THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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The Registrar, Supreme Court of Appeal

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Jacob Gedleyihlekisa Zuma v Democratic Alliance and Economic Freedom Fighters (Case no 1028/2019) [2021] ZASCA 39 (13 April 2021)

Today the Supreme Court of Appeal (SCA) dismissed an appeal by former President Jacob Zuma (Mr Zuma) with costs on a punitive scale, against a judgment of the Pretoria High Court, which held that the State is not liable for the legal costs incurred by him in his personal capacity.

In 2006, and again in 2008, Hulley Inc, a firm of attorneys in private practice, submitted requests on behalf of Mr Zuma to the State Attorney for legal assistance at the State's expense in respect of criminal cases in which he was an accused and to appoint it and four specified counsel (two senior and two junior) to conduct the case on his behalf. Each request included an undertaking to refund those costs should the court find that he acted in his personal capacity and own interest. The High Court had found that the State was not liable for those costs and ordered Mr Zuma to pay back those monies.

On appeal, which was opposed by the Democratic Alliance (the DA) and the Economic Freedom Fighters (the EFF), it was contended on behalf of Mr Zuma that the high court was wrong to hold that: (a) the DA and EFF had brought their applications within a reasonable time; (b) s 3 of State Attorney Act 56 of 1957 (the Act) did not authorise the State Attorney to fund private legal costs at all, including for Mr Zuma; and (c) it is just and equitable to require Mr Zuma to pay back the money.

The SCA held that it was only in March 2018 that the EFF and the DA had become aware of the asserted legal basis for the funding. This was after Mr Zuma's successor, newly appointed President, Cyril Ramaphosa, had furnished replies to the EFF's parliamentary questions on the matter. Until then, the matter had been shrouded in secrecy. Both review applications had been launched within a month of the Parliamentary replies. Moreover, it was only after the review application had been launched and the rule 53 record furnished that the full extent of the funding emerged. In any event, as the Presidency had made plain the funding was ongoing. There was thus no delay to speak of. The SCA took the view that to have granted Mr Zuma, who had been significantly enriched by the payments, a blank cheque to pay private lawyers is egregious. A web of maladministration appears to have made that possible. Many of the payments had no asserted legal basis whatsoever and aside from Mr Zuma, there had been no attempt by any of the other State respondents, who were cited in the review applications, to defend the payments. The effect on state resources could also not be overlooked; substantial unplanned

expenditure had occurred and will continue to occur. The SCA held that for Mr Zuma to contend that even if unlawful, the payments should continue because the DA and EFF waited too long to take the matter on review, was 'breathtakingly audacious'.

The SCA further held that neither s 3(1), nor s 3(3), of the Act entitles the State to pay for Mr Zuma's private legal costs in his criminal prosecution and related matters, as the Presidency and State Attorney had believed. On its express terms, those provisions do not authorise the State Attorney to outsource its functions to a private attorney, at State expense. Their purpose is to give the State Attorney a legal mandate to act as Government's legal representative. Hulley Inc was to perform and procure services not 'on behalf of the Government of the Republic', but on behalf of Mr Zuma, in his personal capacity. In all of the litigation, Mr Zuma was cited in his personal capacity – the orders sought would have been enforced against him personally, not against any government office or department. The fact that Mr Zuma held high office in the executive did not mean that in representing him the State Attorney was acting 'on behalf of the Government'. In rejecting Mr Zuma's argument that the State has an interest in 'protecting a government official', the SCA held that 'the Government and the public have an interest in protecting the rule of law, ensuring accountability and good governance, all of which is achieved by prosecuting offences of corruption and other abuses of public office, and by ensuring that criminal trials proceed without delay'. The SCA suggested that the Government and the public can hardly have a legitimate interest in supporting a defence against criminal charges by an incumbent or former public office bearer, and especially not in respect of charges of dishonesty and corruption. Allowing officials to resist being held accountable, by drawing on state resources to obstruct or delay a prosecution, subverts the Government's (and the public's) interest.

The high court had found that a just and equitable remedy in this case required a full and complete accounting by the State Attorney and an order directing Mr Zuma to repay to the State the legal costs incurred on his behalf. In agreeing with the high court on that score, the SCA stated that a repayment order may well be essential to remedy the abuse of public resources; vindicate the rule of law; and, reaffirm the constitutional principles of accountability and transparency, especially by a former incumbent of the highest office in the land. Simply setting aside the decision to pay, without ordering an accounting, and repayment, would achieve none of those crucial remedial objectives. According to the SCA, consequent upon a finding that the payments should never have been made first place, ordering repayment may arguably be the only just and equitable remedy.

In his petition to the SCA, Mr Zuma alleged that the court: (a) 'essentially [gave] more weight to the political interests of the political parties involved than advancing [his] constitutional rights'; (b) would have made different findings if it had been acting 'fairly and without bias'; (c) in having accepted the submission that he should approach the Legal Aid Board if he could not afford private representation, demonstrated 'further evidence of bias'; (d) was 'hell-bent on finding against [him] on any point possible'; and, (e) 'has become accustomed to its trend of punishing me with costs all the time'. The SCA emphasised that nowhere was any factual foundation laid for any of those allegations, which scandalised the courts. There was nothing on the record to sustain the inference that the presiding judges in this matter (or at a more generalised level in other matters involving Mr Zuma) were biased or that they were not open-minded, impartial or fair. The allegations were made with a reckless disregard for the truth. And, even after having been invited by the EFF to withdraw them, they were persisted in. In the view of the SCA, to have persisted with the unjustified criticism of not just the high court, but more generally the judiciary, is plainly deserving of censure. In the result, the SCA ordered Mr Zuma to pay costs on a punitive scale.

The SCA accordingly dismissed the appeal with costs, including those of two counsel, to be paid on the attorney and client scale.

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