undertaken in July 2019 to furnish to the Commission. On 27 August 2020 I signed the first ever Regulation 10(6) directive against the applicant which was issued soon thereafter and later served on the applicant. Through the Regulation 10(6) directive I sought to compel the applicant to deliver an affidavit or affidavits giving his version in response to the affidavits of Mr Popo Molefe in regard to the Commission's investigations into certain matters at PRASA. Around 11 September 2020 I signed another Regulation 10(6) directive seeking to compel the applicant to furnish the Commission with an affidavit giving his version to the affidavits of Mr Zola Tsotsi and Mr Nick Linnell with regard to a meeting that is alleged to have been held in the President's official residence in Durban on 8 March 2015.

15. On 1 September 2020 the applicant's attorneys wrote to the Acting Secretary of the Commission and said that the applicant would not be able to appear before the Commission on 21 to 25 September 2020. The reasons advanced were that:

    (a) the applicant's attorneys of record had been recently appointed as the applicant's attorneys and needed more time in order to familiarise

themselves with all the documentation with which the applicant had been served by the Commission since the establishment of the Commission;

(b) the applicant was "preparing for his much-anticipated criminal trial, the importance of which cannot be over-emphasised." The letter continued and said that it was "rather unfair to expect [the applicant] to simultaneously consider evidence and affidavits of more than 30 witnesses in order to make himself ready to appear before the Commission on 21 – 25 September 2020";

(c) the applicant was of advanced age and, given Covid-19, he had been advised to limit his movements;

(d) the applicant had raised a concern regarding the recent amendments of certain Regulations of the Commission relating to the sharing of information with law enforcement agencies and was seeking legal advice "on the implications thereof on his further participation."; and

(e) the applicant was also engaged in several other cases which required his full attention.

16. In that letter the applicant's attorneys also noted that notice had been given of the intention of the Commission's Legal Team to proceed with the application for the authorisation of a summons to be issued against the applicant to compel him to appear before the Commission. The applicant's attorneys then said:

> "It should follow that we must await the outcome of that application before we can discuss the possible appearance of [the applicant] at the Commission. We trust that the Commission will engage with us regarding the dates for the hearing of the application."

17. The applicant's attorneys emphasised that dates should have been discussed with them as the applicant's new legal team. They requested that future dates be discussed with them.

18. On the 21st September 2020, which had been meant to be the first day of the applicant's appearance before the Commission that week, I made an announcement at the commencement of the proceedings of the Commission. Since the applicant's attorneys had made it clear that the applicant was not going

to appear before the Commission during the week of 21 to 25 September 2020, the Commission made alternative arrangements in order to ensure that that week was not wasted.

19. The announcement that I made was that:

(a) the application for the authorisation of summons against the applicant was set down for hearing on 9 October 2020;

(b) if the applicant or his lawyers did not appear on the 9th October 2020 and did not provide good reasons why there was no appearance, the matter would proceed with or without them;

(c) the dates 16 to 20 November 2020 had been determined as the dates for the next appearance of the applicant before the Commission.

20. The applicant was to subsequently say that I had called a media conference and made this announcement at a media conference. That was not true as I had made the announcement at the commencement of the day's proceedings in the Commission.

21. On the 28th September 2020 the applicant's attorneys wrote a letter to me in which, for the first time, the applicant said that he would be seeking my recusal as the Chairperson of the Commission. The applicant's attorneys said that they had been instructed to seek my recusal "on the ground that [the applicant] reasonably apprehends that you have already adopted a biased disposition towards him and cannot bring an impartial mind to [bear on] the issues and evidence that relate to him."

22. The applicant's attorneys went on to say that the applicant's conclusion that I was no longer capable of exercising an independent and impartial mind was fortified by what he viewed "as the unwarranted public statements made by the Chairperson at the said media briefing."

23. The applicant's attorneys went on to say that the applicant has "always expressed his willingness to cooperate with the Commission". They confirmed:

> "This is in spite of his reservations about the legality of the Commission and, in particular, about your suitability as Chairperson, given your personal relations with him. However, the conduct of the Chairperson towards him has left [the applicant] with no choice but to take this step in order to defend his rights as a

citizen. [The applicant] believes that the Chairperson's conduct has stripped this Commission of its much required and vaunted legitimacy."

24. The applicant's attorneys also stated in the letter:

"Viewed in the context of previous media statements, the conduct of the Chairperson and treatment of [the applicant] by the Commission, the Chairperson's utterances have left [the applicant] with the distinct impression that the Chairperson seeks to target him for special treatment and public humiliation."

25. In paragraph 9 of the letter, the applicant's attorneys wrote:

"[The applicant] believes that the source of the Chairperson's bias against him stems from the fact that [the applicant] and the Chairperson have historical personal, family and professional relations that ought to have been publicly disclosed by the Chairperson before accepting his appointment."[4]

26. This sentence in the applicant's attorneys' letter of 28 September 2020 makes it clear that, at least as at that time, the applicant believed that the source of my

[4] What the applicant was saying in this sentence in his attorney's letter of 28 September 2020 was that the Chairperson was biased against him because of the alleged historical, personal and family relationship. However, in his founding affidavit the applicant said that he and the Chairperson are friends, and he does not understand why the Chairperson is now hostile to him. However, no evidence of hostility was provided by the applicant.

alleged bias against him stemmed from "the fact that [the applicant] and the Chairperson have historical personal, family and professional relations that ought to have been publicly disclosed by the Chairperson before accepting his appointment."

27. In paragraph 10.3 of the letter the applicant's attorneys wrote:

> "[The applicant] is of the firm view that the Chairperson's bias against him is a result of personal matters and strained relations that the Chairperson ought to have disclosed right at the beginning of the Inquiry."[5]

28. In the letter of 28 September 2020 the applicant's attorneys also listed what they said were "some of the other reasons to be set out in greater detail in the affidavit relating to the recusal application". These were given as:

> "10.1 The Chairperson's election to reserve media conferences for [the applicant] attests to the fact that he seeks to portray him as uncooperative and belligerent in the eyes of the public. No other witness has been subjected to such public rebuke through the media;
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> 10.2 It has become commonplace for the Commission to parade a particular narrative through witnesses and to treat certain witnesses, particularly those who

[5] In the founding affidavit the applicant did not provide any evidence of the allegedly "strained relations".

implicate [the applicant], with deference. It is apparent to [the applicant] that the Commission seeks to entrench a narrative that portrays him as guilty at all costs;

10.3 [The applicant] is of the firm view that the Chairperson's bias against him is a result of personal matters and strained relations that the Chairperson ought to have disclosed right at the beginning of the Inquiry;

10.4 The Chairperson, in his engagements with witnesses testifying before him, has already prejudged the very issues he is tasked to investigate. In particular, he has already made prejudicial statements about [the applicant] while addressing some witnesses who had made no reference to [the applicant].

10.5 The Chairperson refused to believe that [the applicant's] failure to appear before the Commission early this year was due to his travel to seek medical treatment, again publicly portraying him as a liar, and

10.6 The Chairperson has joined the narrative that seeks to present [the applicant] as the cause of all the corruption he is tasked to investigate."

29. Before I proceed, I need to deal immediately with 10.5 above where it is said that "the Chairperson refused to believe that [the applicant's] failure to appear before the Commission early this year was due to his travel to seek medical treatment, again publicly portraying him as a liar". I want to indicate that there is absolutely no evidence in the papers supporting this allegation against the Chairperson.

30. The applicant's attorneys also pointed out that until the applicant's recusal had been determined, the applicant would not take any part in the Commission.

The recusal application

31. In his founding affidavit the applicant provides what he refers to as the synopsis of the grounds upon which he seeks my recusal. He says that those grounds may be summarised as follows:

> "15.1 Given our personal relations, the background of which is set out fully below, Deputy Chief Justice Zondo ought to have declined to chair the Commission, whose terms of reference indicated that I was to be the main implicated person;
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> 15.2 In my absence, the Chairperson has made several comments whose effect is the suggestion that I am already guilty of 'state capture'. Many of these comments carried with them a miscellany on insinuations about my involvement in the unlawful capture of our State while I was President; I am advised that it is not uncommon for judges to hear testimonies that may well outrage them but they remain composed in order to create a safe forum even for the accused. In this regard, they are guarded in the comments they make while hearing testimonies;

15.3 The Chairperson has singled me out for public announcements relating to me through the media. I am the only witness in respect of whom so many press statements have been issued by the Chairperson;

15.4 The Chairperson clearly doubts my *bona fides*. On two occasions he questioned or doubted my statement that I had travelled to seek medical attention; and

15.5 The Commission has tended to call only those witnesses, particularly members of my Cabinet, that implicate me in some way or are disgruntled that at some point I may have removed them from their Cabinet posts."

The law

32. Counsel for the applicant submitted that the applicant's case for my recusal is that the applicant has a reasonable apprehension that I will not bring an impartial mind to bear on the issues involving the applicant. He made it clear, however, that the applicant's case was not based on actual bias.

33. In *President of Republic of South Africa & Others 1999 (2) BCLR 725 (CC)* the Constitutional Court had this to say about the importance of the impartial adjudication of disputes:

"A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes."[6]

34. The test for the determination of a reasonable apprehension of bias was set out in these terms by the Constitutional Court in *SARFU*:

"The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time,

[6] SARFU at p170.

it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.".[7]

35. It is important to highlight that the person contemplated in the test must be reasonable, objective and informed, the apprehension must be reasonable and that the question is not whether a reasonable, objective and informed person might, on the correct facts, apprehend but it is whether such a person would, on the correct facts, reasonably apprehend. Furthermore, the reasonable apprehension is not that the Judge may not bring an impartial mind to bear on the adjudication of the case but the reasonable apprehension is that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case. That is a mind open to persuasion by the evidence and the submissions of Counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by Judges to administer justice without fear, favour or prejudice. Furthermore, the onus to establish the test is upon the applicant.

[7] *SARFU* para 48.

36. In *SARFU*[8] the Court made it clear that an unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for an application for recusal and that the apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application. Courts are hesitant to make a finding of bias or to conclude that there is a reasonable apprehension of bias in the absence of convincing evidence to that effect.[9]

37. Both Mr M Sikhakhane SC and Mr PJ Pretorius SC were agreed that the test as set out above is the test for the determination of a reasonable apprehension of bias but they differed on the application of that test. No benefit will be derived from referring to other cases because I am satisfied that the application of the test to the facts of this case does not present any problem in deciding this application.

38. The first ground upon which the applicant relied in support of his application for my recusal was that he and I are friends and have been friends for many years. In this regard he said that, when the Chief Justice gave him my name as the Judge whom the Chief Justice had selected to chair this Commission, he was concerned

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[8] Para 45.

[9] See *SACCAWU & others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (8) BCLR 886 (CC) at par 12 where the Constitutional Court said that "the presumption of judicial impartiality is not easily dislodged. It requires 'cogent' or 'convincing' evidence to be rebutted."

that, because of that friendship, I could be disqualified. He admits that he did not raise his concerns with the Chief Justice. He says that the reason why he did not raise his concerns about me with the Chief Justice was that he feared that, if he raised his concerns, he could be seen as seeking to influence the selection of the Judge who was going to chair the Commission when the Public Protector's remedial action had made it clear that the Judge to chair the Commission should be selected by the Chief Justice.

39. After becoming aware that this was one of the grounds relied upon by the applicant, I followed the precedent of the Constitutional Court in *SARFU* and read into the record a statement which set out the facts relating to my relationship with the applicant. This was on Monday 16 November 2020. Yesterday morning the applicant furnished the Commission with an affidavit responding to my statement. In my statement I stated that, although the applicant and I have known each other since the early 1990s and have a cordial relationship, we are not friends. The applicant maintains that our relationship was that of friends. What is important, however, is that the applicant does not dispute the various matters listed in paragraph 7 of the statement I read into the record except paragraph 7(e)[10].

[10] Paragraph 7 of my statement reads:

"7. Although Mr Zuma and I have a cordial relationship and have over the years interacted with each other pleasantly wherever we met, mostly in government functions, Mr Zuma's statement that we are friends is not accurate. In this regard I highlight the following:

40. With regard to paragraph 7(e) the applicant points out that it is not accurate because I did meet with him for a briefing at his official residence after the Chief Justice had given him my name as the Judge he had selected to chair this Commission. The applicant is correct that such a meeting took place but he errs in so far as he suggests that such a meeting should have been mentioned in paragraph 7(e). Paragraph 7(e) appears under the heading: "Personal relationship between myself and Mr Zuma." That topic excludes official meetings. The meeting I had with the applicant after the Chief Justice had given him my name was an official meeting. I was not paying him a personal visit. Indeed, I was

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(a) Mr Zuma has never been to any of the houses in which I have lived with my family since the early 1990s and I have never invited him. He only met my wife at the opening of Parliament or other government function. He has also never been to any of the places in Gauteng in which I have lived over the past 23 or 24 years since my appointment as a Judge in 1997.

(b) Mr Zuma and I do not socialise, and, have never socialised, together. I accept that there are functions – especially government functions - which he attended and I attended and that on such occasions we would greet each other and have brief conversations. After I had been elevated to the Bench in 1997, in January 1998 my law firm held a gala dinner in Durban for my farewell from my law firm and many people were invited including His Majesty King Goodwill Zwelithini but Mr Zuma was not among those who were invited. I have never invited Mr Zuma to any family function including my birthdays since I met him in the early 1990s. He has also never invited me to any of his birthday parties since we got to know each other.

(c) Mr Zuma does not get told when there is a death in my family. As a result, he has never attended any of the family funerals we have had since I got to know him even though, from the early 1990s to-date, I have lost four siblings and my mother. I have never attended the funeral of any member of the Zuma family nor does Mr Zuma inform me when there has been any death in his family.

(d) To the best of my recollection since the 1990s I have never shared any private meals with Mr Zuma.

(e) I have never been to Mr Zuma's Presidential Office when he was President nor did I go to his official residence."

Another matter in my statement that the applicant does not dispute in his subsequent affidavit of 18 November 2020 is the following statement in paragraph 4:

"4. As far as I recall, I never had any one-on-one meeting with Mr Zuma throughout the period of nine (9) years when he was President."

informed by the Chief Justice that the applicant had asked that whichever Judge the Chief Justice selected should come and see him. Furthermore, in paragraph 7(e) I had in mind the Pretoria official residence of the President, hence the reference to the Presidential Office in that paragraph.

41. In the light of the fact that the applicant does not dispute most of the facts set out in paragraph 7 of my statement, I am of the opinion that on the undisputed facts there was not the kind of relationship between myself and the applicant that would disqualify me from chairing this Commission nor is it a proper ground for me to recuse myself.

42. In any event I am of the opinion that, if the applicant was of the view that I should not chair this Commission when the Chief Justice gave him my name, he should have raised the matter with the Chief Justice. The view he expresses that he would have been seen to be interfering with the selection of the Judge to chair the Commission is not sound. If the Chief Justice had given him the name of a Judge about whom he (i.e. the applicant) had reports of corruption which he was planning to pass on to the Chief Justice, would he have kept quiet? I do not think so. After all the Chief Justice would not have been bound by the applicant's opinion. He would have applied his mind to the disclosure and either stood by the name of the Judge he had chosen or selected another Judge. In my view, there

was no sound reason why the applicant only raised the issue of a personal relationship between myself and himself close to three years after my appointment to chair this Commission. The applicant cannot be allowed to raise this issue so late in the day.[11]

43. The applicant also contended that the manner in which the Commission called its witnesses at the beginning gave rise to a reasonable apprehension of bias because many of them appeared to be persons who had an axe to grind with him. In this regard he referred to some of the Ministers who testified before this Commission. There is no merit on this point. The Commission was free to use whatever witnesses were available as long as in the end the applicant was himself afforded a fair opportunity to come before the Commission and deal with whatever evidence such witnesses may have given against him.

44. The applicant also contended that, after he had come before the Commission and testified last year, the Commission ignored the matters that he raised during his evidence. The fact of the matter is that the applicant had not completed his evidence when he left the Commission in July 2019 and it was agreed that he

[11] In *Bernert v ABSA Bank Ltd* 2011 (3) SA 92 (CC) at paras 69-77 the Constitutional Court held it not to be "in the interests of justice, at this late stage, to permit the applicant to raise a complaint of bias based on shareholding by Cachalia JA". In this present case Mr Zuma failed to raise the issue of apprehension of bias for close to three years. He did not raise the concern even in July 2019 when he appeared before the Commission and testified before me.

would come back to continue his evidence. Since then, it is now more than a year and the Commission has been trying to get the applicant to come back to the Commission to continue his evidence but the applicant has had to be compelled by way of a summons to appear before the Commission. Indeed, the Commission has served the applicant with two directives in terms of Regulation 10(6) of its Regulations compelling him to furnish the Commission with affidavits but the applicant has not complied with these directives. Indeed, the applicant has to date not furnished the Commission with affidavits he undertook in July last year he would provide to the Commission. In these circumstances it cannot lie in the applicant's mouth to say that the Commission has ignored the matters he raised in his evidence.

45. Counsel for the applicant contended that I made various comments when certain witnesses gave evidence which suggested that I thought that the applicant was guilty of state capture. I have read all the comments quoted in the founding affidavit. I do not propose to refer to any one of them. I am satisfied that the applicant's contention has no merit. As Mr Pretorius SC submitted, I am entitled and, sometimes, actually obliged, to ask witnesses questions and to seek clarification on their evidence because the Commission seeks to establish the truth on the matters that it is investigating.

46. Even a Judge in a court of law is entitled to ask questions and seek clarifications in a trial. The main difference between the applicant's approach to the comments I make and my approach – indeed Mr Pretorius' approach - is that the applicant appears to expect me to be very passive when witnesses give evidence before me. I do not agree. I believe that, provided I keep an open mind and act fairly, there is no difficulty in me seeking clarification from witnesses and testing their evidence. What is important is to strike the right balance. I am of the view that that balance has been correctly struck in regard to most, if not all, the comments about which the applicant complains.[12]

47. In the end I conclude, having had regard to all the points raised by the applicant, including the points relating to press statements and media conferences the he has referred to in his affidavit, that the applicant has failed to meet the test for a reasonable apprehension of bias. Accordingly, I conclude that the application for my recusal falls to be dismissed and it is accordingly dismissed.

ZONDO DCJ, Chairperson of the Commission

[12] See the following cases in the context of a Judge in a Court: *Take and Save Trading CC and others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) at paras 3-6; *Sager v Smith* 2001 JDR 0212 (SCA)